



## EUROPEAN COMMISSION

Brussels, 5.7.2019  
C(2019) 5244 final

### **PUBLIC VERSION**

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

### **To the notifying parties**

**Subject: Case M.9287 – Connect Airways/Flybe  
Commission decision pursuant to Article 6(1)(b) in conjunction with  
Article 6(2) of Council Regulation No 139/2004<sup>1</sup> and Article 57 of the  
Agreement on the European Economic Area<sup>2</sup>**

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

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Dear Sir or Madam,

- (1) On 14 May 2019, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Virgin Atlantic Limited (“Virgin Atlantic”), Cyrus Capital Partners, L.P. (“Cyrus”) and Stobart Group Limited (“Stobart Group”) acquire, through Connect Airways, within the meaning of Article 3(1)(b) of the Merger Regulation joint control of Flybe Group plc (“Flybe Group”) and its trading subsidiaries, Flybe Limited, which owns Flybe Aviation Services Limited, and Flybe.com Limited (Flybe Limited, Flybe Aviation Services Limited and Flybe.com are together referred to as “Flybe”).
- (2) Virgin Atlantic, Cyrus and Stobart Group also acquire, through Connect Airways, within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of Propius Holdings Ltd (“Propius”), Stobart Aviation Limited’s aircraft leasing business, as well as of Stobart Aviation’s operating airline business, Stobart Air Unlimited Company (“Stobart Air”).<sup>3</sup> Virgin Atlantic, Cyrus and Stobart Group are together referred to as “the Notifying Parties”. Flybe Group, Flybe, Propius and Stobart Air are together referred to as the “Target companies”. The operations which bring about the above mentioned concentrations are jointly referred to as the “Transaction”.

## 1. THE PARTIES

- (3) Virgin Atlantic is the holding company of Virgin Atlantic Airways Limited (“VAA”), and Virgin Holidays Limited, a tour operator in the United Kingdom.
- (4) VAA is an airline registered in the United Kingdom, which flies to 34 destinations worldwide, including locations across the United States, Canada, Mexico and the Caribbean, and certain destinations in Africa, the Middle East and Asia. VAA primarily provides passenger air transport services but also cargo air transport services as well as maintenance, repair, and overhaul (“MRO”) services.
- (5) Virgin Atlantic is currently jointly controlled by Virgin Group Holdings Limited (“Virgin Group”) and Delta Air Lines, Inc. (“Delta”).<sup>4</sup> On 8 January 2019, before the notification of the Transaction, Air France-KLM S.A. (“AFKL”, France), Delta and Virgin Group notified the Commission of their intention to acquire joint control over Virgin Atlantic within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation. That concentration was cleared unconditionally by the Commission on 12 February 2019.<sup>5</sup>

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<sup>3</sup> Publication in the Official Journal of the European Union No C 171, 20.05.2019, p. 24.

<sup>4</sup> See Case M.6828 – *Delta Air Lines/Virgin Group/Virgin Atlantic Limited*.

<sup>5</sup> See Case M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*. Completion of this transaction remains subject to a number of regulatory approvals, including a grant of antitrust immunity for the joint venture from the US Department of Transportation. The latter is not expected before July 2019, see Form CO, paragraph 113. Therefore, AFKL is not expected to acquire joint control, together with Virgin Group and Delta, over Virgin Atlantic before July 2019.

- (6) Consistent with its previous practice, the Commission undertakes to review notified concentrations affecting identical or overlapping markets in the order in which they are notified to it on a “first come, first served” basis, based on the date of notification.<sup>6</sup>
- (7) The Commission notes in that regard that, in assessing the competition effects of a proposed transaction under the Merger Regulation, it needs to compare the competitive conditions that would result from the notified concentration with those that would have prevailed in the absence of the concentration. As a general rule, the competitive conditions prevailing at the time of notification constitute the relevant framework for evaluating the effects of a concentration. In some circumstances, however, the Commission may take into account future changes to the market that can be reasonably predicted.
- (8) Therefore, the Transaction should be assessed taking into account the acquisition of joint control by AFKL over Virgin Atlantic, together with its current parents Delta and Virgin Group, notified on 8 January 2019 and cleared unconditionally on 12 February 2019.
- (9) The starting point for the Commission’s assessment of the Transaction is therefore a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. For the purpose of this Decision, Virgin Atlantic (and its current and future parents, i.e. Virgin Group, Delta and AFKL), Cyrus, Stobart Group are together referred to as the “Parties”.
- (10) AFKL and Delta provide passenger air transport services, cargo air transport services, and MRO services. Each of AFKL and Delta flies to more than 300 destinations worldwide. Virgin Group is the holding company of a group of companies active in a wide range of products and services worldwide. In particular, Virgin Group jointly controls West Coast Trains Limited (“Virgin Trains”) together with Stagecoach. Virgin Trains operates the Inter City West Coast rail franchise in the United Kingdom. In addition, Virgin Group is controlling Virgin Holiday, a long-haul scheduled UK tour operator.
- (11) Cyrus is an investment adviser managing over USD [4] billion in securities and loans. Its client base is predominantly endowments, foundations and family offices. [confidential information about Cyrus’s investment strategy]
- (12) Stobart Group is active in aviation and infrastructure. Stobart Aviation forms one of the three core operating divisions of Stobart Group. Stobart Aviation invests in, develops and operates a number of aviation-related businesses. It controls London Southend Airport, Carlisle Lake District Airport, the Stobart Jet Centre, Stobart Aviation Services, Stobart Air and Propius, its aircraft leasing business.
- (13) Flybe Group is the parent company of Flybe. Flybe is a British regional airline with a focus on short-haul, point-to-point flights. It currently operates 190 routes serving 12 countries from 73 departure points in the United Kingdom (29 routes) and other

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<sup>6</sup> See for example Cases M.7962 – *ChemChina/Syngenta*; M.6214 – *Seagate/HDD Business of Samsung*; M.6203 – *Western Digital Ireland/Viviti Technologies*.

European countries (44 routes). Flybe operates a fleet of 76 aircraft (most of which are small turboprop aircraft with 78 or fewer seats).

- (14) In addition to its scheduled passenger regional airline services, charter and cargo transport services and white-label flying for third party airlines, Flybe’s training academy provides pilot, crew, engineering and other training services in-house and to third parties. Flybe also owns a MRO facility servicing both internal and third party customers.

## **2. CONCENTRATION**

### **2.1 Overview**

- (15) The Transaction comprises the following two transactions, which in turn comprise three acquisitions by Virgin Atlantic, Cyrus and Stobart Aviation.
- (16) On 11 January 2019, Connect Airways Limited (“Connect Airways”), a mere acquisition vehicle jointly owned by Virgin Atlantic, through its wholly-owned subsidiary Virgin Travel Group Limited (30%), Cyrus, through its wholly-owned subsidiary DLP Holdings S.à r.l. (40%), and Stobart Group, through its wholly-owned subsidiary Stobart Aviation (30%), announced a recommended cash offer to acquire the entire issued and to be issued share capital of Flybe Group, by way of a scheme of arrangement under Part 26 of the UK Companies Act 2006 (the “first transaction”).<sup>7</sup>
- (17) Due to Flybe’s degrading financial position and in order to lessen the risk exposure of Flybe’s commercial counterparties (notably its credit card acquirers), the Parties had to arrange for a quicker change of control over Flybe. On 15 January 2019, Flybe Group and Connect Airways thus entered into a share purchase agreement, pursuant to which Connect Airways acquires the entire issued share capital of Flybe (Flybe Group’s trading subsidiaries) (the “second transaction”).<sup>8</sup>
- (18) As part of the second transaction, Stobart Aviation offered to sell to Connect Airways as consideration for its shareholding in Connect Airways (and resultantly Flybe) the entire issued share capital of Propius and 40% of the ordinary share capital of Stobart Air (through Everdeal 2019 Limited).<sup>9</sup>

### **2.2 Acquisition of joint control over Flybe Group, Flybe, Propius and Stobart Air**

- (19) The binding terms of the joint bid agreement between Virgin Atlantic, Cyrus and Stobart Aviation dated 11 January 2019 provide for the governance rights of each

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<sup>7</sup> Form CO, paragraph 5.

<sup>8</sup> Annex A.4 to the Form CO.

<sup>9</sup> Pre-Transaction, Stobart Air is wholly owned and controlled by Stobart Aviation. Following internal reorganisation, Everdeal 2019 Limited indirectly holds 100% of the ordinary share capital of Stobart Air. After the second transaction, 40% of the ordinary share capital of Everdeal 2019 Limited is held by Connect Airways [confidential information about Stobart’s governance and the transaction structure]. See Form CO, paragraph 116, reply to RFI 7 of 1 July 2019 and email of the Parties of 4 July 2019.

of Virgin Atlantic, Cyrus and Stobart Aviation over Connect Airways, defined as a limited company established for the purpose of pursuing the first transaction.<sup>10</sup>

- (20) In particular, pursuant to the joint bid agreement with regard to Flybe Group, including its trading subsidiaries and the Shareholders' Agreement in relation to Connect Airways Limited:<sup>11</sup>
- a. [details of governance structure of Connect Airways, giving rise to joint control by each of Virgin Atlantic, Cyrus and Stobart Aviation];
  - b. [details of governance structure of Connect Airways, giving rise to joint control by each of Virgin Atlantic, Cyrus and Stobart Aviation];
  - c. [details of governance structure of Connect Airways, giving rise to joint control by each of Virgin Atlantic, Cyrus and Stobart Aviation]<sup>12</sup>
- (21) [details of the corporate governance of Connect Airways]<sup>13</sup> [details of the corporate governance of Connect Airways]
- (22) In light of the above considerations, each of Virgin Atlantic, Cyrus and Stobart Aviation has the possibility to exercise decisive influence over Connect Airways, which is used as a mere vehicle for the acquisition of Flybe Group, including its trading subsidiaries, by Virgin Atlantic, Cyrus and Stobart Aviation.<sup>14</sup>
- (23) Therefore, as a result of the first transaction, each of Virgin Atlantic, Cyrus and Stobart Aviation acquires joint control over Flybe Group and its trading subsidiaries.
- (24) As part of the second transaction, Connect Airways acquires the entire issued share capital of Propius. Therefore, each of Virgin Atlantic, Cyrus and Stobart Aviation acquires joint control over Propius.
- (25) As part of the second transaction, Connect Airways also acquires 40% of the ordinary share capital of Everdeal 2019 Limited, which indirectly holds 100% of the ordinary share capital of Stobart Air. It has been agreed that, as a result of the shareholders' agreement and articles of association for Everdeal 2019 Limited:<sup>15</sup>

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<sup>10</sup> Annex A.2 to the Form CO.

<sup>11</sup> Annex A.2 to the Form CO, Schedule 1 – Binding terms of shareholders' agreement; Annex A.5 to the Form Co, Shareholders' Agreement in relation to Connect Airways Limited.

<sup>12</sup> [details of the business plan]

<sup>13</sup> Annex A.5 to the Form Co, Shareholders' Agreement in relation to Connect Airways Limited, clause 15.

<sup>14</sup> See paragraph 147 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1 (the "Commission Consolidated Jurisdictional Notice").

<sup>15</sup> Annex A.6 to the Form CO, Everdeal Shareholders Agreement of 21 February 2019 and Annex A.7 to the Form CO, Everdeal Articles of 21 February 2019.

- a. [details of the corporate governance structure of Everdeal, giving control to Connect Airways]<sup>16</sup> [details of the corporate governance structure of Everdeal, giving control to Connect Airways];
  - b. [details of the corporate governance structure of Everdeal, giving control to Connect Airways]
- (26) Therefore, as a result of the second transaction, each of Virgin Atlantic, Cyrus and Stobart Aviation (through Connect Airways) and Everdeal Employees 2019 Limited acquires joint control over Stobart Air.

### **2.3 The first and second transaction constitute a single concentration**

- (27) As indicated in sections 2.1 and 2.2 above, the Transaction comprises the first and second transactions, which in turn comprise the acquisition of joint control by Virgin Atlantic, Cyrus and Stobart Aviation (through Connect Airways), by way of purchase of shares, over (i) Flybe Group, (ii) Flybe, and (iii) Propius and, together with Everdeal Employees 2019 Limited, over Stobart Air.
- (28) Virgin Atlantic, Cyrus and Stobart Aviation submit that, although these three acquisitions are not contractually inter-conditional, they are clearly unitary and interdependent and thus constitute a single concentration within the meaning of Article 3 of the Merger Regulation.<sup>17</sup>
- (29) According to paragraph 38 of the Commission Consolidated Jurisdictional Notice, “[t]wo or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. (...) For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.” In addition, according to paragraph 45 of the Commission Consolidated Jurisdictional Notice, “[a] single concentration may therefore exist if the same purchaser(s) acquire control of a single business, i.e. a single economic entity, via several legal transactions if those are inter-conditional.”
- (30) The Commission considers that the three acquisitions by Connect Airways are de facto inter-conditional.
- (31) First, the acquisition of Flybe Group (the first transaction) was intended to result in the acquisition of its trading subsidiaries (Flybe) as well. As acknowledged by Virgin Atlantic, Cyrus and Stobart Aviation, the acquisition of Flybe by way of a separate transaction (the second transaction) is only a “technical matter” entailed by the “severe financial distress of Flybe.”<sup>18</sup> After completion of the second transaction, which would precede the first transaction, Flybe Group will have no

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<sup>16</sup> See footnote 9.

<sup>17</sup> Form CO, paragraph 137.

<sup>18</sup> See paragraph 3.15 of the Application for a derogation and Form CO, paragraph 143.



assets or market presence. However, Virgin Atlantic, Cyrus and Stobart Aviation will remain committed legally to implement the first transaction, subject to shareholder approval.<sup>19</sup>

- (32) Second, the acquisition of a 100% shareholding in Propius and a 40% shareholding in Stobart Air forms part of the consideration to be paid by Stobart Aviation for its acquisition of joint control over Flybe via the second transaction.<sup>20</sup> In addition, completion of the two operations (the acquisition of Flybe and the acquisition of the shareholding in Propius and Stobart Air) is to occur simultaneously.<sup>21</sup> Therefore, since neither of the acquisition of Flybe and of the acquisition of Propius and a 40% shareholding in Stobart Air would take place without the other, the two operations are interdependent.
- (33) Furthermore, the Commission considers that the three acquisitions are required to transfer to Virgin Atlantic, Cyrus and Stobart Aviation a single business, i.e. a single economic entity managed for a common commercial purpose to which all the assets contribute. The Commission notes in particular that, according to Virgin Atlantic, Cyrus and Stobart Aviation, *“the acquisition of Stobart Air and Propius by Connect Airways is therefore an integral part of the formation of the Connect Airways business”* and *“combining Flybe and Stobart Air in a more integrated commercial co-operation with Virgin Atlantic’s long-haul operations will create a fully-fledged UK network carrier under the Virgin Atlantic brand.”*<sup>22</sup>
- (34) In light of the above considerations, the first and second transactions, which comprise the acquisition of joint control over Flybe Group, Flybe, Propius and Stobart Air, are interdependent and lead to the acquisition of joint control by Virgin Atlantic, Cyrus and Stobart Aviation over a single business. This jointly controlled single business, consisting of Flybe Group, Flybe, Propius and Stobart Air, will be a full-function joint venture, since it will have sufficient own staff, financial resources and dedicated management for its operations, it will consist of pre-existing businesses, will not be limited to exercising a specific function for its parents thus having its independent market presence, it will not have significant sale or purchase relationships with its parent and will operate on a lasting basis.<sup>23</sup>

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<sup>19</sup> Form CO, paragraph 143 *et seq.*

<sup>20</sup> More specifically, part of Stobart Aviation’s investment in Connect Airways is to be satisfied by way of a contribution in kind of Propius and a shareholding in Stobart Air, see Form CO, paragraphs 14 and 140.

<sup>21</sup> See paragraph 3.10 of the Application for a derogation and Form CO, paragraphs 134 and 140.

<sup>22</sup> See paragraphs 3.10 and 3.19 of the Application for a derogation and Form CO, paragraphs 66 and 140.

<sup>23</sup> The first transaction (the acquisition of Flybe by Virgin Atlantic, Cyrus and Stobart Aviation) will lead to several undertakings acquiring joint control of another undertaking from a third party. Since the undertaking is acquired from a third party, the first transaction does not trigger an assessment of the full-functionality criterion (para. 91 of the Consolidated Jurisdictional Notice). However, the second transaction (the acquisition of Stobart Air and Propius by Virgin Atlantic, Cyrus and Stobart Aviation) leads to the acquisition of joint control from one of the parties that will acquire joint control, namely Stobart Aviation. The second transaction therefore triggers the need to assess whether the single business that is being acquired (Flybe, Stobart Air and Propius) and that will be jointly controlled is a

- (35) Therefore, the first and second transactions constitute a single concentration within the meaning of Article 3 of the Merger Regulation.

## 2.4 Conclusion

- (36) The Transaction, by which Virgin Atlantic, Cyrus and Stobart Aviation acquire joint control over the business made of Flybe Group, Flybe, Propius and Stobart Air constitutes a concentration within the meaning of Article 3(1)(b) and Article 3(4) of the Merger Regulation.
- (37) The notification of the Transaction follows the adoption by the Commission of a decision under Article 7(3) of the Merger Regulation. Flybe has experienced negative operational results in three of the last four financial years and its financial position worsened as of spring 2018 leading to Flybe facing the imminent risk of insolvency in mid-January 2019. Virgin Atlantic, Stobart Group and Cyrus requested a derogation from the standstill obligation in mid-February 2019. The Commission granted a derogation decision pursuant to Article 7 (3) EUMR on 21 February 2019 despite prima facie competition concerns considering that the request was justified by the severe financial distress affecting Flybe and the risk that it would stop trading if a change of control would not occur by that date (the “Derogation Decision”). The derogation was granted subject to conditions aiming at preserving effective competition until the Commission completes its merger review process. These conditions included, amongst others, the following: that no voting rights are exercised by Connect Airways in the Target companies and that the acquired business is held separate from Connect Airways.<sup>24</sup>
- (38) Pursuant to the Derogation Decision, the acquisition of shares in Flybe, Propius and Stobart Air was completed on 21 February 2019.<sup>25</sup> The first transaction, the recommended cash offer to acquire the entire issued and to be issued share capital of Flybe Group, by way of a scheme of arrangement under Part 26 of the UK Companies Act 2006, became effective on 11 March 2019.<sup>26</sup>

## 3. EU DIMENSION

- (39) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>27</sup> (Virgin Atlantic: c. EUR [...]; Cyrus: c. EUR [...])

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full-function joint venture (para. 92 of the Consolidated Jurisdictional Notice). See also judgement of the Court of 7 September 2017, C-248/16, Austria Asphalt.

<sup>24</sup> Those conditions were subject to certain exceptions, for example the agreement and implementation of improved commercial terms with Flybe’s key suppliers by Virgin Atlantic, Cyrus and Stobart Aviation. See Commission Decision C(2019) 1605 of 21 February 2019, to be published.

<sup>25</sup> Form CO, paragraph 151.

<sup>26</sup> Form CO, paragraph 149.

<sup>27</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice - CJN (OJ C95, 16.4.2008, p. 1). Virgin Atlantic’s turnover does include Virgin Group, see Form CO, footnote 80. While Delta’s turnover is not included, the turnover thresholds for EU merger control are met. (AFKL’s turnover will not be taken into account since the

million; Stobart Group: c. EUR [...] million; Flybe Group: c. EUR [...]). Each of them has an EU-wide turnover in excess of EUR 250 million (Virgin Atlantic: c. EUR [...]; Cyrus: c. EUR [...]; Stobart Group: c. EUR [...]; Flybe Group: c. EUR [...]),<sup>28</sup> and not each of them achieves more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.<sup>29</sup> The notified operation therefore has an EU dimension.

#### 4. ANALYTICAL FRAMEWORK AND MARKET DEFINITION

- (40) The activities of the Connect Airways (also through Virgin Atlantic's parent companies AFKL, Delta and Virgin Group) and the Target companies overlap with regard to (i) passenger air transport (under both the route-by-route and the airport-by-airport approaches), (ii) cargo air transport and, (iii) maintenance, repair and overhaul ("MRO") services for aircraft. In addition, the Transaction gives rise to vertical relationships in relation to the provision of (i) access to flights of another carrier for connecting passengers ("feeder traffic"), (ii) MRO services, (iii) franchise services, (iv) aircraft leasing services, (v) ground-handling services and (vi) airport infrastructure services.
- (41) While the Parties accept that post-Transaction there will be an unbroken chain of control of AFKL (and Delta) over Flybe, they nevertheless claim that AFKL and Flybe would continue to operate as independent undertakings, as AFKL would only have a small indirect interest in Flybe (as the result of its future minority shareholding in Virgin Atlantic),<sup>30</sup> AFKL would only be a minority shareholder in Virgin Atlantic and would not have the ability to unilaterally pass decisions

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AFKL transaction was not closed before the date of establishing jurisdiction for the transaction at hand, see CJN, para. 172.)

<sup>28</sup> The Commission has identified three possibilities for the geographic allocation of the turnover of air carriers: (i) the "50/50 split" method, (ii) the "point of origin" method, and (iii) the "point of sale" method (see e.g. Case M.4439 *Ryanair/Aer Lingus*, recital 13 *et seq.*). The "50/50 split" method consists in allocating the revenue from an individual route operated by an air carrier in a 50%/50% ratio to the country of origin and the country of final destination so as to take into account the cross border character of the service provided. The "point of origin" method consists in allocating the revenue from an individual route operated by an air carrier to the country where the place of departure of the flight is located. The "point of sale" method consists in allocating the revenue from an individual route operated by an air carrier to the country where the place of departure of the flight is located. The "point of sale" method consists in allocating the turnover to the country where the ticket sale occurred. The EU-wide turnovers of Virgin Atlantic, Stobart Group and Flybe Group have been calculated on the basis of the "point of origin" methodology. The EU turnover thresholds are also met under the "50/50 split" method. Virgin Atlantic's turnover meets the EU turnover thresholds also under the "point of sale" method. However, since the vast majority of its bookings are made online, Flybe is unable to allocate its turnover on the basis of the "point of sale" method. Stobart Group is also unable to allocate its turnover on the basis of the "point of sale" method since Stobart Air operates as a franchise carrier for Aer Lingus and the passenger sales data, including the location of the customer when a ticket is purchased, is collected by Aer Lingus and not provided to Stobart Air. The Parties estimate that the thresholds are also met under the "point of sale" method.

<sup>29</sup> [confidential turnover information].

<sup>30</sup> Form CO, paragraph 46.

relating to Virgin Atlantic or Connect Airways. [confidential information about the transaction structure and governance]<sup>31</sup>

- (42) The Commission acknowledges that AFKL will have only indirect control over Flybe on the basis of the Commission’s clearance decision of 12 February 2019 of the acquisition of joint control over Virgin Atlantic by AFKL, Delta and Virgin Group. However, as concluded in that decision, AFKL acquires joint control over Virgin Atlantic together with Delta and Virgin Group.
- (43) With the Transaction assessed in the present decision, each of Virgin Atlantic, Cyrus and Stobart Aviation acquires joint control over Flybe within the meaning of Article 3(1)(b) of the Merger Regulation.
- (44) Consequently, AFKL post-Transaction exercises joint control over Flybe through an unbroken chain of control. Even if, as the Parties claim, AFKL would, under the current governance structure, not have the ability to determine business decisions on Flybe in its favour, any such decisions, should they nevertheless pass, would be covered by the Commission’s clearance decision under the Merger Regulation. In line with its decisional practice in cases involving joint control, the Commission will therefore take AFKL’s market position into account for the competitive assessment of the Transaction at hand.
- (45) Proper examination of the competitive effects of a transaction under the Merger Regulation rests in particular on a sound understanding of (i) the competitive constraints under which the merged entity will operate, and (ii) the specific causal effects of the transaction on the development of competition in the market.
- (46) Along those lines, and taking account of the forward-looking nature of merger control, the Commission will first define the markets that may be relevant for the purpose of the competitive assessment of the Transaction (Sections 4.1-4.8). The Commission will then determine the circumstances likely to prevail on the relevant markets absent the Transaction, including whether the failing firm defence applies (Section 4.9-4.10) and discuss how it will assess the competitive situation of air/rail overlaps for the purpose of this Decision (Section 4.10).

#### **4.1 Air transport of passengers - O&D approach**

##### *4.1.1 Relevance of the O&D approach*

- (47) In respect of air transport services of passengers, the Commission has, in its prior decision practice related to air transport, defined the relevant markets for scheduled passenger air transport services on the basis of two approaches: (i) the “point of origin/point of destination” (“O&D”) city-pair approach, where the target was an

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<sup>31</sup> Form CO, paragraph 355 *et seq.*

active air carrier;<sup>32</sup> and (ii) the “airport-by-airport” approach, when the target held an important slot portfolio.<sup>33</sup>

- (48) Under the O&D approach, every combination of an airport or city of origin to an airport or city of destination is defined as a distinct market. Such a market definition reflects the demand-side perspective whereby passengers consider all possible alternatives of travelling from a city of origin to a city of destination, which they do not consider substitutable for a different city pair. The effects of a transaction on competition are thus assessed for each O&D separately.
- (49) As a result, every combination of a point of origin and a point of destination is considered a separate market.<sup>34, 35</sup>

#### 4.1.2 Distinction between groups of passengers

- (50) The Parties submit that the Commission can leave open the question as to whether a distinction should be made between time sensitive (“TS”) and non-time-sensitive (“NTS”) passengers on short-haul routes and submitted data not distinguishing between categories groups of passengers.<sup>36</sup>
- (51) The Commission has in its decisional practice (mostly concerning network carriers) considered distinguishing, for a given O&D route, between (i) TS or premium passengers who tend to travel for business purposes, require significant flexibility for their tickets and are willing to pay higher prices for this flexibility, and (ii) NTS or non-premium passengers who travel predominantly for leisure purposes, do not require flexibility with their booking and are more price-sensitive than the first category.<sup>37</sup>
- (52) However, in recent decisions, the Commission has considered that the distinction between TS and NTS passengers has become blurred. Passengers are becoming increasingly price-sensitive and more and more corporate customers apply lowest

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<sup>32</sup> See e.g. Cases M. 8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 48; M. 8869 – *Ryanair/LaudaMotion*, paragraph 96; M.7541 – *IAG/Aer Lingus*, paragraph 14; M.7333 – *Alitalia/Etihad*, paragraph 63; M.6447 - *IAG/bmi*, paragraph 31.

<sup>33</sup> See e.g. Cases M. 8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 48; M.8869 – *Ryanair/LaudaMotion*, paragraph 116, M.8672 – *easyJet/Certain Air Berlin Assets*, paragraph 41; M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraph 58; M.6447 – *IAG/bmi*, paragraph 483. For Cases M.8672 – *easyJet/Certain Air Berlin Assets* and M.8633 – *Lufthansa/Certain Air Berlin Assets*, the Commission only carried out an airport-by-airport assessment, since the target assets did not constitute an active air carrier since Air Berlin had definitively ceased its flight operations on all O&D markets due to its insolvency.

<sup>34</sup> See e.g. Case M.8869 – *Ryanair/LaudaMotion*, paragraph 62.

<sup>35</sup> It follows from the O&D approach that connecting passengers are not part of the same market as O&D passengers, see e.g. Case M.7333 – *Alitalia/Etihad*, paragraph 65.

<sup>36</sup> Form CO, paragraph 274.

<sup>37</sup> See e.g. Cases M.7333 – *Alitalia/Etihad*, paragraphs 70 *et seq.*; M.7270 – *Cesky Aeroholding Travel Service/Ceske Aerolinie*, paragraph 20 *et seq.*; M.6663 – *Ryanair/Aer Lingus III*, recital 382; M.6607 – *US Airways/American Airlines*, paragraph 8; M.6447 – *IAG/bmi*, paragraph 36.

fare policies. Moreover, on short-haul flights, the distinction between TS and NTS has become somewhat artificial, as the offerings for TS and NTS passengers on these routes have become very similar. The transportation of both categories of passengers usually takes place in the same cabin and further product differentiation (e.g. included meals, newspapers and magazines) are mostly also available to NTS passengers for an upgrade fee. The Commission found that it was not appropriate on short-haul routes to define separate markets for TS and NTS and instead considered a market comprising all passengers.<sup>38</sup>

- (53) In this context, the Commission notes that the relevant routes for the purpose of the competitive assessment of the Transaction are all short-haul routes, with Flybe operating only a single cabin.<sup>39</sup>
- (54) Moreover, the market investigation has not produced evidence indicating that the Commission should depart from the approach it has recently taken in respect of short-haul routes. In particular, respondents have not submitted material comments suggesting that there is any need to define separate markets for the different categories of passengers for the purpose of analysing the Transaction.<sup>40</sup>
- (55) In the light of the above, the Commission concludes that, for the purposes of the Transaction, it is not appropriate to define separate markets for different categories of passengers, whether according to the distinction between TS and NTS passengers.

#### 4.1.3 *Distinction between direct and indirect flights*

- (56) On a given O&D pair, passengers can travel by way of a direct flight between the point of origin and the point of destination or by way of an “indirect” flight on the same O&D pair via an intermediate destination.<sup>41</sup>
- (57) In previous cases, the Commission considered that the substitutability between direct and indirect flights on a route-by-route basis depends on various factors, including notably the flight duration, but also price considerations or the inconvenience associated with the indirect flight. In particular, with regard to short-haul routes (generally below 6 hours flight duration) it was considered that indirect flights do not generally provide a competitive constraint to direct flights absent exceptional circumstances, for example, the direct connection does not allow for a

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<sup>38</sup> See e.g. Case M. 8869 – *Ryanair/LaudaMotion*, paragraph 138 *et seq.*; M.7541 – *IAG/Aer Lingus*, paragraph 28; M.6663 – *Ryanair/Aer Lingus III*, paragraph 387.

<sup>39</sup> Form CO, paragraph 274.

<sup>40</sup> Replies to eQ1 – Questionnaire to Airlines, question 66; eQ2 – Questionnaire to Corporate Customers, question 17 and eQ3 – Questionnaire to Travel Agents, question 18.

<sup>41</sup> See e.g. Cases M. 8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 24; M. 7541 – *IAG/Aer Lingus*, paragraph 30; M.7333 – *Alitalia/Etihad*, paragraph 75; M.6663 – *Ryanair/Aer Lingus III*, paragraph 373.

one-day return trip or the share of indirect flights in the overall market is significant.<sup>42</sup>

- (58) The Parties submit that, should direct and indirect flights be considered substitutable, the Transaction gives rise to 22 affected direct/indirect overlap routes.<sup>43</sup> The Parties consider that the indirect services do not provide a competitive constraint on the direct service on the direct/indirect overlap routes.<sup>44</sup>
- (59) However, on 10 routes, also the share of indirect flights in both seasons is significant, i.e. higher than [10-20]%.<sup>45</sup> On 20 of the 22 direct/indirect overlap routes, the direct flight does not allow for a one-day return trip. Therefore, the criterion of exceptional circumstances would in principle be fulfilled.
- (60) It can however be left open if direct and indirect flights are substitutable in this case as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition as assessed in Section 5.1.1.6 below.

#### 4.1.4 Airport substitutability

##### 4.1.4.1 Analytical framework

- (61) When defining the relevant O&D markets for passenger air transport services, the Commission has previously found that flights to or from airports with sufficiently overlapping catchment areas can be considered as substitutes in the eyes of passengers (particularly if the airports serve the same main city). In order to correctly capture the competitive constraint that flights to or from two different airports exert on each other, a detailed analysis taking into consideration the specific characteristics of the relevant airports is necessary.<sup>46</sup>
- (62) The evidence used to characterise airport substitutability includes inter alia a comparison of actual distances and travelling times to the indicative benchmark of

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<sup>42</sup> See e.g. Cases M. 8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 25; M. 7541 – *IAG/Aer Lingus*, paragraph 32; M.7333 – *Alitalia/Etihad*, paragraph 77; M.6663 – *Ryanair/Aer Lingus III*, paragraph 375.

<sup>43</sup> These are the following routes: BER-BHX, BER-CWL, BES-BHX, BHX-HAJ, BHX-HAM, BHX-MIL, BHX-NTE, BHX-STR, BHX-TLS, BUD-HUY, CWL-DUS, CWL-GVA, CWL-MUC, CWL-ROM, CWL-VCE, GVA-SOU, HAJ-MAN, HUY-VCE, INV-AMS, LUX-MAN, LYS-SOU, MAN-TLS.

<sup>44</sup> Form CO, paragraph 540.

<sup>45</sup> See Cases M.2672 – *SAS/Spanair*, paragraph 15 and M.3280 – *Air France/KLM*, paragraph 80. See also e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraphs 151 *et seq.* and M.7333 – *Alitalia/Etihad*, paragraphs 171 *et seq.*, for the filters applied by the Commission for direct/indirect overlap routes to exclude likely unproblematic routes from the scope of its investigation, for example short-haul routes where the total share of indirect operations in the relevant market was below 10%.

<sup>46</sup> See e.g. Cases M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 29; M.7333 – *Alitalia/Etihad*, paragraph 82; M.6663 – *Ryanair/Aer Lingus III*, paragraph 65.

100 km/1 hour driving time,<sup>47</sup> the outcome of the market investigation (views of the competitors and other market participants), and the competitors' practices in terms of monitoring of competition.

- (63) In the present case, taking account of the relevant routes where the Parties' activities overlap, the question of airport substitutability arises for the routes to or from the following cities: Paris, Birmingham, London and Manchester.
- (64) Conversely, for the purpose of this Decision, the question of airport substitutability is not relevant for Berlin, Duesseldorf and Milan.<sup>48</sup>

#### 4.1.4.2 Assessment of airport substitutability

##### 4.1.4.2.1 Paris

- (65) Paris has two main airports, namely Paris Charles de Gaulle (CDG) and Paris Orly (ORY). Paris is also served by Beauvais airport (BVA).
- (66) In its prior decision practice, the Commission has considered ORY and CDG as substitutable airports, but ultimately left the question open.<sup>49</sup> The Commission has also considered whether CDG and BVA were substitutable.<sup>50</sup>
- (67) The Notifying Parties do not contest the Commission's approach and have provided a competitive assessment for each plausible airport pair.<sup>51</sup>
- (68) For the purposes of the O&D assessment of the Transaction, the question of airport substitutability is relevant for the following direct/direct overlap routes: Paris-Manchester, Paris-Birmingham and Paris-Edinburgh.

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<sup>47</sup> The 100 km/1 hour driving time is nevertheless used as a first proxy only. It was defined by the Commission in the specific case of routes served out of Dublin by two airlines with typical attributes of low-frills point-to-point carriers. This "rule" is thus not necessarily strictly applicable for other cases (see Case M.6663 – *Ryanair/Aer Lingus III*, paragraph 82). In this regard, in "Airport Competition: Myth or Reality? IATA Economics Briefing", November 2017, it is noted that "[w]hile isochrones are a simple and powerful visual tool, they are of limited use in understanding the choices that passengers actually make. (...) Moreover, the proximity of an alternative airport can only represent a relevant choice if the airlines which compete with each other offer a substitutable service, for instance a comparable itinerary. Isochrone maps do not reflect the availability of services at comparator airports and are therefore likely to overstate the extent of effective airport competition."

<sup>48</sup> Berlin, Duesseldorf and Milan are cities where the Parties are active and which are served by several airports. Nevertheless, the question of airport substitutability does not arise given that the Parties only operate the affected routes to/from the same airport (namely Berlin Tegel, Duesseldorf and Milan Malpensa airports). As a result, the market shares of the Parties would be the same or lower when taking account of competitors' flights from the other hypothetically substitutable airports. Therefore, should the Commission take account of potential substitutable airports, the outcome of the competitive assessment would remain unchanged.

<sup>49</sup> In case M.5830 – *Olympic/Aegean Airlines*, paragraph 1676, the Commission concluded that CDG and ORY are substitutable for TS and NTS passengers on the Athens-Paris route.

<sup>50</sup> In case M.4439 – *Ryanair/Aer Lingus*, paragraph 163, the Commission concluded that CDG and BVA belonged to the same market for flights to Dublin.

<sup>51</sup> Form CO, paragraph 297.



- (69) Considering that no flights were operated from BVA to Birmingham, Edinburgh and Manchester, the question whether BVA belongs to the same catchment area as CDG and ORY will not be further discussed for the purpose of this Decision.<sup>52</sup>
- (70) Considering that on the Paris-Manchester route, direct flights are provided to/from CDG solely, the question whether CDG or ORY are substitutable with respect to the Paris-Manchester route will not be further discussed for the purpose of this Decision.
- (71) On the Paris-Birmingham route, Flybe and AFKL operate direct services to/from CDG. However, Delta, Virgin Atlantic and Stobart Air do not operate services on this route.<sup>53</sup> Considering that a competitor used to operate on this route to/from ORY, the Commission will assess whether CDG and ORY are substitutable with respect to the Paris-Birmingham route.<sup>54</sup>
- (72) On the Paris-Edinburgh route, AFKL operates direct services to/from CDG. Flybe also operates on this airport pair on the basis of a [...] codeshare agreement, (i.e. not using its own metal). easyJet operates direct flights to/from CDG. AFKL also operated direct flights on the route to/from ORY. Delta, Virgin Atlantic and Stobart Air do not operate services on this route.<sup>55</sup>
- (73) The travel distances and times between CDG and ORY airports and the centre of Paris are summarised below:

Airport	Approximate distance to city centre	Approximate travel time to city centre	
	Road	By car/taxi	By public transport
Charles de Gaulle	24 km	29 min	Rail: 30 min Coach/bus: 45 min
Orly	19 km	43 min	Rail: 30-40 min Coach/bus: 35 min

Source: Form CO, paragraph 295.

- (74) Competitors, corporate customers and travel agents having expressed a view during the market investigation gave mixed replies as to whether passengers consider CDG and ORY as substitutable.<sup>56</sup> The monitoring practices of air carriers (i.e. the degree to which air carriers monitor competitors flying to or from the two airports)

<sup>52</sup> Form CO, paragraphs 473, 518 and 507.

<sup>53</sup> Form CO, paragraphs 472.

<sup>54</sup> Form CO, paragraphs 478 and 487.

<sup>55</sup> Form CO, paragraphs 517-520.

<sup>56</sup> Replies to eQ1 – Questionnaire to Airlines, question 8; eQ2 – Questionnaire to Corporate Customers, question 5 and eQ3 – Questionnaire to Travel Agents, question 6.

diverge, making it difficult to draw conclusions.<sup>57</sup> While the majority of travel agents offer flights to and from the two airports to their customers, corporate customers' replies as to whether they choose flights to/from either CDG and ORY airports are diverging.<sup>58</sup>

- (75) The outcome of the market investigation is therefore inconclusive with respect to the substitutability of CDG and ORY on the routes Paris-Birmingham and Paris-Edinburgh.
- (76) In any event, for the purpose of the assessment of the effects of the Transaction under the O&D approach, the question whether flights to and from Paris Charles de Gaulle airport and Paris Orly airport belong to the same market can be left open, as the competitive assessment would remain unchanged, under any plausible market definition.

#### 4.1.4.2.2 Birmingham

- (77) The city of Birmingham is served by two main airports, namely Birmingham airport (BHX) and East Midlands Airport (EMA).
- (78) In its prior decisional practice, the Commission has considered whether passenger air transport services to and from Birmingham comprised flights from and to BHX and EMA. While the Commission considered that BHX and EMA were substitutable with respect to the Birmingham-Knock route, the Commission left open whether BHX and EMA were substitutable with respect to the Birmingham-Dublin route.<sup>59</sup>
- (79) The Notifying Parties do not contest the Commission's approach and have provided a competitive assessment for each plausible airport pair.<sup>60</sup>
- (80) For the purposes of the O&D assessment of the Transaction, the question of airport substitutability is relevant for the following direct/direct overlap routes: Birmingham-Amsterdam and Birmingham-Paris. The question of airport substitutability is also relevant for direct/indirect overlap routes<sup>61</sup> and air/rail overlaps.<sup>62</sup>

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<sup>57</sup> Replies to eQ1 – Questionnaire to Airlines, question 9.

<sup>58</sup> Replies to eQ2 – Questionnaire to Corporate Customers, question 6 and eQ3 – Questionnaire to Travel Agents, question 7.

<sup>59</sup> In case M.6333 – *Ryanair/Aer Lingus III*, paragraph 174.

<sup>60</sup> Form CO, paragraph 303.

<sup>61</sup> Those are routes between (i) Birmingham and (ii) Brest, Nantes, Berlin, Hannover, Hamburg, Stuttgart and Milan. For completeness, the route Birmingham-Toulouse used to be an overlap route but has been exited by Flybe prior to and independently from the Transaction.

<sup>62</sup> Those are routes between (i) Birmingham and (ii) Edinburgh and Glasgow.

- (81) On the Birmingham-Paris route, Flybe and AFKL operate direct services to/from BHX. Virgin Atlantic, Delta and Stobart Air do not operate on this city pair.<sup>63</sup> No competitor provides direct services on the Birmingham-Paris route.<sup>64</sup>
- (82) On the Birmingham-Amsterdam route, Flybe and AFKL operate direct services to/from BHX. Delta, Virgin Atlantic and Stobart Air do not operate services and there are currently no other carriers with direct services on this route.<sup>65</sup>
- (83) The travel distances and times between BHX and EMA airports and the centre of Birmingham are summarised below:

Airport	Approximate distance to Birmingham city centre	Approximate travel time to Birmingham city centre	
		Road	By car/taxi
Birmingham Airport	17 km	19 - 40 min	Rail: 11 - 15 min Bus: 38 - 44 min
East Midlands	66 km	44 - 75 min	Rail: no direct route Bus: no direct route

Source: Form CO, paragraph 302.

- (84) Competitors, corporate customers and travel agents having expressed a view during the market investigation gave mixed replies as to whether passengers consider that BHX and EMA are substitutable for the relevant routes.<sup>66</sup> The monitoring practices of air carriers (i.e. the degree to which air carriers monitor competitors flying to or from the two airports) diverge, making it difficult to draw conclusions.<sup>67</sup> In addition, travel agents expressed diverging views as to whether, for a relevant route, they propose flights from another airport to customer wanting to fly from Birmingham.<sup>68</sup> Corporate customers' replies as to whether they choose flights to and from the two different airports diverge.<sup>69</sup>
- (85) The outcome of the market investigation is therefore inconclusive with respect to the substitutability of BHX and EMA on the relevant overlap routes.

<sup>63</sup> Form CO, paragraph 472.

<sup>64</sup> Form CO, paragraphs 480 *et seq.*

<sup>65</sup> Form CO, paragraphs 450-455.

<sup>66</sup> Replies to eQ1 – Questionnaire to Airlines, question 8; eQ2 – Questionnaire to Corporate Customers, question 5 and eQ3 – Questionnaire to Travel Agents, question 6.

<sup>67</sup> Replies to eQ1 – Questionnaire to Airlines, question 9.

<sup>68</sup> Replies to eQ3 – Questionnaire to Travel Agents, question 7.

<sup>69</sup> Replies to eQ2 – Questionnaire to Corporate Customers, question 6 and eQ3 – Questionnaire to Travel Agents, question 7.

- (86) In any event, for the purpose of the assessment of the effects of the Transaction under the O&D approach, the question whether flights to and from Birmingham airport and East Midlands airport belong to the same market can be left open as the competitive assessment would remain unchanged, under any plausible market definition.

#### 4.1.4.2.3 London

- (87) London has six main airports, namely Heathrow (LHR), Gatwick (LGW), City (LCY), Stansted (STN), Luton (LTN) and Southend (SEN).
- (88) In previous decisions, the Commission has considered whether short-haul flights to and from London would comprise flights to and from (i) each airport individually, (ii) LHR, LGW, LCY, LTN and STN (“London(five)”) airports, or (iii) LHR, LGW, LCY, LTN, STN and SEN (“London(six)”) airports. With respect to London(five), the Commission left the question open whether they are substitutable in case M.6447 – *IAG/bmi*.<sup>70</sup> With respect to London(six), the Commission considered that the six airports were substitutable with respect to routes to/from Dublin and Belfast.<sup>71</sup>
- (89) The Notifying Parties do not contest the Commission’s approach and have provided a competitive assessment for each plausible airport pair.<sup>72</sup>
- (90) For the purposes of the O&D assessment of the Transaction, the question of airport substitutability is relevant for the one direct/direct overlap route, namely London-Amsterdam. The question of airport substitutability is also relevant for one air/rail overlap route, namely London-Edinburgh.
- (91) On the London-Amsterdam route, Flybe and AFKL operate direct services to/from LCY. AFKL also operates direct services to/from LHR. None of Virgin Atlantic, Delta or Stobart Air operated on this route.<sup>73</sup>
- (92) On the London-Edinburgh route, Flybe operates an air service from LHR and LCY while Virgin Trains operates a rail service from London Euston Station.<sup>74</sup>
- (93) The travel distances and times between Heathrow, Gatwick, City, Stansted, Luton and Southend airports and the centre of London are summarised below:

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<sup>70</sup> For instance, in case M.6447 – *IAG/bmi*, paragraph 58, the Commission considered but ultimately left open the question whether London(five) airports belong to the same market with respect to short-haul domestic and European routes such as London-Manchester, London-Nice or London-Basel.

<sup>71</sup> In case M.7541 – *IAG/Aer Lingus*, paragraph 74.

<sup>72</sup> Form CO, paragraph 293.

<sup>73</sup> Form CO, paragraphs 423-426.

<sup>74</sup> Form CO, paragraph 561.

Airport	Approximate distance to city centre	Approximate travel time to city centre	
	Road	By car/taxi	By public transport
Heathrow	28km	65 min	Rail: 15-30 min Coach/bus: 65/135 min
Gatwick	46 km	85 min	Rail: 30-45 min Coach/bus: 90/145 min
City	14 km	20 min	Rail: 22 min
Stansted	59 km	80 min	Rail: 30-45 min Coach/bus: 90/145 min
Luton	54 km	82.5 min	Rail: 39-60 min (plus 10 min shuttle bus transfer) Coach/bus: 50-115 min
Southend	66.5 km	65-110 min	Rail: 60 min

Source: Form CO, paragraph 290

- (94) Competitors, corporate customers and travel agents having expressed a view during the market investigation gave mixed replies as to whether passengers consider London(five) or London(six) airports as substitutable for the relevant route.<sup>75</sup> The monitoring practices of air carriers (i.e. the degree to which air carriers monitor competitors flying to or from the six airports) diverge, making it difficult to draw conclusions.<sup>76</sup> In addition, travel agents expressed diverging views as to whether, for a relevant route, they propose flights from another airport to customers wanting to fly from London.<sup>77</sup> Corporate customers' replies as to whether they choose flights to and from the six different airports diverge.<sup>78</sup>
- (95) The outcome of the market investigation is therefore inconclusive as to whether the markets for passenger air transport to or from London consists of flights to or from LHR or LCY only, London(five) or London(six) airports.

