

**Summary of Commission Decision**  
**of 23 May 2013**  
**relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union**  
**(Case AT.39595 — Continental/United/Lufthansa/Air Canada)**

*(notified under document C(2013) 2836 final)*

**(Only the English text is authentic)**

(2013/C 201/09)

On 23 May 2013, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 <sup>(1)</sup>, the Commission herewith publishes the names of the parties and the main content of the decision having regard to the legitimate interest of undertakings in the protection of their business secrets.

### Introduction

- (1) The Decision makes legally binding the commitments offered by Air Canada ('AC'), United Airlines, Inc. ('UA') <sup>(2)</sup> and Deutsche Lufthansa AG ('LH') (together 'the parties') under Article 9 of Regulation (EC) No 1/2003 in a proceeding under Article 101 of the Treaty. This Decision concerns the agreement ('A++ Agreement') concluded between the parties in relation to the establishment of a revenue-sharing joint venture ('A++ joint venture'), which covers among others all passenger air transport services of the parties on routes between Europe and North America.

### Procedure

- (2) On 8 April 2009, the Commission opened formal proceedings with a view to taking a decision under Chapter III of Regulation (EC) No 1/2003. On 10 October 2012, the Commission adopted a preliminary assessment.
- (3) On 11 December 2012, the parties proposed commitments to address the Commission's preliminary concerns on the relevant market. On 21 December 2012, a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the proposed commitments, and inviting interested third parties to give their observations. Following the comments received from third parties, on 15 May 2013, the parties submitted the signed version of the final commitments.
- (4) On 7 May 2013, the Advisory Committee on restrictive practices and dominant positions was consulted and gave a positive opinion. On 8 May 2013, the Hearing Officer issued his final report.

### Concerns expressed in the preliminary assessment

*Assessment under Article 101(1) and (3) of the Treaty*

- (5) The preliminary assessment of 10 October 2012 set out the preliminary concerns of the Commission that the parties may have restricted competition in the premium market <sup>(3)</sup> on the Frankfurt–New York route both by object and by effect through their cooperation under the A++ Agreement.
- (6) The Commission took the preliminary view that the A++ Agreement by its very nature aimed at, and had the potential of, restricting competition. This is because the parties' cooperation in the A++ joint venture completely eliminated competition between these parties on key parameters of competition, such as price and capacity. Within the metal-neutral revenue-sharing joint venture, the partner airlines' individual incentives on transatlantic routes were replaced by the common interest and benefit of the joint venture.
- (7) The Commission also preliminarily considered that the parties' cooperation under the A++ Agreement led to appreciable negative effects for premium passengers on the Frankfurt–New York route, since competition that existed between LH and CO before the cooperation in the A++ joint venture most likely would not be replaced by competition from the parties' competitors due to substantial barriers to entry and expansion.
- (8) Therefore, in the Commission's preliminary view, the cooperation between the parties under the A++ Agreement was incompatible with Article 101(1) of the Treaty on the Frankfurt–New York route in relation to premium passengers.

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(2)</sup> In 2010, Continental Airlines (CO) and United Air Lines merged (Case COMP/M.5889 — United Air Lines/Continental Airlines). On 31 March 2013, the merger between those two carriers was completed. CO was a party to the antitrust investigation in this case until the date of the merger's completion.

<sup>(3)</sup> The premium market includes passengers buying first class, business class and flexible economy tickets.

- (9) The parties argued that the A++ Agreement produces efficiencies for both the passengers travelling on the route of concern and the passengers travelling on related behind and beyond routes. The Commission decided to broaden the test for the out-of-market efficiencies set out in paragraph 43 of the Article 101(3) of the Treaty Guidelines. Under this broadened test, the out-of-market efficiencies on related markets can be considered in the competitive assessment, to the extent they benefit the consumers who are also harmed by the cooperation. This assessment therefore does not involve weighing up harm to one customer group versus benefits to another customer group.
- (10) Under the broadened test, the parties should first demonstrate that the route of concern and its behind and beyond routes are related. It is necessary to demonstrate a considerable degree of commonality in the consumer groups that travel on the route of concern and these related behind and beyond routes, and that there is a two-way flow of efficiencies across these routes. Secondly, the parties should quantify efficiencies on related behind and beyond routes that accrue to those consumers who also travel on the route of concern. Finally, it has to be verified that claimed efficiencies (both in-market and out-of-market) meet all other conditions of Article 101(3) of the Treaty on efficiency gains, fair share for consumers, indispensability of restrictions, and no possibility to eliminate competition.
- (11) Following the assessment of efficiencies presented by the parties under the broadened test, it was however concluded that under Article 101(3) of the Treaty, the level of demonstrated efficiencies (in-market and out-of-market) was likely to be insufficient to outweigh the likely significant negative effects resulting from the restriction of competition under Article 101(1) of the Treaty.