<sup>75</sup> Replies to eQ1 – Questionnaire to Airlines, question 8; eQ2 – Questionnaire to Corporate Customers, question 5 and eQ3 – Questionnaire to Travel Agents, question 6.

<sup>76</sup> Replies to eQ1 – Questionnaire to Airlines, question 9.

<sup>77</sup> Replies to eQ3 – Questionnaire to Travel Agents, question 7.

<sup>78</sup> Replies to eQ2 - Questionnaire to Corporate Customers, question 6.

- (96) In any event, for the purpose of the assessment of the effects of the Transaction under the O&D approach, the question whether flights to and from London(five) or London(six) airports belong to the same market can be left open because the Transaction would not raise serious doubts as to its compatibility with the internal market, under any plausible market definition.

#### 4.1.4.2.4 Manchester

- (97) The city of Manchester is served by three airports, namely Manchester (MAN), Liverpool John Lennon (LPL), and Leeds-Bradford (LBA) airports.
- (98) In its prior decisional practice relating to short-haul services to or from Manchester, the Commission examined the effects of the notified transaction on markets comprising flights to and from MAN, LPL and LBA, but left the exact market definition open.<sup>79</sup>
- (99) The Notifying Parties do not contest the Commission's approach and have provided a competitive assessment for each plausible airport pair.<sup>80</sup>
- (100) For the purpose of the O&D assessment of the Transaction, the question of airport substitutability is relevant for the following direct/direct overlap routes: Manchester-Amsterdam and Manchester-Paris. This question is also relevant for direct/indirect overlaps, indirect/indirect overlaps and air/rail overlap routes.
- (101) On the Manchester-Amsterdam route, Flybe and AFKL operate direct services to and from MAN. easyJet also offers a direct flight on this airport pair. In addition, AFKL operates direct services to and from LBA. Virgin Atlantic, Delta and Stobart Air do not operate on this city pair.<sup>81</sup>
- (102) On the Manchester-Paris route, Flybe and AFKL operate direct services to and from MAN. easyJet operates on this route to and from (i) MAN and (ii) LPL. Virgin Atlantic, Delta and Stobart Air do not operate on this city pair.<sup>82</sup>
- (103) The travel distances and times between MAN, LPL and LBA and the centre of Manchester are summarised below.

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<sup>79</sup> See e.g. Case M.6663 – *Ryanair/Aer Lingus*, paragraph 241 for the Manchester-Dublin route.

<sup>80</sup> Form CO, paragraph 300.

<sup>81</sup> Form CO, paragraph 437.

<sup>82</sup> Form CO, paragraph 505.

Airport	Approximate distance to Manchester city centre	Approximate travel time to MAN city centre	
	Road	By car/taxi	By public transport
Manchester Airport	15 km	14 min	Rail: 16 min Bus: 32 min
Liverpool John Lennon	54 km	36 min	Bus: 59 min Bus and Rail: 90/145 min
Leeds-Bradford	73 km	59 min	Bus and rail: 22 min Bus: 153 min

Source: Form CO, paragraph 299.

- (104) Competitors, corporate customers and travel agents having expressed a view during the market investigation gave mixed replies as to whether passengers consider that MAN, LPL and LBA are substitutable airports for the relevant routes.<sup>83</sup> The monitoring practices of air carriers (i.e. the degree to which air carriers monitor competitors flying to or from the three airports) diverge, making it difficult to draw conclusions.<sup>84</sup> In addition, travel agents expressed diverging views as to whether, for a relevant route, they propose flights from another airport to customer wanting to fly from Manchester.<sup>85</sup> Corporate customers' replies as to whether they choose flights to and from the three different airports diverge.<sup>86</sup>
- (105) The outcome of the market investigation is therefore inconclusive with respect to the substitutability of MAN, LPL and LBA on the relevant routes.
- (106) In any event, for the purpose of the assessment of the effects of the Transaction under the O&D approach, the question whether flights to and from Manchester, Liverpool and Leeds airports belong to the same market can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

#### 4.1.5 *Substitutability of train transport services with air transport services*

- (107) When defining the relevant O&D markets for air transport services, the Commission has previously also considered other transport alternatives to the extent that they are substitutable to a flight (intermodal competition). This has been

<sup>83</sup> Replies to eQ1 – Questionnaire to Airlines, question 8; eQ2 – Questionnaire to Corporate Customers, question 5 and eQ3 – Questionnaire to Travel Agents, question 6.

<sup>84</sup> Replies to eQ1 – Questionnaire to Airlines, question 9.

<sup>85</sup> Replies to eQ3 – Questionnaire to Travel Agents, question 7.

<sup>86</sup> Replies to eQ2 - Questionnaire to Corporate Customers, question 6.

considered in cases where alternative modes of transport on the respective O&D route can be considered comparable in terms of price, quality and (global) travel time and can therefore be considered valuable alternatives by customers.<sup>87</sup>

- (108) The question of substitutability of train transport services with air transport services is relevant in this case for the London-Edinburgh, Birmingham-Glasgow, Birmingham-Edinburgh, Edinburgh-Manchester and Glasgow-Manchester routes. On those routes, Flybe operates an air passenger transport service. Virgin Trains is operating the West Coast Rail Franchise, which includes train services between London Euston, the West Midlands, North Wales, Manchester, Liverpool, Edinburgh and Glasgow.<sup>88</sup>
- (109) The Parties submit that the market definition can be left open as no competition concerns would arise.<sup>89</sup>
- (110) The UK Competition and Markets Authority (“CMA”), when assessing rail franchises, takes rail travel as a starting point and considers which other modes of transport to include in its market definition. In this regard, the CMA takes into account (a) the cost of the journey; (b) journey time; (c) time spent travelling to and from the starting point of the journey (for public transport); and (d) frequency and waiting time.<sup>90</sup> In previous cases, the CMA concluded for the London-Edinburgh and London-Glasgow that air services exert a competitive constraint on the rail services on this flow whereas it was considered that air services did not sufficiently constrain train services on the London-Exeter flow.<sup>91</sup>
- (111) The Parties have explained that on Birmingham-Glasgow, Birmingham-Edinburgh, Edinburgh-Manchester and Glasgow-Manchester routes [strategic information on Flybe’s price monitoring].<sup>92</sup>
- (112) From a supply-side perspective, the majority of airlines operating intra-UK routes and expressing their views, explained that they do not monitor rail services.<sup>93</sup>

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<sup>87</sup> See e.g. Cases M.6447 – *IAG/bmi*, paragraph 75.

<sup>88</sup> Form CO, paragraph 249 and 552.

<sup>89</sup> Form CO, paragraph 558.

<sup>90</sup> See CMA Rail franchise mergers: Review of methodologies and guidance, para 4.3, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652749/rail-franchises-review-of-methodologies-and-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652749/rail-franchises-review-of-methodologies-and-guidance.pdf).

<sup>91</sup> See decision *Inter City Railways Limited/ICEC Franchise* (2014), paragraphs 80-88 and 95-100, [https://assets.publishing.service.gov.uk/media/54f9947be5274a1417000007/ICRL-ICEC\\_Full\\_text\\_decision\\_v2.pdf](https://assets.publishing.service.gov.uk/media/54f9947be5274a1417000007/ICRL-ICEC_Full_text_decision_v2.pdf) and decision *First MTR South Western Trains Limited/South Western Franchise* (2017), paragraphs 98-99, <https://assets.publishing.service.gov.uk/media/5975f6c240f0b649a7000012/swt-firstgroup-mtr-slc-decision.pdf>.

<sup>92</sup> Form CO, paragraph 572, 578, 587, 593.

<sup>93</sup> See replies to eQ1 – Questionnaire to airlines, question 10 and 11.



- (113) From a demand-side perspective, the travel agents having expressed their view gave mixed replies as to whether passengers consider rail services as an alternative to air transport within the UK and only around half of those travel agents explained that they also offer train tickets to their customers.<sup>94</sup> When asked if they consider train services as an alternative to air transport with regard to the five air/rail overlaps, only a minority of corporate customers having expressed their views answered in the negative.<sup>95</sup> When asked if they purchase train tickets for the five air/rail overlaps, the majority of corporate customers having expressed a view explained that they purchase train tickets.<sup>96</sup> One customer explained that “*Rail travel between London to Edinburgh is utilised due to the availability of an overnight sleeper service. The other routes are three to four hours each way so in terms of overall journey time, taking into account clearing airport security etc., there is no significant time difference. Rail journeys account for approximately 25% of the London to Edinburgh route and 50% of the other routes (versus air travel).*”<sup>97</sup>
- (114) When asked which criteria would make customers choose rail services over air transport, respondents to the Commission’s market investigation identified most frequently price difference and total travel duration, followed by schedules, but also mentioned other criteria. For example, one customer explained that “[...] *travellers can be more productive during train versus air travel due to the improved travel conditions. Encouraging rail travel helps with environmental targets.*”<sup>98</sup>
- (115) In any event, for the purposes of this Decision, the Commission considers that the question whether air and rail transport services are substitutable on the London-Edinburgh, Birmingham-Glasgow, Birmingham-Edinburgh, Edinburgh-Manchester and Glasgow-Manchester routes can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

#### 4.1.6 *Relevance of the market for air transport services to tour operators*

- (116) Carriers, both charter and scheduled airlines, may sell seats (or entire flights) to tour operators, which then integrate the flights into package holidays or resell only seats to end customers.
- (117) In prior decisions, the Commission has regarded the wholesale supply of airline seats to tour operators as a distinct market from the supply of scheduled air

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<sup>94</sup> See replies to eQ3 – Questionnaire to travel agents, question 8 and 9.

<sup>95</sup> See replies to eQ2 – Questionnaire to corporate customers, question 7 and 8.

<sup>96</sup> See replies to eQ2 – Questionnaire to corporate customers, question 8.

<sup>97</sup> See replies to eQ2 – Questionnaire to corporate customers, question 8.

<sup>98</sup> See replies to eQ1 – Questionnaire to airlines, question 13; eQ2 – Questionnaire to corporate customers, question 9 and eQ3 – Questionnaire to travel agents, question 10.

transport services to end customers.<sup>99</sup> From a demand-side perspective, tour operators have different requirements from those of individual passengers (for example, purchase of large seat packages in advance from the start of the season or negotiation of rebates).<sup>100</sup>

#### 4.1.6.1 Parties' views

(118) The Parties consider that Flybe is only [...] in the wholesale supply of seats to tour operators, and, therefore, it is not necessary to consider this market any further.<sup>101</sup>

#### 4.1.6.2 Commission's assessment

(119) The Commission considers that, for the purpose of assessing the horizontal effects of the Transaction, the supply of airline seats to tour operators only constitutes a meaningful market on routes where either Flybe or Virgin Atlantic (or its parents, in particular AFKL) are active to a significant extent.<sup>102</sup> Indeed, in the absence of any (material) overlap, the market for the supply of airline seats to tour operators cannot be considered as meaningful for the purpose of the Transaction. Therefore, this market is not considered as a relevant market and will not be further assessed in this decision.

## 4.2 Air transport of passengers – Airport-by-airport approach

### 4.2.1 Relevance of the airport-by-airport approach

(120) Under the airport-by-airport approach, every airport (or substitutable airports) is defined as a distinct market. Such a market definition has notably been adopted to assess the risks of foreclosure entailed by the concentration of slots at certain airports in the hands of a single undertaking.<sup>103</sup> Under this approach, the effects of a transaction on competition are thus assessed for all O&Ds taken together to or from an airport (or substitutable airports).

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<sup>99</sup> See e.g. Cases M.8046 – *TUI/Transat France*, paragraphs 66-88; M.5867 – *Thomas Cook/Öger Tours*, paragraph 14-16; M.4601 – *KarstadtQuelle/MyTravel*, paragraphs 39-43; M.4600 – *TUI/First Choice*, paragraph 52-57; M.3770 – *Lufthansa/Swiss*, paragraph 20.

<sup>100</sup> Decision of 27 February 2013, case M.6663 – *Ryanair/Aer Lingus III*, paragraph 409.

<sup>101</sup> Form CO, paragraph 551 and response to QP7 of 30 April 2019, question 9.

<sup>102</sup> In the absence of data on the total size of the market for supply of airline seats to tour operators, the Commission considers that Flybe (or Virgin Atlantic and its parents, in particular AFKL) can be considered as only [...] on that market when the number of seats sold to tour operators represents less than [0-5]% of the number of seats sold by Virgin Atlantic and its parents, in particular AFKL (or Flybe when relevant). See also Case M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 44.

<sup>103</sup> See e.g. Case M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraphs 164 *et seq.*

#### 4.2.1.1 Introduction

##### 4.2.1.1.1 Slots as an input for air transport services

- (121) By virtue of the Slot Regulation,<sup>104</sup> slots, i.e. the permission to land and take-off at a specific date and time at congested airports, are essential for airlines' operations. Indeed, only air carriers holding slots are entitled to get access to the airport infrastructure services delivered by airport managers and, consequently, to operate routes to or from those airports.
- (122) The Commission has, in its prior decision practice, highlighted that the lack of access to slots constitutes a significant barrier to entry or expansion at Europe's busiest airports, such as London Heathrow airport.<sup>105</sup>
- (123) The Commission has also insisted, in the framework of its airport policy, that *"slots are a rare resource"* and *"access to such resources is of crucial importance for the provision of air transport services and for the maintenance of effective competition."*<sup>106</sup>
- (124) In addition, the Slot Regulation recalls that, with the increase of air traffic, there is a continuously growing demand for capacity at congested airports.<sup>107</sup> Therefore, the lack of available slots has become a prominent feature of the EU airline industry and is expected to become an even more critical issue for air carriers in the near future.

##### 4.2.1.1.2 Rules for the allocation of slots

- (125) In the context of the imbalance between demand and supply of airport capacity, the Slot Regulation defines the rules for the allocation of slots at EU airports. It aims to ensure that, where airport capacity is scarce, the latter is used in the fullest and most efficient way and slots are distributed in an equitable, non-discriminatory and transparent way.
- (126) Under the Slot Regulation, the general principle regarding slot allocation is that an air carrier having operated its particular slots for at least 80% during the summer or winter scheduling period is entitled to the same slots in the equivalent scheduling period of the following year (the "grandfather rights").<sup>108</sup> Conversely, slots which

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<sup>104</sup> Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (the "Slot Regulation").

<sup>105</sup> See e.g. Cases M.7541 – IAG/Aer Lingus, paragraphs 188 *et seq.*; M.6447 – IAG/bmi, paragraphs 174 and 663.

<sup>106</sup> Recital (4) of the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011).

<sup>107</sup> Slot Regulation, first recital: *"Whereas there is a growing imbalance between the expansion of the air transport system in Europe and the availability of adequate airport infrastructure to meet that demand; whereas there is, as a result, an increasing number of congested airports in the Community."*

<sup>108</sup> Slot Regulation, Article 8(2).

are not sufficiently used by air carriers (below 80%) are reallocated to other air carriers (the “use it or lose it” rule).

- (127) The Slot Regulation also provides for the setting up of “slot pools” containing newly-created time slots, unused slots and slots which have been given up by a carrier or have otherwise become available (e.g. via the “use it or lose it” rule). 50% of the slots from the slot pool shall first be offered to new entrants. The other 50% of the slots from the slot pool shall be placed at the disposal of other applicant airlines (incumbent airlines). If applications by new entrants amount to less than 50% of the capacity made available through slots from the slot pool, this remaining capacity shall also be placed at the other applicants’ disposal.<sup>109</sup>
- (128) Under the Slot Regulation, slots cannot be traded. They may however be exchanged or transferred between airlines in certain specified circumstances and subject to the explicit confirmation from the coordinator under the Slot Regulation.<sup>110</sup>

#### 4.2.1.2 The Notifying Parties’ views

- (129) The Notifying Parties state that the airport-by-airport approach “*may have been necessary in the circumstances of these decisions where the O&D approach may have failed to capture all of the structural effects on competition brought about by the transaction. By contrast, in circumstances where the effects of the transaction can effectively be assessed by reference to relevant O&D markets, the parties do not consider that it is necessary to also consider these same effects on an airport-by-airport approach.*”<sup>111</sup> The Parties do not consider it necessary to reach a conclusion regarding the relevance of the airport-by-airport approach because they consider that no competition concerns would arise from assessing the transaction under the airport-by-airport approach.<sup>112</sup>

#### 4.2.1.3 Commission’s assessment

- (130) According to the Explanatory Memorandum for the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports,<sup>113</sup> “*the emergence of a strong competitor at a given airport requires it to build up a sustainable slot portfolio to allow it to compete effectively with the dominant carrier (usually the “home” carrier).*”

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<sup>109</sup> Slot Regulation, Article 10(6).

<sup>110</sup> The coordinator is the person responsible for the allocation of slots (Slot Regulation, Article 4(5)). According to the first sentence of Article 8a(2) of the Slot Regulation, “[t]he transfers or exchanges referred to in paragraph 1 shall be notified to the coordinator and shall not take effect prior to the express confirmation by the coordinator.”

<sup>111</sup> Form CO, paragraph 269.

<sup>112</sup> Form CO, paragraph 703.

<sup>113</sup> COM/2011/827 final of 01 December 2011.

- (131) In this context, in a number of prior decisions related to transactions entailing the transfer of slots at certain airports, the Commission has considered the effects of the transaction on the operation of passenger air transport services at a given airport in terms of the slot portfolio held by a carrier at the airport, without distinguishing between the specific routes served to or from that airport.<sup>114</sup> Under this approach, the Commission assesses how the transaction strengthens the merged entity's position at certain airports and the potential effects thereof on the merged entity's ability and incentive to foreclose other air carriers from accessing the relevant airport infrastructure services. Foreclosing access to airport infrastructure services may in turn foreclose those other air carriers from operating routes from/to the relevant airports.<sup>115</sup>
- (132) In this respect, the Commission notes that the O&D approach and the airport-by-airport approach are complementary and not mutually exclusive. In cases where the transaction involves the acquisition of an active air carrier and brings about a transfer of slots, it is appropriate to conduct an analysis under both approaches for a full competitive assessment of the transaction.
- (133) In the present case, Flybe, Stobart and Virgin Atlantic (or its parents AFKL, Delta and Virgin Group) have overlapping slot portfolios at 29 coordinated (Level 3) airports, including Amsterdam Schiphol and Paris Charles de Gaulle airport.<sup>116</sup> The potential effects resulting from this overlap are not fully covered by the O&D approach.
- (134) Therefore, in view of the above, the Commission considers it appropriate, for the purpose of this Decision, to apply the analytical framework designed to address the risk of foreclosure from access to airport infrastructure services and air transport of passengers to and from the relevant airports, potentially resulting from the acquisition of joint control over Flybe, at airports where the slot portfolio of Virgin Atlantic (including Virgin Atlantic's parent companies) and Stobart Group overlapped with the slot portfolio of Flybe, in Winter 2018/2019 and/or Summer 2018 IATA Seasons.<sup>117</sup>

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<sup>114</sup> See e.g. Cases M.8869 – *Ryanair/LaudaMotion*, paragraph 116; M.8672 – *easyJet/Certain Air Berlin Assets*, paragraph 41; M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraph 58; M.6447 – *IAG/bmi*, paragraph 483.

<sup>115</sup> See e.g. Cases M.8869 – *Ryanair/LaudaMotion*, paragraph 506 *et seq.*; M.8672 – *easyJet/Certain Air Berlin Assets*, paragraph 91 *et seq.*; M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraph 160 *et seq.*; M.6447 – *IAG/bmi*, paragraph 483.

<sup>116</sup> Those are: Alicante (ALC), Amsterdam (AMS), Arlanda (ARN), Birmingham (BHX), Bristol (BRS), Paris Charles de Gaulle (CDG), Dublin (DUB), Duesseldorf (DUS), Göteborg Landvetter (GOT), Geneva (GVA), Hannover (HAJ), Hamburg (HAM), Innsbruck (INN), London City (LCY), Gatwick (LGW), Lyon-Saint-Exupery (LYS), Manchester (MAN), Munich (MUC), Milano Malpensa (MXP), Nice Côte d'Azur (NCE), Palma de Mallorca (PMI), Prague (PRG), London Stansted (STN), Stuttgart (STR), Trondheim (TRD), Berlin-Tegel (TXL), Venice (VCE), Vienna (VIE) and Zürich (ZRH) airports. Flybe does not have any historic rights on slots at London Heathrow airport. It operates on the basis of slots released by IAG under the commitments in Case M.6447 – *IAG/bmi* and slot leases agreements with Virgin Atlantic.

<sup>117</sup> Pre-Transaction, Cyrus or any entity controlled by it does not hold slots.

(135) The Commission will consider below the various possible delineations of these two relevant markets under the airport-by-airport approach (i.e. the markets for air transport services of passengers to or from the relevant airports and the market for airport infrastructure services provided at the relevant airports).

#### 4.2.2 *Relevant markets for the assessment of the effects of the Transaction on passenger air transport services under the airport-by-airport approach*

##### 4.2.2.1 Air transport services of passengers to or from the relevant airports

###### 4.2.2.1.1 Relevant product market

(136) In prior decisions, when applying the airport-by-airport approach, the Commission has not deemed it necessary to consider the same distinctions as those considered when each O&D market is examined separately (e.g. time sensitive vs. non-time sensitive passengers, direct vs. indirect flights, charter flights vs. scheduled flights, wholesale vs. retail supply of airline seats).<sup>118</sup> On the basis of the information in the file, the Commission considers that there are no grounds for it to deviate from this past practice for the purposes of this Decision.

###### 4.2.2.1.2 Relevant geographic market

(137) In prior decisions, the Commission has considered whether the relevant airports were substitutable with other airports in view of their overlapping catchment areas.<sup>119</sup>

(138) With respect to the overlap airports where the question of a broader geographic scope encompassing several airports might be relevant, the Commission will focus its assessment of airport substitutability where the Parties would have a slot holding above 20% on average at a specific airport or at a combination of airports within the same catchment area, considering that a combined average slot holding below 20% is unlikely to give the Parties the ability to foreclose access to the market for the provision of passenger air transport services. As explained in section 5.1.2.3 below, the only airport where the Parties and the Target Companies would have a combined slot holding above 20% and where the question of airport substitutability would be relevant is Paris Charles de Gaulle airport. Therefore, the Commission will assess whether Paris Charles de Gaulle is substitutable with other airports within the same catchment area.

(139) In the present case, the substitutability from the point of view of passengers of Paris Charles de Gaulle, Paris Orly and Beauvais has already been considered in section 4.1.4.2 above, and the Commission considered that Paris Charles de Gaulle and Paris Orly might be considered as substitutable with respect to the relevant overlap routes but ultimately left the question open.

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<sup>118</sup> See Cases M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 128; M.8869 – *Ryanair/LaudaMotion*, paragraph 222; M.8672 – *easyJet/Certain Air Berlin assets*, paragraph 52; M.8633 – *Lufthansa/Certain Air Berlin assets*, paragraph 58; M.6447 – *IAG/bmi*, paragraphs 492-506.

<sup>119</sup> See Cases M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 129-130; M.8869 – *Ryanair/LaudaMotion*, paragraphs 223-226 ; M.8672 – *easyJet/Certain Air Berlin assets*, paragraphs 53 *et seq.*; M.8633 – *Lufthansa/Certain Air Berlin assets*, paragraphs 59 *et seq.*

#### 4.2.2.1.3 Conclusion

- (140) For the purpose of its airport-by-airport assessment of the Transaction in this Decision, the Commission will assess the competitive effects of the Transaction on the markets for the provision of passenger air transport services, encompassing all routes to or from an airport, or to or from substitutable airports.
- (141) For the purpose of its airport-by-airport assessment of the Transaction in this Decision, the question of whether the relevant geographic market consists of flights to/from Paris Charles de Gaulle only or Paris Charles de Gaulle and Paris Orly can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under either plausible market definition (see section 5.1.2. below).

#### 4.2.2.2 Airport infrastructure services

- (142) For the purpose of providing passenger air transport services at congested airports, airlines have to source infrastructure services at those airports. As indicated in section 4.2.1.1 above, at congested airports, infrastructure capacity is managed through the allocation of slots, which enable air carriers to fly to and from the airports. A slot is therefore defined, from the point of view of airports, as “*a planning tool for rationing capacity at airports where demand for air travel exceeds the available runway and terminal capacity.*”<sup>120</sup> From the point of view of airlines, the granting of a slot at an airport means that the airline may use the entire range of infrastructure necessary for the operation of a flight at a given time (runway, taxiway, stands and, for passenger flights, terminal infrastructure). This in turn enables the airlines to provide passenger air transport services to and from that airport.
- (143) As a consequence, through the Transaction and the combination of slot portfolios, the Parties together obtain a right of access to a higher share of airport infrastructure capacity. The Transaction therefore has an impact on (the demand-side of) the markets for airport infrastructure services at the relevant airports and also on the markets for passenger air transport to and from those airports.
- (144) In addition, Stobart Aviation is active in the provision of airport infrastructure services. Stobart Aviation owns (i) London Southend airport (“SEN”), (ii) Carlisle Lake District airport (“Carlisle”) and (iii) a minority controlling stake in Durham Tees Valley airport (“DTVA”).<sup>121</sup> The Transaction could therefore give rise to vertical links between Stobart Aviation’s activities in the upstream market for airport infrastructure services and the activities of Flybe in the downstream market for the provision of passenger air transport services.

##### 4.2.2.2.1 Relevant product market

- (145) The Commission has, in its prior decisional practice, delineated a product market for the provision of airport infrastructure services to airlines, which includes the

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<sup>120</sup> Press release of 1 December 2011 accompanying the Airport Package ([http://europa.eu/rapid/press-release MEMO-11-857\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-857_en.htm)).

<sup>121</sup> Form CO, paragraphs 1441 and 1461.

development, maintenance, use and provision of the runway facilities, taxiways and other airport infrastructure.<sup>122</sup>

- (146) In cases where the Transaction could give rise to horizontal overlaps, the Commission has considered sub-dividing the market for airport infrastructure services on the basis of airline customers (i.e. charter operators, scheduled full service carriers and scheduled low cost carriers) and on the basis of the type of flights (i.e. short-haul and long-haul).<sup>123</sup>
- (147) In prior decisions relating to the transfer of slots at airports, the Commission has not considered it appropriate to further distinguish within the market for airport infrastructure services, considering that slot portfolios give access to all infrastructure services necessary to operate at the airport. The Commission considers that there is no element in the file that would require deviating from the Commission's past practice for the purposes of this Decision with respect to the assessment of the effects of the Transaction on passenger air transport under the airport-by-airport approach.
- (148) In prior decisions where the transaction could give rise to vertical links, the Commission has not considered it appropriate to further distinguish within the market for airport infrastructure services, considering that slot portfolios give access to all infrastructure services necessary to operate at the airport.<sup>124</sup> The Commission considers that there is no element in the file that would require deviating from the Commission's past practice for the purposes of this Decision with respect to the assessment of the vertical effects of the Transaction.<sup>125</sup>

#### 4.2.2.2.2 Relevant geographic market

- (149) In its prior decisional practice, the Commission has, defined the geographic scope of the market for airport infrastructure services as the catchment area of individual airports.
- (150) The Commission has also considered additional criteria relevant for assessing airport substitutability in relation to the market for airport infrastructure services, while acknowledging that the airlines' choice of airports ultimately depends on passengers' demand. In addition to the catchment area of a particular airport, the Commission has notably analysed the capacity constraints for slots and facilities, passenger volumes or the positioning of the airport (e.g. a niche airport serving high yield time-sensitive passengers or an airport serving mainly leisure, less time-sensitive passengers).<sup>126</sup>

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<sup>122</sup> See e.g. Cases M.7270 – *Český Aeroholding/Travel Service/České aerolinie*, paragraph 50; M.7008 – *Aena International/Axa PE/LLAGL*, paragraph 12.

<sup>123</sup> See e.g. Case M.7398 – *MIRAEL/Ferrovial/NDHI*, paragraph 19; M.5648 - *OTPP/Macquarie/Bristol Airport*, paragraph 10.

<sup>124</sup> See e.g. Cases M.7270 – *Český Aeroholding/Travel Service/České aerolinie*, paragraph 50.

<sup>125</sup> The Transaction would not give rise to any horizontal overlap.

<sup>126</sup> See e.g. Cases M.5652 – *GIP/Gatwick Airport*, paragraph 14; M.4164 – *Ferrovial/Quebec/GIC/BAA*, paragraphs 15-17; M.3823 – *MAG/Ferrovial Aeropuertos/Exeter Airport*, paragraphs 16-19.



- (151) The Commission has taken account of all the above-mentioned criteria when assessing the geographic scope of the airport infrastructure services markets relevant for the assessment of the effects of transfer of slots.<sup>127</sup>
- (152) The question of the exact geographic market definition is relevant (i) for the assessment of the effects of the Transaction on passenger air transport services under the airport-by-airport approach and (ii) for the assessment of the potential vertical links between Stobart Aviation and Flybe.

*Relevant geographic market for the assessment of the effects of transport of slots on the access to airport infrastructure services*

- (153) For the purpose of the assessment of the effects of the Transaction on the market for passenger air transport under the airport-by-airport approach, with respect to the overlap airports where the question of a broader geographic scope encompassing several airports might be relevant, the Commission will focus its assessment of airport substitutability on markets where the Parties would have a slot holding above 20% on average at a specific airport or at a combination of airports within the same catchment area. The Commission considers that a combined average slot holding below 20% is unlikely to give the Parties the ability to foreclose access to the market for airport infrastructure services. As explained in section 5.1.2 below, the only airport where Parties would have a combined slot holding above 20% and where the question of airport substitutability would be relevant is Paris Charles de Gaulle airport. Therefore the Commission will assess whether Paris Charles de Gaulle is substitutable with other airports within the same catchment area.
- (154) According to the Parties, Paris Charles de Gaulle (CDG), Paris Orly (ORY) and Beauvais (BVA) airports belong to the same geographic market with respect to airport infrastructure services.<sup>128</sup>
- (155) The city of Paris is served by three airports, namely CDG, ORY and BVA.
- (156) Delta, AFKL and Flybe hold slots at CDG. AFKL also holds slot at ORY. The Transaction therefore gives rise to an overlap between AFKL/Virgin Atlantic and Flybe at CDG and on a broader geographic scope comprising at least (i) CDG and (ii) ORY and/or BVA. However, BVA is neither a Level 2 or Level 3 airport and is therefore not slot constrained. Its positioning differs from CDG and ORY. BVA focuses on short-haul and is mainly used by low-cost carriers.<sup>129</sup> The Commission will therefore focus its assessment on whether CDG and ORY belongs to the same geographic market with respect to airport infrastructure services. In any event, given that the Parties do not hold slots at BVA, taking account of BVA would only dilute the Parties' combined slot holding and the increment brought about by the Transaction.

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<sup>127</sup> See Cases M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 142 *et seq.*; M.8869 – *Ryanair/LaudaMotion*, paragraphs 238 *et seq.*, M.8672 – *easyJet/Certain Air Berlin assets*, paragraphs 73 *et seq.*; M.8633 – *Lufthansa/Certain Air Berlin assets*, paragraphs 117 *et seq.*

<sup>128</sup> Form CO, paragraph 722.

<sup>129</sup> Form CO, paragraph 739.

- (157) The question of the catchment area of Paris airports is addressed in section 4.1.4.2 above. From the point of view of passengers, CDG and ORY might be considered as substitutable with respect to certain routes.<sup>130</sup>
- (158) As regards capacity constraints, both CDG and ORY are coordinated (Level 3) airports in both IATA Seasons.
- (159) In 2018, 72.2 million passengers used Paris Charles de Gaulle airport<sup>131</sup>, while 33.1 million passengers used Paris Orly airport.<sup>132</sup>
- (160) As regards positioning, CDG is the largest international airport in France in terms of passenger traffic. CDG is served by more than 60 passenger and cargo airlines, which mainly focus on international long-haul flights.<sup>133</sup> In Summer 2018, direct flights were offered to 318 destinations<sup>134</sup> and 90% of flights were to international destinations.<sup>135</sup> Based on data from ADP, approximately 13% of the traffic at CDG was operated by low-cost carriers.<sup>136</sup>
- (161) ORY is the second largest airport in France in terms of passenger traffic. ORY is served by 35 airlines which operate primarily to short-haul destinations in mainland France, Europe, North Africa and the French Overseas Territories.<sup>137</sup> In Summer 2018, direct flights were offered to 139 destinations<sup>138</sup> and 59% of flights were to international destinations.<sup>139</sup> In 2017, approximately 38% of the traffic was operated by low-cost airlines.<sup>140</sup>
- (162) Considering that Paris Charles de Gaulle and Paris Orly have different positioning and strategy, the Commission concludes that, for the purpose of the assessment of the effects of the Transaction on passenger air transport services under the airport-

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<sup>130</sup> In Case M.5830 – *Olympic/Aegean Airlines*, paragraph 1676, the Commission concluded that CDG and ORY are substitutable for TS and NTS passengers on the Athens-Paris route. With respect to the overlap routes between AFKL and Flybe, it cannot be concluded that CDG and ORY are substitutable.

<sup>131</sup> Form CO, paragraph 725.

<sup>132</sup> Form CO, paragraph 725.

<sup>133</sup> Form CO, paragraph 726.

<sup>134</sup> Form CO, paragraph 724.

<sup>135</sup> Form CO, paragraph 727.

<sup>136</sup> Form CO, paragraph 729.

<sup>137</sup> Form CO, paragraphs 732-733.

<sup>138</sup> Form CO, paragraph 724.

<sup>139</sup> Form CO, paragraph 734.

<sup>140</sup> Form CO, paragraph 737.

by-airport approach, the geographic scope of the market for the provision of airport infrastructure services to airlines is limited to Paris Charles de Gaulle airport.<sup>141</sup>

*Relevant geographic market for the assessment of the vertical effects created by the Transaction*

- (163) Considering that Stobart Aviation is active in the market for the provision of airport infrastructure services at several airports in the United Kingdom, the Commission will assess the geographic scope of airport infrastructure services for London Southend (SEN) airport and DTVA airport.<sup>142</sup>
- (164) The question of the catchment area of London airports is addressed in section 4.1.4.2 above. From the point of view of passengers, the relevant markets consists of flights to/from London Heathrow only, or to/from Heathrow, Gatwick and City airports (“London(three)”), or Heathrow, Gatwick, City, Luton, Stansted and Southend (“London(six)”). As regards capacity constraints, LHR, LGW, LCY, LTN and STN are coordinated (Level 3) airports while SEN is neither schedules facilitated nor coordinated. The question whether airport infrastructure services at SEN constitute a separate market or whether airport infrastructure services should be considered for London(six) airports can be left open, because the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.
- (165) With respect to the geographic scope of the provision of airport infrastructure services in the Tees Valley (UK), the Parties submit that the geographic scope comprises DTVA, Leeds airport (“LBA”) and Newcastle airport (“NCL”).<sup>143</sup> The three airports are within 100 km of Middlesbrough city, the closest city centre to DTVA. The results of the market investigation are inconclusive as to whether DTVA, LBA and NCL belongs to the same market.<sup>144</sup> The Commission considers that the question whether the market for the provision of airport infrastructure services consists in DTVA only or encompasses DTVA, LBA and NCL can be left open because the Transaction would not raise serious doubts as to its compatibility with the internal market, under any plausible geographic market definition.

4.2.2.2.3 Conclusion

- (166) For the purpose of the assessment of the effects of the Transaction on passenger air transport services under the airport-by-airport approach, the Commission will assess the effects of the Transaction on the market for the provision of airport infrastructure services to airlines, without further delineation. Similarly, for the

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<sup>141</sup> For the sake of completeness, the Parties have provided their slot holding for a geographic market comprising ORY and CDG. The competitive assessment remains unchanged under any plausible geographic market definition.

<sup>142</sup> The Parties do not suggest any substitutable airport to Carlisle airport. The Transaction would not raise serious doubts as to its compatibility with the internal market, even on a market defined as encompassing Carlisle airport only.

<sup>143</sup> Form CO, paragraph 1464.

<sup>144</sup> Replies to eQ1 – Questionnaire to Airlines, question 60.

purpose of assessing the vertical links created between Stobart Aviation and Flybe, the Commission will assess the effects of the Transaction on the market for the provision of airport infrastructure services to airlines, without further delineation.

- (167) For the purpose of the assessment of the effects of the Transaction on passenger air transport services under the airport-by-airport approach, the Commission considers that the geographic scope of the market for airport infrastructures services is limited to the individual airport with respect to airport infrastructure services at Paris Charles de Gaulle airport. Considering that the Transaction would not raise serious doubts as to its compatibility with the internal market with respect to passenger air transport under the airport-by-airport approach, the question of the exact geographic market for airport infrastructure at the overlap airports can be left open. For the purpose of assessing the vertical links created between Stobart Aviation and Flybe, the Commission will assess the vertical effects under every plausible geographic market definition given that the exact geographic market definition can be left open with respect to airport infrastructure services at SEN and DTVA.

### **4.3 Market for the provision of access to flights of another carrier for connecting passengers in the context of interlining arrangements**

#### *4.3.1 Relevance of feeder traffic analysis*

- (168) Passengers travelling on indirect flights, in particular for long-haul flights, connect from one flight to the other flight at a certain airport. These passengers do not necessarily travel each “leg” of their journey with the same airline. Traffic made up by passengers connecting at either one or both ends of the route, in particular for long haul flights, is referred to as “feeder traffic”.<sup>145</sup>

##### 4.3.1.1 Parties’ views

- (169) The Notifying Parties consider that, while the vast majority of Flybe’s activities focus on point-to-point flying, Flybe has entered into a number of interlining and codeshare agreements with third party carriers to enhance connectivity for its customers.<sup>146</sup> According to the Notifying Parties, as a result of the Transaction, the Parties will not have the ability or incentive to foreclose third party long-haul carriers’ access to feeder traffic on any specific route. On the contrary, the rationale for the Transaction is to allow enhanced connectivity for customers to travel to destinations globally.<sup>147</sup>
- (170) According to the Notifying Parties, the acquisition will enable Flybe to benefit from committed strategic investment partners in terms of Cyrus, Stobart Aviation and Virgin Atlantic (through Connect Airways) and through linking an enhanced

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<sup>145</sup> See e.g. Case M.7541 – IAG/Aer Lingus, paragraph 106.

<sup>146</sup> Form CO, paragraph 883.

<sup>147</sup> Form CO, paragraph 56.

Flybe regional network with Virgin Atlantic's long-haul operations, increasing feeder traffic, particularly at LHR and MAN.<sup>148</sup>

#### 4.3.1.2 Commission's assessment

- (171) In its prior decision practice, the Commission has analysed if one of the merging airlines has provided competitors with feeder traffic. Such feeder traffic may constitute an essential input for a competitor, the Commission therefore analysed an input foreclosure theory of harm, assessing ability and incentive of the merging parties to engage in input foreclosure post-Transaction, as well as the overall likely impact on effective competition of such potential foreclosure.<sup>149</sup>
- (172) Flybe has interlining and codeshare agreements with several third party airlines, and provides feeder traffic to those third party airlines' long-haul flights (including where these third party airlines compete with Virgin Atlanta, Delta or AFKL for the long-haul flights).<sup>150</sup>
- (173) For the purpose of the competitive assessment of the Transaction, the Commission will therefore apply the analytical framework designed to address the risk of input foreclosure in relation to feeder traffic resulting from the change of control over Flybe. This theory of harm is assessed in Section 5.1.3 below.

#### 4.3.2 Market definition

##### 4.3.2.1 Parties' views

- (174) The Parties have considered the impact of the Transaction on the market for the provision of access to flights of another carrier for connecting passengers in the context of interlining arrangements, which is defined on an O&D and city-pair basis for each input flight<sup>151</sup>, in line with the approach taken by the Commission in previous decisions.<sup>152</sup>

##### 4.3.2.2 Commission's assessment

- (175) "Connecting" or "transfer passengers" are passengers who fly indirectly on a given city-pair (e.g. Dublin-Chicago via London Heathrow). These passengers do not necessarily travel each "leg" or "sector" of their journey on the same carrier (e.g. the carrier who sold them the ticket). In particular for long-haul flights, traffic made up by passengers connecting at either or both ends of the route is commonly referred to as "feeder traffic".

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<sup>148</sup> Form CO, paragraph 184.

<sup>149</sup> See e.g. Case M.7541 – IAG/Aer Lingus, paragraph 442 *et seq.*

<sup>150</sup> Form CO, paragraph 56.

<sup>151</sup> Form CO, paragraph 881.

<sup>152</sup> See Cases M.6447 – IAG/bmi of 30 March 2012 and M.7541 – IAG/Aer of 14 July 2015.

- (176) There is a variety of agreements whereby single tickets may be sold for indirect routes including two legs operated respectively by the two carriers which concluded the agreement. In the framework of such agreements, the carrier granting access to its flights to passengers connecting onto another carrier's flight and travelling with a single ticket issued by this second carrier provides an "input" to the latter and is remunerated for it. This "input" is used to supply the downstream service, i.e. a ticket for an indirect route on a given city-pair. Two carriers that interline are thus engaged in a vertical relationship when one of them sells tickets for indirect routes including one leg operated by the other carrier.<sup>153</sup>
- (177) The main different types of "feeder traffic" or "interlining arrangements" are the following:<sup>154</sup>
- a) Interline agreements, which are commercial agreements between airlines to handle passengers travelling on multiple airlines on the same itinerary. These agreements allow one carrier to issue the main itinerary ticket while each carrier is marketing its own sector.
  - b) Codeshare agreements, which allow one carrier to sell tickets on another carrier's flight under its own name and flight code, thereby broadening their service offering and destinations.
  - c) Special Prorate Agreements ("SPAs"), which support interlining and codesharing, and which specifically define the distribution of the revenues and the settlement of ticket costs between carriers.
  - d) Alliance memberships, which typically entail codesharing (although the actual codeshare agreements are still concluded between two airlines) but which also imply a number of mutual obligations which go beyond those required by codesharing (such as, for example, mutual Frequent Flyer Programme participation<sup>155</sup>).
- (178) These agreements are in principle mutually beneficial as they give each party the opportunity to increase its load factors. In principle, they also benefit passengers as they increase connection opportunities, allow passengers to be compensated in case of missed connections and spare them from taking back luggage at the connection airport.
- (179) There are cases where both carriers can sell tickets for indirect routes including one leg operated by the other party to the agreement. In such a situation, the vertical relationship is symmetrical: both carriers are active upstream and downstream in respect of one another. There are also cases where the ticket for the indirect route is sold by a third party (e.g. a travel agent).

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<sup>153</sup> See Case M.6447 – *IAG/bmi*, paragraph 78; Case M.7541 *IAG/Aer Lingus*, paragraph 107.

<sup>154</sup> Form CO, paragraph 872

<sup>155</sup> Final report of January 2007 on the competition impact of airline code-share agreements, prepared by a.o. European Commission Directorate General for Competition Unit D-2 'Transport'.

- (180) The carrier or distributor operating the downstream service (*in casu* long-haul routes) provides passenger air transport services between two cities. The downstream service is the market for the provision of air transport services between these two cities. As assessed above, this market has to be defined on an O&D basis, i.e. by reference to the two cities (or as the case may be, to the two airports) at both ends of the flight itinerary.
- (181) The carrier operating the upstream service (carrying the feeder traffic) provides to the downstream carrier access to its flights to one end of the city pair (i.e. the connecting airport). For example, for routes between Manchester and Orlando operated by the downstream carrier, the upstream market concerned for the provision of access to flights for connecting passengers would comprise all routes to and providing feeder traffic at Manchester. Such an upstream market has to be defined as comprising all routes to the connecting airport where the flights carrying the feeder traffic are operated. Indeed, a carrier wanting to supply flights e.g. between Manchester and Orlando may rely on and need as an input access to flights feeding traffic to Manchester. Flights to other cities cannot, in principle, constitute a valid substitute.

#### 4.3.2.3 Conclusion

- (182) As a conclusion, the relevant markets for the provision of access to flights from a number of airports in Europe for connecting passengers in the context of interlining arrangements have to be defined on an O&D basis.

### 4.4 Air transport of cargo

#### 4.4.1.1 Relevant product market

- (183) In prior decisions, the Commission considered a market for air transport of cargo including all kinds of transported goods provided by all types of air cargo carriers,<sup>156</sup> without any further subdivision to be made according to the nature of the goods transported (for example, dangerous or perishable goods) or the type of air cargo carrier.<sup>157</sup>
- (184) In fact, the Commission has concluded that four types of air cargo carriers, namely (i) cargo airlines with dedicated freighter planes; (ii) airlines with only belly space cargo capacity on passenger flights; (iii) combination airlines (i.e. airlines with both dedicated freighter airplanes and belly space cargo capacity); and (iv) integrators, compete with each other for business with the same kinds of customers.<sup>158</sup>

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<sup>156</sup> See Cases M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 37; M. 6828 – *Delta Airlines/ Virgin Group / Virgin Atlantic Limited*, paragraph 76; M.6447 – *IAG/bmi*, paragraph 92; M.5747 – *Iberia/British Airways*, paragraph 40.

<sup>157</sup> See Cases M. 6828 – *Delta Airlines/ Virgin Group / Virgin Atlantic Limited*, paragraphs 73-74; M.6447 – *IAG/bmi*, paragraphs 91-92; M.5747 – *Iberia/British Airways*, paragraph 40.

<sup>158</sup> See Cases M. 6828 – *Delta Airlines/ Virgin Group / Virgin Atlantic Limited*, paragraph 75; M.6447 – *IAG/bmi*, paragraph 89; M.5747 – *Iberia/British Airways*, paragraph 38.

- (185) Based on the Commission’s prior decisions, the O&D approach to market definition is not appropriate for air cargo transport services because cargo is (i) in principle less time-sensitive than passengers, and (ii) usually transported “behind” and “beyond” the points of origin and destination by trans-modal transport methods and thus can be routed via a higher number of stops than passengers.<sup>159</sup> Consequently, the Commission considers that a wider market for air transport of cargo exists as, unlike passengers, cargo can be transported with a higher number of stopovers and therefore any one-stop route is a substitute for any non-stop route.<sup>160</sup> In addition, as established in previous Commission decisions, air cargo transport markets are inherently unidirectional due to differences in demand at each end of the route and must hence be assessed on a unidirectional basis.<sup>161</sup>
- (186) The Parties agree with the Commission’s decision-making practice.<sup>162</sup>
- (187) In line with its prior decisional practice, the Commission will assess the effects of the Transaction on a broader market for air transport of cargo encompassing all types of air cargo carriers and including all kinds of transported goods on a unidirectional basis in Section 5.5 below.

#### 4.4.1.2 Relevant geographic market

- (188) In prior decisions, the Commission defined the market in intra-European routes of air cargo transport as European-wide.<sup>163</sup> As regards intercontinental routes, the Commission established that catchment areas at each end of the route broadly correspond to continents where local infrastructure is adequate to allow for onward connections (for example, by road, train, or inland waterways, etc.), such as Europe and North America. As regards continents where local infrastructure is less developed, the relevant catchment area has been considered the country of destination.<sup>164</sup>

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<sup>159</sup> See Cases M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 38; M.6828 – *Delta Airlines/ Virgin Group / Virgin Atlantic Limited*, paragraph 72; M.6447 – *IAG/bmi*, paragraph 87; M.5747 – *Iberia/British Airways*, paragraph 36.

<sup>160</sup> See Cases M.6828 – *Delta Airlines/ Virgin Group/ Virgin Atlantic Limited*, paragraph 73; M.6447 – *IAG/bmi*, paragraph 88; M.5747 – *Iberia/British Airways*, paragraph 37.

<sup>161</sup> See Cases M.8964 – *Delta / Air France-KLM / Virgin Group / Virgin Atlantic*, paragraph 159; M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 39; M.6828 – *Delta Airlines/ Virgin Group / Virgin Atlantic Limited*, paragraph 77; M.6447 – *IAG/bmi*, paragraph 90; M.5747 – *Iberia/British Airways*, paragraph 39.

<sup>162</sup> Form CO, paragraph 1086.

<sup>163</sup> See Cases M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 39; M.6447 – *IAG/bmi*, paragraph 93; M.5747 – *Iberia/British Airways*, paragraph 41.

<sup>164</sup> See Cases M.8964 – *Delta / Air France-KLM / Virgin Group / Virgin Atlantic*, paragraph 162; M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 39; M.6828 – *Delta Airlines/ Virgin Group / Virgin Atlantic Limited*, paragraph 79; M.6447 – *IAG/bmi*, paragraph 94; M.5747 – *Iberia/British Airways*, paragraph 42.



(189) The Parties consider that the Commission's previous finding of unidirectional markets defined on a continent-to-continent basis (or country basis, where connecting transport infrastructure is less developed) is still appropriate.<sup>165</sup>

(190) Therefore, in line with its prior decisional practice, the Commission will assess the effects of the Transaction on a continent-to-continent basis (or continent-to country basis as the case may be), in particular on an EEA-wide (intra-European) basis.

#### 4.4.1.3 Conclusion

(191) Therefore, in line with its prior decisional practice, the Commission will assess the effects of the Transaction on an EEA-wide market for air transport of cargo encompassing all types of air cargo carriers and including all kinds of transported goods on a unidirectional basis.

### 4.5 Maintenance, repair and overhaul ("MRO") services

#### 4.5.1.1 Relevant product market

(192) In prior decisions, the Commission distinguished four separate segments within the MRO market based on the part of the aircraft to be serviced and the level of service required, namely (i) line maintenance (minor checks carried out on aircraft and performed at the different airports), (ii) heavy maintenance (comprehensive inspection and overhaul of the aircraft, for which the aircraft is taken out of service), (iii) engine maintenance, and (iv) components maintenance (inspection, repair and overhaul of specific aircraft components).<sup>166</sup> The Commission also considered but ultimately left the question open, whether a distinction between commercial and business aviation is appropriate.<sup>167</sup> It moreover noted that line maintenance and heavy maintenance can be further subdivided according to nature and frequency of the checks involved (A, B, C and D-checks).<sup>168</sup>

(193) The Parties submit that the precise scope of the product market definition for MRO can be left open as no serious doubts would arise under any plausible market

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<sup>165</sup> Form CO, paragraph 1089.

<sup>166</sup> See Cases M.8425 – *Safran/Zodiac Aerospace*, paragraph 289; M.6447 – *IAG/bmi*, paragraph 105; M.6554 – *EADS/STA/Elbe Flugzeugwerke JV*, paragraph 25; M.6410 – *UTC/Goodrich*, paragraph 174; M.5747 – *Iberia/British Airways*, paragraph 48; M.3374 – *SR Technics/FLS Aerospace*, paragraph 9; M.3280 – *Air France/KLM*, paragraph 39.

<sup>167</sup> See Cases M.8425 – *Safran/Zodiac Aerospace*, paragraph 289.

<sup>168</sup> See Cases M.8425 – *Safran/Zodiac Aerospace*, paragraph 289; M.6554 – *EADS/STA/Elbe Flugzeugwerke JV*, paragraph 25; M.6410 – *UTC/Goodrich*, paragraph 174; M.3280 – *Air France/KLM*, paragraph 39. An A-check is performed approximately every 800 flight hours and requires around 200-300 man-hours to complete. B-checks are performed approximately every 4-6 months and are usually performed within 3 days at an airport hangar. C-checks are performed approximately every 18 to 24 months or after a specific amount of actual Flight Hours as defined by the manufacturer. D-checks/structural checks are the most comprehensive and demanding checks, since the entire aircraft structure is taken apart for inspection and overhaul. Intermediate structural checks occur after 5-6 years and heavy structural checks occur after 10-12 years. Such checks will usually demand around 15,000 to 20,000 man-hours and around 1 month to complete at suitably equipped maintenance bases.

definition.<sup>169</sup> However, in line with the Commission's decisional practice, they provided data for each of the following MRO segments (i) line maintenance; (ii) heavy maintenance; (iii) engine maintenance; and (iv) components maintenance.

- (194) In light of the above, the Commission concludes that the precise scope of the product market definition for MRO services can be left open since the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible product market definition, as assessed in Section 5.6 below.

#### 4.5.1.2 Relevant geographic market

- (195) In prior decisions, the Commission considered that the geographic scope of the market for heavy maintenance services might be at least EEA-wide, whereas line maintenance services could be local in scope and even limited to the airport where services are provided.<sup>170</sup> Indeed, line maintenance services are usually carried out at the airport of origin or destination, or at the aircraft's operational base.<sup>171</sup> As regards to engine maintenance services and components maintenance services, the Commission has considered these services to be worldwide in scope.<sup>172</sup>
- (196) The Parties submit that the precise scope of the geographic market definition for MRO can be left open as no serious doubts would arise under any plausible market definition.<sup>173</sup>
- (197) For the assessment of the Transaction, the Commission concludes that the precise geographic market definition for MRO services can be left open, since the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition, as assessed in Section 5.6 below.

### 4.6 Dry-leasing, wet-leasing and franchise services to other airlines

- (198) Dry-leasing involves the leasing of an aircraft to an airline, without crew, maintenance services and insurance. Dry-leased aircraft are usually used by airlines to increase capacity on a route without the burden of buying an aircraft. In contrast to dry-leasing services, wet-leasing to airlines involves the leasing of an aircraft to

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<sup>169</sup> See Reply to RFI 6 of 1 July 2019. Form CO, paragraphs 1125, 1157-58, 1202, 1254. The Parties claim that, for heavy maintenance, in most cases and for most types of aircraft, "C" and "D" checks form part of the same market or are very close alternatives and should be analysed jointly (see Form CO, paragraph 1158).

<sup>170</sup> See Cases M.7545 – *IAG/Aer Lingus*, paragraph 121; M.6554 – *EADS/STA/Elbe Flugzeugwerke JV*, paragraph 26; M.6447 – *IAG/bmi*, paragraph 108; M.3374 – *SR Technics/FLS Aerospace*, paragraph 12.

<sup>171</sup> See Cases M.7545 – *IAG/Aer Lingus*, paragraph 121; M.6554 – *EADS/STA/Elbe Flugzeugwerke JV*, paragraph 26; M.3374 – *SR Technics/FLS Aerospace*, paragraph 12; M.3280 – *Air France/KLM*, paragraph 40.

<sup>172</sup> See Cases M.7545 – *IAG/Aer Lingus*, paragraph 121; M.6554 – *EADS/STA/Elbe Flugzeugwerke JV*, paragraph 26; M.6447 – *IAG/bmi*, paragraph 108.

<sup>173</sup> See Reply to RFI 6 of 1 July 2019; Form CO, paragraphs 1127, 1162, 1203, 1256.

an airline with crew, maintenance and insurance ('ACMI'). Wet-leasing also allows an airline to increase its capacity or operate new routes without having to buy an aircraft or provide itself for crew, insurance and maintenance. Finally, a franchise agreement also allows an airline to increase its capacity or to operate new routes. Under a franchise agreement, the airline wishing to expand is the franchisor putting its brand and livery at the disposal of the franchisee for use under the franchise agreement. The franchisee operates with its own aircraft, crew, maintenance, insurance and slots, using the brand and livery of the franchisor. The franchisee bears the commercial risk, including setting fares, but the franchisor markets the route as part of its network and sells the tickets. In return for the use of the brand and for the services provided, the franchisee pays a fee to the franchisor.

- (199) Propius provides intra-group dry-leasing services of regional aircraft to Stobart Air. Stobart Air is active in the market for the provision of wet-leasing services to airlines, while Flybe marginally provides such services to [...]. With regard to franchise services, Stobart Air is active as franchisee while Flybe is active as franchisor.
- (200) The Commission has not yet defined the product and geographic markets for the provision of dry-leasing, wet-leasing and franchise services. The Commission is however familiar with wet-leasing agreements.<sup>174</sup> Similarly, the Commission has not yet defined the market for the provision of franchise services but has examined franchise agreements.<sup>175</sup>
- (201) Airlines can source aircraft and aircraft operations in different ways. For dry leasing agreements, wet leasing agreements and franchising agreements there would be different degrees of commercial risk, but also of skill and expertise required on the side of the airline operator for each of these agreements.
- (202) The Parties explained the main differences in the allocation of responsibilities and commercial risk between dry lease agreements, wet lease agreements and franchise agreements, which are summarised in the chart below.

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<sup>174</sup> See e.g. Case M.8633 – *Lufthansa/Certain Air Berlin Assets*.

<sup>175</sup> See case M.6663 – *Ryanair/Aer Lingus III*.

**Figure 3: Allocation of responsibilities and comparison between wet lease, franchise and dry lease agreements**



Source: Form CO, paragraph 1291

- (203) The Parties explained that in a dry lease, only the aircraft would be leased to an airline (which would be operating the aircraft and selling the tickets). Dry leasing services would normally be provided by leasing companies and aircraft manufacturers rather than airlines. Dry leasing would not require the lessor to have any authorisation to fly, in addition, no Air Operator Certificate (“AOC”) would be required.<sup>176</sup>
- (204) For wet-lease and franchise agreements, the Parties explained which party of the agreement is responsible for the different aspects of the business operations.

**Table 102: Differences between wet-lease and franchise agreements**

	<b>Wet-Lease Agreements</b>	<b>Franchise Agreements</b>
Flight Operator	Lessor	Franchisee
AOC	Lessor	Franchisee
Flight number	Lessee	Franchisor
Ticket sale	Lessee	Franchisor
Flight Marketing and Promotion	Lessee	Franchisor & Franchisee
Commercial risk bearer, including setting prices	Lessee	Franchisee
Duration	Generally shorter term (less than 2 years) <sup>651</sup>	Generally longer term (5-10 years)

Source: Form CO, paragraph 1292

<sup>176</sup> Form CO, paragraphs 1293 and 1295 *et seq.*

- (205) The main features distinguishing franchise and wet leasing are the commercial risk and the duration of the agreement.
- (206) The Parties explained that under a franchise agreement, the commercial risk would be passed on to the franchisee (the operating airline) who generates revenues through the sale of seats by the franchisor (and the franchisee pays the franchisor a franchise fee). Franchising would also be a method to expand brand presence, without further investments and financial risk.<sup>177</sup>
- (207) In a wet lease agreement, the lessee would retain the commercial risk of selling tickets. Wet-leasing would allow the airline to continue its operations and thereby not losing its own slots, without the need to acquire additional aircraft and to hire crew.<sup>178</sup>
- (208) In terms of duration, franchise agreements would tend to have a duration between 5 and 10 years, whereas wet lease agreements would be normally shorter than 2 years.<sup>179</sup>
- (209) The Parties submitted that from the supply-side, for a supplier of wet-leasing services (lessor) to offer franchise services (franchisee), it would have to assume the commercial risk for the flight, including setting prices and would have to create the internal structure for revenue management and pricing.<sup>180</sup> The Parties consider that a supplier of franchise services (franchisee) would in contrast not require significant investments to offer wet-leasing services, because the franchisee would have access to aircraft, crew and maintenance, which are needed to provide wet-leasing services. In addition, wet-lease agreements would not require the lessor to bear the commercial risk and would usually be of a shorter duration than franchise agreements, so a supplier of franchise services could enter into a wet-lease agreement without requiring further investments.<sup>181</sup>
- (210) The market investigation has not produced any evidence indicating that dry-leasing, wet-leasing and franchising services are considered substitutable. Respondents have not submitted any comment suggesting that there is any need to define a combined market for dry-leasing, wet-leasing and franchising services.<sup>182</sup> With regard to wet-leasing and franchising services, respondents answering that they procure wet-leasing services explained with a majority that they do not procure franchising services.<sup>183</sup>

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<sup>177</sup> Form CO, paragraph 1310 *et seq.*

<sup>178</sup> Form CO, paragraph 1310 *et seq.*

<sup>179</sup> Form CO, paragraph 1293 and 1295 *et seq.*

<sup>180</sup> Form CO, paragraph 1310 *et seq.*

<sup>181</sup> Form CO, paragraph 1312 *et seq.*

<sup>182</sup> Replies to eQ1 – Questionnaire to Airlines, question 66; eQ2 – Questionnaire to Corporate Customers, question 17 and eQ3 – Questionnaire to Travel Agents, question 18.

<sup>183</sup> Replies to eQ1 – Questionnaire to Airlines, questions 40 and following and question 50.

- (211) The Commission considers that, from the demand side of the airlines, dry-leasing appears not be substitutable with wet-leasing or franchising services, because dry-leasing only provides the airline seeking to expand with an aircraft whereas wet-leasing and franchising services provide also crew and other services. In addition, dry-leasing does not seem to be substitutable with wet-leasing or franchising services from the supply side because the suppliers of dry leasing services would need significant additional resources (e.g. crew) and fulfil regulatory requirement (e.g. an AOC) to offer wet-leasing or franchising services.
- (212) Concerning wet-leasing and franchising services, the Commission considers that wet-leasing and franchising have different business models and offer different solutions for an airline seeking to expand.
- (213) For those reasons, the Commission considers that dry-leasing services, wet-leasing services and franchise services constitute distinct markets. The plausible segmentations of those three markets are assessed in the following.

#### 4.6.1.1 Dry leasing

- (214) The market investigation aimed at determining whether the product market for the supply of dry-leasing services to airlines could be segmented on the basis of aircraft size and type.
- (215) The majority of airlines responding to the market investigation and having expressed a view did not consider that large commercial aircraft (i.e. aircraft with more than 100 seats and a range of greater than 2000 nautical miles) and regional aircraft (aircraft with around 30 to 100 seats and a range of less than 2000 nautical miles) could be regarded as substitutable for reason of their technical characteristics, price and intended end-use.<sup>184</sup> One airline explained that *“Two aircraft types with very different capacities are largely not substitutable. An airline would choose the aircraft type to be deployed on a specific route portfolio according to the actual or expected demand on a route to be able to operate the aircraft on a profitable basis. With an aircraft of a different capacity, not matching the demand, it will in most cases be very difficult to achieve this.”*<sup>185</sup>
- (216) When airlines were asked if, as a customer of aircraft dry-leasing services, they had switched from large commercial aircraft to regional aircraft in the past, or vice versa, the majority of airlines explained that they had not switched. One airline explained that they had changed in some instances aircraft sizes according to the demand from bookings.<sup>186</sup>
- (217) With regard to the dry-leasing of large commercial aircraft, the majority of airlines responding to the market investigation explained that they do not consider wide-

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<sup>184</sup> See replies to eQ1 – Questionnaire to airlines, question 32.

<sup>185</sup> See replies to eQ1 – Questionnaire to airlines, question 32.

<sup>186</sup> See replies to eQ1 – Questionnaire to airlines, question 33.

body aircraft with 200-400+ seats and narrow-body aircraft with 100-200 seats as substitutable for them as customers of dry-leasing services.<sup>187</sup>

- (218) Concerning regional aircraft, the majority of airlines responding to the market investigation explained that they do not consider small regional aircraft with 30-50 seats and large regional aircraft with 70-90+ seats to be substitutable for them as customers of dry-leasing services.<sup>188</sup>
- (219) The Commission therefore considers that the market for the provision of dry leasing services should be segmented according to the aircraft size (seat capacity). The precise market definition can however be left open since the Transaction does not raise serious doubts under any plausible market definition.
- (220) Concerning the geographic market definition, a majority of the airlines responding to the market definition explained that they purchase dry-leasing services worldwide.<sup>189</sup> Some of the airlines responding to the market investigation explained that they also supply aircraft dry-leasing services and would do so worldwide.<sup>190</sup>
- (221) The Commission therefore considers that the geographic market for the provision of dry-leasing services is worldwide.

#### 4.6.1.2 Wet-leasing

- (222) Aircraft can be used for passenger transport or for cargo transport. The Parties submitted that the aircraft and crew for cargo and for passenger transport are different: for cargo air transport, aircraft would not be equipped with passenger seats and only pilots would be required, no flight attendants. Cargo aircraft would typically be aircraft that had been retired from passenger services and they would be older and cheaper to lease than passenger aircraft.<sup>191</sup> In addition, the Parties submitted that the providers of passenger and cargo aircraft would be generally different. The providers of wet-leasing services for air passenger transport would not generally provide wet-leasing services for air cargo transport. Cargo aircraft would normally be operated by a small number of specialist suppliers. From a supply-side perspective, for a supplier of wet-leasing services for air cargo transport to switch to wet-leasing services for air passenger transport, it would need different aircraft and crew.
- (223) The Commission therefore considers that wet-leasing services for air cargo and passenger air transport services appear to constitute distinct markets. However, since Stobart Air and Flybe only provide wet-leasing services for passenger air

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<sup>187</sup> Reply of an air carrier to eQ1 – Questionnaire to airlines, question 34.

<sup>188</sup> See replies to eQ1 – Questionnaire to airlines, question 35.

<sup>189</sup> See replies to eQ1 – Questionnaire to airlines, question 36.

<sup>190</sup> See replies to eQ1 – Questionnaire to airlines, question 37.

<sup>191</sup> Form CO, paragraph 1318.

transport, the Commission will only assess this market segment further in this decision, which is in any event the narrowest plausible market.

- (224) The market investigation aimed at determining whether the product market for the supply of wet-leasing services to airlines could be segmented on the basis of aircraft size and type.
- (225) The majority of airlines responding to the market investigation and having expressed a view did not consider that large commercial aircraft (i.e. aircraft with more than 100 seats and a range of greater than 2000 nautical miles) and regional aircraft (aircraft with around 30 to 100 seats and a range of less than 2000 nautical miles) could be regarded as substitutable for reason of their technical characteristics, price and intended end-use.<sup>192</sup>
- (226) When airlines were asked if, as a customer of aircraft wet-leasing services, they had switched from large commercial aircraft to regional aircraft in the past, or vice versa, the majority of airlines explained that they had not switched.<sup>193</sup>
- (227) With regard to the wet-leasing of large commercial aircraft, the majority of airlines responding to the market investigation explained that they do not consider wide-body aircraft with 200-400+ seats and narrow-body aircraft with 100-200 seats as substitutable for them as customers of wet-leasing services.<sup>194</sup>
- (228) Concerning regional aircraft, the majority of airlines responding to the market investigation explained that they do not consider small regional aircraft with 30-50 seats and large regional aircraft with 70-90+ seats to be substitutable for them as customers of wet-leasing services.<sup>195</sup>
- (229) The Commission therefore considers that the market for the provision of wet-leasing services could be segmented according to aircraft size. The precise product market definition can however be left open since the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (230) Geographically, the Parties submitted that the market for wet-leasing services would be at least EEA-wide in scope. Wet-leasing companies would be based across the EEA and would typically bid for wet-leasing contracts across the EEA. The Parties also explained that wet-leasing companies from outside the EEA would need to fulfil the EEA regulatory requirements and the national requirements before they could offer or bid for wet-leasing contracts within the EEA (for example concerning the AOC, maintenance requirements for aircraft or insurance).<sup>196</sup>

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<sup>192</sup> See replies to eQ1 – Questionnaire to airlines, question 40.

<sup>193</sup> See replies to eQ1 – Questionnaire to airlines, question 41.

<sup>194</sup> See replies to eQ1 – Questionnaire to airlines, question 42.

<sup>195</sup> See replies to eQ1 – Questionnaire to airlines, question 43.

<sup>196</sup> Form CO, paragraph 1325 *et seq.*



- (231) When airlines were asked if they purchase wet-leasing services within the EEA or worldwide, the replies to the market investigation were mixed. Around half of the airlines answering explained that they purchase at EEA level, whereas around the other half of the respondents purchased at worldwide level.<sup>197</sup> Some airlines responding to the market investigation explained that they also supply wet-leasing services to other airlines, whereby around half the respondents explained that they supply at worldwide level whereas around the other half of the respondents supply at EEA level.<sup>198</sup>
- (232) It can however be left open if the geographic market for the provision of wet-leasing services is EEA-wide or worldwide because the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

#### 4.6.1.3 Franchise services

- (233) As explained above in paragraph (199), the Transaction creates a vertical link between Stobart Air as franchisee and Flybe as franchisor. In a previous decision, the Commission has not considered a franchisee as an independent competitor from its franchisor.<sup>199</sup> For the purpose of the assessment of the vertical link created by this Transaction, the Commission will consider the provision of franchising services to other airlines as an upstream market and input to the operation of air passenger transport services.
- (234) Geographically, the Parties submitted that the provision of franchising services might be EEA-wide, but would be at least UK and Ireland wide (based on the routes operated under the Stobart Air-Flybe franchise agreement).<sup>200</sup> None of the airlines having replied to the market investigation and having expressed an opinion stated that they would purchase franchising services only from franchisees based in the same country.<sup>201</sup>
- (235) Therefore, the Commission considers for the purpose of this decision the provision of franchising services to be an EEA-wide market.

### 4.7 Ground-handling services

#### 4.7.1.1 Relevant product market

- (236) Aircraft ground-handling refers to the servicing of an aircraft while it is on the ground. It covers a variety of airport services such as ramp services, passenger and baggage handling, fuel and oil handling, aircraft maintenance, ground administration and supervision and crew administration. In its previous decisional

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<sup>197</sup> See replies to eQ1 – Questionnaire to airlines, question 44.

<sup>198</sup> See replies to eQ1 – Questionnaire to airlines, question 45.

<sup>199</sup> See Case M.6663 – *Ryanair/Aer Lingus III*, paragraph 459.

<sup>200</sup> Form CO, paragraphs 1343 *et seq.*

<sup>201</sup> See replies to eQ1 – Questionnaire to airlines, question 50 and 51.

practice, the Commission has defined ground-handling services as a product market consisting of ramp, passenger, and baggage handling services as well as airside cargo handling services.<sup>202</sup>

- (237) The Parties consider that the Commission does not need to reach a view on the market definition in this case as the Transaction will not give rise to any horizontal or vertical affected markets, even on the narrowest plausible market.<sup>203</sup>
- (238) The Commission considers that the product market as defined in its relevant precedents is still appropriate. In line with its prior decisional practice, the Commission will assess the effects of the Transaction on the market for the provision of ground-handling services comprising ramp, passenger, and baggage handling services as well as airside cargo handling services.

#### 4.7.1.2 Relevant geographic market

- (239) As regards the geographic scope for the provision (or contracting) of ground-handling services, the Commission has in its prior decisional practice considered that the geographic scope of the market is restricted to a specific airport (or possible two neighbouring airports), given that the services required at a particular airport could not normally be substituted by services provided at other airports.<sup>204</sup>
- (240) The Parties consider that the Commission does not need to reach a view on the market definition in this case as the Transaction will not give rise to any horizontal or vertical affected markets, even on the narrowest plausible market.
- (241) The Commission considers that, in any event, the precise definition can be left open as the Transaction does not raise serious doubts irrespective of the precise geographic market definition adopted.

### 4.8 Competitive situation most likely to prevail absent the Transaction

- (242) In assessing the competitive effects of a concentration, the Commission compares the competitive conditions that would result from the Transaction with the conditions that would have prevailed absent the Transaction. In most cases, the competitive conditions existing at the time of the Transaction constitute the relevant comparison for evaluating its effects. However, in some circumstances, the Commission may take into account future changes to the market to the extent that they can be reasonably predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison.<sup>205</sup>

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<sup>202</sup> See e.g. Cases M.8470 – *DAAM/INFRAVIA/FIH/AI*, paragraph 16; M.8137 – *HNA Group/Servair*, paragraph 51.

<sup>203</sup> Form CO, paragraph 1419.

<sup>204</sup> See e.g. Cases M.9270 – *Vinci/ Gatwick airport*, paragraph 12; M.8470 – *DAAM/INFRAVIA/FIH/AI*, paragraph 19; M.8137 – *HNA Group/ Servair*, paragraph 52.

<sup>205</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 9 (OJ C 31, 5.2.2004, p.5).

#### 4.8.1 *Flybe's history and financial background*

- (243) While Flybe has experienced negative operational results in three of the last four financial years, its financial position worsened in Spring 2018. Flybe issued a profit warning to the market on 3 April 2018.<sup>206</sup> [confidential information about Flybe's financial situation.] As recognised by Flybe's board in approving entry into the share purchase agreement described in paragraph (17) above, Flybe faced an imminent risk of insolvency by 15 January 2019.
- (244) In February 2019, the Parties requested a derogation decision under Article 7(3) of the EU Merger Regulation, claiming that the suspension obligation under Article 7(1) would cause irreparable damage to Flybe and third parties.<sup>207</sup>

#### 4.8.2 *Failing Firm*

- (245) In the case at hand, the Notifying Parties argue that absent the Transaction, Flybe would become insolvent and exit all markets since the Notifying Parties would not provide the financial support to this loss-making company.<sup>208</sup>
- (246) In this context, the Notifying Parties consider that Flybe meets the criteria of the failing firm defence as set out in paras. 89-91 of the Commission's Horizontal Merger Guidelines. Namely, the Horizontal Merger Guidelines and the case law of Court of Justice establish a three-pronged test to determine whether a "rescue merger" may be allowed (that is to say, a failing firm defence can be accepted) despite its adverse effects on competition:
- i. the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking;
  - ii. there is no less anti-competitive alternative purchase than the notified merger; and
  - iii. in the absence of a merger, the assets of the failing firm would inevitably exit the market.<sup>209</sup>
- (247) More generally, a merger that is found to give rise to significant impediment of effective competition may be found compatible with the internal market if it can be proved that without the merger the competition would be deteriorated at least to the same extent as if the failing firm would simply disappear from the market.<sup>210</sup> In that context, "*the Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a*

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<sup>206</sup> Another profit warning was issued on 25 January 2019.

<sup>207</sup> See Derogation Decision.

<sup>208</sup> Form CO, paragraph 186.

<sup>209</sup> Horizontal Merger Guidelines, paragraph 90.

<sup>210</sup> Horizontal Merger Guidelines, paragraph 89.

*failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.*"<sup>211</sup>

- (248) It is then for the Notifying Parties to provide in due time all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.<sup>212</sup>

#### 4.8.2.1 Commission's assessment

- (249) The criteria of the failing firm defence as laid down in paragraphs 89-91 of the Commission's Horizontal Merger Guidelines are cumulative. For the reasons, set out below, the Notifying Parties failed to demonstrate that all three criteria are met and therefore that the deterioration of the competitive structure that follows the merger is not caused by the merger.

##### 4.8.2.1.1 Flybe's exit from the market

- (250) Whilst the Commission acknowledges Flybe's precarious financial position as set out in the Derogation Decision, it nevertheless cannot conclude that the most likely scenario absent the Transaction would be that Flybe would have completely and definitively exited the market for air transport services in the immediate or short term, since it considers that it does not have sufficient evidence to exclude that Flybe may have been acquired by another interested purchaser instead (and, as such, would have continued its operations as an active provider of air transport services).
- (251) Indeed, other potential purchasers expressed interest in a possible acquisition of Flybe (albeit they did not materialise into any formal offers).<sup>213</sup> It can therefore not be excluded that at least parts of Flybe's operations would have continued in some form.

##### 4.8.2.1.2 No less anticompetitive purchaser than Connect Airways

- (252) The Notifying Parties argue that there was no less anti-competitive alternative purchaser than Connect Airways that had demonstrated an ability to execute and complete a transaction sufficient to rescue Flybe in the required timeframe.<sup>214</sup>
- (253) Whilst Flybe Group did receive some interest from potential purchasers (including from Virgin Atlantic on its own and Stobart separately<sup>215</sup>), before and during the

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<sup>211</sup> Horizontal Merger Guidelines, paragraph 89.

<sup>212</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, para 91 (OJ C 31, 5.2.2004, p.5). See also COMP/M.308 KALI+SALZ and Joined Cases C-68/94 and C-30/95 France and Others v Commission (Kali & Salz) [1998] ECR I-1375.

<sup>213</sup> Form CO, paragraph 187(a).

<sup>214</sup> Form CO, paragraph 373.

formal sale process to acquire Flybe Group as a whole or part, no other potential interest materialised into an offer according to the Parties.

- (254) The Commission considers that, in any event, as the criteria for a failing firm defence are cumulative, and the first and third criteria are not met, the defence cannot be relied upon in this case.

#### 4.8.2.1.3 The assets would inevitably exit the market

- (255) One of the cumulative criteria laid down in the Horizontal Guidelines to accept a failing firm defence is that absent the merger, “*the assets of the failing firm would inevitably exit the market*” (emphasis added).<sup>216</sup>
- (256) Among the main assets of Flybe are the [10-20] slot pairs (for WS18; [10-20] for SS18) it holds at Amsterdam Schiphol and [10-20] slot pairs (for WS18, [10-20] for SS18) at Paris Charles de Gaulle. In case of insolvency, and due to the severe congestion affecting these airports, all Flybe slots would be reallocated to other carriers, most likely via the slot pool managed by the slot coordinator. Nothing would prevent carriers obtaining such slots to use them on the routes where they are currently used by Flybe.
- (257) Therefore, it is concluded that at least some of these slots would likely continue to be used and these assets would not “inevitably” exit the market.

#### 4.8.2.1.4 Overall causality criterion

- (258) The overall criterion for assessing a failing firm defence requires the Notifying Parties to demonstrate that the deterioration of the competitive structure (or the significant impediment to effective competition or “SIEC”) that follows the merger is not caused by the merger.<sup>217</sup> In the case at hand, for the reasons set out below, the Notifying Parties fail to demonstrate this.
- (259) Namely, in order to conclude that the Transaction is compatible with the internal market, it is necessary to establish whether, absent the Transaction, the competitive structure in the market would likely deteriorate to a similar degree compared to the merger.
- (260) As explained below in Section 4.8.3.1, the Commission has indications that absent the Transaction, competition in the market would not deteriorate to the same extent as it would should the Transaction go through.
- (261) In particular, the reallocation of Flybe’s slots, in particular its portfolio at highly congested Schiphol and congested Charles de Gaulle, would increase opportunities and incentives for entry and expansion by other airlines than AFKL, in particular on the routes of concern. The same opportunities would not arise in the post-Transaction scenario.

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<sup>215</sup> See Reply to RFI 2 to AFKL of 11 June 2019.

<sup>216</sup> See Horizontal merger guidelines, paragraph 90.

<sup>217</sup> See Horizontal merger guidelines, paragraph 91.

(262) To conclude, the overall causality criterion is not fulfilled.

#### 4.8.2.2 Conclusion on the failing firm defence

(263) The Commission concludes that the Parties have failed to demonstrate that the criteria for meeting the failing firm test as set out in the Horizontal Merger Guidelines are met. In addition, it has not been shown that the deterioration of the competitive structure that follows from the Transaction would not be directly caused by the Transaction. Instead, the Transaction would most likely deteriorate competition beyond the extent of the deterioration that could occur absent the Transaction. In addition, it appears likely that the negative effects of a possible bankruptcy of Flybe would be short term while the negative effects likely to be caused by the Transaction would be structural in nature.

#### 4.8.3 *Most likely situation absent the Transaction*

##### 4.8.3.1 Scenario 1: Flybe's insolvency and market exit

(264) Pursuant to Article 8(2) and 10(2) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (hereafter: "the EU Slot Regulation"), a carrier holding a slot series in a given scheduling season is entitled to retain the same series in the next equivalent scheduling season if it can demonstrate to the slot coordinator that the series of slots has been operated for at least 80% of the time during the scheduling period for which it has been allocated for the operation of scheduled and programmed non-scheduled air services. This is referred to as the "use-it-or-lose-it" rule.

(265) If the Commission considers the scenario that Flybe would have exited the market, it would take account of the fact that, in such case, Flybe's slots would be made available to other carriers during or shortly before the insolvency proceedings, e.g. through fall back to the slot pools and subsequent reallocation by the relevant slot coordinators, including in Amsterdam.

(266) The relatively short timespan before slots would be withdrawn in application of this rule, part – and probably most of – Flybe's slots at Amsterdam and Paris for the ongoing season would end up in the slot pool. Indeed, Flybe's liquidator / administrator would likely face difficulties to transfer Flybe's activity including the slots linked to it before these slots fall back to the pool in application of the "use-it-or-lose-it" rule. As regards slots for the following season, Flybe (or its liquidator) may have more time to transfer Flybe's activity including the slots linked to it. However, AFKL would be unlikely to be the only air carrier being transferred these slots, for the reasons explained below.

(267) Amsterdam Schiphol Airport is generally known to be heavily congested, and Paris Charles De Gaulle also constitutes a congested airport, which means that available slots at these airports are insufficient to satisfy airlines' demand. In that context, in case of Flybe's exit from the relevant markets, all the slots currently held by Flybe would be very likely to be taken up, e.g. through re-allocation via the pool.<sup>218</sup>

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<sup>218</sup> As regards the slots that would fall back to the pool, pursuant to Article 10(6) of the EU Slot Regulation, 50 % of the slots included in the pool are destined to incumbents and 50% to airlines which qualify as "new entrants" under Article 2(b) of the above-mentioned Regulation. In practice, numerous airlines would qualify as potential new entrants at Amsterdam and in Paris.

Moreover, a significant proportion of Flybe's slots (most likely 50%<sup>219</sup>) at Amsterdam and Paris would be likely to end up with other carriers than AFKL,<sup>220</sup> unlike in the post-Transaction scenario where AFKL would indirectly take control of all these slots. The fact that a relatively large portfolio of slots at Amsterdam and Paris airports would be made available through reallocation via the pool would significantly facilitate the implementation of potential entry plans by other airlines.

- (268) Therefore, one difference between this scenario and the post-Transaction situations relates to the distribution of slots at Amsterdam Schiphol and Paris Charles De Gaulle. In the absence of the Transaction, the likelihood that carriers other than AFKL may acquire part of Flybe's slot portfolio at Amsterdam and Paris and enter routes where AFKL would be in a monopoly or dominant position because of Flybe's exit, would be higher than in the post-Transaction situation, where the entirety of Flybe's slot portfolio would be (indirectly) controlled by AFKL. Indeed, post-Transaction, due to the heavy congestion prevailing at Amsterdam Schiphol and Paris Charles de Gaulle, entry opportunities would remain strongly limited by the scarcity of slots whereas in absence of the Transaction, entry barriers would be lowered by the reallocation via the pool of Flybe's slots portfolio between various carriers.
- (269) The Transaction is not expected to have the same effect as Flybe's market exit on potential new entrants' incentives to enter/expand on routes. This is because Flybe's exit would lead to an immediate reduction in capacity on these routes, whereas post-Transaction, this capacity would be taken up by AFKL. The capacity which disappears as a consequence of Flybe's exit would create an incentive for other carriers to enter the route in order to respond to the remaining demand and thereby increase more (than post-Transaction) their incentives to enter/expand.
- (270) It thus appears that in this scenario, Flybe's exit would have heightened other carrier's incentives to enter the exited routes, at least to some extent. Besides, as explained above, the ability of these carriers to enter would have been heightened by the reallocation of Flybe's slots at Amsterdam and Paris.
- (271) In conclusion, post-Transaction, AFKL would likely be less threatened by new entries on the routes where Flybe currently operates than in this scenario (i.e. Flybe's market exit). This is due to lower incentives and higher barriers to entry in the post-Transaction scenario than in this insolvency scenario.

#### 4.8.3.2 Scenario 2: Flybe's continuation of operations

- (272) As mentioned above, the Commission does not consider that it has sufficient evidence to conclude that Flybe's exit from the market and the cessation of its operations as an independent air carrier would be the most likely situation absent the Transaction, since it may have been acquired by another purchaser and continued its operations on the market for air transport services as such. Indeed, other potential purchasers expressed interest in a possible acquisition of Flybe

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<sup>219</sup> See EU Slot Regulation, Article 10(6).

<sup>220</sup> There is no reason why the reallocated slots should all end up with AFKL should Flybe become insolvent.

(albeit they did not materialise into any formal offers).<sup>221</sup> It can therefore not be excluded that at least parts of Flybe’s operations would have continued in some form.

(273) In particular, earlier in 2018, Virgin Atlantic showed interest in acquiring 100% of Flybe and considered making an offer for Flybe on its own, as did Stobart.<sup>222</sup>

(274) If, absent the Transaction, Flybe would not have become insolvent, because an alternative buyer (whether Virgin Atlantic on its own or Stobart or other) would have taken over all or parts of Flybe, the latter would have continued its operations on many or all of the relevant routes and would have continued to exert a competitive pressure on AFKL on these routes, remaining in control over its slots at the relevant airports (at least those not lost under the “use it or lose it” rule). This competitive pressure would be removed following the proposed Transaction.

#### 4.8.4 Conclusion

(275) For the purpose of this Decision, the Commission does not need to take a firm position as to whether, absent the Transaction, Flybe would have exited the market and ceased all operations, or would have continued following the acquisition by an alternative purchaser, as the Transaction raises serious doubts as to its compatibility with the internal market under both scenarios. Namely, the Transaction would most likely impede competition beyond the extent of the impediment that could occur under either possible scenario absent the Transaction.

### 4.9 Competitive situation for the assessment of air/rail overlaps

(276) As stated above, when assessing the competition effects of a proposed transaction under the Merger Regulation, the Commission needs to compare the competitive conditions that would result from the notified concentration with those that would have prevailed in the absence of the concentration. As a general rule, the competitive conditions prevailing at the time of notification constitute the relevant framework for evaluating the effects of a transaction. In some circumstances, however, the Commission may take into account future changes to the market that can be reasonably predicted.<sup>223</sup>

(277) The Parties explained that Virgin Trains currently operates the West Coast Train Franchise in the United Kingdom. Virgin Trains has operated the West Coast Train Franchise since October 2012. The West Coast Train Franchise was extended in December 2018 until March 2020. The Department for Transport has an option to terminate the franchise from November 2019 on.<sup>224</sup> The West Coast Train Franchise will be replaced by the West Coast Partnership franchise. When the West

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<sup>221</sup> Form CO, paragraph 187(a).

<sup>222</sup> See Reply to RFI 2 to AFKL of 11 June 2019.

<sup>223</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, paragraph 9 (OJ C 31, 5.2.2004, p.5).

<sup>224</sup> Form CO, paragraph 250 and 552 *et seq.*



Coast Partnership franchise begins, the West Coast Franchise will be terminated.<sup>225</sup> As a result, the West Coast Train Franchise will expire before March 2020, most likely around November 2019.<sup>226</sup>

- (278) The West Coast Partnership franchise is awarded through a tender process by the UK DfT. The consortium involving Virgin Group was disqualified from the tender process in relation to the West Coast Partnership franchise.<sup>227</sup>
- (279) [confidential strategic information related to Virgin Trains' disqualification from the West Coast Partnership]<sup>228</sup>
- (280) The Commission notes that for Virgin Trains to be awarded the West Coast Partnership franchise, the consortium involving Virgin Trains would need to challenge the decision in court, be successful in this challenge, be re-admitted to the tender process and be ultimately selected as the successful bidder in the tender process.
- (281) Due to these uncertainties, the Commission considers that for the purpose of this decision, it cannot be reasonably predicted that Virgin Trains would be awarded the West Coast Partnership franchise. The Commission will therefore assess the effects of this Transaction against a situation absent the Transaction in which Virgin Trains operates train services on the London-Edinburgh, Birmingham-Glasgow, Birmingham-Edinburgh, Edinburgh-Manchester and Glasgow-Manchester routes until November 2019 and a third party train operator operates these routes under the West Coast Partnership Franchise as of November 2019. As a result, the Transaction gives only rise to air/rail overlaps until November 2019.

## 5. COMPETITIVE ASSESSMENT

### 5.1 Passenger air transport services

#### 5.1.1 Passenger air transport services under the O&D approach

##### 5.1.1.1 Flybe's and Virgin Atlantic's (including its shareholders') business models in air passenger transport

- (282) **Flybe** is a UK regional airline and currently operates passenger services on 190 routes from 73 departure points in the UK. Flybe operates a fleet of 76 aircraft. Flybe operates short-haul flights primarily within the UK and between the UK and Continental Europe. Flybe's operations are not based around specific airports, its

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<sup>225</sup> Form CO, paragraph 596.

<sup>226</sup> Form CO, paragraph 601.

<sup>227</sup> Form CO, paragraph 596.

<sup>228</sup> Form CO, paragraph 598.

business model was described by the Parties as most akin to a point-to-point model.<sup>229</sup>

- (283) **Virgin Atlantic** is operating long-haul flights from the United Kingdom to 34 destinations worldwide. Virgin Atlantic does not operate flights within the UK or any short-haul routes.
- (284) **Delta** is an US airline. Delta's network was explained by the Parties to be operated on a system of hub and key airports, for example Minneapolis-St. Paul, New York-LaGuardia and New York-JFK, Amsterdam, Paris-Charles de Gaulle and London Heathrow. Delta does not operate routes within the UK or any European short-haul routes.
- (285) **AFKL** operates a network organised around Paris-Charles de Gaulle and Amsterdam. It operates short-haul flights within Europe as well as long-haul flights worldwide. AFKL does not operate on any domestic UK routes.

#### 5.1.1.2 Treatment of Stobart Air and its franchise agreements

- (286) Stobart Air operates on routes out of the UK and Ireland pursuant to franchise agreements with Aer Lingus (on a number of routes between Dublin and Cork and the United Kingdom) and Flybe (on a number of routes between the United Kingdom and Continental Europe).
- (287) In a previous decision, the Commission has concluded that Aer Arann (who was taken over by Stobart Group) operated flights pursuant to a franchise agreement with Aer Lingus, cannot be considered as an independent competitor from Aer Lingus and that it is appropriate to add Aer Arann's shares of the market to those of Aer Lingus for the purpose of the competitive assessment.<sup>230</sup>
- (288) The key terms of Aer Lingus – Stobart Air franchise agreement and the Flybe – Stobart Air franchise agreement are as follows.
- (289) Stobart Air as the franchisee bears the commercial risk for the performance on the routes that it operates pursuant to the franchise agreement, including setting the prices on these routes.<sup>231</sup>
- (290) Under the Aer Lingus-Stobart Air franchise agreement, Stobart Air pays a franchise fee to Aer Lingus and Flybe, respectively.<sup>232</sup>
- (291) Stobart Air operates its routes using Aer Lingus and Flybe's brand and flight numbers. Stobart Air uses the Aer Lingus Regional brand and operates under Aer

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<sup>229</sup> Form CO, paragraph 232 *et seq.*

<sup>230</sup> See Case M.6663 – *Ryanair/Aer Lingus III*, paragraphs 431 *et seq.*

<sup>231</sup> Form CO, paragraph 319 *et seq.*

<sup>232</sup> Form CO, paragraph 321 and 322.

Lingus' code (EI). For flights operated under the Flybe-Stobart Air franchise agreement, Stobart Air uses Flybe's brand and code.<sup>233</sup>

- (292) [confidential information about Stobart Air's franchise agreements with Aer Lingus and with Flybe]<sup>234</sup>
- (293) [confidential information about marketing in relation to Stobart Air's franchise agreements with Aer Lingus and with Flybe] For example, the Stobart Air routes under the Flybe-Stobart Air franchising agreement are advertised on Flybe's website as Flybe flights "operated by Stobart Air". Destinations only served under the Flybe-Stobart Air franchise agreement are advertised as Flybe destinations and the timetables of Stobart Air's routes under the franchise agreement are displayed as Flybe flights on Flybe's website. [confidential marketing information about marketing in relation to Stobart Air's franchise agreements with Aer Lingus and with Flybe] <sup>235</sup>
- (294) [confidential information about Stobart Air's franchise agreements with Aer Lingus and with Flybe]<sup>236</sup>
- (295) [confidential marketing information about Stobart Air's franchise agreements with Aer Lingus and with Flybe] <sup>237</sup>
- (296) It appears therefore that Stobart Air cannot be considered as an independent competitor from Flybe and Aer Lingus, respectively. The Commission is thus considers it appropriate to add Stobart Air's market shares to the market shares of Flybe and Aer Lingus, respectively, for the purposes of the competitive assessment.

#### 5.1.1.3 Treatment of interlining and codeshare agreements for the purpose of the competitive assessment

- (297) Airlines operating scheduled air passenger transport services can enter into cooperative agreements with other airlines.
- (298) An interline agreement is a commercial agreement between airlines to enable one airline to book passengers on another airline's flights and the passengers to travel on one ticket despite their journey being on flights operated by multiple airlines. It also enables passengers to check their bags from the point of origin through to their final destination.
- (299) In case of an interline agreement, the carrier which issues the main itinerary ticket does not market the flight operated by the third-party carrier as its own and does not determine the fare for the flight operated by the third-party carrier. The carrier

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<sup>233</sup> Form CO, paragraph 324.

<sup>234</sup> Form CO, paragraph 324.

<sup>235</sup> Form CO, paragraph 324.

<sup>236</sup> Form CO, paragraph 324.