#### Initial and the final commitments

- (12) On 11 December 2012, the parties proposed commitments to address the Commission's preliminary concerns for premium passengers on the Frankfurt–New York route. The parties offered:

- (a) to make arrival and departure slot pairs available at Frankfurt airport and/or New York JFK/Newark Liberty airports — at a competitor's choice — to allow to operate up to one additional daily frequency (and up to three daily frequencies should existing competitors' services on the route be withdrawn). The offer is subject to a number of conditions, including that a competitor has to exhaust all reasonable efforts to obtain the necessary slots through the general slot allocation process. The parties also do not have to release more than one slot pair at New York JFK airport;

- (b) to enter into fare combinability agreements with competitors for premium passengers<sup>(1)</sup>. Eligible competitors are all competitors which operate or have started to operate new or increased non-stop services on the Frankfurt–New York route, and do not operate a hub/focus-city airport at both ends of the route;

- (c) to enter into special prorate agreements for traffic with an origin and a destination in Europe/Israel or North America/the Caribbean/Central America, provided that part of the journey involves the Frankfurt–New York route<sup>(2)</sup>. Eligible competitors are all competitors which have started to operate new or increased non-stop services on the Frankfurt–New York route, and alone or in combination with their alliance partners do not operate a hub/focus-city airport at both ends of the Frankfurt–New York route;

- (d) to open their frequent flyer programmes to a competitor which commences or increases services on the route, if such competitor does not have a comparable programme of its own and does not participate in any of the parties' frequent flyer programmes.

- (13) The parties offer to give responsibility to a trustee to monitor the application of the commitments. In case of disagreement between a new entrant and the parties on the commitments, the parties offer a dispute resolution process where an arbitral tribunal will ultimately decide on the matter.

- (14) In response to the comments of the market test, the parties submitted the signed version of the final commitments on 15 May 2013. Other than a few technical adjustments and clarifications, these revised commitments differ from the initially offered commitments in particular in relation to the scope of the special prorate agreement commitment. The scope of the commitment has been extended from 15 to 20 routes on which the parties will offer access for competitors to their connecting traffic, subject to certain conditions.

#### Assessment and proportionality of the proposed commitments

- (15) The commitments in their final form are sufficient to address the preliminary concerns identified by the

<sup>(1)</sup> Fare combinability agreement allows for the possibility for a competitor (or travel agents) to offer a return trip to premium passengers, thus comprising a non-stop service provided one way by one of the parties, and the other way by that competitor.

<sup>(2)</sup> Special prorate agreements allow interested airlines to obtain favourable terms from the parties to carry connecting passengers on flights of the parties on short-haul routes in Europe and North America (and selected other countries) in order to 'feed' their own transatlantic services on the Frankfurt–New York route by transferring these passengers onto their own transatlantic flights.

Commission in its preliminary assessment without being disproportionate. The commitments facilitate entry or expansion on the Frankfurt–New York route for premium passengers by lowering barriers to entry or expansion, as well as strengthen the existing services of competitors. They aim at providing competitors with improved access to connecting traffic and with the possibility to conclude fare combinability agreements and cooperation agreements on frequent flier programmes with the parties.

- (16) The Commission considers that the scope of the final commitments as regards slots is sufficient and adequate to make them effective and attractive enough to encourage the actual take-up. This is especially true if combined with the other elements of the final commitments, such as the fare combinability and special prorated agreements. The fare combinability commitment will mitigate competitors' frequency disadvantage against the parties, by enabling these competitors to offer more combined frequencies. It will make competitors' services

more attractive for premium passengers and, therefore, will both improve the long-term sustainability of the existing competitors and decrease barriers to entry for new competitors. The commitment in relation to special prorated agreements will enable a new entrant to have the necessary access to connecting traffic of the parties on advantageous terms at both ends of the route. It will reduce the hub advantage of the parties against new entrants and will therefore incentivise entry by competitors.

### **Conclusion**

- (17) The Decision makes the commitments proposed by the undertakings concerned legally binding upon them.
- (18) In light of the final commitments offered by the parties, the Commission considers that there are no longer grounds for action on its part. The Decision shall be binding for a period of 10 years from the date of adoption of the Decision.