<sup>237</sup> Form CO, paragraph 324.

selling the ticket to the passenger for an interline itinerary collects the entire fare. The third-party carrier that transports the passengers then bills the carrier which issued the tickets and collects the fare.<sup>238</sup>

- (300) Interlining agreements between airlines can be based on IATA's Multilateral Interline Traffic Agreement ("MITA") or on a bilateral interline traffic agreement ("BITA"). MITA enables an airline to interline with other airlines signed up to the MITA without having to enter into a separate bilateral agreement.<sup>239</sup> In the case of BITA, the airlines participating prorate the revenue relating to the itinerary on terms that are commercially negotiated between the airlines on a bilateral basis.<sup>240</sup>
- (301) Codeshare agreements allow flights operated by one airline to be marketed also by its codeshare partner under its own code.<sup>241</sup> In a codeshare, the marketing carrier adds its own code on flights operated by the operating carrier and markets them via its own distribution network.<sup>242,243</sup>
- (302) Codeshares can be unilateral or parallel. The codeshare is unilateral if only one codeshare partner is operating on the route; it is parallel when both codeshare partners fly on the route and codeshare on each other's flights. Unilateral codeshare allows the marketing carrier to expand its network by allowing it to reach destinations to which it does not fly its own aircraft. Through parallel codeshare, carriers can increase frequencies without deploying additional aircraft. Parallel codeshare normally allows for fare combinability, which enables passengers to fly on each leg of a roundtrip with different carriers. In both unilateral and parallel codeshares, the operating carrier receives indirect access to the distribution network and customer base of the marketing carrier(s).<sup>244</sup>
- (303) Seats on flights operated by a codeshare partner can be sold on a "free flow" (also known as "free-sell") or "blocked space" basis. In a free-flow codeshare, the marketing carrier can sell codeshare seats as long as there are seats available. As it acts as an agent of the operating carrier, the marketing carrier does not bear any economic risk. In order to monitor seats availability in each booking class, the marketing carrier has access to the operating carrier's IT system in real time. In a blocked space codeshare, the marketing carrier can purchase a block of seats from

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<sup>238</sup> Form CO, paragraphs 309 and 311.

<sup>239</sup> Form CO, paragraphs 308 *et seq.*

<sup>240</sup> Form CO, paragraph 312.

<sup>241</sup> In computer reservation systems, each airline is identified by a two-letter "airline designator code".

<sup>242</sup> See e.g. Case M.7333 – *Alitalia/Etihad*, paragraph 156 *et seq.*

<sup>243</sup> As explained above in Section 4.6, under a franchise agreement, the franchisee operates with its own aircraft, crew, maintenance, insurance and slots, using the brand and livery of the franchisor. The franchisee bears the commercial risk, including setting fares, and pays a franchise fee to the franchisor. The flight is operated under the franchisor's flight number and it is the franchisor who sells and distributes the tickets. The Commission has assessed the treatment of Stobart Air and its franchise agreements for the purpose of this decision in Section 5.1.1.2.

<sup>244</sup> See e.g. Case M.7333 – *Alitalia/Etihad*, paragraph 156 *et seq.*

the operating carrier in advance and resell them under its own code. Blocked space codeshares can be further distinguished in “soft” and “hard” block. In a “soft block” codeshare, the marketing carrier has an option to return some or all of the unsold seats to the operating carrier at an agreed number of days before departure. Under this system, the economic risk can lay mainly on the marketing carrier or the operating carrier depending on the specific features of the agreement. In a “hard block” codeshare, the marketing carrier cannot in principle return the tickets it has purchased and therefore the economic risk lies on it.<sup>245</sup>

- (304) Codeshare agreements are a common feature of the air passenger transport industry and it is not unusual for carriers to have in place at any given time a substantial number of agreements with multiple carriers.<sup>246</sup>

*Flybe’s and AFKL’s [...] codeshare agreements*

- (305) Flybe has a [...] codeshare agreement with Air France on the following routes: Birmingham-Paris Charles de Gaulle (CDG), Manchester-Paris CDG and Edinburgh-Paris CDG.
- (306) Air France and Flybe both operate the Birmingham-Paris CDG and the Manchester-Paris CDG routes and, in addition, codeshare on each other’s flights on these two routes within the scope of the [...].<sup>247</sup> These two routes are assessed as direct-direct operating overlaps in the competitive assessment.
- (307) The Edinburgh-Paris CDG route is only operated by Air France. Flybe does not operate a direct connection on this route with its own metal.<sup>248</sup> Flybe puts its code on and sells tickets for these Air France operated flights [...].<sup>249</sup> The Commission will therefore apply the most conservative approach and assess the Edinburgh-Paris Charles de Gaulle route as an operating overlap route [...]. It is however not necessary to assess in detail [...] for the Edinburgh-Paris Charles de Gaulle route, since no competition concerns arise even under this most conservative approach.

*Flybe’s and AFKL’s interlining and [...] codeshare agreements*

- (308) The Parties have identified 39 direct-direct marketing overlaps. These are routes on which either Flybe or AFKL operates and the other carrier is able to book passengers onto the flight of the operating carrier as a result of interlining or codeshare agreements.<sup>250</sup> On two routes, the marketing overlap arises as a result of

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<sup>245</sup> See e.g. Case M.7333 – *Alitalia/Etihad*, paragraph 156 *et seq.*

<sup>246</sup> See e.g. Case M.7333 – *Alitalia/Etihad*, paragraph 156 *et seq.*

<sup>247</sup> Form CO, footnote 265.

<sup>248</sup> Form CO, paragraph 517.

<sup>249</sup> Form CO, paragraph 533 and footnote 265.

<sup>250</sup> Form CO, paragraph 533.

interlining,<sup>251</sup> on the other routes the marketing overlap arises as a result of a [...] codeshare agreement between Flybe and AFKL.<sup>252-253</sup>

- (309) The Parties do not view the two routes overlapping as a result of an **interline agreement** to constitute a “marketing overlap”. They explain that the code of the operating carrier [...] remains on the tickets, which means that the operating carrier is also marketing the tickets with its own code (the interlining partner airline, - [...]) - is only issuing and pricing the tickets but its code does not appear on the tickets). [confidential information about Flybe’s commercial agreements] <sup>254</sup>
- (310) The Commission concludes that since [...] is only issuing tickets because of interlining in the framework of MITA, it is not active on a market with regard to those two routes. Therefore, the activities of Flybe and AFKL do not overlap concerning these two routes.
- (311) With regard to the [...] **codeshare agreement**, the Parties explained that under a [...] codeshare agreement, [...]. The marketing carrier would price independently of the operating carrier and receive a percentage commission for the flights that it sells on a marketing carrier basis.<sup>255</sup> The marketing carrier would be subject to the inventory availability from the operating carrier on any given day or time, which means that the marketing carrier has no certainty of availability. If the marketing carrier would not sell a seat, [...]. The marketing carrier also would have no ability to determine flight schedules or frequencies.<sup>256</sup>
- (312) Considering these arguments, the Commission concludes that the marketing carrier is not active on routes, which it only markets because of a [...] codeshare agreement. Therefore, the activities of Flybe and AFKL do not overlap concerning the routes identified by the Parties as marketing overlaps.
- (313) In any case, for the avoidance of doubt, should this be viewed differently and these routes be assessed as overlap routes (*quod non*), no serious doubts would arise for the following reasons:

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<sup>251</sup> These are the routes [...] and [...], Form CO, paragraph 533, footnote 263.

<sup>252</sup> These are the following routes: Aberdeen-Paris, Avignon-Birmingham, Avignon-Southampton, Birmingham-Bastia, Birmingham-Biarritz, Birmingham-Bordeaux, Birmingham-Chambery, Birmingham-Bergerac, Birmingham-Guernsey, Birmingham-Jersey, Birmingham-Lyon, Birmingham-Rennes, Bordeaux-Southampton, Caen-London, Chambery-Cardiff, Chambery-Exeter, Chambery-Manchester, Chambery-Southampton, Cardiff-Paris, Duesseldorf-Manchester, Bergerac-Exeter, Bergerac-Manchester, Bergerac-Southampton, Exeter-Paris, Exeter-Rennes, Glasgow-Manchester, Limoges-Southampton, London-Rennes, La Rochelle-Manchester, La Rochelle-Southampton, Lyon-Manchester, Manchester-Milan, Manchester-Nantes, Manchester-Rennes, Newcastle-Paris, Southampton-Paris, Perpignan-Southampton, Rennes-Southampton, Form CO, paragraph 533, footnote 263 and reply of the Parties to QP7 of 3 May 2018, question 8 (as amended in QP7a).

<sup>253</sup> Form CO, paragraph 533, footnote 264.

<sup>254</sup> Reply of the Parties to QP7 of 3 May 2019, question 8 (as amended in QP7a).

<sup>255</sup> Reply of the Parties to QP7 of 3 May 2019, question 8 (as amended in QP7a).

<sup>256</sup> Form CO, paragraph 533.

- (314) The Commission has found in its prior decision practice that for routes on which the activities of airlines overlap due to a unilateral codeshare, the Transaction could give rise to serious doubts as to its compatibility with the internal market only if (i) despite the codeshare agreements, the operating carrier and the marketing carrier exert a significant constraint on each other as actual competitors for the sales of seats on the operating carrier's flights; or (ii) there is a significant likelihood that the marketing carrier would grow into an effective competitive force, e.g. by starting to operate on the route with its own aircraft. It was found that anti-competitive effects might occur in particular where the marketing carrier is very likely to incur the necessary sunk costs to enter the relevant codeshare route as an operating carrier in a relatively short period.<sup>257</sup>
- (315) As already explained above, under the [...] codeshare agreements between AFKL and Flybe, the marketing carrier receives a commission for each of the tickets it sells. The marketing carrier prices independently of the operating carrier. However, the incentives for the marketing carrier to price aggressively are limited. The commission the marketing carrier receives for the flights it sells on a marketing carrier basis is a percentage of the fare it charges for the ticket, most commonly [...] % of the fare.<sup>258</sup> Therefore, the higher the price at which the marketing carrier sells the tickets, the greater its commission per ticket will be.
- (316) The likelihood that the marketing carrier would represent a material competitive constraint for the operating carrier is further limited by the operating carrier's ability to terminate the codeshare agreement if the marketing carrier started to offer fares substantially lower than the operating carrier, thus depriving the marketing carrier of any benefit of an aggressive pricing policy. In the case at hand, either party to the [...] codeshare can terminate the respective codeshare agreement for any reason at [...].<sup>259</sup>
- (317) As a result, should the marketing overlaps be assessed as overlap routes, the Commission concludes that the marketing carrier does not exert more than a residual constraint on the operating carrier.
- (318) Furthermore, the Parties' explained that, in the absence of the Transaction, neither [confidential strategic information on Flybe and AFKL future operations].<sup>260</sup>

#### 5.1.1.4 Methodology to calculate market shares

- (319) The Commission has previously used Marketing Information Data Tapes ("MIDT") data<sup>261</sup> and PaxIS PLUS data<sup>262</sup> as appropriate proxies to estimate market shares for air transport of passengers.

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<sup>257</sup> See Case M.7333 – *Alitalia/Etihad*, paragraph 160.

<sup>258</sup> Reply of the Parties to QP7 of 3 May 2019, question 8 (as amended in QP7a).

<sup>259</sup> Reply of the Parties to QP7 of 3 May 2019, question 8 (as amended in QP7a).

<sup>260</sup> Reply of the Parties to QP7 of 3 May 2019, question 8 (as amended in QP7a).

<sup>261</sup> See e.g. Cases M.6447 – *IAG/bmi*; M.5889 – *United Airlines/Continental Airlines*; M.5747 – *Iberia/British Airways*.

- (320) To take account of the increasing number of direct sales, the Commission has considered it necessary in the most recent airline merger case, to use a data source that captures direct sales by the Parties and their competitors and considered Direct Data Solutions (“DDS”) data as the best proxy.<sup>263</sup> DDS is an IATA database.<sup>264</sup>
- (321) The DDS database includes data from the IATA Billing and Settlement Plan, the Amadeus Airline booking system as well as direct and indirect data contributed by airlines. DDS includes the actual booking data from the carriers subscribing to it. To the extent that direct and indirect booking data for an airline is not contributed, an algorithm is applied to estimate the market shares for those airlines.<sup>265</sup> <sup>266</sup>
- (322) The Commission is of the view that DDS data are the best proxy to estimate market shares and are appropriate for the assessment of the affected overlap routes in this case.
- (323) The O&D assessment in the following sections of this decision is based on point-to-point bookings only, because connecting passengers are not included in the relevant O&D market.<sup>267</sup>

#### 5.1.1.5 Direct-direct operating overlaps<sup>268</sup>

- (324) The transaction gives rise to six direct-direct operating overlap routes between the UK and Continental Europe, all resulting from overlaps between Flybe and AFKL.<sup>269</sup>

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<sup>262</sup> See e.g. Cases M.7333 – *Alitalia/Etihad*, paragraphs 135 *et seq.*; M.7541 – *IAG/Aer Lingus*, paragraphs 135 *et seq.*

<sup>263</sup> See Case M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 179 *et seq.*

<sup>264</sup> See e.g. <https://www.iata.org/services/statistics/intelligence/Pages/direct-data-solutions.aspx>.

<sup>265</sup> Form CO, paragraph 329 *et seq.*

<sup>266</sup> The Commission has in previous cases considered that most of the services offered by charter companies (package holiday sales, seat sales to tour operators) are not in the same market as scheduled point-to-point air passenger transport services. However, as regards charter carriers selling dry seats (seats only without other services) and scheduled point-to-point air passenger transport services, the Commission has left open whether they are part of the same relevant product market, see e.g. Case M.6663 – *Ryanair/Aer Lingus III*, paragraph 418 *et seq.* The DDS data submitted is an appropriate proxy to assess scheduled point-to-point air passenger transport services, because it does not include charter flights, see Form CO, paragraph 329.

<sup>267</sup> Form CO, paragraph 329 and 333.

<sup>268</sup> Both Flybe and AFKL operated the Amsterdam-Southampton route during the Winter 2017/2018 IATA Season and Summer 2018 IATA Season. However, in December 2018, KLM announced that it will cease operating this route as of March 2019. The decision to exit this route was taken by KLM independently and prior to the Transaction, see Form CO, paragraph 527. Therefore, the Amsterdam-Southampton will not be assessed as an affected direct-direct overlap route in this decision.

<sup>269</sup> As regards potential substitutability between relevant airports, please refer to Section 4.1.4 above.



### 5.1.1.5.1 London-Amsterdam

- (325) In the Summer 2018 IATA Season, [300,000-400,000] passengers travelled between London City and Amsterdam airports and [900,000-1,000,000] passengers flew between London City/ London Heathrow and Amsterdam airports. In Winter 2017/2018 IATA Season, [200,000-300,000] passengers travelled between London City and Amsterdam airports and [600,000-700,000] passengers flew between London City/ London Heathrow and Amsterdam airports.<sup>270</sup>
- (326) In Summer 2018 and Winter 2017/2018 IATA Seasons, both Flybe and AFKL operated direct services on the London City-Amsterdam airport pair. In addition, AFKL operated direct services on the London Heathrow-Amsterdam airport pair in both seasons. Neither Virgin Atlantic, nor Delta or Stobart Air operated on the London-Amsterdam city pair.<sup>271</sup>
- (327) The Commission will therefore assess the effect of the Transaction on the London City-Amsterdam and London Heathrow/London City-Amsterdam airport pairs. If other London airports were considered substitutable with London City or with London City and London Heathrow airport, the Parties' combined market shares and market position post-Transaction would necessarily be lower than on the London City-Amsterdam and London Heathrow/London City-Amsterdam airport pairs.
- (328) The table below provides the market shares and frequencies of AFKL and Flybe as well as its biggest competitor British Airways on London City-Amsterdam airport pair.

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	British Airways	AFKL	Flybe	Combined	British Airways
<b>Market share</b>	[50-60]%	[5-10]%	[60-70]%	[30-40]%	[40-50]%	[5-10]%	[50-60]%	[40-50]%
<b>Weekly frequencies</b>	45	8	53	29	41	9	50	32

- (329) The table below provides the market shares and frequencies of AFKL and Flybe as well as its biggest competitor British Airways on London City/London Heathrow-Amsterdam airport pair.

<sup>270</sup> Form CO, paragraphs 431 and 433.

<sup>271</sup> Form CO, paragraph 423. The Parties submit that the DDS data shows minor bookings for Delta on this city pair on a marketing carrier basis. As explained above, the starting point for the Commission's assessment of the Transaction is a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. Therefore, applying the most conservative approach, the Commission has included those minor bookings for Delta on a marketing carrier basis in AFKL's market share. However, taking those bookings into account in AFKL's market share does not change to any material extent AFKL's market share or market position.

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	British Airways	AFKL	Flybe	Combined	British Airways
<b>Market share</b>	[50-60]%	[0-5]%	[50-60]%	[40-50]%	[50-60]%	[0-5]%	[50-60]%	[40-50]%
<b>Weekly frequencies</b>	116	8	124	84	113	9	121	90

- (330) British Airways is UK airline. It carries more than 40 million passengers a year and has a fleet of nearly 300 aircraft.<sup>272</sup> British Airways is a competitor with a strong presence in the United Kingdom. It has its main hub at London Heathrow and it operates bases at London City and London Gatwick.<sup>273</sup> The Commission considers that on both airport pairs, the Parties will face significant competition from British Airways post-Transaction.
- (331) The Commission therefore considers that the competitive constraints on the Parties would be sufficient to prevent them from raising prices post-Transaction on the London-Amsterdam route.
- (332) Finally, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties from raising prices post-Transaction.<sup>274</sup>
- (333) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the London-Amsterdam route under any plausible market definition.

#### 5.1.1.5.2 Manchester-Amsterdam

- (334) In the Summer 2018 IATA Season, [300,000-400,000] passengers travelled between Manchester and Amsterdam airports and [400,000-500,000] passengers flew between Manchester/ Leeds Bradford and Amsterdam airports. In Winter 2017/2018 IATA Season, [200,000-300,000] passengers travelled between Manchester and Amsterdam airports and [300,000-400,000] passengers flew between Manchester/ Leeds Bradford and Amsterdam airports.<sup>275</sup>
- (335) In Summer 2018 and Winter 2017/2018 IATA Seasons, both Flybe and AFKL operated direct services on the Manchester-Amsterdam airport pair. In addition, AFKL operated direct services on the Leeds Bradford-AMS airport pair in both

<sup>272</sup> See reply to eQ1 – Questionnaire to airlines, question 1.

<sup>273</sup> See Case M.7541 – *IAG/Aer Lingus*, paragraph 4.

<sup>274</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

<sup>275</sup> Form CO, paragraphs 442 and 446.

seasons. Flybe and AFKL did not operate direct services on Liverpool John Lennon-Amsterdam airport pair. Neither Virgin Atlantic, nor Delta or Stobart Air operated on the Manchester-Amsterdam city pair.<sup>276</sup>

(336) The Commission will therefore assess the effect of the Transaction on the Manchester-Amsterdam and Manchester/Leeds Bradford-Amsterdam airport pairs. If Liverpool John Lennon airport were considered substitutable with Manchester airport or with Manchester and Leeds Bradford airport, the Parties' combined market shares and market position post-Transaction would necessarily be lower than on Manchester-Amsterdam and Manchester/Leeds Bradford-Amsterdam airport pairs.

(337) The table below provides the market shares and frequencies of AFKL and Flybe as well as its biggest competitor easyJet on the Manchester-Amsterdam airport pair.

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	easyJet	AFKL	Flybe	Combined	easyJet
<b>Market share</b>	[30-40]%	[10-20]%	[50-60]%	[40-50]%	[20-30]%	[20-30]%	[50-60]%	[40-50]%
<b>Weekly frequencies</b>	41	21	63	18	34	27	61	20

(338) The table below provides the market shares and frequencies of AFKL and Flybe as well as its biggest competitor easyJet on the Manchester/Leeds Bradford-Amsterdam airport pair.

	Summer 2018 IATA Season					Winter 2017/2018 IATA Season				
	AFKL	Flybe	Combined	easyJet	Jet2	AFKL	Flybe	Combined	easyJet	Jet2
<b>Market share</b>	[30-40]%	[10-15]%	[50-60]%	[30-40]%	[5-10]%	[30-40]%	[20-30]%	[50-60]%	[30-40]%	[5-10]%
<b>Weekly frequencies</b>	62	21	83	18	7	54	27	80	20	7

<sup>276</sup> Form CO, paragraph 437. The Parties submit that the DDS data shows minor bookings for Delta on this city pair on a marketing carrier basis. As explained above, the starting point for the Commission's assessment of the Transaction is a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. Therefore, applying the most conservative approach, the Commission has included those minor bookings for Delta on a marketing carrier basis in AFKL's market share. However, taking those bookings into account in AFKL's market share does not change to any material extent AFKL's market share or market position.

- (339) easyJet is a low-cost point-to-point airline domiciled in the United Kingdom that operates in the European short-haul aviation market and is focused primarily on Western and Northern Europe. Between August 2016 and August 2017, easyJet carried more than 79 million passengers and had, in 2017, a fleet of 279 aircraft.<sup>277</sup> Jet2 is a UK airline primarily operating scheduled air passenger transport services between the United Kingdom and Europe. Jet2 has a fleet of around 90 aircraft.<sup>278</sup>
- (340) On both airport pairs, the Parties will face significant competition from easyJet, but also from Jet2 post-Transaction. The Commission therefore considers that the competitive constraints on the Parties would be sufficient to prevent them from raising prices post-Transaction on the London-Amsterdam route.
- (341) Finally, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties from raising prices post-Transaction.<sup>279</sup>
- (342) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the Manchester-Amsterdam route under any plausible market definition.

#### 5.1.1.5.3 Birmingham-Amsterdam

- (343) In the Summer 2018 IATA Season, [200,000-300,000] passengers travelled between Birmingham and Amsterdam airports and [100,000-200,000] passengers in Winter 2017/2018 IATA Season.<sup>280</sup>
- (344) In Summer 2018 and Winter 2017/2018 IATA Seasons, both Flybe and AFKL operated direct services on the Birmingham-Amsterdam airport pair. Neither Virgin Atlantic, Delta or Stobart Air operated on the Birmingham-Amsterdam city pair.<sup>281</sup>
- (345) The table below provides the market shares and frequencies of AFKL and Flybe on the Birmingham-Amsterdam airport pair.

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<sup>277</sup> See e.g. Case M.8672 – *easyJet/Certain Air Berlin* assets, paragraphs 2 *et seq.*

<sup>278</sup> See reply to eQ1 – Questionnaire to airlines, question 1.

<sup>279</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

<sup>280</sup> Form CO, paragraphs 462.

<sup>281</sup> Form CO, paragraph 451. The Parties submit that the DDS data shows minor bookings for Delta on this city pair on a marketing carrier basis. As explained above, the starting point for the Commission's assessment of the Transaction is a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. Therefore, applying the most conservative approach, the Commission has included those minor bookings for Delta on a marketing carrier basis in AFKL's market share. However, taking those bookings into account in AFKL's market share does not change to any material extent AFKL's market share or market position.

	Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
	AFKL	Flybe	Combined	AFKL	Flybe	Combined
<b>Market share</b>	[40-50]%	[50-60]%	[90-100]%	[30-40]%	[60-70]%	[90-100]%
<b>Weekly frequencies</b>	38	33	71	30	42	72

- (346) Flybe and AFKL’s combined market shares post-Transaction on the Birmingham/ East Midlands–Amsterdam airport pair amount to [90-100]% in Summer 2018 IATA Season and [90-100]% in Winter 2018 IATA Season.
- (347) The majority of respondents to the market investigation having expressed a view gave mixed replies as to whether there will be sufficient competition on the route to prevent the Parties’ from raising prices post-Transaction.<sup>282</sup>
- (348) The Commission notes that the Flybe and AFKL were the only operators on the Birmingham-Amsterdam route in the past four IATA Seasons for which the Parties provided market share data and will thus post-Transaction become a monopoly route.<sup>283</sup> The Commission thus considers that post-Transaction the merged entity is not constrained by competitive pressure on this route.
- (349) The market investigation has not allowed identifying any entry project on the Birmingham-Amsterdam route, which, in the absence of relevant commitments, could be considered as timely, likely and sufficient to deter or defeat the anticompetitive effect of the Transaction on the route.
- (350) As explained above in Section 4.9, if, absent the Transaction, Flybe would have exited this route, AFKL would likely have been more threatened by new entry on this route than in a post-Transaction scenario.
- (351) Therefore, in the light of the above, the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market with respect to the Birmingham-Amsterdam route under any plausible market definition.

#### 5.1.1.5.4 Birmingham-Paris

- (352) In the Summer 2018 IATA Season, [100,000-200,000] passengers travelled between Birmingham and Paris CDG airports and [100,000-200,000] passengers in Winter 2017/2018 IATA Season.<sup>284</sup>

<sup>282</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

<sup>283</sup> Form CO, paragraph 462 and 457.

<sup>284</sup> Form CO, paragraphs 494.

- (353) In Summer 2018 and Winter 2017/2018 IATA Seasons, both Flybe and AFKL operated direct services on the Birmingham-Paris CDG airport pair. Flybe and AFKL did not operate on the East Midlands-Paris CDG airport pair. Neither Virgin Atlantic, Delta or Stobart Air operated on the Birmingham-Paris city pair.<sup>285</sup>
- (354) The table below provides the market shares and frequencies of AFKL and Flybe on the Birmingham-Paris CDG airport pair.

	Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
	AFKL	Flybe	Combined	AFKL	Flybe	Combined
<b>Market share</b>	[60-70]%	[20-30]%	[90-100]%	[60-70]%	[30-40]%	[90-100]%
<b>Weekly frequencies</b>	19	23	42	19	20	39

- (355) Flybe and AFKL have a combined market shares post-Transaction on the Birmingham-Paris of around [90-100]% in the past four IATA Seasons irrespective of whether Birmingham and East Midlands airports or Paris CDG and Paris Orly airports are considered substitutable. The only exception is the Summer 2017 IATA Season when the combined market shares of AFKL and Flybe were around [70-80]% on the Birmingham/East Midlands-Paris CDG/Paris Orly airport pair and on the Birmingham-Paris CDG/Paris Orly airport pair. The Parties explained that this was due to the direct service that Vueling (IAG) operated for one season, the Summer 2017 IATA Season, between Birmingham and Paris Orly airport. Since this service was only provided for one season, the Commission does not take the competitive pressure exerted by Vueling as an active competitor into account in the assessment but will assess the possibility of potential entry and potential competition.<sup>286</sup>
- (356) The majority of respondents to the market investigation having expressed a view gave mixed replies as to whether there will be sufficient competition on the route to prevent the Parties' from raising prices post-Transaction.<sup>287</sup>

<sup>285</sup> Form CO, paragraphs 472, 478 and 487. The Parties submit that the DDS data shows minor bookings for Delta on this city pair on a marketing carrier basis. As explained above, the starting point for the Commission's assessment of the Transaction is a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. Therefore, applying the most conservative approach, the Commission has included those minor bookings for Delta on a marketing carrier basis in AFKL's market share. However, taking those bookings into account in AFKL's market share does not change to any material extent AFKL's market share or market position.

<sup>286</sup> Form CO, paragraphs 478, 487 and 491. Concerning Paris Beauvais airport, the Parties stated that no bookings are recorded in the DDS data from either Birmingham or East Midlands airports to Paris Beauvais airport, see Form CO paragraph 473.

<sup>287</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

- (357) The Commission notes that the Flybe and AFKL were the only operators on the Birmingham-Paris route in the past IATA Seasons and will thus post-Transaction become a monopoly route. The Commission thus considers that post-Transaction the merged entity is not constrained by competitive pressure on this route.
- (358) Finally, the market investigation has not allowed identifying any entry project on the Birmingham-Paris route, which, in the absence of relevant commitments, could be considered as timely, likely and sufficient to deter or defeat the anticompetitive effect of the Transaction on the route.
- (359) As explained above in Section 4.9, if, absent the Transaction, Flybe would have exited this route, AFKL would likely have been more threatened by new entry on this route than in a post-Transaction scenario.
- (360) Therefore, in the light of the above, the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market with respect to the Birmingham-Paris route under any plausible market definition.

#### 5.1.1.5.5 Manchester-Paris

- (361) In the Summer 2018 IATA Season, [200,000-300,000] passengers travelled between Manchester and Paris Charles de Gaulle airports and [300,000-400,000] passengers flew between Manchester/Liverpool John Lennon and Paris Charles de Gaulle airports. In Winter 2017/2018 IATA Season, [100,000-200,000] passengers travelled between Manchester and Paris Charles de Gaulle airports and [200,000-300,000] passengers flew between Manchester/Liverpool John Lennon and Paris Charles de Gaulle airports.<sup>288</sup>
- (362) In both seasons, Flybe and AFKL operated direct services on the MAN-CDG airport pair.<sup>289</sup> Neither Virgin Atlantic, Delta or Stobart Air operated on the Manchester-Paris city pair.<sup>290</sup>
- (363) easyJet operates direct flights on the Manchester-Paris Charles de Gaulle airport pair as well as on the Liverpool John Lennon-Paris Charles de Gaulle airport pair, whereas neither Flybe nor AFKL operates on the Liverpool John Lennon-Paris Charles de Gaulle airport pair.<sup>291</sup>

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<sup>288</sup> Form CO, paragraphs 509 and 513.

<sup>289</sup> Form CO, paragraph 505.

<sup>290</sup> Form CO, paragraph 505. The Parties submit that the DDS data shows minor bookings for Delta and Virgin on this city pair on a marketing carrier basis. As explained above, the starting point for the Commission's assessment of the Transaction is a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. Therefore, applying the most conservative approach, the Commission has included those minor bookings for Delta on a marketing carrier basis in AFKL's market share. However, taking those bookings into account in AFKL's market share does not change to any material extent AFKL's market share or market position.

<sup>291</sup> Form CO, paragraphs 505 *et seq.*

(364) The table below provides the market shares and frequencies of AFKL and Flybe on the Manchester-Paris Charles de Gaulle airport pair.<sup>292</sup>

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	easyJet	AFKL	Flybe	Combined	easyJet
<b>Market share</b>	[50-60]%	[10-20]%	[60-70]%	[30-40]%	[40-50]%	[20-30]%	[70-80]%	[20-30]%
<b>Weekly frequencies</b>	21	28	49	9	21	26	46	8

(365) The table below provides the market shares and frequencies of AFKL and Flybe on the Manchester/Liverpool John Lennon-Paris Charles de Gaulle airport pair.<sup>293</sup>

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	easyJet	AFKL	Flybe	Combined	easyJet
<b>Market share</b>	[40-50]%	[10-20]%	[50-60]%	[40-50]%	[40-50]%	[10-20]%	[60-70]%	[30-40]%
<b>Weekly frequencies</b>	21	28	49	15	21	26	46	12

(366) As stated above in Section 4.1.4, the market investigation gave mixed replies as to whether Manchester and Liverpool John Lennon airport can be considered substitutable. Around half of the respondents to the market investigation having expressed a view explained that they consider the two airports to be substitutable for passengers.

(367) If Manchester and Liverpool John Lennon airport are considered substitutable, the Parties will face significant competition from easyJet post-Transaction. easyJet had a market share of [40-50]% in Summer 2018 IATA Season and [30-40]% in Winter 207/2018 IATA Season. The Commission therefore considers that the competitive constraints on the Parties on the Manchester/ Liverpool John Lennon – Paris Charles de Gaulle airport pair would be sufficient to prevent them from raising prices post-Transaction on this route.

(368) The Parties would also face significant competitive constraints if Manchester and Liverpool John Lennon airport are not considered substitutable. First, easyJet

<sup>292</sup> Form CO, paragraph 509.

<sup>293</sup> Form CO, paragraph 513.



provides a significant constraint. In Summer 2018 IATA Season, easyJet accounted for a [30-40]% and in Winter 2017/2018 for [20-30]% of the market. Second, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties' from raising prices post-Transaction.<sup>294</sup> Third, the Commission takes into account the fact that for a large number of passengers, the two airports are substitutable. As a result, the competitive pressure exerted by EasyJet on the Liverpool John Lennon-Paris Charles de Gaulle airport pair constitutes an out-of-market constraint on the Parties and mitigates the Parties' market position post-Transaction on the Manchester-Paris Charles de Gaulle airport pair.

(369) Therefore, taking all considerations into account, the Commission considers that the Parties will face significant competition from easyJet post-Transaction also on the Manchester-Paris Charles de Gaulle airport pair. The Commission therefore concludes that the competitive constraints on the Parties on the Manchester – Paris Charles de Gaulle airport pair would be sufficient to prevent them from raising prices post-Transaction on this route.

(370) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the Manchester-Paris route under any plausible market definition.

#### 5.1.1.5.6 Edinburgh-Paris

(371) In the Summer 2018 IATA Season, [200,000-300,000] passengers travelled between Edinburgh and Paris Charles de Gaulle airports and [200,000-300,000] passengers flew between Edinburgh and Paris Charles de Gaulle/ Paris Orly airports. In Winter 2017/2018 IATA Season, [100,000-200,000] passengers travelled between Edinburgh and Paris Charles de Gaulle airports and [100,000-200,000] passengers flew between Edinburgh and Paris Charles de Gaulle/ Paris Orly airports.<sup>295</sup>

(372) AFKL and Flybe overlap on the Edinburgh-Paris Charles de Gaulle airport pair due to a [...] codeshare agreement. Flybe does not operate this airport pair directly with its own metal. During the Summer 2018 IATA Season, Flybe marketed bookings on 3 direct services each day. AFKL operated direct flights on the EDI-CDG airport pair as well as the EDI-ORY airport pair. As already explained above in Section 5.1.1.3, under the terms of this [...] codeshare agreement, [...] bears a commercial risk.<sup>296</sup> The Commission will therefore apply the most conservative approach and assess the Edinburgh-Paris Charles de Gaulle route as an operating overlap route because of the commercial risk [...]. Neither Virgin Atlantic, Delta or Stobart Air operated on the Edinburgh-Paris city pair.<sup>297</sup>

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<sup>294</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

<sup>295</sup> Form CO, paragraphs 521 and 524.

<sup>296</sup> Form CO, paragraph 533 and footnote 265.

<sup>297</sup> Form CO, paragraph 517. The Parties submit that the DDS data shows minor bookings for Delta on this city pair on a marketing carrier basis. As explained above, the starting point for the Commission's

- (373) The table below provides the market shares and frequencies of AFKL and Flybe as well as its biggest competitor easyJet on the Edinburgh-Paris Charles de Gaulle airport pair.

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	easyJet	AFKL	Flybe	Combined	easyJet
<b>Market share</b>	[40-50]%	[5-10]%	[50-60]%	[40-50]%	[30-40]%	[0-5]%	[30-40]%	[60-70]%
<b>Weekly frequencies</b>	21	2	23	12	20	0	20	11

- (374) The table below provides the market shares and frequencies on the Edinburgh-Paris Charles de Gaulle/Paris Orly airport pair.

	Summer 2018 IATA Season				Winter 2017/2018 IATA Season			
	AFKL	Flybe	Combined	easyJet	AFKL	Flybe	Combined	easyJet
<b>Market share</b>	[50-60]%	[0-5]%	[50-60]%	[40-50]%	[40-50]%	[0-5]%	[40-50]%	[50-60]%
<b>Weekly frequencies</b>	24	2	26	12	22	0	22	11

- (375) easyJet is a low-cost point-to-point airline domiciled in the United Kingdom that operates in the European short-haul aviation market and is focused primarily on Western and Northern Europe. Between August 2016 and August 2017, easyJet carried more than 79 million passengers and had, in 2017, a fleet of 279 aircraft.<sup>298</sup>
- (376) On both airport pairs, the Parties will face significant competition from easyJet post-Transaction. Moreover, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties' from raising prices post-Transaction.<sup>299</sup>

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assessment of the Transaction is a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group. Therefore, applying the most conservative approach, the Commission has included those minor bookings for Delta on a marketing carrier basis in AFKL's market share. However, taking those bookings into account in AFKL's market share does not change to any material extent AFKL's market share or market position.

<sup>298</sup> See e.g. Case M.8672 – *easyJet/Certain Air Berlin* assets, paragraphs 2 *et seq.*

<sup>299</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

(377) The Commission therefore considers that the competitive constraints on the Parties would be sufficient to prevent them from raising prices post-Transaction on the Edinburgh-Paris route.

(378) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the Edinburgh-Paris route under any plausible market definition.

#### 5.1.1.6 Direct-indirect operating overlaps

##### 5.1.1.6.1 “Filters”

(379) Should direct and indirect routes be considered substitutable, consistent with previous Commission practice, the Parties have applied the following filters for direct/indirect overlap routes to exclude likely unproblematic routes from the scope of its investigation (all criteria must have been met in the four last completed IATA Seasons):<sup>300</sup>

- The Parties’ combined market share was below 25%; or
- One of the Parties had a market share below 2%; or
- Short-haul routes where the total share of indirect operations in the relevant market was below 10%; or
- At least one end of the city pair is outside the EU and the total annual traffic was below 30 000 passengers; or
- The route was below the HHI thresholds of paragraph 20 of the Horizontal Merger Guidelines.

(380) As a result of the above, the Parties submitted that 22 direct/indirect operating overlap routes would be affected by the Transaction if direct and indirect routes are considered substitutable.<sup>301</sup>

##### 5.1.1.6.2 Closeness of competition

(381) As explained above in the market definition section in Section 4.1.3, the Commission considered in previous cases that the substitutability between direct and indirect flights on a route-by-route basis depends on various factors, including notably the flight duration, but also price considerations or the inconvenience associated with the indirect flight. In particular, with regard to short-haul routes (generally below 6 hours flight duration) it was considered that indirect flights do

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<sup>300</sup> See e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraphs 151 *et seq.* and M.7333 – *Alitalia/Etihad*, paragraphs 171 *et seq.*

<sup>301</sup> While the Parties submitted in the Form CO that the Transaction would give rise to 31 affected direct/indirect operating overlap routes, they explained at a later stage that 9 of those 31 routes were not direct/indirect operating overlaps in Winter 2017/2018 and Summer 2018 seasons, see Form CO, paragraph 538 and reply to RFI 5 of 24 May 2019. These are the following routes: [...]. These routes will therefore not be assessed as direct/indirect operating overlap routes in this decision.

not generally provide a competitive constraint to direct flights absent exceptional circumstances, for example, the direct connection does not allow for a one-day return trip or the share of indirect flights in the overall market is significant.<sup>302</sup>

- (382) The Parties submit that, should direct and indirect flights be considered substitutable, the Transaction gives rise to 22 affected direct/indirect overlap routes.<sup>303</sup>
- (383) On 10 of those 22 routes, the share of indirect flights in both seasons is significant, i.e. higher than [10-20]%.<sup>304</sup> On 20 of the 22 direct/indirect overlap routes, the direct flight does not allow for a one-day return trip.
- (384) Therefore, the Commission considered in Section 4.1.3 above that the exceptional circumstances to consider direct and indirect flights as substitutable seem to apply and that 22 overlap routes would be affected by the Transaction.
- (385) However, for the reasons explained in the following, the Commission considers that AFKL and Flybe are not close competitors on these 22 overlap routes.
- (386) The Commission has in previous airline cases analysed the closeness of competition between the Parties to the concentration.<sup>305</sup> The concept of “closeness of competition” may play an important role in better understanding the competitive constraint exerted by different competitors on each other in differentiated markets such as airline markets.<sup>306</sup>
- (387) The Commission notes that on all 22 affected direct/indirect overlap routes, Flybe is operating the direct flight while AFKL is operating the indirect flight. The only exception is the Inverness-Amsterdam route, on which AFKL is operating the direct flight and Flybe the indirect flight. [confidential strategic information on

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<sup>302</sup> See e.g. Cases M. 8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 25; M. 7541 – *IAG/Aer Lingus*, paragraph 32; M.7333 – *Alitalia/Etihad*, paragraph 77; M.6663 – *Ryanair/Aer Lingus III*, paragraph 375.

<sup>303</sup> These are the following routes: BER-BHX, BER-CWL, BES-BHX, BHX-HAJ, BHX-HAM, BHX-MIL, BHX-NTE, BHX-STR, BHX-TLS, BUD-HUY, CWL-DUS, CWL-GVA, CWL-MUC, CWL-ROM, CWL-VCE, GVA-SOU, HAJ-MAN, HUY-VCE, INV-AMS, LUX-MAN, LYS-SOU, MAN-TLS.

<sup>304</sup> See Cases M.2672 – *SAS/Spanair*, paragraph 15 and M.3280 – *Air France/KLM*, paragraph 80. See also e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraphs 151 *et seq.* and M.7333 – *Alitalia/Etihad*, paragraphs 171 *et seq.*, for the filters applied by the Commission for direct/indirect overlap routes to exclude likely unproblematic routes from the scope of its investigation, for example short-haul routes where the total share of indirect operations in the relevant market was below 10%.

<sup>305</sup> See e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraphs 155 *et seq.*; M.6828 – *Delta Air Lines/Virgin Group/Virgin Atlantic Limited*, paragraphs 168 *et seq.*

<sup>306</sup> See paragraphs 28-30 of the Horizontal Merger Guidelines.

Flybe's and AFKL's monitoring practices].<sup>307</sup> [confidential strategic information on Flybe's and AFKL's monitoring practices].<sup>308</sup>

- (388) In addition, the majority of competing airlines flying direct services on the direct/indirect overlap routes stated that they would not monitor competitors flying indirect services.<sup>309</sup> Furthermore, the Commission has requested from AFKL and Flybe the average fares for direct as well as indirect flights in Summer 2018 and Winter 2017/2018 IATA Season on the 22 direct/indirect affected overlap routes.<sup>310</sup> For each of these direct/indirect overlap routes, the fare for the indirect route, despite being longer and involving a stop-over, was higher than the fare for the direct flight. This indicates that from the supply-side perspective of Flybe and AFKL as well as the other competing airlines, indirect flights exert only a limited constraint – if any – on the direct flights on the direct/indirect operating overlap routes affected by the Transaction.
- (389) When asked if they consider indirect flights as an alternative to direct flights with regard to the direct/indirect overlaps affected by the Transaction, only a minority of respondents to the market investigation confirmed this, while around half of the respondents that expressed an opinion replied that indirect flights would not be considered as an alternative to direct flights.<sup>311</sup> Other respondents replied that in general this would depend on other criteria, for example the price or the total flight duration.<sup>312</sup>
- (390) From a demand-side perspective, while the majority of travel agents having expressed their views stated that, on each of the affected direct/indirect overlap routes, they sell tickets to both direct and indirect flights to their customers;<sup>313</sup> the majority of corporate customers having expressed their view stated that they only buy tickets for direct flights.<sup>314</sup>
- (391) When asked which criteria would make customers choose an indirect flight over a direct flight, respondents to the Commission's market investigation identified most

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<sup>307</sup> See reply to RFI 5 of 24 May 2019.

<sup>308</sup> See reply to RFI 5 of 24 May 2019.

<sup>309</sup> Reply to eQ1 – Questionnaire to airlines, question 7.

<sup>310</sup> See reply to RFI 5 of 24 May 2019.

<sup>311</sup> See replies to eQ1 – Questionnaire to airlines, question 5; eQ2 – Questionnaire to corporate customers, question 2 and eQ3 – Questionnaire to travel agents, question 3.

<sup>312</sup> See replies to eQ1 – Questionnaire to airlines, question 5; eQ2 – Questionnaire to corporate customers, question 2 and eQ3 – Questionnaire to travel agents, question 3.

<sup>313</sup> See replies to eQ3 – Questionnaire to travel agents, question 5.

<sup>314</sup> See replies to eQ3 – Questionnaire to corporate customers, question 4.

frequently price difference and total travel duration (including stopover time), followed by schedules.<sup>315</sup>

- (392) One travel agency responding to the market investigation stated that “[c]ustomers usually do not do stopovers for flights under 3 hours, but in some cases could consider if they travel for leisure and price is significantly cheaper.”<sup>316</sup>
- (393) With regard to the price difference, as already explained above, the average fare for the indirect flight in Summer 2018 and Winter 2017/2018 IATA Season with AFKL (and Flybe, respectively, concerning the Amsterdam-Inverness route) on the direct/indirect overlap routes was higher than the fare for the direct flight with Flybe (and AFKL, respectively).<sup>317</sup>
- (394) Concerning the total travel duration, the Commission notes that of the 22 direct/indirect overlap routes, 18 routes have a flight duration of the direct flight of under or around 2 hours, while 4 routes have a flight duration of the direct flight of between 2 and 3 hours.<sup>318</sup> The indirect flight duration was at least (with the quickest direct connection) more than 80 minutes longer than the direct flight duration on 19 of the direct/indirect overlap routes; on 8 of those routes, it was at least more than 110 minutes longer than the direct flight duration.<sup>319</sup>
- (395) The Commission considers that, taking into account the short direct flight time of the direct/indirect overlap routes of 2-3 hours, the total travel duration of the indirect routes is on most routes significantly longer than the direct total travel time.
- (396) The market investigation showed that one of the criteria that would make customers choose an indirect flight over a direct flight is the schedules of the flights.<sup>320</sup>
- (397) When assessing the exceptional criteria, the Commission has analysed if a one-day return trip is possible with the direct flight and found that on 20 of the 22 direct/indirect overlap routes, the direct flight does not allow for a one-day return trip.
- (398) On the 20 routes on which the direct flight does not allow for a day-return trip, the indirect flight allows for a one-day return trip in both seasons and both directions

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<sup>315</sup> See replies to eQ1 – Questionnaire to airlines, question 6; eQ2 – Questionnaire to corporate customers, question 3 and eQ3 – Questionnaire to travel agents, question 4.

<sup>316</sup> See replies to eQ3 – Questionnaire to travel agents, question 3.

<sup>317</sup> See reply to RFI 5 of 24 May 2019.

<sup>318</sup> See reply to QP1 of 19 March 2019, question 16.

<sup>319</sup> See also Case M.5335 - *Lufthansa/SN Holding (Brussels Airlines)*, paragraph 40.

<sup>320</sup> See replies to eQ1 – Questionnaire to airlines, question 6; eQ2 – Questionnaire to corporate customers, question 3 and eQ3 – Questionnaire to travel agents, question 4.

on only 3 routes and it is only possible to do a one-day return trip in one season and/ or in one direction on 10 routes.

- (399) Furthermore, even on routes and directions on which a one-day return trip by using an indirect connection would be possible, this would involve a very long travel day with a very short stay in the city. For example on the Birmingham-Nantes route, in the Nantes-Birmingham direction, the amount of time in Birmingham before the return flight is below three hours, making a day-return trip in this direction realistically not possible. In the Birmingham-Nantes direction, the amount of time in Nantes city centre would be at most around four hours with an overall travel time between departure at Birmingham airport and arriving at Birmingham airport of around 15 ½ hours (not taking into account the travel time from/to the airport in Birmingham, time for check-in in the morning and disembarking the plane and waiting for hold luggage in the evening). AFKL's data indicates that between April 2018 and March 2019 it had on average [0-5] return passengers per day on the Birmingham-Nantes route, of which only [0-5] took a same day return.<sup>321</sup>
- (400) The Commission considers that, even on routes where a one-day trip might be possible with the indirect service while it is not possible with the direct service, this is unlikely to be an attractive or workable option. The Commission therefore considers that this indicates that indirect flights are not closely competing with direct flights on the 22 affected overlap routes.
- (401) Taking the above considerations into account, the Commission considers that AFKL and Flybe are not close competitors on the 22 affected overlap routes.

#### 5.1.1.6.3 Overview of the 22 direct/indirect overlap routes

- (402) As explained in the previous section, considering that AFKL and Flybe are not close competitors, it is not evident that direct and indirect flights are substitutable on the 22 direct/indirect overlap routes. However, no serious doubts arise for one of the following reasons: the route was exited by Flybe prior to and unrelated to the Transaction; the routes has very low passenger numbers; the increment brought about by the Transaction is *de minimis*; or a competitor is active on the route sufficiently constraining the Parties post-Transaction.
- (403) An overview of the main reason why no serious doubts arise on each of 22 routes is provided in the following table:

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<sup>321</sup> See reply to RFI 5 of 24 May 2019 and supplementary response of the Parties of 7 June 2019.

	Route exited prior to and unrelated to Transaction	Route with very low passenger number	Low increment brought about by the Transaction	Competitor sufficiently constraining Connect Airways post-Transaction
Berlin-Cardiff	x			
Birmingham-Toulouse	x			
Cardiff-Duesseldorf	x			
Cardiff-Munich	x			
Cardiff-Rome	x			
Cardiff-Venice	x			
Brest-Birmingham		x		
Birmingham-Nantes		x		
Budapest-Humberside		x		
Cardiff-Geneva		x		
Southampton-Geneva		x		
Humberside-Venice		x		
Luxembourg-Manchester		x		
Lyon-Southampton		x		
Inverness-Amsterdam			x	
Berlin-Birmingham			x	
Birmingham-Hanover			x	



	Route exited prior to and unrelated to Transaction	Route with very low passenger number	Low increment brought about by the Transaction	Competitor sufficiently constraining Connect Airways post-Transaction
Birmingham-Milan			x	
Birmingham-Stuttgart			x	
Birmingham-Hamburg				x
Hanover-Manchester				x
Manchester-Toulouse				x

#### 5.1.1.6.4 Routes exited by Flybe prior to and unrelated to the Transaction

- (404) The Transaction does not have any merger specific effect on competition on the Berlin-Cardiff, Birmingham-Toulouse, Cardiff-Duesseldorf, Cardiff-Munich, Cardiff-Rome and Cardiff-Venice routes.
- (405) Flybe exited the Birmingham-Toulouse route in March 2018 and the Cardiff-Duesseldorf route in October 2018.<sup>322</sup>
- (406) Concerning the Cardiff-Berlin, Cardiff-Munich, Cardiff-Rome and Cardiff-Venice routes, the Parties have explained that the routes all fall within the scope of Flybe's [confidential information about Flybe's commercial agreements and the reasons for Flybe exiting certain routes]. Flybe's schedule for the Winter 2019/2020 IATA Season excludes all routes to/from Cardiff airport.<sup>323</sup>
- (407) The Commission considers therefore that Flybe exited these six routes pre-Transaction or Flybe decided to exit pre-Transaction and unrelated to the Transaction.<sup>324</sup>

<sup>322</sup> See reply to RFI 5 of 24 May 2019.

<sup>323</sup> Reply to RFI 5 of 24 May 2019 and reply to RFI 6 of 29 May 2019.

<sup>324</sup> Form Co, paragraph 541, reply to RFI 5 of 24 May 2019 and reply to RFI 6 of 29 May 2019.

#### 5.1.1.6.5 Routes with very low passenger numbers

- (408) The Commission has considered, in its previous decision practice, when passenger figures were very low, that these direct/indirect overlap routes are not constituting a substantial part of the internal market or that no competition concerns were deemed to arise.<sup>325</sup>
- (409) Applying a similar reasoning, the Commission considers that no competition concerns are deemed to arise on the following routes.

Route – city pair	Total annual pax (Summer 2018 IATA Season and Winter 2017/2018 IATA Season)
Brest-Birmingham <sup>326</sup>	[0-5,000]
Birmingham-Nantes <sup>327</sup>	[15,000-20,000]
Budapest-Humberside	[0-5,000]
Cardiff-Geneva	[0-5,000]
Southampton-Geneva	[20,000-25,000]
Humberside-Venice	[0-5,000]
Luxembourg- Manchester <sup>328</sup>	[25,000-30,000]
Lyon-Southampton <sup>329</sup>	[0-5,000]

<sup>325</sup> See e.g. Cases M. 7333 – *Alitalia /Etihad*, paragraph 299; M. 6607 – *US Airways/American Airlines*, paragraph 32. See also Case M.3280 – *Air France/KLM*, paragraph 83.

<sup>326</sup> Numbers do not differ irrespective of whether BHX and EMA are considered substitutable or not.

<sup>327</sup> Numbers do not differ materially irrespective of whether BHX and EMA are considered substitutable or not. To apply a cautious approach, the annual pax numbers included in the table include passengers from BHX and EMA airports.

<sup>328</sup> Numbers do not differ materially irrespective of whether MAN, LPL and LBA airports are considered substitutable or not. To apply a cautious approach, the annual pax numbers included in the table include passengers from MAN, LPL and LBA airports.

<sup>329</sup> The Parties submitted that Flybe's direct operations on this route ended in February 2018, while ad-hoc operations were conducted in December 2018 to January 2019, see response to RFI 5 of 24 May 2019. It can be left open if Flybe exited route. Applying a cautious approach and considering that Flybe is still operating, the passenger numbers on this route are very low and the route is therefore in any case not considered to be substantial part of the internal market.

5.1.1.6.6 Low increment brought about by the Transaction or sufficient competition on the route

(410) In previous cases, the Commission has considered increments of around 5% as low increments on direct/indirect overlap routes.<sup>330</sup> In line with its prior decisional practice, the Commission considers that an increment of around 5% on an affected direct/indirect overlap is *de minimis* and that the following routes do not give rise to serious doubts as to the compatibility of the Transaction with the internal market.

Summer Season

Winter Season

Route (city – pair)	Airport pair	Total pax summer	Flybe market share	AFKL <sup>331</sup>	combined	Total pax winter	Flybe market share	AFKL <sup>332</sup>	combined
Inverness-Amsterdam	INV-AMS	[30,000-40,000]	[1-5]%	[90-100]%	[90-100]%	[0-10,000]	[1-5]%	[90-100]%	[90-100]%
Berlin-Birmingham	TXL-BHX <sup>333</sup>	[30,000-40,000]	[70-80]%	[5-10]%	[80-90]%	[30,000-40,000]	[80-90]%	[1-5]%	[80-90]%
Birmingham-Hannover	BHX-HAJ <sup>334</sup>	[20,000-30,000]	[80-90]%	[1-5]%	[90-100]%	[10,000-20,000]	[80-90]%	[5-10]%	[90-100]%
Birmingham-Milan	BHX-MXP <sup>335</sup>	[30,000-40,000]	[70-80]%	[1-5]%	[70-80]%	[20,000-30,000]	[60-70]%	[1-5]%	[60-70]%
Birmingham-Stuttgart	BHX-STR <sup>336</sup>	[40,000-50,000]	[80-90]%	[1-5]%	[90-100]%	[20,000-30,000]	[80-90]%	[1-5]%	[90-100]%

<sup>330</sup> See e.g. Cases M. 8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*, paragraph 198; M.7541 – *IAG/Aer Lingus*, paragraphs 412 *et seq.*

<sup>331</sup> AFKL’s market share includes the market share of Delta and Virgin Airlines, where applicable.

<sup>332</sup> AFKL’s market share includes the market share of Delta and Virgin Airlines, where applicable.

<sup>333</sup> The Commission is applying a cautious and conservative approach with regard to the Berlin-Birmingham route and included in the table the narrowest plausible market comprising of the Berlin Tegel-Birmingham airport pair on which the combined market share post-Transaction and the increment is highest.

<sup>334</sup> The market shares of the Parties do not differ, irrespective of whether BHX-HAJ or BHX/EMA-HAJ are considered.

<sup>335</sup> The Commission is applying a cautious and conservative approach with regard to the Birmingham-Milan route and included in the table the narrowest plausible market comprising of Birmingham-MXP airport pair on which the combined market share post-Transaction and the increment is highest.

<sup>336</sup> The market shares of the Parties do not differ, irrespective of whether BHX-STR or BHX/EMA-STR are considered.

- (411) On the routes briefly assessed in the following paragraphs, the increment brought about by the Transaction, while not being a *de minimis* increment, is lower than 10% and another airline is active on the route, constraining the merged entity post-Transaction: Birmingham-Hamburg, Hannover-Manchester and Manchester-Toulouse.
- (412) On the **Birmingham-Hamburg route**, in the Summer 2018 IATA Season, [20,000-30,000] passengers travelled on this route. In Winter 2017/2018 IATA Season, [10,000-20,000] passengers travelled between Birmingham and Hamburg. The table below provides the market shares of the AFKL and Flybe on the Birmingham-Hamburg airport pair.<sup>337</sup>

Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
Flybe market share	AFKL market share	combined	Flybe market share	AFKL market share	combined
[70-80]%	[5-10]%	[70-80]%	[70-80]%	[5-10]%	[70-80]%

- (413) Lufthansa is also active on this route, a competitor with a strong presence in Germany and with a market share of [10-20]% in Summer 2018 IATA Season and [10-20]% in Winter 2017/2018 IATA season, which is higher than the increment brought about by the Transaction. In addition, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties from raising prices post-Transaction.<sup>338</sup> On this basis, the Commission considers that the competitive constraints on the Parties on the Birmingham-Hamburg route would be sufficient to prevent them from raising prices post-Transaction on this route.
- (414) On the **Hanover-Manchester route**, in the Summer 2018 IATA Season, [20,000-30,000] passengers travelled on this route. In Winter 2017/2018 IATA Season, [10,000-20,000] passengers travelled between Hannover and Manchester. While AFKL and Flybe's combined market shares do not differ significantly irrespective of whether Manchester, Liverpool John Lennon and Leeds Bradford airport are considered substitutable or not, the increment brought about by the Transaction is highest if Manchester and Leeds Bradford are considered substitutable. The Commission is applying a cautious approach and is therefore assessing the competitive effects of the Transaction on the Hanover-Manchester/Leeds Bradford airport pair. The table below provides the market shares of the Flybe and AFKL on the Hanover-Manchester/Leeds Bradford airport pair.

<sup>337</sup> Market shares do not differ, irrespective of whether BHX-HAM or BHX/EMA-HAM are considered.

<sup>338</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
Flybe market share	AFKL market share	combined	Flybe market share	AFKL market share	combined
[80-90]%	[5-10]%	[80-90]%	[70-80]%	[5-10]%	[80-90]%

(415) Lufthansa is also active on this route. Lufthansa has a strong presence in Germany and has a market share of [10-20]% in Summer 2018 IATA Season and [10-20]% in Winter 2017/2018 IATA season, which is higher than the increment brought about by the Transaction. In addition, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties from raising prices post-Transaction.<sup>339</sup> On this basis, the Commission considers that the competitive constraints on the Parties on the Hanover-Manchester route would be sufficient to prevent them from raising prices post-Transaction on this route.

(416) On the **Manchester-Toulouse route**, in the Summer 2018 IATA Season, [30,000-40,000] passengers travelled on this route. In Winter 2017/2018 IATA Season, [20,000-30,000] passengers travelled between Manchester and Toulouse. While the AFKL and Flybe’s combined market shares do not differ significantly irrespective of whether Manchester, Liverpool John Lennon and Leeds Bradford airport are considered substitutable or not, the increment brought about by the Transaction is highest if Manchester and Leeds Bradford are considered substitutable. The Commission is applying a cautious approach and is therefore assessing the competitive effects of the Transaction on the Toulouse-Manchester/Leeds Bradford airport pair. The table below provides the market shares of the AFKL and Flybe on the Toulouse-Manchester/Leeds Bradford airport pair.

Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
Flybe market share	AFKL market share	combined	Flybe market share	AFKL market share	combined
[70-80]%	[5-10]%	[80-90]%	[60-70]%	[5-10]%	[70-80]%

(417) On the route also TUI, Lufthansa and British Airways are active. In the Winter 2017/2018 IATA Season, TUI had a market share of [20-30]%, Lufthansa of [5-10]% and British Airways of [0-5]%. In the Summer 2018 IATA Season, Lufthansa had a market share of [5-10]%, British Airways of [0-5]% and TUI [0-

<sup>339</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

5]%. In both seasons, the market share of the biggest competitor is higher or similar to the increment brought about by the Transaction. In addition, the majority of respondents to the market investigation having expressed a view considers that there will be sufficient competition on the route to prevent the Parties from raising prices post-Transaction.<sup>340</sup> On this basis, the Commission considers that the competitive constraints on the Parties on the Manchester-Toulouse route would be sufficient to prevent them from raising prices post-Transaction on this route.

#### 5.1.1.6.7 Conclusion

(418) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market on any of the direct-indirect overlap routes.

#### 5.1.1.7 Indirect/indirect overlaps

(419) The Parties submitted that 6 indirect/indirect operating overlap routes would be affected by the Transaction where Flybe and AFKL both operate only indirect flights:<sup>341</sup> Bordeaux-Manchester, Cagliari-Manchester, Duesseldorf-Edinburgh, Edinburgh-Nantes, Edinburgh-Toulouse and Glasgow-Munich.

(420) The Glasgow-Munich route has not been an overlap route in the last two IATA Seasons.<sup>342</sup> This route will therefore not be assessed as an indirect/indirect operating overlap route in this decision.

(421) According to the data submitted by the Parties, the Cagliari-Manchester route was only an overlap in Winter 2017/2018 IATA Season and only on the Cagliari-Manchester/Liverpool John Lennon airport pair. In Winter 2017/2018, a total of [0-500] passengers was transported on this route. The Commission will therefore not assess this route any further in the following paragraphs.

(422) As regards airport substitutability, for the purpose of this decision, the Commission has taken a cautious approach and assessed the effects of the Transaction on the airport pair on which the combined market shares or the increment brought about by the Transaction are highest.

(423) The table below provides the market shares of Flybe and AFKL on the indirect/indirect overlap routes.

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<sup>340</sup> See replies to eQ1 – Questionnaire to airlines, question 18; eQ2 – Questionnaire to corporate customers, question 14 and eQ3 – Questionnaire to travel agents, question 15.

<sup>341</sup> Consistent with previous Commission practice, the Parties have applied the following filters for indirect/indirect overlap routes to exclude likely unproblematic routes from the scope of its investigation (all criteria must have been met in the four last completed IATA Seasons): The Parties' combined market share was below 25%; or one of the Parties had a market share below 2%; or as regards short-haul routes where the total annual traffic was below 15 000 passengers or as regards long-haul routes where the total annual traffic was below 30 000 passengers; or at least one end of the city pair is outside the EU and the total annual traffic was below 30 000 passengers; or the route was below the HHI thresholds of paragraph 20 of the Horizontal Merger Guidelines.

<sup>342</sup> Form CO, paragraph 545.

	Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
	Flybe	AFKL	combined	Flybe	AFKL	combined
Bordeaux-Manchester (BOD-MAN/LPL)	[0-5]%	[50-60]%	[60-70]%	[0-5]%	[60-70]%	[70-80]%
Duesseldorf-Edinburgh (DUS-EDI)	[10-20]%	[5-10]%	[10-20]%	[10-20]%	[5-10]%	[20-30]%
Edinburgh-Nantes (EDI-NTS)	[0-5]%	[5-10]%	[10-20]%	[0-5]%	[0-5]%	[5-10]%
Edinburgh-Toulouse (EDI-TLS)	[0-5]%	[5-10]%	[5-10]%	[0-5]%	[5-10]%	[5-10]%

- (424) The Commission notes that two of the indirect/indirect overlaps routes (Edinburgh-Nantes and Edinburgh-Toulouse) did not constitute an affected market in the last two IATA Seasons.
- (425) On the other two routes, no competition concerns arise because either the Parties' combined market shares are below 30% (Duesseldorf-Edinburgh) or the increment brought about by the Transaction is below 5% (Bordeaux-Manchester), so that no material merger specific effect would likely exist. Indirect routes are often established in an opportunistic way by carriers and are modified from one IATA Season to the next. Furthermore, price increases or reductions of capacity could be countered by competitors who could start operating these routes more easily than on direct/direct routes, which require the deployment of aircraft dedicated to the O&D route. Given the low competitive constraint between indirect services, market shares below 60% on routes indicate that there is already *prima facie* sufficient competition from other carriers.<sup>343</sup>
- (426) No respondent to the market investigation raised substantiated concerns as to the existence of any competition problem on the indirect-indirect overlap routes.<sup>344</sup>
- (427) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market on any of the indirect-indirect overlap routes.

<sup>343</sup> See e.g. Case M.7541 – IAG/Aer Lingus, paragraph 431.

<sup>344</sup> See replies to eQ1 – Questionnaire to airlines, question 66; eQ2 – Questionnaire to corporate customers, question 17 and eQ3 – Questionnaire to travel agents, question 18.

### 5.1.1.8 Air/rail overlaps

- (428) The Transaction gives rise to affected air/rail overlap markets on the Edinburgh-London, Birmingham-London, Birmingham-Glasgow, Manchester-Edinburgh and Manchester-Glasgow routes where Flybe operates air passenger transport services and Virgin Train operates train passenger transport services.
- (429) The following table provides the market shares of Flybe and Virgin Train on the five air/rail overlap routes.<sup>345</sup>

	Summer 2018 IATA Season			Winter 2017/2018 IATA Season		
	Virgin Trains	Flybe	combined	Virgin Trains	Flybe	combined
Edinburgh-London  (LHR/LCY-EDI) <sup>346</sup>	[5-10]%	[10-20]%	[20-30]%	[0-5]%	[10-20]%	[10-20]%
Birmingham-Edinburgh (BHX-EDI) <sup>347</sup>	[20-30]%	[70-80]%	[90-100]%	[20-30]%	[70-80]%	[90-100]%
Birmingham-Glasgow (BHX-GLA) <sup>348</sup>	[20-30]%	[70-80]%	[90-100]%	[20-30]%	[70-80]%	[90-100]%
Manchester-Edinburgh (MAN-EDI)	[5-10]%	[30-40]%	[40-50]%	[10-20]%	[30-40]%	[40-50]%
Manchester-Glasgow (MAN-GLA)	[20-30]%	[20-30]%	[50-60]%	[30-40]%	[20-30]%	[50-60]%

<sup>345</sup> The Parties submitted the air passenger data based on the DDS data base and the rail passenger data based on the Lennon database, a databased used by rail operators to allocate ticket revenue in circumstances where a passenger does not buy a ticket for a particular rail service. The Parties explained that the Lennon database estimates, based on schedules and journey times, the number of passengers that would have travelled on particular trains and would allocate booking revenue accordingly. For indirect services, a booking would be allocated pro rata based on the journey time. See Form CO, paragraph 619. The Commission considers that for the purpose of this decision, the Lennon database is appropriate proxy to estimate Virgin Trains' market shares on the five air/rail overlap routes.

<sup>346</sup> The Transaction does not give raise to an affected market if Lon3 or Lon5 is considered, see Form CO paragraph 657 and 659. The Commission applies a cautious approach and assesses the effects of the Transaction on the LHR/LCY-EDI airport pair.

<sup>347</sup> The combined market shares post-Transaction do not differ materially, irrespective of whether BHX and EMA airports are considered substitutable or not; Form CO, paragraphs 670 and 671.

<sup>348</sup> The combined market shares post-Transaction do not differ materially, irrespective of whether BHX and EMA airports are considered substitutable or not; Form CO, paragraphs 679 and 680.



- (430) Despite high to very high combined intermodal market shares on four of these overlapping routes, the proposed Transaction will not raise serious doubts for the following reasons.
- (431) As explained in Section 4.10, Virgin Trains only operates train services under the current rail franchise until November 2019. A third party train operator will be operating these routes under the new West Coast Partnership Franchise as of November 2019. As a result, the Transaction gives only rise to air/rail overlaps until November 2019.
- (432) The Parties explained that Virgin Trains sets its fare prices [...]. While certain fares on the train routes are price-regulated and [...], Virgin Trains also offers fares that are not price-regulated. Virgin Trains reviews the prices for its non-regulated fares [Details about Virgin Trains price setting strategy].<sup>349</sup> [Details about Virgin Trains price setting strategy].
- (433) With regard to the train schedules, [details about Virgin Trains schedule setting strategy].<sup>350</sup>
- (434) As a result, the Commission considers that the no long-lasting changes to the current pricing and schedule are to be expected until the end of the current rail franchise.
- (435) In the light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market on any of the air/rail overlap routes.

#### 5.1.1.9 Conclusion on passenger air transport services under the O&D approach

- (436) The Commission therefore considers that the Transaction raises serious doubts as to its compatibility with the internal market with respect to the Birmingham-Amsterdam route and the Birmingham-Paris route.

#### 5.1.2 Passenger air transport services under the airport-by-airport approach

##### 5.1.2.1 Introduction

- (437) According to paragraph 36 of the Horizontal Merger Guidelines,<sup>351</sup> *“some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. In such a case, competitors may not, either individually or in the aggregate, be in a position to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition. For instance, the merged entity may have such a degree of control, or influence over, the supply of inputs or*

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<sup>349</sup> Form CO, paragraph 641.

<sup>350</sup> Form CO, paragraph 642 *et seq.*

<sup>351</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2017, p. 5.

*distribution possibilities that expansion or entry by rival firms may be more costly.”*

- (438) As explained in Section 4.2 above, the Transaction entails the increase of the Parties’ combined slot holding at airports where their slot portfolios overlap. Flybe, Stobart and Virgin Atlantic (including its current and future shareholders Delta and AFKL) had overlapping slot portfolios at 29 coordinated Level 3 airports in Summer 2018 and at 27 coordinated Level 3 airports in Winter 2018/2019 IATA Season.<sup>352</sup>
- (439) For the sake of completeness, it must be noted that Flybe does not hold any historic rights on the slots operated at London Heathrow airport. These slots are operated under the commitments in case M.6447 – *IAG/bmi*. Flybe also flies between London Heathrow airport and Guernsey using slots leased from Virgin Atlantic.<sup>353</sup>
- (440) Accordingly, after setting out the framework of its assessment, the Commission will first assess whether the Transaction, by reinforcing the Parties’ slot holding at a number of airports and granting it broader access to their infrastructure, gives the Parties the ability and incentive to prevent other air carriers from getting access to airport infrastructure and therefore to the markets for the provision of passenger air transport services from those airports, preventing or reducing competition on those markets. The Commission will then analyse the overall effects of the Parties’ slot holding position on the ability of the Parties’ rivals to compete at the relevant airports.

#### 5.1.2.2 Framework for the assessment of possible foreclosure of competitors’ access to the markets for the provision of passengers air transport services

- (441) An air carrier may harm competition on the market for the provision of passenger air transport services through a foreclosure strategy only if this air carrier has both the ability and the incentive to foreclose access of competitors to the markets for the provision of passenger air transport services at a given airport.

##### 5.1.2.2.1 Ability to foreclose access to the markets for the provision of passenger air transport services

###### 5.1.2.2.1.1 Conditions for the ability to foreclose access to the markets for the provision of passenger air transport services

- (442) In line with its prior decisional practice, the Commission considers that, for the Parties to be able to foreclose their competitors post-Transaction, the following cumulative conditions must be fulfilled: (i) the slots that the Parties would hold post-Transaction represent a significant share of the airport capacity, in particular at peak times; (ii) the Transaction has a material impact on the Parties’ slot holding at the airport, in particular at peak times; and (iii) the Parties’ slot holding could

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<sup>352</sup> Form CO, paragraph 750 and annexes B.11 and B.12.

<sup>353</sup> Form CO, paragraph 754.

negatively affect the overall availability of slots as an input for the passenger air transport markets to or from the relevant airport.<sup>354</sup>

- (443) In the present case, in line with its prior decisional practice, the Commission considers it not necessary to assess whether the third condition (i.e. the negative impact on the overall availability of slots) is fulfilled with respect to airports where the combined slot holding post-Transaction does not represent a significant share of the capacity and where the Transaction has no material impact on any of the Parties' slot holding.<sup>355</sup>
- (444) In assessing whether the merged entity would have the ability to foreclose, the Commission considers whether rival firms would be likely to deploy effective and timely counter-strategies in case of foreclosure. In this case, the Commission notes that there are limited effective and timely counter-strategies that the Parties' competitors would be likely to deploy in the case of a foreclosure strategy by any of them. There is no possibility for an air carrier to be less reliant on access to airport infrastructure and very limited possibility to sponsor the expansion of airport capacity or the opening of new airports.<sup>356</sup>
- (445) In light of the above, the Commission will assess the ability of the Parties post-Transaction to foreclose access to the markets for the provision of passenger air transport at the relevant airports by taking account of the following three factors together:<sup>357</sup> (i) the share of slots held by the Parties post-Transaction at the airport or at substitutable airports being high, in particular at peak times, (ii) the increment in the Parties' slot holding brought about by the Transaction at the airport or at the substitutable airports being material, in particular at peak times and (iii) the level of congestion at the airport or the substitutable airports being high. Considering that the Parties' slot holdings at the relevant airports vary between the Summer and Winter IATA Seasons, the Commission will carry out separate assessments for each IATA Season.
- (446) Before conducting an airport-by-airport assessment of the Parties' ability to foreclose access to the markets for the provision of passenger air transport, the Commission will detail the methodologies for determining the slot holding post-Transaction, the increment brought about by the Transaction and the congestion rate.

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<sup>354</sup> See e.g. Cases M.8964 – Delta/Air France-KLM/Virgin Group/Virgin Atlantic, paragraph 406; M.8869 – Ryanair/LaudaMotion, paragraph 508, M.8672 – easyJet/Certain Air Berlin Assets, paragraph 105; M.8633 – Lufthansa/Certain Air Berlin Assets, paragraph 182.

<sup>355</sup> See e.g. Cases M.8964 – Delta/Air France-KLM/Virgin Group/Virgin Atlantic, paragraph 407; M.8869 – Ryanair/LaudaMotion, paragraph 509.

<sup>356</sup> Without prejudice to the exceptional cases of joint ventures between an airport manager and an airline (see e.g. the joint venture between Lufthansa and Flughafen München GmbH, the company managing Munich airport).

<sup>357</sup> As explained in paragraph (444) above, given that the three conditions are cumulative, there is no need to assess the third condition at airports for which the first two conditions are not fulfilled.

#### 5.1.2.2.1.2 Methodologies

- (447) A slot holding is defined as the ratio between the number of slots held by an air carrier (or the air carriers that are part of the same group) at an airport and the total available slots at that airport (i.e. the airport runway capacity).
- (448) The Parties have estimated their slot holdings at the different airports using the information from (i) the UK slot coordinator for data relating to the UK airports and (ii) the e-airport slots website and the DIIO for the non-UK airports.<sup>358</sup> The Commission has checked the overall accuracy of the data submitted by the Parties against the information gathered from publicly available sources and slot coordinators during the market investigation.<sup>359</sup>
- (449) For each of Summer and Winter IATA Season, the Commission has considered two values for the Parties' slot holding post-Transaction: (i) their average slot holding during the opening hours of the airport,<sup>360</sup> and (ii) their average slot holding during peak times.<sup>361</sup>
- (450) As regards the average slot holding during peak time and adopting a conservative approach, the Commission has calculated the Parties' combined highest slot holding at any given hour band throughout the whole week (including any peak hour), which exceeds their combined average slot holding during peak times.<sup>362</sup>
- (451) The "gross increment" of the Parties' slot holding corresponds to the difference between the Parties' slot holding post-Transaction and the Parties' slot holding pre-Transaction. This also reflects the situation absent the Transaction in which Flybe would have been acquired by a third party buyer.
- (452) The "net increment" is the difference between the number of slots obtained through the Transaction and the number of slots that AFKL would have obtained in the

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<sup>358</sup> Form CO, paragraph 788. The Commission has cross-checked the data on slot holding provided by the Parties against data publicly available on slot coordinators websites.

<sup>359</sup> See e.g. <https://slotcoordination.nl/slot-allocation/declared-capacity/> and eQ4a – *Questionnaire to Slot Coordinator ACNL* and eQ4b – *Questionnaire to Slot Coordinator COHOR*.

<sup>360</sup> For airports open 24/7, the opening hours are assumed on the basis of the number of total arrival and departure slots allocated by hour band.

<sup>361</sup> The Parties have considered that peak times comprised the hour bands between 6:00-9:59 and 17:00-20:59 UTC. For the sake of completeness, the Commission has also considered alternative definitions of peak times such as hour bands when the congestion rate was above a certain threshold. However, the competition assessment would remain unchanged, under any plausible definition of peak times.

<sup>362</sup> The Parties submitted that peak time comprises the hour bands between 6:00-9:59 and 17:00-20:59 UTC. Considering that the Transaction is unlikely to raise serious doubts under the airport-by-airport approach under any definition of "peak time", the Commission will adopt the most conservative approach and consider the Parties' highest slot holding at any given hour band.

situation absent the Transaction where Flybe would have exited the market for passenger air transport and where its slots would have returned to the pool.<sup>363</sup>

(453) To assess the impact of the Transaction, the Commission therefore considers the Parties' combined slot holding post-Transaction, as well as the net and gross increments<sup>364</sup> in the Parties' slot holding as a result of the Transaction.

#### 5.1.2.2.2 Incentive to foreclose access to the markets for the provision of passenger air transport services

(454) A dominant carrier at a relevant airport would in principle have a strong incentive to pursue a foreclosure strategy, as any new service or expansion by another carrier would be likely to introduce or increase competition on one of the dominant carrier's routes. Such dominant carrier would have a greater incentive than any other carrier at the airport to keep slots out of reach of other carriers. The incentive to foreclose would also grow with the increased size of the slot portfolio it would control at the airport.

(455) Therefore, the Commission needs to analyse (i) the market shares of the merged entity in the relevant passenger air transport markets; and (ii) the relative capacity constraints faced by the merged entity and its competitors.

#### 5.1.2.2.3 Overall effect on competition for passenger air transport services

(456) Effective competition would be significantly harmed if the foreclosed air carriers played a sufficiently important role in the competitive process on the passenger air transport markets to and from the overlap airports. The higher the proportion of carriers which would be foreclosed on these markets, the more likely it would be that the merger would result in a significant price increase in the passenger air transport markets and, therefore, to significantly impede effective competition therein.

(457) The Commission notes that, when an air carrier holds a significant slot portfolio at a given airport while the remaining slot holding is very fragmented and slots are held by a large number of small air carriers, the latter are unable to translate these slots into a viable alternative to dominant air carriers.<sup>365</sup>

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<sup>363</sup> As explained in Section 4.9 above, absent the Transaction in a scenario where Flybe would have exited the market, the Parties would have likely obtained some of Flybe's slots returned to the pool at the airports where they also hold slots, based on their current position at the relevant airport.

<sup>364</sup> Considering that the Commission left open whether Flybe would have exited the market or continued flying following its acquisition by another buyer, the Commission will consider both the net and the gross increments, as relevant. At the airports where the combined slot holding is moderate, the Commission will take account of the gross increment, adopting a conservative approach. In any event, the competitive assessment would remain unchanged, should the Commission take account of the net increment.

<sup>365</sup> See paragraph 27 of the Explanatory Memorandum to the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011).

5.1.2.3 Assessment of the effects of the Transaction on passenger air transport services under the airport-by-airport approach

5.1.2.3.1 Assessment for Amsterdam Schiphol airport

(458) In Summer 2018 and Winter 2018/2019 IATA Seasons, AFKL, Delta and Flybe held slots (and historic rights thereto) at Amsterdam Schiphol airport. The Commission will first assess whether the Parties have the ability to foreclose access to the market for the provision of passenger air transport services Amsterdam Schiphol airport.

**Ability to foreclose**

*Slot holding and increment brought about by the Transaction*

**Table 1 – Parties’ slot holding – Summer 2019<sup>366</sup>**

Summer	Average slot holding <sup>367</sup>				Highest slot holding			
	Pre-Transaction	Post-Transaction	Gross increment	Net increment	Pre-Transaction	Post-Transaction	Gross increment	Net increment
AMS Arrival	[50-60]%	[50-60]%	[0-5]%	[0-5]%	[70-80]%	[70-80]% Hour band 17:00-17:59	[0-5]%	[0-5]%
AMS Departure	[40-50]%	[40-50]%	[0-5]%	[0-5]%	[70-80]%	[70-80]% Hour band 7:00-7:59	[0-5]%	[0-5]%

Source: Form CO, paragraph 801 and Annex B.12.

(459) In Summer 2019, the Parties estimate that their combined average slot holding post-Transaction at Amsterdam Schiphol airport would be [50-60]% with a gross increment of [0-5]% and a net increment of [0-5]% for arrival slots and [40-50]% with a gross increment of [0-5]% and a net increment of [0-5]% for departure slots.

(460) For arrival slots, the Parties’ highest slot holding during any specific hour band at Amsterdam Schiphol airport would reach [70-80]% with a gross increment below [0-5]% and a net increment below [0-5]%. This hour band corresponds to the third most congested hour band at Amsterdam Schiphol airport. For departure slots, the Parties’ highest slot holding during any specific hour band at Amsterdam Schiphol airport would reach [70-80]% with a gross increment of [0-5]% and a net increment below [0-5]%. This hour band corresponds to the most congested hour band at Amsterdam Schiphol airport.

<sup>366</sup> Considering that “total” slot holding data are not available for Amsterdam Schiphol airport, the Parties have distinguished between arrival and departure slots.

<sup>367</sup> The Parties have considered that Amsterdam Schiphol’s assumed opening hours were 04:00-21:00 UTC.

(461) In Summer 2019 IATA Season, the Parties’ average slot holding post-Transaction would be more than [50-60]% of the available arrival slot capacity at Amsterdam Schiphol airport and more than [40-50]% with respect to available departure slot capacity. During some hour bands, the Parties’ combined slot holding would represent most of the available capacity (e.g. more than [70-80]% of available departure and arrival slots). The net increment brought about by the Transaction is not insignificant (on average [0-5]% for arrival slots and [0-5]% for departure slots). Therefore, it cannot be excluded that the Transaction will have a material impact on the Parties’ slot holding at Amsterdam Schiphol airport in Summer 2019 IATA Season.

**Table 2 – Parties’ slot holding - Winter<sup>368</sup>**

Winter	Average slot holding <sup>369</sup>				Highest slot holding			
	Airport	Pre-Transaction	Post-Transaction	Gross increment	Net increment	Pre-Transaction	Post-Transaction	Gross increment
AMS Arrival	[40-50]%	[40-50]%	[0-5]%	[0-5]%	[70-80]%	[70-80] Hour band 7:00-7:59	[0-5]%	[0-5]%
AMS Departure	[40-50]%	[40-50]%	[0-5]%	[0-5]%	[60-70]%	[70-80] Hour band 8:00-8:59	[0-5]%	[0-5]%

Source: Form CO, paragraph 806 and annex B.12.

(462) In Winter 2019/2020 IATA Season, the Parties estimate that their combined average slot holding post-Transaction at Amsterdam Schiphol airport would be [40-50]% with a gross increment of [0-5]% for arrival slots and [40-50]% with a gross increment of [0-5]% and a net increment of [0-5]% for departure slots.

(463) For arrival slots, the Parties’ highest slot holding during any specific hour band at Amsterdam Schiphol airport would reach [70-80]% with a gross increment of [0-5]% and a net increment of [0-5]% in Winter 2019/2020 IATA Season. This hour band corresponds to the second most congested hour band at Amsterdam Schiphol airport. For departure slots, the Parties’ highest slot holding during any specific hour band at Amsterdam Schiphol airport would reach [70-80]% with a gross increment of [0-5]% and a net increment of [0-5]%. This hour band corresponds to the most congested hour band at Amsterdam Schiphol airport.

(464) In Winter 2019/2020 IATA Season, the Parties’ average slot holding post-Transaction would be more than [40-50]% of the available arrival and departure capacity at Amsterdam Schiphol airport but below [40-50]%. During some hour bands, the Parties’ combined slot holding would represent most of the available

<sup>368</sup> Considering that “total” slot holding data are not available for Amsterdam Schiphol airport, the Parties have distinguished between arrival and departure slots.

<sup>369</sup> The Parties have considered that Amsterdam Schiphol’s assumed opening hours were 04:00-21:00 UTC.

capacity (e.g. more than [70-80]% of available departure and arrival slots). Therefore, it cannot be excluded that the Parties' share of airport capacity post-Transaction would enable them to foreclose access of other carriers to the market for the provision of passenger air transport services at Amsterdam Schiphol airport in Winter IATA Season.

- (465) The net increment brought about by the Transaction is not insignificant (on average [0-5]% for arrival slots and [0-5]% for departure slots). Therefore, it cannot be excluded that the Transaction will have a material impact on the Parties' slot holding at Amsterdam Schiphol airport in Winter 2019 IATA Season.

#### *Congestion*

- (466) In Summer 2018, the average congestion rate during the effective opening hours of Amsterdam Schiphol airport amounted to 83.1% with respect to arrival slots, and 75.4% with respect to departure slots.<sup>370</sup> The airport reached its highest congestion level during the hour band 5:00-5:59 UTC with a congestion rate of 96.8% with respect to arrival slots.<sup>371</sup> As regards departure slots, the airport reached its highest congestion level during the hour band 7:00-7:59 UTC with a congestion rate of 91.4%.<sup>372</sup>

- (467) In Winter 2018/2019, the average congestion rate during the effective opening hours of Amsterdam Schiphol airport amounted to 77.0% with respect to arrival slots, and 69.1% with respect to departure slots.<sup>373</sup> The airport reached its highest congestion level during the hour band 18:00-18:59 UTC with a congestion rate of 96.0% with respect to arrival slots.<sup>374</sup> As regards departure slots, the airport reached its highest congestion level during the hour band 8:00-8:59 UTC with a congestion rate of 93.2%.<sup>375</sup>

- (468) Therefore, the available capacity at Amsterdam Schiphol airport is limited in both relevant IATA Seasons.

#### *Conclusion on the ability to foreclose access to the market for the provision of passenger air transport services at Amsterdam Schiphol*

- (469) In Summer IATA Season, considering (i) the Parties' significant share of the airport capacity post-Transaction (approximately [50-60]% for arrival slots and [40-50]% for departure slots on average and up to approximately [70-80]% at peak times), (ii) the potentially material impact of the Transaction on the Parties' slot holding, and (iii) the limited airport capacity available at Amsterdam Schiphol, it

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<sup>370</sup> Form CO, paragraph 810.

<sup>371</sup> Form CO, annex B.12.

<sup>372</sup> Form CO, annex B.12.

<sup>373</sup> Form CO, paragraph 810.

<sup>374</sup> Form CO, annex B.12.

<sup>375</sup> Form CO, annex B.12.



cannot be excluded that the Transaction might give the Parties the ability to foreclose access of other carriers to the markets for the provision of passenger air transport services. In any event, it is not necessary to conclude whether the Parties would have, post-Transaction, the ability to foreclose access of other air carriers to the market for the provision of passenger air transport services at Amsterdam Schiphol airport since the Parties would not have the incentive to foreclose access of competitors to this market, as explained in paragraph (477) below.

- (470) In Winter IATA Season, considering (i) the Parties’ potentially significant share of the airport capacity post-Transaction (above [40-50]% for arrival and departure slots on average) (ii) the potentially material impact of the Transaction on the Parties’ slot holding, and (iii) the limited airport capacity available at Amsterdam Schiphol, it cannot be excluded that the Transaction might give the Parties the ability to foreclose access of other carriers to the markets for the provision of passenger air transport services. In any event, it is not necessary to conclude whether the Parties would have, post-Transaction, the ability to foreclose access of other air carriers to the market for the provision of passenger air transport services at Amsterdam Schiphol airport since the Parties would not have the incentive to foreclose access of competitors to this market, as explained in paragraph (477) below.

**Incentive to foreclose**

- (471) Considering that it cannot be excluded that the Parties have the ability to foreclose access of competitors to the market for the provision of passenger air transport services at Amsterdam Schiphol in both Summer and Winter IATA Season, the Commission will assess whether the Parties would have, post-Transaction, the incentive to foreclose access to the market for the provision of passenger air transport services at Amsterdam Schiphol.
- (472) The merged entity would have a strong position at Amsterdam Schiphol airport. The combined market share of AFKL, Delta and Flybe on the market for the provision of passenger air transport (calculated in terms of passenger transported) was [50-60]% in Winter 2018/2018 IATA Season, and [50-60]% in Summer 2018 IATA Season.

**Table 3 – Parties’ shares of passengers at Amsterdam Schiphol and Paris Charles de Gaulle airports**

Airport	Season	Share of passengers transported to/from airport		
		Delta	AFKL	Flybe
AMS	W17/18	[0-5]%	[50-60]%	[0-5]%
AMS	S18	[5-10]%	[50-60]%	[0-5]%

Source: Form CO, paragraph 757. Figures based on DDS data.

- (473) However, Flybe’s share in passenger air transport services was not material ([0-5]% in both IATA Seasons), contrary to AFKL’s share, which amounted to [50-60]% in Winter 2017/2018 IATA Season and [50-60]% in Summer 2018 IATA

Season (in terms of passengers transported). In addition, as explained in Section 2.1 above, Flybe operates small turboprop aircraft with 78 or fewer seats and is not a home-based carrier at Amsterdam Schiphol airport.<sup>376</sup> In contrast, TUI fly and easyJet have a base at Amsterdam Schiphol.<sup>377</sup>

- (474) Therefore, the merged entity's market position at Amsterdam Schiphol in terms of shares of passengers will not materially increase as a result of the Transaction. It follows that the merged entity's strong slot holding position at Amsterdam Schiphol airport is unlikely to enable it to materially increase its operations at Amsterdam Schiphol airport compared to the situation pre-Transaction. Considering that the merged entity is unlikely to be able to capture the demand from any potentially foreclosed competitors,<sup>378</sup> the merged entity is unlikely to have the incentive to foreclose access to the markets for the provision of passenger air transport at Amsterdam Schiphol airport.
- (475) In addition, the Commission notes that it has not found material evidence during its market investigation that the Parties have previously engaged in any foreclosure strategy or that the reinforcement of their position at Amsterdam Schiphol airport had, as an objective or consequence, to prevent the entry or expansion of competitors through exclusionary practices such as slot hoarding or slot shuffling.<sup>379</sup> Furthermore, competitors having expressed a view gave mixed replies as to whether Connect Airways would have the incentive, post-Transaction, to prevent competitors from providing passenger air transport to or from Paris Charles de Gaulle and Amsterdam airports.<sup>380</sup> An air carrier indicated that it does not believe "*that the combined slot holding was a driving factor for the Transaction.*"<sup>381</sup>
- (476) The absence of an incentive to foreclose is reinforced by the fact that Connect Airways' shareholders seem not to have an alignment of interest with respect to the

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<sup>376</sup> Form CO, paragraph 756.

<sup>377</sup> See Annual Report 2018 Royal Schiphol Group, p.53. Available online <https://www.annualreportschiphol.com/pdfondemand/printpdf?docId=192807>.

<sup>378</sup> In 2018, easyJet transported 5 987 542 passengers and TUIfly transported 1 880 752 passengers while Flybe transported 809 991 passengers.

<sup>379</sup> For completeness, the Commission notes that the Netherlands Authority for Consumers and Markets (ACM) established that KLM and Amsterdam Airport Schiphol discussions related to the airport's strategy (e.g. facilities provided to other airlines, airport charges) might present anticompetitive risks (no violation was established). Therefore, KLM and Schiphol committed (i) not to contact each other about limiting the growth opportunities of other airlines, (ii) Schiphol will develop its own plans for investments, airport charges and marketing strategy, and (iii) KLM and Schiphol will not have any contact about requests for bases, lounges, or other specific facilities of other airlines. However, for the purpose of the assessment of the Transaction, the Commission considers that these Commitments are not related to exclusionary practices linked to AFKL's slot holding at AMS.

See ACM's press release available online <https://www.acm.nl/en/publications/commitments-klm-and-schiphol-acm-level-playing-field-schiphol-airport>.

<sup>380</sup> Replies to eQ1 – Questionnaire to Airlines, question 20.

<sup>381</sup> Reply of an air carrier to eQ1 – Questionnaire to Airlines, question 20.

use of Connect Airways' slots. The Parties submit that post-Transaction, AFKL and Flybe cannot be viewed as a single undertaking with respect to slot holding. They consider that Flybe and AFKL will remain two separate airlines, operating independently and each making use of its own portfolio of slots. They further submit that AFKL will not have any rights to influence the commercial decisions of Flybe in respect of its slots, as a result of its minority shareholding in Virgin Atlantic, which itself will be a minority shareholder of Flybe through Connect Airways post-Transaction.<sup>382</sup> While, as noted in Section 4 above, the unbroken chain of control does not preclude the Commission to consider that the Parties are part of one single undertaking whose slots could be transferred between parents and subsidiaries (e.g. between Flybe and AFKL), the Commission notes that two of Flybe's shareholders (namely Stobart Air and Cyrus) do not have any structural link with AFKL and they do not hold slots at Amsterdam Schiphol or Paris Charles de Gaulle. Therefore, a foreclosure strategy could only be instigated by AFKL (or to a lesser extent Delta) using its own portfolio of slots and capacity. The Commission considers it unlikely that Stobart Air and Cyrus would approve of any foreclosure strategy instigated by AFKL, as they would not benefit from such strategy. Should AFKL have the ability and the incentive post-Transaction to engage into a foreclosure strategy (quod non), Cyrus and Stobart would only bear the potential costs of not pursuing their own commercial strategy for Flybe with respect to passenger air transport to and from Amsterdam Schiphol, without reaping any benefit. More specifically, internal documents show that [...].<sup>383</sup> In that respect, a discussion document prepared by Nyra for Stobart and Cyrus during the due diligence concludes that "[...]"<sup>384</sup> This shows that Stobart and Cyrus would rather be inclined to pursue Flybe's current flight operations rather than using the slots to prevent the entry or expansion of competitors and hence endangering Flybe's profitability.

- (477) Considering the inability of the merged entity to capture the demand from potentially foreclosed competitors, the lack of material evidence of such past conduct and the absence of alignment of interest, the Commission concludes that the Parties are unlikely to have the incentive to foreclose access of competitors to the market for the provision of passenger air transport at Amsterdam airport.

### **Overall effect on competition for passenger air transport services**

- (478) The results of the market investigation with respect to the effect on competition of the Transaction are mixed. While some competitors having expressed a view consider that the impact of the Transaction might be a "*More difficult access [to airport infrastructure at AMS]*",<sup>385</sup> other air carriers consider that the impact of the Transaction would be rather neutral.<sup>386</sup> More specifically, an air carrier indicated

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<sup>382</sup> Form CO, paragraph 758 *et seq.*

<sup>383</sup> See for example Form CO, annex A.21.G, Virgin Atlantic's board presentation "*Foxtrot Investment Opportunity*", 4 December 2018, p.16.

<sup>384</sup> Form CO, annex A.20.B, "Slot securitization to support transaction funding, 20 November 2018"

<sup>385</sup> Reply of an air carrier to eQ1 – Questionnaire to airlines, question 21.

<sup>386</sup> Replies to eQ1 – Questionnaire to airlines, question 21.

that “*Slots and infrastructure [at Amsterdam Schiphol] are constrained but we don’t expect a material change as a result of the Transaction.*”<sup>387</sup>

- (479) However, the Commission notes that the Parties will continue to face strong competition at Amsterdam Schiphol airports. At Amsterdam Schiphol airport, the Parties face competition from approximately 100 airlines, which accounted for more than [60-70]% of the total number of passengers transported and which include easyJet, TUIfly, IAG Group and Lufthansa Group.<sup>388</sup> These competitors will likely have the ability to react to any anti-competitive foreclosure strategy by the merged entity as a result of the Transaction, considering their respective slot portfolio. In particular, in Summer 2018 IATA Season, the portfolio of slots of a number of competitors was larger than Flybe’s own portfolio. While Flybe held [0-5]% of the allocated slots, its competitors easyJet, IAG, Lufthansa Group and Scandinavian Airlines (SAS) held respectively [5-10]%, [5-10]%, [0-5]% and [0-5]% of the allocated slots.<sup>389</sup>
- (480) The Commission therefore considers that it is unlikely that the Transaction will harm effective competitive on the provision of passenger air transport services at Amsterdam Schiphol airport.

### **Conclusion**

- (481) In light of the above, and in particular the lack of incentive to foreclose access of competitors to the markets for the provision of passenger air transport at Amsterdam Schiphol and the lack of effective competitive harm caused by any potential foreclosure strategy, the Commission concludes that the Transaction is unlikely to raise serious doubts as to its compatibility with the internal market with respect to passenger air transport at Amsterdam under the airport-by-airport approach in both IATA Season.

#### 5.1.2.3.2 Assessment for Paris Charles de Gaulle airport

- (482) In Summer 2018 and Winter 2018/2019 IATA Seasons, AFKL, Delta and Flybe held slots (and historic rights thereto) at Charles de Gaulle airport. The Commission will first assess whether the Parties have the ability to foreclose access to the market for the provision of passenger air transport services at Paris Charles de Gaulle airport.

### **Ability to foreclose access to the market for the provision of passenger air transport services**

*Slot holding and increment brought about by the Transaction*

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<sup>387</sup> Reply of an air carrier to eQ1 – Questionnaire to airlines, question 19.

<sup>388</sup> See Annual Report 2018 Royal Schiphol Group, pp 51-54. Available online <https://www.annualreportschiphol.com/pdfondemand/printpdf?docId=192807> .

<sup>389</sup> Form CO, paragraph 808.

**Table 4 - Slot holding of the Parties - Summer**

Summer	Average slot holding <sup>390</sup>				Highest slot holding			
Airport	Pre-Transaction	Post-Transaction	Gross increment	Net increment	Pre-Transaction	Post-Transaction	Gross increment	Net increment
CDG	[30-40]%	[30-40]%	[0-5]%	[0-5]%	[50-60]%	[50-60]%, Hour band 5:00-5:59	[0-5]%	[0-5]%

Source: Form CO, paragraph 830 and annex B.12.

- (483) In Summer 2019 IATA Season, the Parties estimate that their combined average slot holding post-Transaction at Paris Charles de Gaulle airport would be [30-40]% with a gross increment of [0-5]% and a net increment of [0-5].
- (484) The Parties' highest slot holding at Paris Charles de Gaulle airport in Summer 2019 IATA Season would be [50-60]% with a gross increment of [0-5]% and a net increment below [0-5].
- (485) However, this share of airport capacity is insufficient for the Parties to be able to foreclose other airlines as (i) it is possible for them to build up a substantial slot portfolio using the remaining [60-70]% of average airport capacity (and [40-50]% of airport capacity when the Parties' slot holding is the highest), and (ii) as further explained below, there is available capacity at Paris Charles de Gaulle airport ([30-40]% on average during Summer 2018 IATA Season).

**Table 5 - Slot holding of the Parties - Winter**

Winter	Average slot holding <sup>391</sup>				Highest slot holding			
Airport	Pre-Transaction	Post-Transaction	Gross increment	Net increment	Pre-Transaction	Post-Transaction	Gross increment	Net increment
CDG	[30-40]%	[30-40]%	[0-5]%	[0-5]%	[50-60]%	[50-60]%, Hour band 5:00-5:59	[0-5]%	[0-5]%

Source: Form CO, paragraph 836 and annex B.12.

- (486) In Winter 2019/2020 IATA Season, the Parties estimate that their combined average slot holding post-Transaction at Paris Charles de Gaulle airport would be [30-40]% with a gross increment of [0-5]% and a net increment of [0-5].
- (487) The Parties' highest slot holding at Paris Charles de Gaulle airport in Winter 2019/2020 IATA Season would be [50-60]% with a gross increment of [0-5]% and a net increment below [0-5].

<sup>390</sup> The Parties have considered that the CDG assumed opening hours were 05:00-22:00 UTC.

<sup>391</sup> The Parties have considered that the CDG assumed opening hours were 05:00-22:00 UTC.

- (488) However, this share of airport capacity is insufficient for the Parties to be able to foreclose other airlines as (i) it is possible for them to build up a substantial slot portfolio using the remaining [60-70]% of average airport capacity (and [40-50]% of airport capacity when the Parties' slot holding is the highest), and (ii) as further explained below, there is available capacity at Paris Charles de Gaulle airport ([30-40]% on average during Winter 2018/2019 IATA Season).
- (489) Therefore, the level of the Parties' combined slot holding post-Transaction is unlikely to give rise to competition concerns in both Summer and Winter IATA Seasons.

#### *Congestion*

- (490) In Summer 2018 IATA Season, the average congestion rate during the assumed opening hours amounted to 70%.<sup>392</sup> The airport reached its highest congestion level during the hour band 10:00-10:59 UTC, with a congestion rate of 86%.<sup>393</sup>
- (491) In Winter 2018/2019 IATA Season, the average congestion rate during the assumed opening hours amounted to 67%.<sup>394</sup> The airport reached its highest congestion level during the hour band 11:00-11:59 UTC, with a congestion rate of 82.8%.<sup>395</sup>
- (492) In both relevant IATA Season, although Paris Charles de Gaulle airport is coordinated, the actual level of congestion indicates that there are still slots available for entry or expansion at the airports, corresponding to, on average, approximately 30% of the airport capacity.

#### *Conclusion on the ability to foreclose*

- (493) Given (i) the Parties' limited slot holding position at Paris Charles de Gaulle airport post-Transaction (no more than [30-40]% on average) and (ii) the available slot capacity at Paris Charles de Gaulle airport in both IATA Seasons ([30-40]% on average), the Parties are unlikely to have post-Transaction a sufficient degree of market power to foreclose access of other carriers to the markets for the provision of passenger air transport services.

### **Conclusion**

- (494) Considering that the Parties will not have, post-Transaction, the ability to foreclose access to the market for the provision of passenger air transport services at Paris Charles de Gaulle airport, and that, as explained in section 5.1.2.2 above, the conditions for foreclosing access to the market for the provision of passenger air services (ability and incentive) are cumulative, it is not necessary to assess whether

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<sup>392</sup> Form CO, paragraph 839.

<sup>393</sup> Form CO, annex B.12.

<sup>394</sup> Form CO, paragraph 839.

<sup>395</sup> Form CO, annex B.12.

the Parties would have the incentive to foreclose access to the markets for the provision of passenger air transport services.

- (495) In light of the above, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market with respect to passenger air transport services under the airport-by-airport approach at Paris Charles de Gaulle airport in both IATA Seasons.

#### 5.1.2.3.3 Assessment for the other overlap airports

- (496) In Summer 2018, (i) AFKL and/or Delta and/or Virgin Atlantic and (ii) Flybe and/or Stobart Air held slots (and historic rights thereto) at 27 airports.<sup>396</sup> In Winter 2018/2019 IATA Seasons, (i) AFKL and/or Delta and/or Virgin Atlantic and (ii) Flybe and/or Stobart Air held slots (and historic rights thereto) at 25 airports.<sup>397</sup>

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<sup>396</sup> Those are: Alicante (ALC), Arlanda (ARN), Birmingham (BHX), Bristol (BRS), Dublin (DUB), Duesseldorf (DUS), Göteborg Landvetter (GOT), Geneva (GVA), Hannover (HAJ), Hamburg (HAM), Innsbruck (INN), London City (LCY), London Gatwick (LGW), Lyon-Saint-Exupery (LYS), Manchester (MAN), Munich (MUC), Milano Malpensa (MXP), Nice Côte d'Azur (NCE), Palma de Mallorca (PMI), Prague (PRG), London Stansted (STN), Stuttgart (STR), Trondheim (TRD), Berlin-Tegel (TXL), Venice (VCE), Vienna (VIE) and Zürich (ZRH).

<sup>397</sup> Those are: Alicante (ALC), Arlanda (ARN), Birmingham (BHX), Bristol (BRS), Dublin (DUB), Duesseldorf (DUS), Göteborg Landvetter (GOT), Geneva (GVA), Hannover (HAJ), Hamburg (HAM), Innsbruck (INN), London City (LCY), London Gatwick (LGW), Lyon-Saint-Exupery (LYS), Manchester (MAN), Munich (MUC), Milano Malpensa (MXP), Nice Côte d'Azur (NCE), Palma de Mallorca (PMI), Prague (PRG), London Stansted (STN), Stuttgart (STR), Trondheim (TRD), Berlin-Tegel (TXL) and Venice (VCE).

**Table 6 - Slot holding at the other overlap airports - Summer<sup>398</sup>**

Summer	Average slot holding <sup>399</sup>			Highest slot holding		
Airport <sup>400</sup>	Virgin Atlantic <sup>401</sup>	Flybe (and Stobart Air)	Post-Transaction	Virgin Atlantic	Flybe (and Stobart Air)	Post-Transaction
ALC	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 8:00-8:59
ARN – arrival <sup>402</sup>	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]% Hour band 09:00-09:59
ARN - departure	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[5-10]%	[5-10]% Hour band 12:00-12:59
BHX	<b>[0-5]%</b>	[10-20]%	[10-20]%	<b>[0-5]%</b>	[20-30]%	[20-30]% Hour band 17:00-17:59
BRS	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 12:00-12:59
DUB	[0-5]%	<b>[0-5]%</b>	[5-10]%	[5-10]%	<b>[10-20]%</b>	[20-30]% Hour band 07:00-07:59
DUS	[0-5]%	<b>[0-5]%</b>	[5-10]%	[0-5]%	<b>[10-20]%</b>	[10-20]% Hour band 15:00-15:59
GOT	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 20:00-20:59
GVA	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 09:00-09:59

<sup>398</sup> Considering that Flybe has at some airport a larger slot holding than Virgin Atlantic (and its shareholders), Virgin Atlantic might account for the gross increment. The gross increment is in bold characters.

<sup>399</sup> In Summer IATA Season, Stobart Air holds has an immaterial average slot holding (<[0-5]%) at Dublin, London Gatwick, Milan Malpensa, Prague and Vienna airports. Stobart Air's slot holding is not included in the Pre-Transaction slot holding but in the Post-Transaction slot holding.

<sup>400</sup> Alicante (ALC), Arlanda (ARN), Birmingham (BHX), Bristol (BRS), Dublin (DUB), Duesseldorf (DUS), Göteborg Landvetter (GOT), Geneva (GVA), Hannover (HAJ), Hamburg (HAM), Innsbruck (INN), London City (LCY), London Gatwick (LGW), Lyon-Saint-Exupery (LYS), Manchester (MAN), Munich (MUC), Milano Malpensa (MXP), Nice Côte d'Azur (NCE), Palma de Mallorca (PMI), Prague (PRG), London Stansted (STN), Stuttgart (STR), Trondheim (TRD), Berlin-Tegel (TXL), Venice (VCE), Vienna (VIE) and Zürich (ZRH).

<sup>401</sup> i.e. combined slot holding of Virgin Atlantic Airways, Delta and AFKL.

<sup>402</sup> Considering that "total" slot holding data are not available for Arlanda airport, the Parties have distinguished between arrival and departure slots.



Summer	Average slot holding <sup>399</sup>			Highest slot holding		
HAJ	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[5-10]%</b>	[5-10] Hour band 19:00-19:59
HAM	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5] Hour band 19:00-19:59
INN	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5] Hour band 07:00-07:59
LCY	<b>[0-5]%</b>	[5-10]%	[5-10]%	<b>[5-10]%</b>	[10-20]%	[20-30] Hour band 07:00-07:59
LGW	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 08:00-08:59
LYS	[10-20]%	<b>[0-5]%</b>	[10-20]%	[30-40]%	<b>[0-5]%</b>	[30-40] Hour band 17:00-17:59
MAN	<b>[0-5]%</b>	[10-20]%	[10-20]%	<b>[5-10]%</b>	[10-20]%	[10-20] Hour band 07:00-07:59
MUC	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5] Hour band 06:00-06:59
MXP <sup>403</sup>	[0-5]%	<b>[0-5]%</b>	[5-10]%	[5-10]%	<b>[5-10]%</b>	[10-20] Hour band 12:00-12:59
NCE	[5-10]%	<b>[0-5]%</b>	[5-10]%	[10-20]%	<b>[0-5]%</b>	[10-20] Hour band 10:00-10:59
PMI	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5] Hour band 13:00-13:59
PRG	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 11:00-11:59
STN	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5] Hour band 15:00-15:59
STR	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 08:00-08:59
TRD <sup>404</sup>	[0-5]%	<b>[0-5]%</b>	[0-5]%	[10-20]%	<b>[0-5]%</b>	[10-20] Hour band 20:00-20:59

<sup>403</sup> Capacity data is not available for this airport. Slot holding has been calculated in terms of share of slot allocated, in order to adopt a conservative approach.

<sup>404</sup> Capacity data is not available for this airport. Slot holding has been calculated in terms of share of slot allocated, in order to adopt a conservative approach.

Summer	Average slot holding <sup>399</sup>			Highest slot holding		
TXL	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 07:00-07:59
VCE <sup>405</sup>	[5-10]%	<b>[0-5]%</b>	[5-10]%	[10-20]%	<b>[0-5]%</b>	[10-20]% Hour band 04:00-04:59
VIE	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5]% Hour band 17:00-17:59
ZRH	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 20:00-20:59

Source: Form CO, annex B.12

- (497) In Summer 2019 IATA Season, the Parties estimate that their slot holding post-Transaction at each of the other airports would be below [10-20]% on average during the relevant airport's opening hours with a gross increment below [0-5]%. Their highest share during any specific hour band at each of these airports would reach no more than [30-40]% with a gross increment of [0-5]%.
- (498) Therefore, the level of the Parties' slot holding post-Transaction is unlikely to give rise to competition concerns at each of these 27 overlap airports in Summer 2019 IATA Season.

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<sup>405</sup> Capacity data is not available for this airport. Slot holding has been calculated in terms of share of slot allocated, in order to adopt a conservative approach.

**Table 7 – Parties’ slot holding at the other airports - Winter**

Winter	Average slot holding <sup>406</sup>			Highest slot holding		
	Airport <sup>407</sup>	Virgin Atlantic <sup>408</sup>	Flybe (and Stobart Air)	Post-Transaction	Virgin Atlantic	Flybe (and Stobart Air)
ALC	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 09:00-09:59
ARN - arrival <sup>409</sup>	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[5-10]%	[5-10] Hour band 16:00-16:59
ARN - departure	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[5-10]%	[5-10] Hour band 17:00-17:59
BHX	<b>[0-5]%</b>	[10-20]%	[10-20]%	<b>[0-5]%</b>	[20-30]%	[20-30] Hour band 17:00-17:59
BRS	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 13:00-13:59
DUB	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[10-20]%</b>	[10-20] Hour band 08:00-08:59
DUS	[0-5]%	<b>[0-5]%</b>	[5-10]%	[0-5]%	<b>[5-10]%</b>	[10-20] Hour band 16:00-16:59

<sup>406</sup> In Summer IATA Season, Stobart Air holds has an immaterial average slot holding (<[0-5]%) at Dublin, London Gatwick, Milan Malpensa, Prague and Vienna airports. Stobart Air’s slot holding is not included in the Pre-Transaction slot holding but in the Post-Transaction slot holding.

<sup>407</sup> Alicante (ALC), Arlanda (ARN), Birmingham (BHX), Bristol (BRS), Dublin (DUB), Duesseldorf (DUS), Göteborg Landvetter (GOT), Geneva (GVA), Hannover (HAJ), Hamburg (HAM), Innsbruck (INN), London City (LCY), London Gatwick (LGW), Lyon-Saint-Exupery (LYS), Manchester (MAN), Munich (MUC), Milano Malpensa (MXP), Nice Côte d’Azur (NCE), Palma de Mallorca (PMI), Prague (PRG), London Stansted (STN), Stuttgart (STR), Trondheim (TRD), Berlin-Tegel (TXL), Venice (VCE).

<sup>408</sup> i.e. combined slot holding of Virgin Atlantic Airways, Delta and AFKL.

<sup>409</sup> Considering that “total” slot holding data are not available for Arlanda airport, the Parties have distinguished between arrival and departure slots.

Winter	Average slot holding <sup>406</sup>			Highest slot holding		
GOT	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 22:00-22:59
GVA	[5-10]%	<b>[0-5]%</b>	[5-10]%	[10-20] 20%]	<b>[0-5]%</b>	[10-20] Hour band 10:00-10:59
HAI	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 13:00-13:59
HAM	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10] Hour band 16:00-16:59
INN	[5-10]%	<b>[0-5]%</b>	[5-10]%	[20-30] 30%]	<b>[0-5]%</b>	[20-30] Hour band 08:00-08:59
LCY	<b>[0-5]%</b>	[5-10]%	[5-10]%	<b>[5-10] 10%]</b>	[10-20]%	[20-30] Hour band 08:00-08:59
LGW	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[5-10] Hour band 09:00-09:59
LYS	[10-20]%	<b>[0-5]%</b>	[10-20]%	[30-40] 40%]	<b>[0-5]%</b>	[30-40] Hour band 18:00-18:59
MAN	<b>[0-5]%</b>	[10-20]%	[10-20]%	<b>[0-5]%</b>	[10-20]%	[10-20] Hour band 11:00-11:59
MUC	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5] Hour band 08:00-08:59
MPX <sup>410</sup>	[0-5]%	<b>[0-5]%</b>	[5-10]%	[5-10]%	<b>[0-5]%</b>	[10-20] Hour band 13:00-13:59

<sup>410</sup> Capacity data is not available for this airport. Slot holding has been calculated in terms of share of slot allocated, in order to adopt a conservative approach.

Winter	Average slot holding <sup>406</sup>			Highest slot holding		
NCE	[5-10]%	<b>[0-5]%</b>	[5-10]%	[10-20]%	<b>[0-5]%</b>	[10-20]% Hour band 11:00-11:59
PMI	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5]% Hour band 13:00-13:59
PRG	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 13:00-13:59
STN	[0-5]%	<b>[0-5]%</b>	[0-5]%	[0-5]%	<b>[0-5]%</b>	[0-5]% Hour band 10:00-10:59
STR	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 13:00-13:59
TRD <sup>411</sup>	[0-5]%	<b>[0-5]%</b>	[0-5]%	[90-100]%	<b>[0-5]%</b>	[90-100]% Hour band 04:00-04:59
TXL	[0-5]%	<b>[0-5]%</b>	[0-5]%	[5-10]%	<b>[0-5]%</b>	[5-10]% Hour band 10:00-10:59
VCE <sup>412</sup>	[5-10]%	<b>[0-5]%</b>	[5-10]%	[40-50]%	<b>[0-5]%</b>	[40-50]% Hour band 16:00-16:59

Source: Form CO, annex B.12

(499) In Winter 2019/2020 IATA Season, the Parties estimate that their slot holding post-Transaction at each of the other airports would be below [10-20]% on average during the relevant airport's opening hours with a gross increment of [0-5]%. Their highest share during any specific hour band at each of these airports would reach no more than [40-50]% with a negligible increment.

<sup>411</sup> Capacity data is not available for this airport. Slot holding has been calculated in terms of share of slot allocated, in order to adopt a conservative approach.

<sup>412</sup> Capacity data is not available for this airport. Slot holding has been calculated in terms of share of slot allocated, in order to adopt a conservative approach.

(500) Therefore, the level of the Parties' slot holding post-Transaction is unlikely to give rise to competition concerns at each of these 25 overlap airports in Winter 2019/2020 IATA Season.<sup>413</sup>

#### *Congestion*

(501) As explained in section 5.1.2.2.1 above, considering that the conditions to establish an ability to foreclose are cumulative and that the level of the Parties' slot holding post-Transaction is unlikely to give rise to competition concerns at these overlap airports, the Commission does not consider it necessary to assess the congestion rate at these airports.

#### *Conclusion on the ability to foreclose*

(502) In light of the above, given the Parties' combined slot holding at the relevant 27 airports post-Transaction during the relevant IATA Seasons, the Commission considers that the Parties will not be likely to have the ability to foreclose competitors' access to the markets for the provision of passenger air transport services.

#### **Conclusion**

(503) Considering that the Parties will not have, post-Transaction, the ability to foreclose access to the markets for the provision of passenger air transport services at these airports and that, as explained in section 5.1.2.2 above, the conditions for foreclosing access to the market for the provision of passenger air services (ability and incentive) are cumulative, it is not necessary to assess whether the Parties would have the incentive to foreclose access to the markets for the provision of passenger air transport services.

(504) In light of the above, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market with respect to passenger air transport services under the airport-by-airport approach at the relevant other overlap airports in both IATA Seasons.

#### 5.1.2.4 Conclusion on passenger air transport under the airport-by-airport approach

(505) In light of the above, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to passenger air transport services under the airport-by-airport approach at any of the relevant overlap airports in both IATA Seasons.

#### 5.1.3 Feeder traffic

##### 5.1.3.1 Introduction

(506) As explained in Section 4.3 above, in the air transport sector, there is a variety of agreements whereby tickets may be sold for indirect route including two legs operated respectively by each party to the agreement. Interlining and codesharing

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<sup>413</sup> In Winter IATA Season, Vienna and Zurich airport are not overlap airports since neither Flybe nor Stobart holds slots at these airports.

arrangements are in principle mutually beneficial as they give each party the opportunity to increase its load factors. In principle, they also benefit passengers as they increase connection opportunities, allow passengers to be compensated in case of missed connections and spare them from taking back luggage at the connection airport. In particular for long-haul flights, traffic made up by passengers connecting at either or both ends of the route is commonly referred to as “feeder traffic”.

- (507) The theory of harm examined in relation to feeder traffic relates to a risk of foreclosure whereby the merged entity would deny competing air carriers access or hamper their access (e.g. by raising the price charged for such access) to capacity on routes operated pre-Transaction by one of the merging parties, which could be used by that competing air carrier to attract feeder traffic. In particular, as regards the Transaction, Connect Airways could foreclose access by competing air carriers to routes previously flown by Flybe in relation to passengers wishing to connect at Amsterdam, Paris Charles de Gaulle, London Heathrow, Glasgow or Manchester onto flights operated by such competing carriers to a destination where one or more of Connect Airways’ shareholders (*i.e.* Virgin Atlantic or its parents AFKL or Delta) also offers services from these (connecting) airports. For example, according to this theory of harm, Connect Airways could deny or hamper access to its flights to Manchester for passengers connecting onto a flight operated by another carrier from Manchester to Abu Dhabi (a destination where AFKL also operates). As a result, prices may increase on the Manchester-Abu Dhabi air transport market and any competitive constraint on Connect Airways may be reduced on that market.
- (508) Such a risk does not depend on how the tickets for such indirect routes are distributed. Therefore, the assessment is the same no matter whether the two carriers are engaged in a vertical relationship or are active in closely related markets<sup>414</sup>, providing the “inputs” necessary to a sale of tickets for indirect route by a third party.<sup>415</sup> For the sake of simplification, the terminology of the input foreclosure theory will be used to conduct this assessment.
- (509) In order for foreclosure to occur and harm competition as a result of the Transaction, the latter must confer on Connect Airways the ability and incentives to engage in such foreclosure, or increase such ability and incentives, and foreclosure must be likely to significantly impede effective competition.

#### 5.1.3.2 Overview of feeder traffic provided by the Parties

- (510) The assessment concerns Flybe’s and AFKL’s feeder traffic activities. Virgin Atlantic does not operate any short-haul flight which feeds its long-haul or third parties’ long-haul flights. Delta does not operate any short-haul flights in Europe.<sup>416</sup>

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<sup>414</sup> See Non Horizontal Merger Guidelines, paragraph 91.

<sup>415</sup> When a ticket for an indirect route is sold by a third party rather by one of the two carriers, the theory of harm would take the form of foreclosure through tying. It refers to a situation where Virgin Atlantic (or either of its parents) would avoid selling one leg of the indirect route in isolation from the second one, thereby preventing the sale of indirect routes combining a leg operated by Virgin Atlantic (or one of its parents) and one of its competitors on a given route.

<sup>416</sup> Form CO, paragraph 882.

#### 5.1.3.2.1 Flybe's feeder traffic activities

- (511) Flybe has entered into a number of interlining and codeshare agreements with third party carriers:<sup>417</sup>
- a) Flybe has codeshare agreements with [...] long-haul and/ or short-haul carriers which allow these carriers to sell tickets on Flybe's flights: [...],<sup>418</sup> [...].
  - b) Flybe has interline agreements with [...] long-haul and/ or short-haul carriers which allow these carriers to issue tickets including one leg of the journey on Flybe's flights: [...],<sup>419</sup> [...].
  - c) Flybe also has interline agreements with other airlines within the scope of the IATA Multilateral Interline Traffic Agreement ("MITA"), including with [...].
  - d) Flybe has a [...] codeshare with Air France on three routes (BHX-CDG, CDG-EDI and CDG-MAN). [confidential information about Flybe's codeshare agreements with Air France].<sup>420</sup>
  - e) Flybe notably provides feed to/from several airports including AMS, GLA, LHR, MAN and CDG.
- (512) The vast majority of Flybe's codeshares are [confidential information about Flybe's codeshare agreements].
- (513) Most of these codesharing and interlining agreements enable the codeshare partner to sell the entire indirect route combining Flybe's short-haul flight with their short-haul or long-haul flight. [Confidential information on Flybe's codeshare agreements].
- (514) The vast majority of Flybe's flights are flown point-to-point by passengers (and thus do not feed into the long-haul flight of another carrier).<sup>421</sup> This, however, does not mean that no other carrier relies to some extent on Flybe for feeder traffic, as Flybe still provides a significant share of third party carriers' feeder traffic for certain long-haul flights, as will be demonstrated in Table 9 below.

#### 5.1.3.2.2 AFKL's feeder activities

- (515) By contrast with Flybe, many of AFKL's short-haul flights are used not only to meet local or point-to-point passengers, but to provide feeder traffic to other short-haul or long-haul flights operated by AFKL or third party carriers. However, in

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<sup>417</sup> Form CO, paragraph 883.

<sup>418</sup> [Confidential information about Flybe's commercial agreements]. See Form CO, footnote 448.

<sup>419</sup> [Confidential information about Flybe's commercial agreements].

<sup>420</sup> [Confidential information about Flybe's commercial strategy].

<sup>421</sup> Form CO, paragraph 884.



particular in the case of flights to AMS or CDG, it provides feeder traffic to its own long-haul flights rather than third party carriers' long-haul flights.

- (516) AFKL has entered into joint venture agreements with other airlines including Delta, as well as Virgin Atlantic (noting that the latter is still awaiting US ATI Approval)<sup>422</sup>. Within the scope of the JV Agreement of 15 May 2018 and post-completion of the AFKL Transaction, AFKL and Virgin Atlantic will be part of the same metal neutral joint venture whereby both airlines will reciprocally codeshare on each other metal, amongst other cooperation. As a result, AFKL and Virgin Atlantic will be, amongst others, codesharing on each other's metal.

#### 5.1.3.2.3 Overview

- (517) Table 8 below lists all the routes operated by Flybe which feed a long-haul route where Virgin Atlantic, AFKL or Delta operated in Winter 2017 and/or Summer 2018. To identify relevant routes, a threshold of 100 passengers per year is applied so that only routes feeding more than 100 passengers on long-haul sectors according to DDS data have been considered as relevant. The list of relevant routes is set out in in the Table below.

**Table 8 – Flybe feeder routes (Winter 2017/Summer 2018)<sup>423</sup>**

Flybe Feeder Routes Winter 2017/ Summer 2018	
ABZ-LHR	EDI-EMA
ABZ-MAN	EDI-EXT
AMS-BHX	EDI-LHR
AMS-EXT	EDI-MAN
AMS-LCY	EDI-SOU
AMS-MAN	EMA-GLA
AMS-SOU	EXT-MAN
BHD-EDI	GLA-MAN
BHD-GLA	GLA-SOU
BHD-MAN	HAJ-MAN
BHX-CDG	IOM-MAN
BHX-EDI	JER-MAN
BHX-GLA	LGW-NQY
CDG-CWL	LUX-MAN
CDG-EXT	LYS-MAN
CDG-MAN	MAN-MXP
CDG-SOU	MAN-NOC
CWL-DUB	MAN-NQY
CWL-EDI	MAN-NTE
DUB-EXT	MAN-SEN
DUB-SEN	MAN-SOU
DUB-SOU	MAN-TLS
DUS-MAN	

Source: DDS data provided by the Parties

<sup>422</sup> See paragraph 67 of the Derogation Decision.

<sup>423</sup> Form CO, paragraph 547.

- (518) Table 9 below provides an overview of feeder traffic provided by Flybe and the Parties to other carriers on the relevant long-haul routes where the shareholders of Connect Airways (namely Virgin Atlantic or its parents AFKL or Delta) operate. These routes and carriers have been selected on the basis of thresholds reflecting the importance of the feeder traffic provided by the Parties relative to the total number of passengers travelling on the services provided by the carrier in question on the route.
- (519) Consistent with the Commission's practice in the case *IAG/bmi*,<sup>424</sup> the criterion applied to select the routes is that feeder traffic provided by the Parties and Flybe combined to the third party carrier service in question accounts for 3% or more of the total number of passengers on the third party carrier service, or the feeder traffic provided by Flybe accounts for 1% or more of the total number of passengers of the third party carrier on a relevant route for Winter 2017/18 and Summer 2018. In addition, only long-haul routes where either alone or together Virgin Atlantic, Delta or AFKL carried at least 10,000 passengers on an operating carrier basis in the last two completed IATA seasons combined, are considered. On that basis, and on the basis of DDS data, 21 relevant routes at 4 airports (AMS, CDG, GLA, and MAN) were identified, as set out in Table 9 below.
- (520) These thresholds focus the Commission's analysis on the routes where (i) feed from Flybe or from the Parties combined is higher than a *de minimis* proportion of total passengers on the route, and therefore where a hypothetical foreclosure may potentially impact the operations of the third party carriers; and (ii) Connect Airways' shareholders' operations to/from the same long-haul destination/origin, from/to the same connecting hub or from/to its own hubs, are non-negligible and therefore they compete with the third party carrier.
- (521) The applied thresholds are therefore adequate in the present case to focus the Commission's analyses of routes where feeder traffic could be a material aspect of operations for a third party carrier.

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<sup>424</sup> Case No M.6447 – *IAG/bmi*, footnote 227; Case M.7541 – *IAG/Aer Lingus*, paragraph 462.

**Table 9 – feeder traffic provided by the Parties at the 4 relevant airports (AMS, CDG, GLA and MAN) on a range of international long-haul routes in Winter 2017 and Summer 2018<sup>425</sup>**

Connecting Airport	Destination	Long-haul operating carrier	Feeder traffic as % of total long-haul passengers by carrier on route	
			Flybe	AFKL
Amsterdam	Abu Dhabi	Etihad	[0-5]%	[10-20]%
Amsterdam	Beijing	[China Southern]	[0-5]%	[50-60]%
Amsterdam	Mumbai/Bombay	Jet Airways	[0-5]%	[10-20]%
Amsterdam	Mexico City	AeroMexico	[0-5]%	[5-10]%
Amsterdam	Nairobi	Kenya Airways	[0-5]%	[50-60]%
Amsterdam	Singapore	Singapore	[0-5]%	[0-5]%
Amsterdam	Singapore	Garuda Indonesia	-	[0-5]%
Parris CDG	Mumbai/Bombay	Jet Airways	[0-5]%	[5-10]%
Paris CDG	Guangzhou	[China Southern]	[0-5]%	[10-20]%
Paris CDG	Luanda	TAAG <sup>426</sup>	[5-10]%	-
Paris CDG	Mauritius	Air Mauritius	[0-5]%	[5-10]%
Paris CDG	Nairobi	Kenya Airways	[5-10]%	[20-30]%
Paris CDG	Riyadh	[Saudi Arabian Airlines]	[0-5]%	[0-5]%
Paris CDG	Shanghai	[China Eastern Airlines]	[0-5]%	[10-20]%
Glasgow	Orlando	Thomas Cook	[0-5]%	-
Manchester	Bridgetown	Thomas Cook	[0-5]%	-
Manchester	Boston	Thomas Cook <i>[No longer operating]</i>	[30-40]%	
Manchester	Las Vegas	Thomas Cook	[5-10]%	[0-5]%

<sup>425</sup> Form CO, tables 60-64.

<sup>426</sup> It is possible that the data is not fully complete or that passengers have mistakenly been attributed to TAAG.

Connecting Airport	Destination	Long-haul operating carrier	Feeder traffic as % of total long-haul passengers by carrier on route	
Manchester	New York/Newark	Thomas Cook	[5-10]% <sup>427</sup>	[0-5]%
Manchester	Orlando	Thomas Cook	[10-20]%	[0-5]%
Manchester	San Francisco	Thomas Cook	[20-30]%	[0-5]%
Manchester	Los Angeles	Thomas Cook	[20-30]%	[0-5]%

Source: DDS data provided by the Parties

### 5.1.3.3 Parties' views

#### 5.1.3.3.1 No ability to foreclose

- (522) In the Parties' views, feeder traffic from Flybe and the Parties does not represent an important input to the provision of air transport services on the downstream market,<sup>428</sup> because Flybe's feed on the relevant feeder routes represents only a small share of the total number of passengers on both (i) the relevant third party carrier's flights (see Table 9 above), and (ii) the total volume of passengers flying on the relevant long-haul route (see Table 10 below).
- (523) Firstly, according to the Notifying Parties, feeder traffic represents a very small proportion of Flybe's activities.<sup>429</sup> Namely, they argue that, in Winter 2017, on Flybe's short-haul routes, only [0-5]% ([50,000-60,000]) of passengers were connecting on to long-haul services where Virgin Atlantic, AFKL or Delta was active ([5-10]% - [150,000-200,000] passengers – in Summer 2018). A further [0-5]% of passengers were connecting on to long-haul services where Virgin Atlantic, AFKL and Delta were not active ([0-5]% in Summer 2018) and [10-20]% were connecting on to short-haul services ([10-20]% in Summer 2018). By contrast, [80-90]% were travelling directly and point-to-point on Flybe's metal ([80-90]% in Summer 2018).
- (524) Secondly, the Parties argue that AFKL's feeder activities focus on its own services and its joint venture and alliance partners.<sup>430</sup> In particular, they argue that AFKL's business model is to use its own short-haul flights to serve local traffic and (if the flight is to AMS or CDG) to feed its long-haul services, thereby covering a broader network and reaching a wider number of passengers. Consequently, AFKL's feed to third party airlines represents a very small proportion of its activities (compared to self-supply) and is largely limited to feed to its joint venture and alliance partners with whom it has reciprocal codeshares or enhanced cooperation.

<sup>427</sup> On this route, Flybe also feeds [0-5]% of the total number of passengers of United Airlines.

<sup>428</sup> Form CO, paragraphs 903, 929 and 945.

<sup>429</sup> Form CO, paragraphs 892-894.

<sup>430</sup> Form CO, paragraph 895.

- (525) Thirdly, the Parties consider that Flybe’s and AFKL’s feeder traffic provided to third parties is very limited.<sup>431</sup> Namely, without applying any filters, they have identified 131 long-haul routes on which (i) Flybe provided feeder traffic to third parties (i.e. carriers excluding Connect Airways’ shareholders, i.e. Virgin Atlantic, Delta or AFKL) and (ii) Virgin Atlantic, Delta or AFKL operated. These 131 routes include a connection at 10 airports in Europe, including CDG, AMS, MAN and GLA. Out of these 10 relevant airports, there are only 3 airports (AMS, MAN and GLA) where Flybe’s and AFKL’s combined share of feeds is above 1% and the increment resulting from the Transaction is below 1% for all airports. According to the Parties, this represents a very limited feeder traffic provided by Flybe and the Parties to third party carriers across these 10 airports, representing less than 290,000 (out of more than 68 million) long-haul passengers.
- (526) Furthermore, applying the thresholds in previous Commission decisions and as explained at paragraphs 519 above,<sup>432</sup> the Parties have identified 20 relevant routes to/from 4 European airports. As set out in Table 10 below, for each of these airports, the increment resulting from the Transaction is small, i.e. at CDG ([0-5]%), AMS ([0-5]%) and MAN (less than [0-5]%). There is no incremental feeder traffic at GLA.

**Table 10 – Feeder traffic provided by Flybe and AFKL to third party carriers – Winter 2017 and Summer 2018 – no filters provided**<sup>433</sup>

Connecting Airport	Number of long-haul routes	Flybe feeder traffic to third party carriers		AFKL feeder traffic to third party carriers	
		Number of passengers	% of total third party carriers’ long-haul passengers	Number of passengers	% of total third party carriers’ long-haul passengers
CDG	7	[5,000-10,000]	[0-5]%	[50,000-60,000]	[5-10]%
AMS	6	[0-5,000]	[0-5]%	[100,000-110,000]	[20-30]%
MAN	6 <sup>434</sup>	[70,000 – 80,000]	[10-20]%	[0-5,000]	[0-5]%
GLA	1	[0-5,000]	[0-5]%	-	-
Total	20	[80,000 – 90,000]	[0-5]%	[150,000-200,000]	[5-10]%

Source: DDS data (passenger volumes) provided by the Parties

- (527) In addition, the Notifying Parties note that, post-Transaction, [confidential information about Flybe’s inventory management system].<sup>435</sup>

<sup>431</sup> Form CO, paragraphs 896-899.

<sup>432</sup> Case No M.6447 – IAG/bmi, footnote 227.

<sup>433</sup> Form CO, Table 59.

<sup>434</sup> 7 including MAN-LAX, where Virgin Atlantic has started operating since Summer 2019.

### 5.1.3.3.2 No incentive to foreclose

- (528) Even if the merged entity was found to have the ability to foreclose access to its feeder traffic in Manchester (as this is where Flybe's feed on the relevant feeder routes represents the highest share of the passengers on the relevant third party carrier's flights) (quod non), the Notifying Parties argue that it would not have any incentive to foreclose access to its feeder traffic, since it would not be profitable for it (or its shareholders) to do so.<sup>436</sup> For the purpose of proving this, the Parties have considered the gains Virgin Atlantic would make from carrying Thomas Cook's long-haul passengers themselves either through Manchester or other hubs on their own connecting flights against the losses it would incur (namely the lost margin on the short-haul Flybe flight to MAN).<sup>437</sup>
- (529) The abovementioned analysis by the Notifying Parties<sup>438</sup> indeed demonstrates that this foreclosure strategy would not be profitable to Virgin Atlantic, since on MAN-MCO, Virgin Atlantic would gain on average GBP [...] <sup>439</sup> per passenger but would lose GBP [...] per passenger, resulting in a net loss of GBP [...]. On MAN-LAX, Virgin Atlantic would gain GBP [...] per passenger but would lose GBP [...] per passenger, resulting in a net loss of GBP [...] per passenger. On MAN-LAS, Virgin Atlantic would gain on average GBP [...] per passenger but would lose GBP [...] per passenger, resulting in a net loss of GBP [...].<sup>440</sup>
- (530) In addition, the Notifying Parties claim that, post-Transaction, the merged entity will remain subject to competition from other short-haul carriers which provide access to their flights for connecting services at Manchester, including IAG and Lufthansa. According to the Notifying Parties, a foreclosure strategy leading to price increases or less attractive connecting flights for indirect routes at Manchester for their competitors would thus likely trigger a switch of customers to indirect services via other hub airports, rather than a switch to services offered by the merged entity. The Parties explain that, for example, IAG airlines provide significant feed to Virgin Atlantic on MAN-Orlando ([5,000-10,000] passengers) and MAN-SFO ([0-5,000] passengers). According to them, these actual (and potential) competitors will continue to constrain the merged entity post-Transaction and any foreclosure strategy would therefore likely result in (i) third party airlines switching provider of feed (e.g. switching to IAG airlines or Lufthansa), and (ii) consumers switching airlines (including switching to fly over a different hub).<sup>441</sup>

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<sup>435</sup> Form CO, paragraphs 905-907 and 962.

<sup>436</sup> Form CO, paragraph 964.

<sup>437</sup> Form CO, paragraphs 964-965. For the purpose of this analysis, (i) Flybe provided [confidential pricing and cost information used to undertake the economic analysis on the profitability of a foreclosure strategy].

<sup>438</sup> See Annex B.14B to the Form CO for the analysis.

<sup>439</sup> Converted at 1 EUR = 0.882 GBP; all EUR figures rounded to nearest EUR 1.

<sup>440</sup> See Annex B.22 to the Form CO for the underlying analysis in respect of MAN-LAS.

<sup>441</sup> Form CO, paragraph 961.

(531) In this respect, the Parties believe that London Heathrow – where IAG has a hub and offers connecting flights to/ from the UK and the Parties are also present – as well as Munich, Madrid, Dublin and Frankfurt will remain a very competitive alternative to connecting flights at Manchester post-Transaction. In the Parties’ views, Loganair and EasyJet, with their growing worldwide proposition, are also alternatives for a long-haul carrier to obtain feed.<sup>442</sup>

#### 5.1.3.3.3 No anti-competitive impact

(532) The Notifying Parties claim that the Transaction does not result in less effective competition for access to feeder traffic, since (i) Flybe's share of feeder traffic provided to third party carriers is very small such that the Transaction cannot result in a significant impediment to effective competition; (ii) the merged entity would have no incentive to foreclose access to its feeder traffic to third party carriers at MAN, AMS, CDG and GLA and (iii) a foreclosure strategy leading to price increases or less attractive connecting flights for indirect routes connecting at AMS may trigger a switch of customers to indirect services via other hub airports, rather than switching to AFKL's (or Virgin Atlantic's/Delta's) services.<sup>443</sup>

#### 5.1.3.4 Commission's assessment

##### 5.1.3.4.1 Ability to foreclose

(533) Access to flights feeding traffic to a route operated by an air carrier from/to its hub may constitute an essential input. Therefore, restriction of access to that input can potentially raise competition problems.<sup>444</sup>

(534) Multilateral Interline Traffic Agreements (“MITA”) and Bilateral Interline Traffic Agreements (“BITA”) are typically open-ended and have a 30 day notice/termination whereas SPAs are generally valid for one year and are renegotiated thereafter. It is also customary for SPAs to have a 30 day prior written notice termination clause that can be exercised by either carrier at any time, without cause. Codeshare agreements are typically open-ended and have various termination clauses. Most termination clauses for codeshare agreements include 3 months, 6 months or 180 days prior written notice by either party.<sup>445</sup>

(535) [Confidential information about Flybe's inventory management system], Connect Airways would, in theory, be able to terminate Flybe's current feeder traffic agreements with third parties in the short term and, given this possibility, to impose on them a revision of such agreements on terms less favourable than pre-Transaction.

(536) Table 10 above shows that feeder traffic provided by Flybe generally represents a relatively small share of the total of passengers on third party carriers' long-haul

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<sup>442</sup> Form CO, paragraph 967.

<sup>443</sup> Form CO, paragraphs 923, 943 and 952.

<sup>444</sup> See Non-horizontal Merger Guidelines, paragraph 34.

<sup>445</sup> See Case M.7541 – IAG/Aer Lingus, footnote 383.

flight on each relevant route. Out of the 21 relevant long-haul routes identified, Flybe's share was below [0-5]% on 5 routes, below [0-5]% on 7 routes and below [5-10]% on 5 routes.

- (537) As demonstrated in Table 9 above, the share of feeder traffic provided by Flybe is highest (and constitutes an important input) on 5 long-haul routes connecting at Manchester airport, namely MAN-Boston ("BOS") (amounting to [30-40]% of Thomas Cook's total passengers on this route); MAN-Orlando ("MCO") (amounting to [10-20]% of Thomas Cook's total passengers on this route); MAN-San Francisco ("SFO") (amounting to [20-30]% of Thomas Cook's total passengers on this route); MAN-Los Angeles ("LAX") (amounting to [20-30]% of Thomas Cook's total passengers on this route)<sup>446</sup>; and MAN-Las Vegas ("LAS") (amounting to [5-10]% of Thomas Cook's total passengers on this route). However, Virgin Atlantic and Thomas Cook no longer compete on the MAN-BOS route as Thomas Cook exited this route at the end of Summer 2018, and on the MAN-SFO route as Virgin Atlantic exited this route at the end of Summer 2018.<sup>447</sup>
- (538) Therefore, the relevant long-haul routes concerned by this Transaction to which Flybe currently provides a significant number of feeder passengers (as important input) to Thomas Cook are the routes from/via Manchester to Orlando, Las Vegas and Los Angeles.
- (539) In light of the foregoing, the Commission considers it unlikely that Connect Airways would have the ability to foreclose access to flights on the routes to/from Manchester currently operated by Flybe, except for passengers connecting at Manchester flying to/from Los Angeles, where it cannot be excluded that Connect Airways may have this ability, post-Transaction. In any event, the Commission considers that it will not have the incentive to do so, as assessed in Section 5.1.3.4.2 below.

#### 5.1.3.4.2 Incentive to foreclose

- (540) The incentives for an airline to foreclose a competitor in the context of feeder traffic were described by the Commission in the *IAG/bmi* decision.<sup>448</sup>
- (541) In the present case, it cannot be excluded that Connect Airways could post-Transaction deny or hamper access to its flights – or raise the costs<sup>449</sup> of such access – for passengers connecting (in particular at Manchester airport) onto long-

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<sup>446</sup> This MAN-LAX route does not fall within the thresholds set out above, but Virgin Atlantic has started operating this route as of Summer 2019 (i.e. from 26 May 2019), and Thomas Cook is also active on this route.

<sup>447</sup> See Annex QP7-Q15 to the Form CO, which provides an article dated 30 May 2018 saying that the launch of the MAN-LAX service in Summer 2019 is "*at the expense of the three times weekly San Francisco service*". Virgin Atlantic exiting Manchester-San Francisco was part of the "changes to the flying programme" which started in Summer 2019.

<sup>448</sup> M.6447 – *IAG/bmi*, paragraphs 535 and following.

<sup>449</sup> The costs of such access depend on fares and financial settlement rules set in the relevant interlining and special prorate agreements.



haul flights to/from Los Angeles operated by another carrier on a route where this carrier would compete with any of Connect Airways' shareholders (Virgin Atlantic or its parents AFKL or Delta). Thus, for example, Connect Airways could raise the prices for access to its feeder traffic connecting at Manchester, which may allow it to raise prices for such indirect routes where its shareholders operate (e.g. Amsterdam-Los Angeles via Manchester). Connect Airways could also, for example, divert away passengers from that competitor to the long-haul flights operated by its shareholders, with a view to increasing load factors but also to weaken that competitor and pave the way for price increases. For example, by applying such a foreclosure strategy on various "feeder routes" to passengers connecting onto services offered by a competitor on the Manchester-Los Angeles route (where for, instance, AFKL also operates), Connect Airways may reduce the number of passengers carried on this competitor's services between Manchester and Los Angeles. This competitor would then be weakened on this route and exert less competitive pressure on AFKL, thereby allowing it to raise prices, both for direct routes out of Manchester to Los Angeles and for indirect routes via Manchester to Los Angeles.

- (542) The incentive to foreclose depends on the degree to which foreclosure would be profitable. The merged entity is expected to take into account how the provision of access to its flights for connecting passengers would affect its profits on that upstream market, but also its profits on the downstream air passenger transport market. The merged entity would face a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gained, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers. The trade-off is likely to depend on the level of profits the merged entity obtains upstream and downstream. Other things being equal, the lower the margins upstream, the lower the loss from restricting input sales. Similarly, the higher the downstream margins, the higher the profit gain from increasing market share downstream at the expense of foreclosed rivals.<sup>450</sup>
- (543) As argued by the Notifying Parties, and supported by the economic analysis provided by them (see paragraphs (528)-(529) above), the Commission agrees that such a foreclosure strategy would not be profitable to the merged entity (Connect Airways or its shareholders). In addition, the Commission understands and agrees with the Notifying Parties' argument (see paragraphs (530)-(531) above) that a foreclosure strategy may lead the connecting passengers to switch services to a competing airline (other than Connect Airways or its shareholders) or to a different connecting airport.
- (544) Indeed, in this respect, respondents to the market investigation have indicated that passengers may, depending on the prices, overall travel duration, connecting time, schedules and frequencies, consider alternative connecting flights to Orlando, Los

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<sup>450</sup> Non Horizontal Merger Guidelines, paragraphs 40–41.

Angeles or Las Vegas via Dublin<sup>451</sup> or via London (Gatwick or Heathrow) or even Frankfurt or Paris (or, to a lesser extent, Munich or Zurich).<sup>452</sup>

- (545) In light of the foregoing, the Commission considers that post-Transaction, Connect Airways is not likely to have the incentives to restrict access to its flights on the routes on which Flybe currently operates for passengers connecting onto flights competing with its shareholders' services.
- (546) During the market investigation, Thomas Cook argued that the Parties would have the ability and incentive to stop or reduce feeder traffic provided to it on the routes from/via Manchester to Bridgetown, Las Vegas, New York, Orlando, San Francisco and Los Angeles.<sup>453</sup>
- (547) With regard to a possible reduction or termination by Connect Airways of its provision of feeder traffic to Thomas Cook on the relevant routes from/via Manchester, the Commission understands that Flybe Limited and Condor Flugdienst GmbH, Thomas Cook's subsidiary, have entered into a Special Prorate Agreement dated 1 June 2019 which applies to all the Thomas Cook airlines (the "SPA"). Pursuant to this SPA, Thomas Cook is allowed to interline with Flybe pursuant to rates set out in the SPA. The SPA is valid for tickets issued between 1 June 2019 and 31 May 2020,<sup>454</sup> but either party has termination rights on 30 days' written notice.<sup>455</sup> The Notifying Parties have expressed (and are prepared to issue a statement to this effect) that they are prepared to commit that, post EUMR clearance, and in so far as it relates to routes involving Manchester Airport, Connect Airways will not withdraw from the SPA pursuant to Clause 2.2. For the avoidance of doubt, the Notifying Parties clarified that Connect Airways would also have no intention to terminate the MITA between Flybe and Condor/Thomas Cook in this respect.<sup>456</sup>
- (548) The fact that the Commission has not found any evidence of such a (past or future) incentive in the internal documents, and, in fact, even found an internal document which sets out the "revenue risk" for Flybe resulting from a situation where Virgin Atlantic's (and Delta's) long-haul competitors which currently receive feed from Flybe (including Thomas Cook) no longer would accept or carry such feed,<sup>457</sup> strengthens the credibility of this statement and the Commission's finding that

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<sup>451</sup> In particular for Manchester-Orlando (also, to a lesser extent, via London Gatwick). See Replies to Questionnaire Q1 to Airlines, questions 24-26; Questionnaire Q2 to Corporate Customers, questions 10-12; Questionnaire Q3 to Travel Agents, questions 11-13.

<sup>452</sup> See Replies to Questionnaire Q1 to Airlines, questions 24-26; Questionnaire Q2 to Corporate Customers, questions 10-12; Questionnaire Q3 to Travel Agents, questions 11-13.

<sup>453</sup> See non-confidential reply by TCGA to Questionnaire Q1 to competitors, question 30.

<sup>454</sup> See Clause 2.1 of the SPA.

<sup>455</sup> Pursuant to Clause 2.2 of the SPA.

<sup>456</sup> See e-mail from the Parties of 7 June 2019.

<sup>457</sup> See documents submitted in response to Section 5.4 of the Form CO, in particular Annex A.21E, p.39 and the Notifying Parties' Reply to QP5 of 2 May 2019.

Connect Airways would have no incentive to foreclose access to its feeder flights post-Transaction.

- (549) In light of the foregoing, the Commission concludes that Connect Airways is not likely to have the incentive post-Transaction to foreclose access to its feeder flights.

#### 5.1.3.4.3 Overall likely impact on effective competition

- (550) Anticompetitive foreclosure may occur when a vertical merger allows the parties to increase the costs of downstream rivals on the market thereby leading to an upward pressure on their sales prices. Significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market.<sup>458</sup>
- (551) During the market investigation, Thomas Cook argued that the loss of feeder traffic by Flybe would have a slight impact on load factors resulting in it having to reduce prices to maintain load factors, impacting revenue and profitability. According to Thomas Cook, this would ultimately have a negative impact on its long-haul flights (i.e. higher prices, lower services, etc.).<sup>459</sup>
- (552) In light of the fact that, as established above, Connect Airways is not likely to have an incentive post-Transaction to foreclose access to Flybe's feeder traffic to third party carriers at MAN, AMS, CDG and GLA, and such a foreclosure strategy may lead customers to switch to competing airlines and/or alternative hub airports, the Commission considers the Transaction would not likely have detrimental effects on the long-haul routes out of the aforementioned connecting airports and thus not give rise to a significant impediment to effective competition on the markets for the provision of access to flights of other carriers for connecting passengers.

#### 5.1.3.5 Conclusion on feeder traffic

- (553) In light of the above, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market as regards the provision of feeder traffic to (long-haul) services operated by other carriers.

## 5.2 Dry leasing services to airlines

- (554) Propius is currently dry-leasing [...] intra-group to Stobart Air. From 2017 to 2018, Propius was dry-leasing three aircraft to Flybe.<sup>460</sup> These relationships remain or become intra-group and are not relevant for the purposes of the Commission's competitive assessment.

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<sup>458</sup> Non Horizontal Merger Guidelines, paragraph 48.

<sup>459</sup> See non-confidential reply by TCGA to Questionnaire Q1 to competitors, questions 30 and 31.

<sup>460</sup> Form CO, paragraph 1345.

- (555) [confidential information about AFKL's, Delta's and Virgin Atlantic's dry leasing activities].<sup>461</sup>
- (556) Flybe dry leases aircraft from third parties. [...].<sup>462</sup>
- (557) The Transaction does not give rise to a horizontally or vertically affected market.
- (558) The Commission therefore considers that the Transaction does not raise serious doubts as to its compatibility with the internal market in the market for the provision of dry-leasing services of large regional aircraft to other airlines.

### **5.3 Wet-leasing services to airlines**

- (559) Stobart Air (as a lessor) currently has wet-lease agreements with British Airways and AFKL (as lessees).<sup>463</sup> [confidential information about the aircraft leasing arrangements of Stobart Air and Flybe].
- (560) The Parties explained that Flybe was previously active as wet-lessor but has reduced its activities as a provider of wet-leasing services. [confidential information about Flybe's commercial (wet-leasing) strategy].<sup>464</sup> [further confidential information about Flybe's commercial (wet-leasing) strategy]. Therefore, the Commission considers that Flybe is not active as a provider of wet-leasing services.
- (561) [confidential information about Virgin Atlantic's, Delta's and AFKL's wet-leasing activities].<sup>465</sup>
- (562) The Transaction does not give rise to a horizontally affected market in this respect, because the combined market shares post-Transaction on the market for the supply of wet-leasing services regarding large regional aircraft in the EEA would be below [5-10]%.<sup>466</sup> However, based on the above, the Transaction gives rise to a vertical link between Stobart Air as a lessor and Flybe, AFKL, Virgin Atlantic and Delta as (potential) wet-lessees, as regards the supply of wet-leasing services for large regional aircraft, which is the narrowest possible segment relevant for the Transaction.
- (563) Since the market share in the upstream market for the supply of wet-leasing services of regional aircraft would be low ([5-10]%), the Commission considers that the merged entity could not restrict access to regional aircraft (input

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<sup>461</sup> Form CO, paragraph 1359.

<sup>462</sup> Form CO, paragraphs 1351 *et seq.*

<sup>463</sup> Form CO, paragraph 1361 *et seq.*

<sup>464</sup> Form CO, paragraph 1363 and 1387.

<sup>465</sup> Form CO, paragraphs 1368 *et seq.*

<sup>466</sup> Form CO, paragraphs 1371, 1383 *et seq.* and Annex E3. To apply a cautious approach, this is taking into account [...]. If Flybe were considered as being active as a wet-lessor (*quod non*), the combined market share post-Transaction would be below [10-20]% [...].

foreclosure), as there are a large number of operators, for example CityJet or Adria Airways that supply wet-leasing services of regional aircraft in the EEA.<sup>467</sup> Considering that numerous airlines, including major carriers, are wet-leasing regional aircraft to provide air passenger transport services in the EEA, post-Transaction, the merged entity also does not represent a significant customer base for wet-leasing of regional aircraft. As a result, there is no risk that the merged entity will restrict access to downstream markets post-Transaction (customer foreclosure).

- (564) This was confirmed by the market investigation. The majority of respondents to the market investigation having expressed an opinion stated that the Transaction would have no impact on the upstream market for the supply of wet-leasing services and no impact on the downstream demand for such services. One respondent explained in this regard that “*there are a significant number of airlines in the market both nationally and throughout the EEA competing in the same market, and so the market will be unaffected.*”<sup>468</sup>
- (565) The Commission therefore considers that the Transaction does not raise serious doubts as to its compatibility with the internal market due to vertical effects in the market for the provision of wet-leasing services of large regional aircraft to other airlines.

#### **5.4 Franchise services to airlines**

- (566) The Transaction gives rise to a vertical link between Stobart Air, as a franchisee, in the upstream market for franchise services, and Flybe, as a franchisor active in the downstream market for passenger air transport services.<sup>469</sup> As explained in Section 4.6, franchising services are the operation of flight with the aircraft, crew and slots of the franchisee, who is also bearing the commercial risk, under the brand of the franchisor who is also selling and distributing the tickets. Stobart Air has, as a franchisee, as already explained above, franchise agreements with Flybe and with Aer Lingus. Flybe has, as a franchisor, in addition to the franchise agreement with Stobart Air, franchise agreements with Blue Islands for routes within the UK connecting the Channel Islands and Southern England and with Eastern Airways focussing on routes linked to the oil and gas industries out of Aberdeen. According to those franchising agreements, Blue Islands and Eastern Airways are franchisees, Flybe is a franchisor.<sup>470</sup>
- (567) Stobart Air’s market share in the upstream market for franchising services to other airlines in the EEA would be below 20%.<sup>471</sup> The merged entity could not restrict

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<sup>467</sup> Form CO, Annex E3.

<sup>468</sup> Replies to eQ1 - Questionnaire to Airlines, question 46 and 47.

<sup>469</sup> Form CO, paragraph 1372 *et seq.* The Parties submitted that neither Virgin Atlantic nor AFKL or Delta are active in the market for the provision of franchise services to other airlines and do not act as franchisors in the EEA; Form CO, paragraph 1377.

<sup>470</sup> Form CO, paragraph 1375 and 1407.

<sup>471</sup> Form CO, paragraph 1392 and Annex E4.

access to regional aircraft under franchising agreements (input foreclosure) as there are a large number of operators that supply franchising services of regional aircraft, for example Air Nostrum who has a market share of [40-50]% in the upstream market,<sup>472</sup> but also Blue Islands and Eastern Airways. Considering that other airlines than Flybe are purchasing franchise services, for example Aer Lingus, post-Transaction, the merged entity does not represent a significant customer base for franchising services of regional aircraft. As a result, there is no risk that the merged entity will restrict access to downstream markets post-Transaction (customer foreclosure).

- (568) The market investigation has been inconclusive as to whether other airlines consider that post-Transaction, Flybe would have the ability and the incentive to stop purchasing franchise services from third-party airlines and as to whether post-Transaction, Stobart Air would have the ability and the incentive to stop supplying franchise services to third-party airlines.<sup>473</sup> However, the majority of airlines responding to the market investigation and having expressed a view stated that the Transaction would have no impact on the competitive situation on the markets for the provision of franchise services to airlines.<sup>474</sup>
- (569) The Commission therefore considers that the Transaction does not raise serious doubts as to its compatibility with the internal market due to vertical effects in the market for the provision of franchise services to other airlines.

## **5.5 Cargo air transport services**

- (570) The Transaction gives rise to a horizontal overlap because Flybe and AFKL are both providing intra-European air cargo transport.<sup>475</sup>
- (571) The Commission has previously accepted to take into account in its assessment estimated market shares based on World Air Cargo Data (“WACD”) and the Cargo Accounts Settlement System (“CASS”). The Commission has also noted that CASS and/or WACD data do not reflect the entire air cargo markets, and therefore underestimated the total market size and overestimates the Parties’ market shares.<sup>476</sup> The Parties have provided market shares based on WACD and CASS. Since Flybe would not subscribe to either WACD or CASS, the Parties have submitted Flybe’s market shares based on Flybe’s internal data.
- (572) AFKL and Flybe’s combined market shares on the intra-European air cargo transport market are well below 10% in the last three years. The Transaction therefore does not give rise to a horizontally affected market and does not raise

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<sup>472</sup> Form CO, Annex E4.

<sup>473</sup> Replies to eQ1 – Questionnaire to Airlines, question 52 and 53.

<sup>474</sup> Replies to eQ1 – Questionnaire to Airlines, question 54.

<sup>475</sup> Form CO, paragraph 1096.

<sup>476</sup> See e.g. Cases M.5440 – *Lufthansa/Austrian Airlines*, paragraph 283 and M.6447 – *IAG/bmi*, paragraph 555.

serious doubts as to its compatibility with the internal market with respect to air cargo transport services under any plausible market definition.

## 5.6 MRO services

(573) Whilst the treatment of captive sales in market definition depends on the facts of the case, the Commission has previously accepted to exclude self-supply from the relevant market, and to assess the impact of a concentration on the “merchant market” (“third-party” or “free” procurement market).<sup>477</sup> For the purpose of this decision, the Commission will assess the impact of the Transaction on the merchant markets for MRO services below.

### 5.6.1 Horizontal overlaps

(574) The Transaction gives rise to horizontal overlaps because Flybe and AFKL are both active with respect to the supply of heavy maintenance services in the EEA, while Flybe, AFKL and Delta overlap in relation to the supply of heavy maintenance services on a worldwide basis.

(575) The Parties have provided estimated market shares for the supply of heavy maintenance services at EEA-wide and global level. In particular, in the last three years, the Parties’ combined market share in the market for the supply of heavy maintenance services did not exceed [0-5]% in the EEA<sup>478</sup> or [0-5]% in the worldwide market.<sup>479</sup> In addition, the Parties confirm that their combined market shares would not exceed 20% under any plausible market definition for the supply of MRO services to third parties.<sup>480</sup>

(576) Moreover, the majority of respondents to the market investigation having expressed a view considered that the Transaction would not have a negative impact on the markets for MRO services in terms of prices or quality of services.<sup>481</sup>

(577) The Transaction therefore does not give rise to a horizontally affected market and does not raise serious doubts as to its compatibility with the internal market due to horizontal effects with respect to MRO services under any plausible market definition.

### 5.6.2 Vertically affected markets

(578) The Transaction also gives rise to potential vertical relationships between the relevant carriers, since Flybe, AFKL, Delta and, to a more limited extent, Virgin Atlantic are all active in the upstream market for the provision of MRO services in

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<sup>477</sup> See for instance M.2002 – *Preussag/Thompson*, 26 July 2000, paragraph 11.

<sup>478</sup> Assuming that all of Flybe’s revenue and AFKL’s revenue was derived in the EEA.

<sup>479</sup> Form CO, table 71.

<sup>480</sup> Reply to RFI 6.

<sup>481</sup> Replies to Questionnaire Q1 to Competitors, question 56.

the EEA or worldwide. Delta, Virgin Atlantic<sup>482</sup>, AFKL, Flybe and Stobart Air are present in the downstream market (for demand of MRO services) in the EEA (or worldwide).

- (579) The Parties have provided estimated market shares for the upstream markets for the supply and downstream markets for the acquisition of (i) line maintenance services for each relevant airport; (ii) heavy maintenance services at EEA-wide and worldwide levels; (iii) engine maintenance services (also as segmented by application; by engine type and by engine family) at EEA-wide and worldwide levels; and (iv) components maintenance services (also as segmented by aircraft type) at EEA-wide and worldwide levels. Their combined market shares did not exceed 30% on any of these segments in the last three years.<sup>483</sup> In addition, the Parties confirm that their combined market shares would not exceed 30% under any plausible market definition for the supply (upstream) or acquisition (downstream) of any type of MRO services.<sup>484</sup>
- (580) Moreover, the majority of respondents to the market investigation having expressed a view considered that the Transaction would not have a negative impact on the markets for MRO services in terms of prices or quality of services.<sup>485</sup>
- (581) The Transaction therefore does not give rise to a vertically affected market and does not raise serious doubts as to its compatibility with the internal market due to vertical effects in the market for MRO services under any plausible market definition.

### *5.6.3 Conclusion*

- (582) In light of the above considerations and all evidence available to it, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the markets for MRO services, under any plausible market definition.

## **5.7 Ground-handling services**

- (583) Stobart Aviation Services is the specialised ground-handling business of Stobart Aviation. It provides ground-handling services at Stansted (“STN”) and Southend (“SEN”) airports. It must be noted that Stobart Aviation Services falls outside the scope of the Transaction.

### *No horizontal overlap*

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<sup>482</sup> Form CO, paragraph 102: Virgin Atlantic is active in the MRO services market, but its business in the merchant market is very small. Virgin Atlantic offers line maintenance to third parties at just three locations around the world (JFK, JNB and LHR) and self-supplies at [...] airports worldwide.

<sup>483</sup> Form CO, tables 68-101.

<sup>484</sup> Reply to RFI 6.

<sup>485</sup> Replies to Questionnaire Q1 to Competitors, question 56.



- (584) The Transaction does not give rise to any horizontal overlap because Flybe and Virgin Atlantic’s current and future shareholders do not provide ground-handling services in the UK.

*No vertically affected market*

- (585) The Transaction does not give rise to any vertically affected market between Stobart’s activities in the upstream market for ground-handling services and Flybe’s activities in the downstream market for passenger air transport services.
- (586) If the geographic market is defined as limited to the airport alone (i.e. STN “only” and SEN “only”), the Transaction would not give rise to vertical links because neither Flybe nor Virgin Atlantic (nor Virgin Atlantic’s current and future shareholders) operate from STN or SEN.<sup>486</sup>
- (587) If the geographic market is defined more broadly in order to include airports where Flybe operates (i.e. London(five) airports and London(six) airports),<sup>487</sup> the Transaction would not give rise to affected markets. First, Stobart’s market share on the upstream market for ground-handling services is below 30% under any plausible market definition.<sup>488</sup> Second, Flybe’s and Virgin Atlantic’s (and its current and future shareholders’) market shares in the downstream market for passenger air transport from the London(five) and London(six) airports are below 30%.<sup>489</sup>

*Conclusion*

- (588) Therefore, the Transaction would not give rise to any vertically affected market and is unlikely to raise serious doubts as to its compatibility with the internal market with respect to ground-handling services, under any plausible market definition.

## **5.8 Airport infrastructure services**

- (589) The Transaction does not give rise to any horizontal overlap in relation to the provision of airport infrastructure services. However, the Transaction would give rise to vertical links between the upstream market for the provision of airport infrastructure services and the downstream market for the provision of passenger air transport services.

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<sup>486</sup> Form CO, paragraphs 1422 and 1423. For the sake of completeness, Stobart Air operates from SEN under a franchise agreement with Flybe. As discussed in Section 4.2.6 above, Stobart Air [...]. Therefore, the link between Stobart Air and Stobart Aviation Services is pre-existing and the Transaction does not give rise to a vertical link.

<sup>487</sup> London(five) airports are London Heathrow, London Gatwick, London City, Stansted and Luton airports. London(six) airports are London Heathrow, London Gatwick, London City, Stansted, Luton and Southend airports.

<sup>488</sup> Form CO, paragraphs 1422, 1425 *et seq.*

<sup>489</sup> Form Co, paragraph 1430.

- (590) With respect to Stobart’s activities in the provision of airport infrastructure services at Carlisle airport, the Commission notes that the airport is not yet operational and that neither Flybe nor any of the Parties (other than Stobart Air) has plans to provide passenger air transport services to or from that airport.<sup>490</sup> None of the respondents to the market investigation expressed concerns with respect to the effect of the Transaction on the provision of airport infrastructure services at Carlisle airport.<sup>491</sup> The Transaction is therefore unlikely to raise serious doubts as to its compatibility with the internal market with respect to airport infrastructure services at Carlisle airport.
- (591) With respect to Stobart’s activities in the provision of airport infrastructure services at SEN airport, the Transaction would not give rise to any vertically affected market. On the basis of a geographic market defined as “London six” market comprising London Heathrow, London Gatwick, London City, London Luton, London Stansted and SEN airports, Stobart’s market share in the upstream market for airport infrastructure services would be below 30% and the merged entity’s combined market share in the provision of passenger air transport services to or from London six would be below 30%.<sup>492</sup> If the geographic market is defined as SEN alone, the Transaction would not give rise to any vertical link, considering that none of the Parties or Flybe fly to or from SEN.<sup>493</sup> None of the respondents to the market investigation expressed concerns with respect to the effect of the Transaction on the provision of airport infrastructure services at SEN airport.<sup>494</sup> The Transaction is therefore unlikely to raise serious doubts as to its compatibility with the internal market with respect to airport infrastructure services at SEN.
- (592) With respect to Stobart’s activities in the provision of airport infrastructure services at Durham Tees Valley (“DTVA”) airport, the Transaction seems unlikely to raise serious doubts as to its compatibility with the internal market under any plausible geographic market delineation for the following reasons.
- (593) If DTVA, Leeds and Newcastle airports are considered as belonging to the same geographic market with respect to the provision of airport infrastructure services in the Tees Valley, the Transaction would not give rise to any affected market. Stobart’s market share in the upstream market would be [0-5]% while the merged entity’s combined market share in the downstream market would be [5-10]%. Therefore, the Transaction would be unlikely to raise serious doubts.

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<sup>490</sup> Form CO, paragraph 1457.

<sup>491</sup> Replies to eQ1 – Questionnaire to Airlines, question 64.3.

<sup>492</sup> Form CO, paragraph 1454. The market shares for the acquisition of airport infrastructure services have been calculated by reference to passenger capacity, in terms of the number of seats available on an aircraft operating at each airport because passenger capacity provides a reasonable proxy for estimating market shares for airport infrastructure services, given that supply and demand of such services largely depends on the number of passengers expected to be catered for at an airport.

<sup>493</sup> Form CO, paragraph 1455.

<sup>494</sup> Replies to eQ1 – Questionnaire to Airlines, question 64.2.

- (594) If the geographic market is defined as comprising DTVA only, the Transaction would give rise to an affected market where Stobart would have a [90-100]% market share in the provision of airport infrastructure services at DTVA, while Flybe and AFKL would have a combined market share of [90-100]% in the provision of passenger air transport services to and from this airport [...].<sup>495</sup>
- (595) However, it is unlikely that any of the Parties would engage into an input or customer foreclosure in the predictable future. A customer foreclosure is unlikely, given that DTVA would be the only possible upstream provider. An input foreclosure also seems unlikely. First, there is currently no other airlines at DTVA at risk of input foreclosure<sup>496</sup> and none of the respondents to the market investigation has plan to enter the market for the provision of passenger air transport to or from DTVA.<sup>497</sup> Furthermore, the Parties will have no incentive to engage in a foreclosure strategy. [...].<sup>498</sup> It is unlikely that any profit generated by the Parties as a result of a foreclosure strategy would outweigh the loss of profits from DTVA not serving other airlines or worsening its terms of service. In addition, Stobart [...] DTVA with Tees Valley Combined Authority (“TVCA”), the majority shareholder which is moreover a public entity. It is unlikely that TVCA will have an incentive allowing the implementation of an input foreclosure strategy, which would only benefit Stobart. Finally, none of the respondents to the market investigation expressed concerns with respect to the effect of the Transaction on the provision of airport infrastructure services at DTVA airport.<sup>499</sup>
- (596) Therefore, the Transaction is unlikely to raise serious doubts as to its compatibility with the internal market with respect to vertical effects at DTVA airport.

### *Conclusion*

- (597) In light of the above considerations and all evidence available to it, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market due to vertical effects in the market for the provision of airport infrastructure services, under any plausible market definition.

## **5.9 Conclusion**

- (598) For the reasons mentioned above, the Transaction raises serious doubts as to its compatibility with the internal market with respect to passenger air transport services on the two following routes: Birmingham-Amsterdam and Birmingham-Paris. The Transaction does not raise serious doubts in respect of any other plausible relevant markets.

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<sup>495</sup> Form CO, paragraphs 1471 and 1473.

<sup>496</sup> Form CO, paragraph 1473.

<sup>497</sup> Replies to eQ1 – Questionnaire to Airlines, question 62.

<sup>498</sup> Form CO, paragraph 1473.

<sup>499</sup> Replies to eQ1 – Questionnaire to Airlines, question 64.1.

## 6. THE PROPOSED COMMITMENTS

### 6.1 Description

(599) In order to address the serious doubts raised by the Transaction on the Birmingham-Amsterdam and Birmingham-Paris routes, the Parties submitted commitments on 14 June 2019.<sup>500</sup> On the same date, the Commission – whilst it expressed some doubts as to whether the commitments would foster sufficient, timely, and likely entries on these routes – launched a market test in order to gather the opinion of market participants. Following the feedback from the market participants, the Parties submitted an improved version of the commitments on 3 July 2019 (the “Commitments”).<sup>501</sup> As will be shown below, these Commitments are suitable to entirely remove the serious doubts identified by the Commission.

(600) The Commitments aim at reducing the barriers to entry and facilitating entry for prospective entrant(s)<sup>502</sup> on the Birmingham-Amsterdam and Birmingham-Paris routes. Specifically, they provide for the release and transfer of a number of Connect Airways slots at Amsterdam Schiphol and Paris Charles de Gaulle airports.

(601) The main aspects of the Commitments are summarised below.

#### *6.1.1 Slot release on city pairs with competition concerns*

(602) At the outset, it is worth mentioning that Amsterdam Schiphol and Paris CDG are (heavily) congested airports where slots are a scarce resource. Under the Commitments, Connect Airways would procure that slots are made available at Amsterdam Schiphol and Paris CDG in order to allow one or more prospective entrant(s) to operate or increase their services on the following city pairs: (i) Birmingham-Amsterdam (“BHX-AMS”) and (ii) Birmingham-Paris (“BHX-PAR”) (together the “Relevant Routes”).

(603) The number of slots to be made available would enable prospective entrant(s) to operate up to a total of five slot pairs per day on the BHX-AMS route and up to a total of three slot pairs per day on the BHX-PAR route.<sup>503</sup>

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<sup>500</sup> A draft set of commitments was submitted on 11 June 2019 and discussed with the Commission on 12 June 2019. The version formally lodged on 14 June 2019 incorporates some comments made by the Commission relating to the number of slots offered and certain conditions.

<sup>501</sup> A draft set of commitments was submitted on 27 June 2019 and discussed with the Commission on 27 June 2019. The version formally lodged on 3 July 2019 incorporates some comments made by the Commission.

<sup>502</sup> Defined in the Commitments as “Any Applicant that is not a Controlling entity of Connect Airways or affiliated with Connect Airways, able to offer a Competitive Air Service individually or collectively by codeshare and needing a Slot or Slots to be made available by Connect Airways in accordance with the Commitments in order to operate a Competitive Air Service.”

<sup>503</sup> As opposed to the initial version, the final version of the Commitments does not provide for a capacity limitation mechanism, which allowed for the daily frequencies to be reduced in case the prospective entrant intended to operate with any aircraft of 100 seats or more.

### 6.1.2 *Conditions pertaining to the slots*

- (604) A prospective entrant shall be eligible to obtain slots from Connect Airways pursuant to these Commitments only if it can demonstrate that it has exhausted all reasonable efforts to obtain the necessary slots to operate on the Relevant Routes through the normal workings of the general slot allocation procedure. The prospective entrant shall be deemed not to have exhausted all reasonable efforts to obtain necessary slots if: (a) slots at the relevant airport (i.e. AMS or CDG) were available through the general slot allocation procedure within +/- 20 minutes of the times requested but such slots have not been accepted by the prospective entrant; or (b) slots at the relevant airport (i.e. AMS or CDG, for use to operate a competitive air service on the Relevant Routes) were obtained through the general slot allocation procedure more than 20 minutes from the times requested and the prospective entrant did not give Connect Airways the opportunity to exchange those slots for slots within +/- 20 minutes of the times requested; or (c) it has not exhausted its own slot portfolio at the AMS or CDG.
- (605) Slots shall be released within +/- 20 minutes of the time requested if Connect Airways has such slots available. In the event that Connect Airways does not have such slots available, it shall offer to release the slots closest in time to the request.
- (606) Connect Airways does not have to offer slots if the slots which the prospective entrant could have obtained through the general slot allocation procedure are closer in time to the request than the slots which Connect Airways has available.
- (607) In addition, the slots released by Connect Airways should be spread evenly throughout the day, i.e. with respect to AMS no more than two (2) arrival/departure slots in the morning (the period up until 12:00 local time), no more than two (2) arrival/departure slots in the afternoon (the period after 12:00 and up until 16:00 local time), and no more than two (2) arrival/departure slots in the evening (the period after 16:00 local time), and with respect to CDG no more than one (1) arrival/departure slot in the morning (the period up until 12:00 local time), no more than one (1) arrival/departure slot in the afternoon (the period after 12:00 and up until 16:00 local time), and no more than one (1) arrival/departure slot in the evening (the period after 16:00 local time).<sup>504</sup>

### 6.1.3 *Grandfathering rights*

- (608) As a general rule, the slots obtained by a prospective entrant must be operated on the city pair(s) for which they have been requested from Connect Airways and cannot be used on another city pair unless the prospective entrant has operated them during at least six full consecutive IATA seasons (the "Utilisation Period"). The prospective entrant would be deemed to have grandfathering rights for the slots once appropriate use of the slots has been made on the city pairs at issue for the Utilisation Period. Once the Utilisation Period has elapsed, the prospective entrant

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<sup>504</sup> As opposed to the initial version, the final version of the Commitments does not provide for the time band restrictions.

will be entitled to use the slots obtained on the basis of the Commitments to operate services on any route connecting Paris or Amsterdam.<sup>505</sup>

- (609) During the Utilisation Period the prospective entrant shall not be entitled to transfer, assign, sell, swap or charge in breach of the Commitments any slots obtained from Connect Airways under the Commitments (except for (i) changes to any such slots which are within the 20 minutes time window and which have been agreed with the slot coordinator and (ii) any slots between 12:00 and 16:00 (local time) which can be swapped provided this has been agreed with the slot coordinator). Provisions on misuse of slots also apply. In the event of a misuse, the prospective entrant shall have fifteen days after such notice to cure the misuse, failure to which gives Connect Airways the right to terminate the agreement and obtain restitution of the slots.

#### *6.1.4 Consideration*

- (610) To the extent that the slots released under the Commitments are at an airport where secondary trading takes place,<sup>506</sup> the agreement with the prospective entrant may, as an option, provide for monetary and/or other consideration, so long as such contractual provisions are voluntarily agreed, clearly disclosed to the Monitoring Trustee and comply with the Commitments and all other administrative requirements set out in the applicable legislation.<sup>507</sup>

#### *6.1.5 Other provisions*

##### *6.1.5.1 Fare combinability*

- (611) Connect Airways also committed to enter, at the request of an airline which started to operate new or increased services on any of the Relevant Routes concerned by the slot commitments (whether or not such service uses slots released to that airline pursuant to the Commitments), an agreement that arranges for fare combinability on that Relevant Route. This agreement provides for the possibility for the airline concerned, or travel agents, to offer a return trip on the Relevant Route comprising a non-stop service provided one way by Connect Airways and a non-stop service provided the other way by the airline at issue.

##### *6.1.5.2 Frequent flyer programmes*

- (612) Should Connect Airways become part of a frequent flyer program (“FFP”), at the request of an airline wishing to operate new or increased services on any of the routes concerned by the slot commitments that does not have a comparable FFP of

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<sup>505</sup> As opposed to the initial version, the final version of the Commitments does not provide for a restriction of the grandfathering rights to use of slots on European short-haul routes only.

<sup>506</sup> The Commission understands that secondary trading is not allowed at AMS and CDG at the time of the decision. Therefore, this provision would become relevant only if the relevant airports would become airports where secondary trading is allowed.

<sup>507</sup> For the sake of clarity, the consideration referred to in this paragraph does not preclude Connect Airways from requesting reasonable compensation as provided in the Slot Release Agreement in case of Misuse.

its own, Connect Airways shall request for the relevant airline to be hosted in the same FFP as Connect Airways for the Relevant Route(s) on which the relevant airline has commenced or increased service. Where the FFP provider agrees to host the relevant airline, Connect Airways shall use its reasonable endeavors for the FFP agreement with the relevant airline to be on terms such that the relevant airline shall have equal treatment vis-à-vis the accrual and redemption of Miles on the Relevant Route as compared with Connect Airways for as long as the relevant airline operates a non-stop service on the Relevant Route.

#### 6.1.5.3 Monitoring Trustee

- (613) A Monitoring Trustee will be appointed by Connect Airways to monitor the correct execution of the Commitments, subject to previous approval by the Commission. The Monitoring Trustee will be independent of Connect Airways (including its controlling entities and affiliated undertakings) and must be familiar with the airline industry and the slot allocation and exchange procedures. Connect Airways shall provide the Monitoring Trustee with such assistance and information, including copies of all relevant documents, as the Monitoring Trustee may reasonably require in carrying out its mandate. In particular, the Monitoring Trustee would have access to Connect Airways' books, records, documents, management or other personnel facilities, sites and technical information necessary to fulfil its duties under the Commitments.

#### 6.1.5.4 Fast track dispute resolution

- (614) The Commitments also contain provisions on fast-track dispute resolution according to which the new entrant can decide to settle any dispute with Connect Airways through arbitration. In the event of disagreement between the parties to the arbitration regarding the interpretation of the Commitments the arbitral tribunal may seek the Commission's interpretation and shall be bound by that interpretation. Both the parties to the arbitration will then be bound by the decision of the arbitral tribunal.

#### 6.1.6 *Sunset clause*

- (615) The Commitments provide for a "sunset clause", which states that the obligation on Connect Airways to procure that slots are made available at the relevant airports (i.e. AMS and CDG) is limited in time and shall apply for 20 full consecutive IATA Seasons (starting from and including Summer 2020). If there are no slot release agreements in force at the end of this period, then the Commitments will expire. This provision, however, does not affect the validity of the slot release agreements, fare combinability agreements and FFP agreements already concluded and in operation, or the grandfathering rights already obtained (or in the process of being obtained) at the time the sunset clause would apply.

## 6.2 **Assessment of the proposed Commitments**

- (616) As set out in the Commission Notice on Remedies<sup>508</sup>, the Commission assesses the compatibility of a notified concentration with the internal market on the basis of its

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<sup>508</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1.

effect on the structure of competition in the European Union. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the Parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the concentration cleared.

- (617) According to the European Union Courts' case law, commitments must be likely to eliminate all competition concerns identified and ensure competitive market structures. The Commission enjoys a broad discretion in assessing whether commitments offered before the initiation of proceedings constitute a direct and sufficient response capable of dispelling any serious doubts about the proposed merger.
- (618) In assessing whether or not the commitments will maintain effective competition, the Commission considers *inter alia* the type, scale and scope of the remedies offered by reference to the structure and the particular characteristics of the market in which the Commission's serious doubts as to the compatibility of the Transaction with the internal market arise. It should be emphasised, however, that commitments offered prior to the initiation of proceedings can only be accepted when the competition problem that the concentration gives rise to is readily identifiable and can easily be remedied.
- (619) For the reasons set out below and on the basis of the available evidence, the Commission's assessment concludes that the Commitments address the serious doubts identified in this Decision. As such, the Commission concludes that the Commitments offered by the Parties are sufficient to eliminate any serious doubts as to the compatibility of the Transaction with the internal market.

#### *6.2.1 Structure and design of the Commitments*

- (620) In airline cases, slot release commitments are acceptable to the Commission where it is sufficiently clear that actual entry by new competitors that would eliminate any significant impediment to effective competition will occur. For such commitments to be acceptable, the notifying party need not identify a precise new entrant if competitors express an interest during the administrative procedure in entering the markets concerned in view of the proposed commitments.
- (621) The Commitments relating to slots are based on the fact that the severely limited slot availability at Amsterdam and Paris CDG is an important entry barrier on the routes where competition concerns have been identified. Therefore, the Commitments are designed to remove (or at least reduce significantly) this barrier and foster sufficient, timely, and likely entries on the Relevant Routes.
- (622) It is important to note that, given the significant level of congestion at AMS and CDG, slots are intrinsically attractive. In addition, the Commitments make entry more interesting due to the prospect of acquiring grandfathering rights after six IATA seasons.

#### *6.2.2 Outcome of the market test*

- (623) Following the feedback from the market test with respect to the initial commitments provided by the Parties on 14 June 2019, the revised Commitments provided on 3 July 2019 address the shortcomings of the initial commitments as



identified in particular in the market test. Namely, the Commitments, as opposed to the initial version, are no longer restricted with respect to (i) the timing of the slots offered ( i.e. hour bands no longer imposed), (ii) the frequencies of the slots offered (i.e. no capacity limitation mechanism anymore) or (iii) the grandfathering rights (i.e. six (6) IATA Seasons required to obtain grandfathering instead of eight (8) IATA Seasons, and no longer limited to intra-European flights only).

- (624) The total number of five daily frequencies offered for the BHX-AMS route and three daily frequencies for the BHX-PAR route was considered sufficient by a majority of all respondents to the market test expressing an opinion.<sup>509</sup>
- (625) During the market test, potential interest was expressed in the initial commitments subject to the abovementioned restrictions with regard to timing, frequencies and grandfathering rights being removed. Following the feedback from the market test and discussions with the Commission, the Parties submitted the revised Commitments, which no longer feature these restrictions.<sup>510</sup>
- (626) A majority of all respondents expressing an opinion also thought that, in addition to grandfathering, each of the fare combinability commitment and frequent flyer programme commitment on the Relevant Routes increases the likelihood that entry will take place on both the BHX-AMS and BHX-PAR routes.<sup>511</sup>
- (627) In addition, a majority of all respondents expressing an opinion also considered that each of the monitoring system and the fast-track dispute resolution system proposed in the Commitments is appropriate to ensure the effective implementation of the Commitments.<sup>512</sup> With regard to the duration of the slot commitments, considering its purpose, the market test indicated that 10 years (i.e. 20 IATA Seasons) would be a reasonable maximum duration.<sup>513</sup>

### 6.2.3 Conclusion on the Commitments

- (628) According to the European Union Courts' case law, commitments must be likely to eliminate competition concerns identified and ensure competitive market structures. In particular, contrary to those entered into during the Phase II procedure, commitments offered in Phase I (i.e. before the initiation of proceedings) are intended not to prevent a significant impediment to effective competition but rather to clearly dispel all serious doubts in that regard. The

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<sup>509</sup> See Replies to Questionnaire Q2 to other market participants, question 1. Replies to Questionnaire Q1 to competitors were inconclusive.

<sup>510</sup> See Replies to Questionnaire Q1 to competitors, question 8.

<sup>511</sup> See Replies to Questionnaire Q1 to competitors, questions 11-12; and Replies to Questionnaire Q2 to other market participants, questions 10-11.

<sup>512</sup> See Replies to Questionnaire Q1 to competitors, questions 13-13.2; and Replies to Questionnaire Q2 to other market participants, questions 12-12.2.

<sup>513</sup> See Reply to Questionnaire Q1 to competitors, question 8.

Commission enjoys a broad discretion in assessing whether these remedies constitute a direct and sufficient response capable of dispelling any such doubts.<sup>514</sup>

- (629) Concerning the suitability of commitments aiming at facilitating entry of a new competitor, the Commission Notice on Remedies states that “[o]ften, a sufficient reduction of entry barriers is not achieved by individual measures, but by [...] a commitments package aimed at overall facilitating entry of competitors by a whole range of different measures”.
- (630) In airline cases, commitments are acceptable to the Commission where it is sufficiently likely that actual entry by new competitors will occur and where such entry would eliminate any serious doubts as to the compatibility of the concentration with the internal market. In this respect, account must be taken of the facts existing at the time when the decision is adopted and not in the light of subsequent events.<sup>515</sup>
- (631) The Commission considers that the Commitments constitute a comprehensive package which takes into consideration past experience with commitments in merger cases in the aviation sector.
- (632) Amsterdam Schiphol is one of the most congested airports in Europe. Paris CDG is also a very congested airport. Consequently, slots at AMS and CDG are highly valuable, therefore rendering the slot Commitments very appealing for prospective new entrants.
- (633) Indeed, it is extremely unlikely that, absent the Commitments, any prospective new entrant could obtain all the slots necessary to operate the above-mentioned routes to/from Amsterdam Schiphol or Paris CDG with a sufficient number of frequencies from the first IATA season. In addition, the slot allocation mechanism in the Commitments ensures that the prospective new entrant will in all probability receive the requested slots in a window of +/-20 minutes of the requested times.
- (634) The limitation concerning the need to spread released slots throughout the day does not change the picture materially. In addition, to the extent that the slots released under the Commitments would be at an airport where secondary trading takes place,<sup>516</sup> the possibility for airlines to pay a consideration for the slots offered by Connect Airways does not reduce the attractiveness of the slots or preclude their award to the best applicants. Indeed, the above is not an obligation, but rather an option that airlines may use in order to have a chance to obtain the slots in the

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<sup>514</sup> Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, para 128 ff.

<sup>515</sup> Cf. point 63 of the Commission Notice on Remedies, and Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, para 197 ff. Point 63, footnote (4), of the Commission Notice on Remedies state that, in air transport mergers, a mere reduction of barriers to entry by a commitment of the parties to offer slots on specific airports may not always be sufficient to ensure the entry of new competitors on those routes where competition problems arise and to render the remedy equivalent in its effects to a divestiture.

<sup>516</sup> The Commission understands that secondary trading is not allowed at AMS and CDG at the time of the decision. Therefore, this provision would become relevant only if the relevant airports would become airports where secondary trading is allowed.

event that, following the Commission's evaluation, several applicants are deemed to provide similarly effective competitive constraints on services from/to AMS or CDG.

- (635) In light of the above, and on the basis of the information available to the Commission, in particular considering the potential interest demonstrated during the market test, it is concluded that the Commitments will likely lead to entry by one or more airlines on AMS-BHX and AMS-CDG in a timely manner, and that this entry is of a sufficient magnitude to dispel the serious doubts identified on these markets.
- (636) For the reasons outlined above, the Commitments entered into by the Parties are considered sufficient to eliminate the serious doubts as to the compatibility of the transaction with the internal market.
- (637) Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (638) The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (639) The commitments in sections 1, 2 and 3 of the Commitments submitted by the Parties on 3 July 2019 constitute conditions attached to this Decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other sections in the Commitments constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.

## 7. CONCLUSION

(640) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions and obligations laid down in the Commitments annexed to the present decision. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission*

*(Signed)*  
*Margrethe VESTAGER*  
*Member of the Commission*

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## CASE COMP/M.9287 – CONNECT AIRWAYS/ FLYBE

### COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 as amended (the “**Merger Regulation**”), the shareholders of Connect Airways Ltd (“**Connect Airways**”) hereby provide the following commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the proposed acquisition by Connect Airways of Flybe Group plc and its subsidiaries (“**Flybe**”) (the “**Notified Concentration**”) compatible with the internal market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the “**Decision**”).

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of EU law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004.

## A. Definitions

For the purpose of the Commitments, the following terms shall have the following meanings:

<b>Affiliated Undertakings</b>	Undertakings controlled by Connect Airways or by the ultimate parents of Connect Airways, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No. 802/2004.
<b>Airport Catchment Area</b>	In respect of AMS, this area includes Lelystad Airport. In respect of CDG, this area includes ORY and BVA. In respect of BHX, this area includes EMA.
<b>AMS</b>	Amsterdam Schiphol Airport.
<b>AMS Remedy Frequencies</b>	This term has the meaning given in Clause 1.1.1(a).
<b>Applicant</b>	Any airline interested in obtaining Slots from Connect Airways in accordance with these Commitments.
<b>BHX</b>	Birmingham Airport.
<b>BHX-AMS City Pair</b>	Flights between BHX and either AMS or Lelystad.
<b>BHX-PAR City Pair</b>	Flights between BHX and either CDG, ORY or BVA.
<b>BVA</b>	Paris Beauvais Tillé Airport.
<b>CDG</b>	Paris Charles de Gaulle Airport.
<b>Commitment(s)</b>	The Slot commitment for each Relevant City Pair and/or, as relevant, the commitment relating to Frequent Flyer Programmes and/or, as relevant, the commitment relating to fare combinability.
<b>Competitive Air Service</b>	A non-stop scheduled passenger air transport service operated on the BHX-AMS City Pair and/or the BHX-PAR City Pair.
<b>Connect Airways</b>	Connect Airways Ltd.
<b>Controlling Entity(ies)</b>	The entities which, together, own the entire share capital of Connect Airways which are DLP, Stobart, and Virgin Atlantic (through its wholly owned subsidiary Virgin Travel Group Limited).
<b>Cyrus</b>	Cyrus Capital Partners L.P.
<b>DLP</b>	DLP Holdings S.à.r.l. a company wholly owned and managed by Cyrus Capital Partners L.P.
<b>Effective Date</b>	The date of adoption of the Decision.
<b>Eligible Air Services</b>	An airline that is not an associated carrier belonging to the

<b>Provider</b>	same corporate group as Connect Airways or affiliated with Connect Airways and which operates a new or increased Competitive Air Service on a Relevant City Pair.
<b>European Short-haul City Pair(s)</b>	Any route connecting a Relevant Airport with any other part of Europe, which, for the avoidance of doubt, shall include the UK and thus the Relevant City Pairs.
<b>EU Slot Regulation</b>	Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at EU airports (OJ L 14 of 22.01.1993), as amended.
<b>Fast-Track Dispute Resolution Procedure</b>	This term has the meaning given in Clause 5.
<b>Frequency(ies)</b>	A round-trip on a Relevant City Pair.
<b>Frequent Flyer Programme (or FFP)</b>	A programme offered by an airline to reward customer loyalty under which members of the programme accrue points for travel on that airline which can be redeemed for free air travel and other products or services, as well as allowing other benefits such as airport lounge access or priority bookings.
<b>General Slot Allocation Procedure</b>	The Slot allocation procedure as set out in the EU Slot Regulation and IATA Worldwide Scheduling Guidelines (including participation at the IATA Scheduling Conference to try to improve slots and allocation by the slot coordinator from the waitlist following the Slot Handback Deadline).
<b>Grandfathering</b>	This term has the meaning given in Clause 1.3.2.
<b>IATA</b>	The International Air Transport Association.
<b>IATA Scheduling Conference</b>	The industry conference of airlines and airport coordinators worldwide to solve scheduling issues where there are discrepancies between the slots requested by the airlines and allocated by the airport coordinators. The IATA scheduling conference for the Winter Season takes place in June, and the one for the Summer Season in November.
<b>IATA Season</b>	The IATA Summer Season begins on the last Sunday of March and ends on the Saturday before the last Sunday of October. The IATA Winter Season begins on the last Sunday of October and ends on the Saturday before the last Sunday of March.
<b>ICC</b>	International Chamber of Commerce.
<b>Identified Time Period</b>	The period prior to 12:00 (local time) and the period after 16:00 (local time).
<b>Key Terms</b>	The following terms that shall be included in the Applicant's formal bid for Slots: timing of the requested Slot(s), number of frequencies and IATA Seasons to be operated (year-round

	service or seasonal).
<b>Material Increase in Capacity</b>	Permitted capacity (including permitted movements) increase of 5% or more per year.
<b>Misuse</b>	This term has the meaning given in Clause 1.4.2.
<b>MITA</b>	Multilateral Interline Traffic Agreements Manual published by IATA.
<b>Monitoring Trustee</b>	An individual or institution, independent of Connect Airways, who is approved by the Commission and appointed by Connect Airways and who has the duty to monitor Connect Airways' compliance with the conditions and obligations attached to the Commitment Decision.
<b>New Air Services Provider</b>	An airline that is not an associated carrier belonging to the same corporate group as Connect Airways or affiliated with any member of Connect Airways and which commences a new non-stop service on a Relevant City Pair or which increases the number of non-stop Frequencies it operates on a Relevant City Pair in accordance with these Commitments.
<b>ORY</b>	Paris Orly Airport.
<b>PAR Remedy Frequencies</b>	This term has the meaning given in Clause 1.1.1(b).
<b>Published Fares</b>	Fares published by Connect in ATPCo in reservation booking designator (or selling classes):  Y and J for European Short-haul City Pairs
<b>Prospective Entrant</b>	Any air carrier interested in obtaining Slots from Connect Airways in accordance with these Commitments and which complies with the following requirements: <ul style="list-style-type: none"> <li>• it must be independent of and unconnected with Connect Airways. For the purpose of these Commitments, an airline shall not be deemed to be independent of and unconnected to Connect Airways when, in particular: <ul style="list-style-type: none"> <li>○ it is an associated carrier belonging to the same corporate group as Connect Airways; or</li> <li>○ it co-operates with Connect Airways on the Relevant City Pair concerned in the provision of passenger air transport services, except if this co-operation is limited to agreements concerning servicing, deliveries, lounge usage or other secondary activities entered into on an arm's length basis;</li> </ul> </li> <li>• it must have the intention and be able to start or increase a Competitive Air Service on one or more of the Relevant City Pairs individually or collectively by</li> </ul>



	codeshare;
	<ul style="list-style-type: none"> <li>to that effect, it needs a Slot or several Slots for the operation of a Competitive Air Service.</li> </ul>
<b>Q/YQ/YR Surchage</b>	Charges paid in addition to the base fare amount of a ticket which are allocated to the Q, YQ or YR IATA ticket coding and which are used in particular to recover fuel, insurance and/or security charges.
<b>Relevant Airport(s)</b>	AMS and/or CDG.
<b>Relevant City Pair(s)</b>	This term has the meaning given in Clause 1.2.2.
<b>Requesting Party</b>	This term has the meaning given in Clause 5.1.2.
<b>SAL</b>	Slot Allocation List.
<b>Slot Handback Deadline</b>	15 January for the IATA Summer Season and 15 August for the IATA Winter Season.
<b>Slot Release Agreement</b>	An agreement between Connect Airways and a Prospective Entrant that provides for the exchange of Slot(s) with the Prospective Entrant according to the principles laid down in Clause 1 of these Commitments. For the avoidance of doubt, (i) the Slot Release Agreement shall abide by the EU Slot Regulation and any exchange pursuant to this agreement shall be confirmed by the slot coordinator and (ii) the duration of the Slot Release Agreement shall be unlimited in time, subject to its termination provisions.
<b>Slot Release Procedure</b>	This term has the meaning given in Clause 1.2.1.
<b>Slot Request Submission Deadline</b>	The final date for the request for Slots to the slot coordinator as set out in the IATA Worldwide Scheduling Guidelines.
<b>Slot(s)</b>	The permission to land and take-off in order to operate an air service at the airport on a specific date and time given in accordance with the EU Slot Regulation.
<b>Stobart</b>	Stobart Aviation Limited, being a wholly owned subsidiary of Stobart Group Limited.
<b>Sunset Date</b>	The last day of IATA Winter Season 2029/2030.
<b>TFEU</b>	The Treaty on the Functioning of the European Union.
<b>Time Window</b>	The period of time either side of the Slot time requested by the Prospective Entrant and shall be +/- twenty (20) minutes for Relevant City Pairs.
<b>Utilisation Period</b>	This term has the meaning given in Clause 1.3.1 and shall be six (6) consecutive IATA Seasons (e.g. Summer/Winter/Summer/Winter/Summer/Winter for routes operated on a year-round basis or a continuous series of six (6) Summer or Winter Seasons for the routes which are

operated on a seasonal basis).

**Virgin Atlantic**

Virgin Atlantic Limited.

## 1. SLOTS

### 1.1 SLOTS AT RELEVANT AIRPORTS

1.1.1 Subject to Clause 7, Connect Airways undertakes to procure that Slots are made available at Relevant Airports to allow one or more Prospective Entrant(s) to operate or increase the following number of new or additional Frequencies on the following city pairs:

- (a) up to (5) five Frequencies per day in total on the BHX-AMS City Pair (the “**AMS Remedy Frequencies**”); and
- (b) up to (3) three Frequencies per day in total on the BHX-PAR City Pair (the “**PAR Remedy Frequencies**”).

### 1.2 CONDITIONS PERTAINING TO SLOTS

1.2.1 Each Prospective Entrant shall comply with the following procedure to obtain Slots from Connect Airways (“**Slot Release Procedure**”).

1.2.2 The Prospective Entrant wishing to commence/increase a Competitive Air Service on one or more of the city pairs covered by Clause 1.1.1 (“**Relevant City Pair(s)**”) shall:

- (a) apply to the slot coordinator for the necessary Slots through the General Slot Allocation Procedure; and
- (b) notify its request for Slots to the Monitoring Trustee, within the period foreseen in Clause 1.5.1.

1.2.3 The Prospective Entrant shall be eligible to obtain Slots from Connect Airways pursuant to these Commitments only if it can demonstrate that it has exhausted all reasonable efforts to obtain the necessary Slots to operate on the Relevant City Pairs through the normal workings of the General Slot Allocation Procedure.

1.2.4 For the avoidance of doubt, the Prospective entrant remains solely responsible to negotiate and enter into any agreement with the Relevant Airports for the provision of airport and terminal related services.

1.2.5 For the purposes of this Clause 1.2, the Prospective Entrant shall be deemed not to have exhausted all reasonable efforts to obtain necessary Slots if:

- (a) Slots at the Relevant Airport were available through the General Slot Allocation Procedure within the Time Window but such Slots have not been accepted by the Prospective Entrant; or
- (b) Slots at the Relevant Airport (for use to operate a Competitive Air Service on the Relevant City Pair) were obtained through the General Slot Allocation Procedure outside the Time Window and the Prospective Entrant did not give Connect Airways the opportunity to exchange those Slots for Slots within the Time Window; or
- (c) it has not exhausted its own Slot portfolio at the Relevant Airport. For these purposes, the Prospective Entrant will be deemed not to have exhausted its own Slot portfolio:

- (i) if the Prospective Entrant has Slots at the Relevant Airport within the Time Window which are being leased-out to or exchanged with other carriers (unless that lease or exchange was concluded before the Effective Date or the carrier can provide reasonable evidence satisfying the Commission (following consultation with the Monitoring Trustee) that there are bona fide reasons for this being done rather than it being a pretext to enable the Prospective Entrant to present itself as needing Slots to operate a Competitive Air Service on a Relevant City Pair); or
- (ii) if the Prospective Entrant has Slots at the Relevant Airport which are outside the Time Window and which are leased-out to other carriers, in which case the Prospective Entrant shall be entitled to apply for Slots from Connect Airways, but only if:
  - that lease was concluded before the Effective Date; or
  - it can provide reasonable evidence satisfying the Commission (following consultation with the Monitoring Trustee) that there are bona fide reasons for leasing the Slot out in this way rather than using it itself; or
  - it gives Connect Airways an option to become the lessee of the leased-out Slot at the earliest possible time allowed under the applicable lease (on terms substantially the same as that lease and for a duration that runs in parallel with the Slot Release Agreement). If the Slot Release Agreement with the Prospective Entrant does not provide for monetary compensation, then the lease to Connect Airways will likewise not provide for monetary compensation.

For the purposes of Clause 1.2.5(c) (i) and (ii), the bona fide reasons for leasing out (or, as relevant, exchanging) Slots by the Prospective Entrant shall include, but shall not be limited to, a situation where the Prospective Entrant can provide clear evidence of an intention to operate those Slots on a specific route and clear and substantiated evidence of the reasons that currently prevent it from doing so.

1.2.6 If the Prospective Entrant obtains Slots through the General Slot Allocation Procedure but after the IATA Scheduling Conference:

- (a) which are within the Time Window; or
- (b) which (in the case of Slots obtained at both ends of the route) are not compatible with the planned flight duration of the Prospective Entrant's operation on the route,

the Prospective Entrant shall remain eligible to obtain Slots from Connect Airways through the Slot Release Procedure provided that it gives an option to Connect Airways to use the Slots obtained through the General Slot Allocation Procedure on terms substantially the same as the terms of the Slot Release Agreement, and for a duration that runs in parallel with the Slot Release Agreement (provided that such use by Connect Airways is compatible with Article 8a(3) of the EU Slot Regulation).

- 1.2.7 Without prejudice to these Commitments (and, particularly, of this Clause 1), Connect Airways shall not be obliged to honour any agreement to make available the Slots to the Prospective Entrant if:
- (a) the Prospective Entrant has not exhausted all reasonable efforts in the General Slot Allocation Procedure to obtain the necessary Slots to operate a new or increased service on the Relevant City Pair; or
  - (b) the Prospective Entrant has been found to be in a situation of Misuse (as described in Clause 1.4.2 below).
- 1.2.8 Subject to Clause 1.5.11, Connect Airways undertakes to make available Slots within the Time Window (if it has such Slots). In the event that Connect Airways does not have Slots within the Time Window, Connect Airways shall offer to release the Slots closest in time to the Prospective Entrant's request. Connect Airways does not have to offer Slots if the Slots which the Prospective Entrant could have obtained through the General Slot Allocation Procedure are closer in time to the Prospective Entrant's request than the Slots that Connect Airways has. The arrival and departure Slot times shall be such as to allow for reasonable aircraft rotation to the extent possible, taking into account the Prospective Entrant's business model and aircraft utilisation constraints.

### **1.3 GRANDFATHERING OF SLOTS**

- 1.3.1 As a general rule, the Slots obtained by the Prospective Entrant from Connect Airways as a result of the Slot Release Procedure shall be used only to provide a Competitive Air Service on the Relevant City Pair for which the Slots were requested. These Slots cannot be used on another city pair unless the Prospective Entrant has operated a Competitive Air Service on the Relevant City Pair for which these Slots have been made available for a number of full consecutive IATA Seasons ("**Utilisation Period**"). For the avoidance of doubt, a Utilisation Period may extend beyond the Sunset Date.
- 1.3.2 The Prospective Entrant will be deemed to have grandfathering rights for the Slots once appropriate use of the Slots has been made on the Relevant City Pair for the Utilisation Period. In this regard, once the Utilisation Period has elapsed, the Prospective Entrant will be entitled to use the Slots obtained on the basis of these Commitments on any city pair to/from the Relevant Airport ("**Grandfathering**").
- 1.3.3 Grandfathering is subject to approval of the Commission, advised by the Monitoring Trustee, in accordance with Clause 1.5.

### **1.4 LIMITATIONS ON USE OF SLOTS**

- 1.4.1 During the Utilisation Period, the Prospective Entrant shall not be entitled to transfer, assign, sell, swap or charge in breach of these Commitments any Slots obtained from Connect Airways under the Slot Release Procedure, except for (i) changes to any such Slots which are within the Time Window and which have been agreed with the slot coordinator, and (ii) any Slots which are outside the Identified Time Period which can be swapped provided this has been agreed with the slot coordinator.

1.4.2 During the Utilisation Period, Misuse shall be deemed to arise where a Prospective Entrant which has obtained Slots released by Connect Airways decides:

- (a) not to commence services on the Relevant City Pair(s);
- (b) to cease operating on a Relevant City Pair(s) or to operate the Frequencies on a Relevant City Pair(s) at a utilisation rate lower than proposed in the bid, submitted in accordance with Clause 1.5.7, unless such a decision is consistent with the “use it or lose it” principle in Article 10(2) of the EU Slot Regulation (or any suspension thereof);
- (c) to transfer, assign, sell, swap, sublease or charge any Slot released by Connect Airways on the basis of the Slot Release Procedure, except for (i) changes to the Slot which are within the Time Window and which have been agreed with the slot coordinator, and (ii) any Slots which are outside the Identified Time Period which can be swapped provided this has been agreed with the slot coordinator;
- (d) not to use the Slots on a Relevant City Pair(s), as proposed in the bid, submitted in accordance with Clause 1.5.7;
- (e) not to use the Slots properly: this situation shall be deemed to exist where the Prospective Entrant (i) loses the series of Slots at a Relevant Airport as a consequence of the principle of “use it or lose it” in Article 10(2) of the EU Slot Regulation; or (ii) misuses the Slots at a Relevant Airport as described and interpreted in Article 14(4) of the EU Slot Regulation.

1.4.3 If Connect Airways or the Prospective Entrant which has obtained Slots under the Slot Release Procedure becomes aware of or reasonably foresees any Misuse by the Prospective Entrant during the Utilisation Period, it shall immediately inform the other and the Monitoring Trustee. The Prospective Entrant shall have (15) fifteen calendar days after such notice to cure the actual or potential Misuse.

- (a) If the Misuse is not cured, Connect Airways shall have the right to terminate the Slot Release Agreement and the Slots shall be returned to Connect Airways. In cases (a) and (b) of Clause 1.4.2, Connect Airways shall then use its reasonable best efforts to redeploy the Slots in order to safeguard the historic precedence. If despite its reasonable best efforts, Connect Airways is not able to retain the historic precedence for these Slots, or in case of a Misuse as defined in cases (c), (d) or (e) of Clause 1.4.2, the Prospective Entrant shall provide reasonable compensation to Connect Airways as provided for in the Slot Release Agreement.
- (b) If the Misuse is cured within the (15) fifteen calendar day period, Connect Airways shall not have the right to terminate the Slot Release Agreement and the Prospective Entrant can continue to use the Remedy Slots.
- (c) For the avoidance of doubt, the occurrence of Misuse during the Utilisation Period resets the count of the Utilisation Period to zero in cases (a) and (b) of Clause 1.4.2.

1.4.4 For the avoidance of doubt, the Slot Release Agreement may:

- (a) contain prohibitions on the Prospective Entrant transferring its rights to the Slots (except for swaps pursuant to Clause 1.4.2(c)(ii)) to a third party, making the Slots available in any way to a third party for the use of that third party, or releasing, surrendering, giving up or otherwise disposing of any rights to the Slots; and/or
- (b) provide for reasonable compensation to Connect Airways in case of Misuse during the Utilisation Period; and/or

If for any reason (including, but without limitation, the insolvency of the Prospective Entrant) Connect Airways is unable to receive reasonable compensation for the Slots being either lost or not returned within sufficient time for Connect Airways to preserve its grandfathering rights, such Slots shall be counted against the maximum number of Slots to be released in accordance with the Commitments.

- (c) may contain a re-application procedure in case a change of control of the Prospective Entrant occurs.

14.5 In view of the Commission’s Communication of 30 April 2008 on the EU Slot Regulation, which stated that: “The text of the current [EU Slot] Regulation is silent on the question of exchanges with monetary and other consideration” and that the Commission would therefore “not intend to pursue infringement proceedings against Member States where such exchanges take place in a transparent manner, respecting all the other administrative requirements for the allocation of slots set out in the applicable legislation”, and to the extent that the Slots released under the Slot Release Procedure are at an airport where secondary trading takes place, the Slot Release Agreement with the Prospective Entrant may provide for monetary and/or other consideration, so long as such Slot Release Agreement provisions are clearly disclosed to the Monitoring Trustee and comply with these Commitments and all other administrative requirements set out in the applicable legislation.

14.6 The Slot Release Agreement shall provide that the Prospective Entrant will be able to terminate the agreement at the end of each IATA Season without penalty, provided the Prospective Entrant notifies the termination of the agreement to Connect Airways in writing no later than two (2) weeks after the IATA Scheduling Conference.

## **1.5 SELECTION PROCEDURE, ROLE OF MONITORING TRUSTEE AND APPROVAL BY COMMISSION**

15.1 At least seven (7) weeks before the Slot Request Submission Deadline, any airline wishing to obtain Slots from Connect Airways pursuant to the Slot Release Procedure shall:

- (a) inform the Monitoring Trustee of its proposed Slot request (indicating the arrival and departure times);
- (b) submit to the Monitoring Trustee the list of its leased out or exchanged Slots at the Relevant Airport for which it is applying for Slots, along with the date at which the leases or exchanges were concluded. The Monitoring Trustee or the Commission may also request additional

information from the Applicant to enable assessment of its eligibility pursuant to Clause 1.2.5 and Clause 1.5.4; and

- (c) indicate to the Monitoring Trustee if it has any confidentiality concerns which would justify keeping its identity anonymous vis-à-vis Connect Airways, in which case it must provide a reasoned explanation of those concerns together with its request for anonymity. In the event that such a request is made, the Monitoring Trustee shall:
  - (i) immediately inform the Commission of that request,
  - (ii) within one (1) week of that request advise the Commission whether or not that request should be granted, and
  - (iii) within three (3) weeks of the request, in consultation with the Commission, determine whether or not the Applicant's Slot request may be treated anonymously (and, if so, to what extent, subject to what conditions and for what period).

152 At least six (6) weeks before the Slot Request Submission Deadline, the Monitoring Trustee shall forward the Slot request to Connect Airways and the Commission. Until the beginning of the IATA Scheduling Conference, the Monitoring Trustee shall not disclose to Connect Airways the Relevant City Pair for which the Slot is requested. Once informed of the Slot request, Connect Airways may discuss with the Applicant the timing of the Slots to be released and the types of compensation which could be offered. Connect Airways shall copy the Monitoring Trustee on all correspondence between it and the Applicant which relates to the Slot Release Procedure. Connect Airways shall not share any information about such discussions with other Applicants and may require the Applicant not to share any such information with other Applicants. At least six (6) weeks before the Slot Request Submission Deadline, the Monitoring Trustee shall also inform the manager of the Relevant Airport for which the slot request is made and the slot coordinator of the Slot request and, subject to the Applicant's consent, disclose to them any relevant information regarding the Slot request. The Monitoring Trustee shall ask the manager of the Relevant Airport for which the slot request is made and the slot coordinator to inform it of any likely impediments to the satisfaction of the request, in particular due to the availability of terminal facilities and infrastructure.

153 If the Applicant has made a request for anonymity in accordance with Clause 1.5.1(c), the Monitoring Trustee shall not disclose to Connect Airways the identity of the Applicant for so long as that request is pending or has been granted. In such a case, the procedure set down in this Clause 1.5.3 shall apply, save that, until the beginning of the IATA Scheduling Conference, any communication or correspondence between Connect Airways and the Applicant shall go through the Monitoring Trustee, who shall ensure the protection of the anonymity of the Applicant.

154 After being informed of the Slot request in accordance with Clause 1.5.2, the Commission (advised by the Monitoring Trustee) shall assess whether the Applicant meets the following criteria:

- (a) the Applicant is independent of and unconnected to Connect Airways and its Controlling Entity(ies); and



- (b) the Applicant has exhausted its own Slot portfolio at the Relevant Airport for which the slot request is made.

If the Commission decides that the Applicant does not fulfil the above criteria, the Commission shall inform the Applicant and Connect Airways of that decision at least two (2) weeks before the Slot Request Submission Deadline.

- 155 At least one (1) week before the Slot Request Submission Deadline, Connect Airways shall indicate to the Monitoring Trustee and each Applicant which Slots at each Relevant Airport they would release, if necessary, during the Time Window.
- 156 By the Slot Request Submission Deadline, each Applicant shall send its request for Slots (at the same time(s) as those requested through the Slot Release Procedure) to the slot coordinator in accordance with the General Slot Allocation Procedure.
- 157 By the Slot Request Submission Deadline, each Applicant shall also submit its formal bid for the Slots to the Monitoring Trustee. The formal bid shall include at least:
  - (a) the Key Terms (i.e. timing of the Slots, number of frequencies to be operated on a year-round service or on a seasonal basis, number of IATA Seasons to be operated); and
  - (b) a detailed business plan. This plan shall contain a general presentation of the company including its history, its legal status, the list and a description of its shareholders and the two most recent yearly audited financial reports. The detailed business plan shall provide information on the plans that the company has in terms of access to capital, development of its network, fleet etc. and detailed information on its plans for the Relevant City Pair(s) on which it wants to operate. The latter should specify in detail planned operations on the Relevant City Pair(s) over a period of at least two (2) consecutive IATA Seasons (size of aircrafts, seat configuration, total capacity and capacity by each class, number of frequencies operated, pricing structure, service offerings, planned time-schedule of the flights) and expected financial results (expected traffic, revenues, profits, average fare by cabin class). The Monitoring Trustee and/or the Commission may also request any additional information and documents from the Applicant required for their assessment, including a copy of all cooperation agreements the Applicant may have with other airlines. Business secrets and confidential information will be kept confidential by the Commission and the Monitoring Trustee and will not become accessible Connect Airways, other undertakings or the public; and
  - (c) a corporate statement (e.g. a Board approval) confirming that the Prospective Entrant has the intention and is able to start or offer a Competitive Air Service on one or more of the Relevant City Pairs.
- 158 In parallel, if an Applicant is offering compensation for the Slot(s) it has requested pursuant to these Commitments, it will send Connect Airways, copying the Monitoring Trustee, a detailed description of the compensation which it is willing to offer in exchange for the release of the Slots for which it has submitted

bids. Within three (3) weeks, Connect Airways shall provide the Monitoring Trustee with a ranking of these offers.

15.9 Having received the formal bid(s), the Commission (advised by the Monitoring Trustee) shall:

- (a) assess whether each Applicant, is a viable existing or potential competitor, with the ability, resources and commitment to operate services on the Relevant City Pair(s) in the long term as a viable and active competitive force;
- (b) evaluate the formal bids of each Applicant, that meets (a) above, and rank these Applicants in order of preference.

15.10 In conducting its evaluation in accordance with Clause 1.5.9, the Commission shall give preference to the Applicant (or combination of Applicants) which will provide the most effective overall competitive constraint on each of the Relevant City Pairs, without regard to the country in which the Applicant(s) is licensed or has its principal place of business. For these purposes, the Commission shall take into account the strength of the Applicant's business plan and in particular give preference to Applicants meeting one or more of the following criteria:

- (a) the largest capacity (as measured in seats offered on services for two (2) relevant consecutive IATA Seasons (e.g. Summer/Winter or a continuous series of two (2) Summer or Winter IATA Seasons for a seasonal Competitive Air Service)) from/to the Relevant Airport on Relevant City Pairs;
- (b) a pricing structure and service offerings that would provide the most effective competitive constraint on the Relevant City Pair(s); and
- (c) plans to offer feed to third party carriers operating services from the Relevant Airport.

15.11 The Commission (advised by the Monitoring Trustee) shall also ensure that the up to (5) five arrival and departure Slots at AMS and the up to (3) three arrival and departure Slots at CDG to be made available under Clause 1.1.1 are spread evenly throughout the day i.e. with respect to AMS no more than two (2) arrival/departure Slots in the morning (the period up until 12:00 local time), no more than two (2) arrival/departure Slots in the afternoon (the period after 12:00 and up until 16:00 local time), and no more than two (2) arrival/departure Slots in the evening (the period after 16:00 local time), and with respect to CDG no more than one (1) arrival/departure Slot in the morning (the period up until 12:00 local time), no more than one (1) arrival/departure Slot in the afternoon (the period after 12:00 and up until 16:00 local time), and no more than one (1) arrival/departure Slot in the evening (the period after 16:00 local time).

15.12 In advance of the beginning of the IATA Scheduling Conference, the Monitoring Trustee shall inform each Applicant (if the latter did not receive slots within the Time Window as indicated through the SAL) and the slot coordinator:

- (a) whether the Applicant qualifies for the Slots Commitment; and
- (b) the Applicant's ranking.

- 15.13 In any case, the Applicant shall attend the IATA Scheduling Conference and try to improve its Slots. Following confirmation of the Commission's approval pursuant to Clause 1.5.9, the Applicants and Connect Airways shall be deemed to have agreed the Key Terms of the Slot Release Agreement, as well as any compensation which was offered by the Applicant to Connect Airways under Clause 1.5.8. The Key Terms may only be changed after such date by mutual agreement between the Applicant and Connect Airways if the Monitoring Trustee confirms that the changes are not material or if the Commission (advised by the Monitoring Trustee) approves the changes.
- 15.14 Within two (2) weeks of the end of the IATA Scheduling Conference, each Applicant shall inform the Monitoring Trustee and Connect Airways whether it will commit to operate the Slots offered eventually by Connect Airways in case it has not obtained them through the General Slot Allocation Procedure.
- 15.15 Within three (3) weeks of the end of the IATA Scheduling Conference, the Monitoring Trustee shall confirm to the highest ranked Applicant(s) that has provided the confirmation in accordance with Clause 1.5.12 that it is entitled to receive Slots from Connect Airways. Connect Airways shall offer the dedicated Slots for release to such Applicant. The Slot Release Agreement shall be subject to review by the Monitoring Trustee and approval of the Commission. Unless both Connect Airways and the relevant Applicant agree to an extension and subject to Clause 1.2.6, the Slot Release Agreement shall be signed and the Slot release completed within six (6) weeks after the IATA Scheduling Conference, and the slot coordinator shall be informed of the Slot exchange in order to obtain the required confirmation.

## **2. FARE COMBINABILITY**

- 2.1 At the request of an Eligible Air Services Provider which, after the Effective Date and before the Sunset Date, has started to operate new or increased Competitive Air Service on a Relevant City Pair (whether or not such service uses Slots released to that carrier pursuant to these Commitments), Connect Airways shall enter into an agreement that arranges for fare combinability on that Relevant City Pair. This agreement will provide for the possibility for the Eligible Air Services Provider, or travel agents, to offer a return trip on the Relevant City Pair comprising a non-stop service provided one way by Connect Airways and a non-stop service provided the other way by the Eligible Air Services Provider. At the request of the Eligible Air Services Provider, the agreement shall apply in relation to all of the Eligible Air Services Provider's services on the Relevant City Pair. For the avoidance of doubt, Connect Airways shall not be obliged to enter into an agreement with an Eligible Air Services Provider that arranges for fare combinability on that Relevant City Pair, if Connect Airways/Flybe has ceased operating services on that Relevant City Pair and any such agreement shall automatically lapse in the event that Connect Airways/Flybe ceases to operate all services on that Relevant City Pair.
- 2.2 Any such agreement shall be subject to the following restrictions:
- (a) it shall provide for fare combinability on the basis of Connect Airways/Flybe's Published Fares. Where this provides for a published round-trip fare, the fare can be comprised of half the round-trip fare of Connect Airways/Flybe and half the round-trip fare of the Eligible Air

Services Provider;

- (b) it shall provide for the appropriate division or recovery of any applicable Q/YQ/YR Surcharges;
  - (c) it shall be limited to true origin and destination traffic on the Relevant City Pair operated by the Eligible Air Services Provider; and
  - (d) it shall be subject to the MITA rules.
- 2.3 Subject to Clause 2.7, any term included in the agreement (for example interline service charge, number of booking classes included) can never be less favourable than the corresponding term in any fare combinability agreement which Connect Airways/Flybe and the Eligible Air Services Provider have in place as at the Effective Date.
- 2.4 Subject to seat availability in the relevant fare category, Connect Airways shall carry a passenger holding a coupon issued by an Eligible Air Services Provider for travel on a Relevant City Pair. Connect Airways may require that the Eligible Air Services Provider or the passenger, where appropriate, pay the (positive) difference between the fare charged by Connect Airways and the fare charged by the Eligible Air Services Provider if Connect Airways was not the original ticketed carrier on the Relevant City Pair. In cases where the Eligible Air Services Provider's fare is lower than the value of the coupon issued by it, Connect Airways may endorse its coupon only up to the value of the fare charged by the Eligible Air Services Provider. An Eligible Air Services Provider shall enjoy the same protection in cases where Connect Airways' fare is lower than the value of the coupon issued by it.
- 2.5 A fare combinability agreement entered into pursuant to this Clause 2 for a particular Relevant City Pair shall have an effective duration of up to five (5) years at the choice of the Eligible Air Services Provider, or if it elects to have a shorter initial duration than that to which it is entitled pursuant to this Clause 2.5, the Eligible Air Services Provider shall have a right to renew the agreement on an evergreen basis for further periods of one (1) year (i.e. rolled over on the same terms) as long as these Commitments are in force, provided it exercises its right of extension by informing Connect Airways/Flybe in writing no later than thirty (30) days before the expiry of the agreement. The Eligible Air Services Provider also has a right to terminate the agreement, at any time during the initial term or the extensions, upon thirty (30) days written notice.
- 2.6 All agreements entered into pursuant to this Clause 2 for a particular Relevant City Pair shall lapse automatically in the event that the Eligible Air Services Provider ceases to operate the new or increased service on that Relevant City Pair.
- 2.7 The conclusion of the fare combinability agreement shall be subject to the approval of the Commission, as advised by the Monitoring Trustee, in particular as to whether its terms are reasonable.

### **3. FREQUENT FLYER PROGRAMMES**

- 3.1 Subject to Clause 7, should Connect Airways become part of a FFP, at the request of a New Air Services Provider that does not have a comparable FFP of its own, Connect Airways shall request for the New Air Services Provider to be hosted in the same FFP as Connect Airways for the Relevant City Pair(s) on which the New Air Services Provider has commenced or increased service.
- 3.2 Where the FFP provider agrees to host the New Air Services Provider, Connect Airways shall use its reasonable endeavors for the FFP agreement with the New Air Services Provider to be on terms such that the New Air Services Provider shall have equal treatment vis-à-vis the accrual and redemption of Miles on the particular Relevant City Pair as compared with Connect Airways for as long as the New Air Services Provider operates a non-stop service on that Relevant City Pair.
- 3.3 The conclusion of the FFP agreement with the New Air Services Provider shall be subject to the approval of the Commission, as advised by the Monitoring Trustee, in particular as to whether its terms are reasonable.

### **4. MONITORING TRUSTEE**

#### **4.1 APPOINTMENT OF MONITORING TRUSTEE**

- 4.1.1 A Monitoring Trustee shall be appointed by Connect Airways on the terms and in accordance with the procedure described below and, once approved by the Commission, shall perform the functions of monitoring Connect Airways' fulfilment of the Commitments and further obligations that may be contained in the Commitment Decision.
- 4.1.2 The Monitoring Trustee shall be independent of Connect Airways, its Controlling Entities, and its Affiliated Undertakings and must be familiar with the airline industry and the slot allocation and exchange procedures, and have the experience and competence necessary for this appointment (e.g. investment bank, consultant specialised in the air transport sector, or auditor). In addition, it shall not be exposed to any conflict of interest and shall not have had any direct or indirect work, consulting or other relationship with the shareholders of Connect Airways in the last three (3) years and shall not have a similar relationship with Connect Airways for three (3) years after completing its mandate. For the avoidance of doubt, the performance of the role of monitoring trustee in other Commission proceedings, including the performance of the role of monitoring trustee for Connect Airways, shall not be an obstacle to the appointment as Monitoring Trustee.
- 4.1.3 Connect Airways shall ensure that the Monitoring Trustee's remuneration shall be sufficient to guarantee the effective and independent compliance of its mandate. Connect Airways will only be required to remunerate the Monitoring Trustee for costs and expenses reasonably incurred in the performance of its mandate.
- 4.1.4 Connect Airways shall use reasonable endeavours to, within two (2) weeks of the Effective Date, submit to the Commission for approval a list of one or more

persons whom Connect Airways considers adequate to fulfil the duties of the Monitoring Trustee. The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out above and shall include:

- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments; and
- (b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out the tasks assigned to it.

4.15 The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, Connect Airways shall appoint the individual or institution concerned as Monitoring Trustee. If more than one name is approved by the Commission, Connect Airways shall be free to choose the Trustee to be appointed from among the names approved. The Monitoring Trustee should be appointed within one (1) week of the Commission's approval, in accordance with the mandate approved by the Commission.

4.16 If all the proposed Monitoring Trustees are rejected by the Commission, Connect Airways shall submit the names of at least two more individuals or institutions within one (1) week of being formally informed of the rejection by the Commission.

4.17 If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate at least two candidates for the position of Monitoring Trustee and Connect Airways shall appoint one of these candidates in accordance with the mandate approved by the Commission.

## **4.2 MONITORING TRUSTEE'S MANDATE**

4.2.1 The Monitoring Trustee's mandate shall include, in particular, the following obligations and responsibilities:

- (a) to monitor the satisfactory discharge by Connect Airways of the obligations entered into in these Commitments in so far as they fall within the scope of these Commitments;
- (b) to propose to Connect Airways such measures as the Monitoring Trustee considers necessary to ensure Connect Airways' compliance with the conditions and obligations attached to the Decision;
- (c) to advise and make a written recommendation to the Commission as to the suitability of any Slot Release Agreement or Prospective Entrant submitted for approval to the Commission under Clause 1;
- (d) to provide written reports to the Commission on Connect Airways' compliance with these Commitments and the progress of the discharge of its mandate, identifying any respects in which Connect Airways has failed to comply with these Commitments or the Monitoring Trustee has been unable to discharge its mandate;

- (e) to mediate in any disagreements relating to any Slot Release Agreement, if mediation is agreed to by the other party or parties to the agreement in question, and submit a report upon the outcome of the mediation to the Commission; and
  - (f) at any time, to provide to the Commission, at its request, a written or oral report on matters falling within the scope of these Commitments.
- 4.2.2 For the avoidance of doubt, subject to Clause 4.2.1, there is no requirement for the Monitoring Trustee to be involved in the commercial negotiations between Connect Airways and a third party carrier entering into any of the agreements under the Commitments. Any such agreements however remain subject to the Commission's approval.
- 4.2.3 Any request made by a third party carrier for the Monitoring Trustee to verify Connect Airways' compliance with these Commitments must be reasonable. In particular, the Monitoring Trustee must refuse to conduct such a verification where the third party carrier fails to produce any evidence of a suspected breach of the Commitments and/or appears to be making a vexatious request.
- 4.2.4 Connect Airways shall receive simultaneously a non-confidential version of any recommendation made by the Monitoring Trustee to the Commission (as provided for in Clause 4.2.1(c)).
- 4.2.5 The reports provided for in Clauses 4.2.1(c) to 4.2.1(f) shall be prepared in English. The reports provided for in Clause 4.2.1(d) shall be sent by the Monitoring Trustee to the Commission within ten (10) working days from the end of every IATA Season following the Monitoring Trustee's appointment or at such other time(s) as the Commission may specify and shall cover developments in the immediately preceding IATA Season. Connect Airways shall receive simultaneously a non-confidential copy of each Monitoring Trustee report.
- 4.2.6 Connect Airways shall provide the Monitoring Trustee with such assistance and information, including copies of all relevant documents, as the Monitoring Trustee may reasonably require in carrying out its mandate. Connect Airways shall pay reasonable remuneration for the services of the Monitoring Trustee as agreed in the mandate.
- 4.2.7 The Monitoring Trustee shall have access to Connect Airways' books, records, documents, management or other personnel facilities, sites and technical information necessary to fulfil its duties under these Commitments.
- 4.2.8 At Connect Airways' expense, the Monitoring Trustee may appoint advisors, subject to the Commission's prior approval, if the Monitoring Trustee reasonably considers the appointment of such advisors necessary for the performance of its duties under the mandate, provided that any fees incurred are reasonable and Connect Airways has been consulted on the appointment and has approved the amount of the fees.

### **4.3 TERMINATION OF MANDATE**

- 4.3.1 If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including but not limited to the exposure of the Monitoring Trustee to a conflict of interest:

- (a) the Commission may, after hearing the Monitoring Trustee, require Connect Airways to replace the Monitoring Trustee; or
  - (b) Connect Airways may replace the Monitoring Trustee.
- 4.3.2 If the Monitoring Trustee is removed, it may be required to continue its functions until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand-over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in Clause 4.1.1.
- 4.3.3 Aside from being removed in accordance with Clause 4.3.1 the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the Commitments have not been fully and properly implemented.
- 4.3.4 The Monitoring Trustee will be discharged from its duties if the entire Commitments expire in accordance with Clause 7.1.4.

## 5. FAST-TRACK DISPUTE RESOLUTIONPROCEDURE

- 5.1.1 The agreements concluded to implement the Commitments in accordance with Clause 1 shall provide for the Fast-Track Dispute Resolution procedure (the “**Fast- Track Dispute Resolution Procedure**”) described in this Clause 5 in the event that a Prospective Entrant has reason to believe that Connect Airways is failing to comply with the requirements of the Commitments vis-à-vis that party, this Fast-Track Dispute Resolution Procedure will apply.
- 5.1.2 Any Prospective Entrant which wishes to avail itself of the Fast-Track Dispute Resolution Procedure (the “**Requesting Party**”) shall send a written request to Connect Airways (with a copy to the Monitoring Trustee) setting out in detail the reasons leading that party to believe that Connect Airways is failing to comply with the requirements of the Commitments (the “**Request**”). The Requesting Party and Connect Airways will use their best efforts to resolve all differences of opinion and settle all disputes that may arise through cooperation and consultation within a reasonable period of time not to exceed fifteen (15) working days after receipt of the Request.
- 5.1.3 The Monitoring Trustee shall present its own proposal (the “**Trustee Proposal**”) for resolving the dispute within eight (8) working days, specifying in writing the action, if any, to be taken by Connect Airways in order to ensure compliance with the Commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.
- 5.1.4 Should the Requesting Party and Connect Airways fail to resolve their differences of opinion through cooperation and consultation as provided for in Clause 5.1.2 the Requesting Party may serve a notice (the “**Notice**”), in the sense of a request for arbitration, to the International Chamber of Commerce (the “**ICC**”) (the “**Arbitral Institution**”), with a copy of such a Notice and request for arbitration to Connect Airways.



- 5.15 The Notice shall set out in detail the dispute, difference or claim (the “**Dispute**”) and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by Connect Airways (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.
- 5.16 Connect Airways shall, within ten (10) working days from receipt of the Notice, use best endeavours to submit its answer (the “**Answer**”), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which Connect Airways proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

## **5.2 APPOINTMENT OF THE ARBITRATORS**

- 5.2.1 The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; Connect Airways shall nominate its arbitrator in the Answer.
- 5.2.2 The arbitrators nominated by the Requesting Party and Connect Airways shall, within five (5) working days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators. Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and Connect Airways shall agree on the nomination of a sole arbitrator within five (5) working days from the communication of the Answer, communicating this to the Arbitral Institution. Should Connect Airways fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, or should the parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the “**Arbitral Tribunal**”.

## **5.3 ARBITRATION PROCEDURE**

- 5.3.1 The Dispute shall be finally resolved by arbitration under the ICC rules, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “**Rules**”). Subject to Clause 5.3.2, the seat, or legal place, of the arbitration shall be London, England in the English language.
- 5.3.2 In the event that European Union law ceases to apply to the United Kingdom pursuant to Article 50(3) of the Treaty on European Union, the seat, or legal place, of the arbitration shall be Paris, France in the English language.
- 5.3.3 The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far

as admissible and appropriate in the circumstances. The parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.

- 534 The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the parties to the Arbitration. Terms of reference shall be drawn up and signed by the parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two (2) months of the confirmation of the Arbitral Tribunal.
- 535 In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the parties to the Arbitration agree.
- 536 The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, the Commission and outside counsel and experts of the opposing party.
- 537 The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless Connect Airways can produce evidence to the contrary.

#### **5.4 INVOLVEMENT OF THE COMMISSION**

- 54.1 The Commission shall be allowed and enabled to participate in all stages of the procedure by:
- (a) receiving all written submissions (including documents and reports, etc.) made by the parties to the Arbitration;
  - (b) receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the parties to the Arbitration (including Terms of reference and procedural time-table);
  - (c) giving the Commission the opportunity to file amicus curiae briefs; and
  - (d) being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.
- 54.2 The Arbitral Tribunal shall forward, or shall order the parties to the Arbitration to forward, the documents mentioned to the Commission without delay via the use of e-mail. In the event of disagreement between the parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any party to the Arbitration and shall be bound by the interpretation.

## **5.5 DECISIONS OF THE ARBITRAL TRIBUNAL**

- 55.1 The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
- 55.2 Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one (1) month of the confirmation of the Arbitral Tribunal. The preliminary ruling shall be applicable immediately and, as a rule, remain in force until the final decision is issued.
- 55.3 The final award shall, as a rule, be rendered by the arbitrators within six (6) months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitment if asked by the Arbitral Tribunal.
- 55.4 The Arbitral Tribunal shall, in their preliminary ruling as well as the final award, specify the action, if any, to be taken by Connect Airways in order to comply with the Commitments vis-à-vis the Requesting Party (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal.
- 55.5 The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
- 55.6 The parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.
- 55.7 Nothing in the arbitration procedure shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the TFEU.

## **6. REVIEW CLAUSE**

- 6.1.1 The Commission may, in response to a request by Connect Airways:
- (a) grant Connect Airways an extension of the deadlines foreseen in the Commitments; or
  - (b) waive, modify or substitute any one or more undertakings in these Commitments, justified by exceptional circumstances.
- 6.1.2 At the request of Connect Airways, any or all of the Commitments submitted herein may be reviewed, waived or modified by the Commission based on long-term market evolution. In particular:

- (a) the Commission will consider waiving any or all of the obligations in the Commitments to the extent that it finds that Commitments are no longer required to maintain effective competition in any relevant market because, for instance:
  - (i) there has been a material change to the ownership structure of Connect Airways; or
  - (ii) general market conditions have changed to a material extent in the context of the Commission's assessment. Such changed market conditions may include the situation where the total number of daily Competitive Air Services or the capacity operated by third party airlines, without Slots from the Commitments, on the Relevant City Pairs significantly increases.
- (b) the Commission may consider waiving any or all of the obligations in the Commitments to the extent that it finds that Commitments are no longer required to maintain effective competition in any relevant market because, for instance there has been a Material Increase in Capacity at either of the Relevant Airports or any airport in their Airport Catchment Area.

## **7. SUNSET CLAUSE**

- 7.1.1 The obligation on Connect Airways to procure that Slots are made available at Relevant Airports pursuant to Clause 1.1.1 shall apply in respect of 20 full consecutive IATA Seasons starting from and including Summer Season 2020. A Prospective Entrant can thus apply for Slots through the Slot Release Procedure to commence a Competitive Air Service in IATA Summer Season 2020 as the earliest season and IATA Winter Season 2029/2030 as the last season.
- 7.1.2 After the Sunset Date:
  - (a) a Prospective Entrant will no longer be able to commence a Competitive Air Service pursuant to Clause 1;
  - (b) the obligation for Connect Airways to enter into a fare combinability agreement with an Eligible Air Services Provider pursuant to Clause 2.1 shall cease to have effect; and
  - (c) Clause 3 shall cease to have effect.
- 7.1.3 For the avoidance of doubt Clauses 7.1.1 and 7.1.2 shall not affect the validity of the Slot Release Agreements, fare combinability agreements and FFP agreements already entered into operation prior to the Sunset Date. As long as such agreements continue to apply, the provisions in these Commitments that concern these agreements also continue to apply.
- 7.1.4 If there are no Slot Release Agreements in operation on the Sunset Date, then the entire Commitments will expire on the Sunset Date.