Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

16 December 2020*

(Competition – Concentrations – Air transport market – Decision declaring a concentration compatible with the internal market and the EEA Agreement – Commitments – Decision granting Grandfathering rights – Error of law – Concept of appropriate use)

In Case T-430/18,

American Airlines, Inc., established in Fort Worth, Texas (United States), represented by J.-P. Poitras, Solicitor, J. Ruiz Calzado and J. Wileur, lawyers,

applicant,

v

European Commission, represented by T. Franchoo, H. Leupold and L. Wildpanner, acting as Agents,

defendant,

supported by

Delta Air Lines, Inc., established in Wilmington, Delaware (United States), represented by M. Demetriou, QC, C. Angeli and I. Giles, lawyers,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2018) 2788 final of 30 April 2018 granting Grandfathering rights to Delta Air Lines (Case M.6607 – US Airways/American Airlines),

THE GENERAL COURT (First Chamber, Extended Composition),

composed of H. Kanninen, President, M. Jaeger (Rapporteur), N. Półtorak, O. Porchia and M. Stancu, Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

The Merger Clearance Decision and Commitments

1 On 18 June 2013, the European Commission received a notification of a proposed concentration pursuant to which US Airways Group, Inc. ('US Airways'), would enter into a merger with AMR Corporation ('AMR') (together, the parties to the merger, 'the Parties').

2 The Commission considered that the transaction would give rise to serious doubts as to its compatibility with the internal market as regards one long haul route between London and Philadelphia in respect of London Heathrow (United Kingdom) and Philadelphia International Airport (United States).

3 In order to address the serious doubts expressed by the Commission concerning the transaction, the Parties proposed certain commitments.

4 In that regard, the Parties offered a first draft of commitments on 10 July 2013 ('the Draft Commitments of 10 July 2013').

5 The Parties' counsel indicated in the e-mail accompanying those draft commitments that they were based on recent commitments, including those in Case COMP/M.6447 – IAG/bmi ('the IAG/bmi Case'), which gave rise to Commission Decision C(2012) 2320 of 30 March 2012 (OJ 2012 C 161, p. 2), and Case COMP/AT.39595 – A++ ('the A++ Case'), which gave rise to Commission Decision C(2013) 2836 of 23 May 2013 (OJ 2013 C 201, p. 8).

6 Clause 1.2.6 of the commitments in the A++ Case ('the A++ Commitments') stated the following:

'The Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall only be used for the purpose of providing the service proposed in the bid in accordance with Clause 1.3.9, for which the Prospective Entrant has requested the Slots, and cannot be used on another route.'

7 Clause 1.11 of the Draft Commitments of 10 July 2013 provided as follows:

'The Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall only be used for the purpose of providing the Competitive Air Service proposed in the bid in accordance with Clause 1.24, for which the Prospective Entrant has requested the Slots, and cannot be used on another route.'

8 On 12 July 2013, the Commission rejected the Draft Commitments of 10 July 2013 and insisted, in particular, that Grandfathering rights would need to be incorporated into those commitments.

9 On 14 July 2013, the Parties submitted revised commitments, but did not include any Grandfathering rights, being of the view that that was not appropriate in the present case ('the Draft Commitments of 14 July 2013').

10 Clause 1.11 of the Draft Commitments of 14 July 2013 provided as follows:

'The Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall only be used for the purpose of providing the Competitive Air Service in accordance with Clause 1.23, and cannot be used on a route other than LHR-PHL.'

11 The Draft Commitments of 14 July 2013 were accompanied by a track-changes version reflecting the changes to the Draft Commitments of 10 July 2013.

12 On 15 July 2013, the Commission rejected the Parties' draft commitments again and insisted that Grandfathering rights 'based on' the IAG/bmi Case had to be included. The Commission was of the view that Grandfathering rights were necessary in order to remove all serious doubts regarding the transaction.

13 The relevant part of the commitments in the IAG/bmi Case ('the IAG/bmi Commitments') reads as follows:

'1.3 Grandfathering of slots

1.3.1 As a general rule, the Slots obtained by the Prospective Entrant from IAG 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 Prospective Entrant has requested them from IAG through the Slot Release Procedure. These Slots cannot be used on another city pair unless the Prospective Entrant has operated the Relevant City Pair for which these Slots have been transferred for a number of full consecutive IATA Seasons ("**Utilisation Period**").

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 exclusively to operate services on any European Short-haul City Pair or the Identified Long-haul City Pairs ("**Grandfathering**").

1.3.3 Grandfathering is subject to approval of the Commission, advised by the Monitoring Trustee, …'

14 Clause 1.3.5 of the IAG/bmi Commitments, relating to misuse, was set out in the same section, entitled 'Grandfathering of slots'.

15 With the statutory deadline for formally submitting commitments expiring on 17 July 2013, the Parties on 16 July 2013 submitted revised commitments notably introducing Grandfathering rights ('the Draft Commitments of 16 July 2013'). The document sent to the Commission also included a track-changes version reflecting the changes to the Draft Commitments of 14 July 2013.

16 As regards the incorporation of Grandfathering rights into those draft commitments, the e-mail accompanying the Draft Commitments of 16 July 2013 merely stated that Grandfathering rights had been included 'as requested' by the Commission.

17 Clauses 1.9 to 1.11 of the Draft Commitments of 16 July 2013 were incorporated for the first time in that draft. They read as follows:

'1.9 As a general rule, the Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall be used only to provide a Competitive Air Service on the Airport Pair. The Slots cannot be used on another city pair unless the Prospective Entrant has operated a nonstop service on the Airport Pair in accordance with the bid submitted pursuant to Clause 1.24 for a number of full consecutive IATA Seasons ("**Utilisation Period**").

1.10 The Prospective Entrant will be deemed to have grandfathering rights for the Slots once appropriate use of the Slots has been made on the Airport 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 ("**Grandfathering**").

1.11 Grandfathering is subject to approval of the Commission, advised by the Monitoring Trustee at the end of the Utilisation Period …'

18 On 18 July 2013, the Parties provided the Commission with a Form RM relating to the Draft Commitments of 16 July 2013 ('the Form RM of 18 July 2013').

19 In a Form RM, the content of which is set out in Annex IV to Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1, Corrigendum OJ 2004 L 172, p. 9, ('the Implementing Regulation'), undertakings are expected to specify the information and documents which they submit when offering commitments pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1, 'the Merger Regulation').

20 Following the market test, the Parties had further discussions with the Commission regarding the Draft Commitments of 16 July 2013 and made some changes.

21 Thus, on 25 July 2013, the Parties submitted to the Commission their final commitments ('the Final Commitments') and, on 30 July 2013, the Parties provided the Commission with the Form RM accompanying the Final Commitments ('the Form RM of 30 July 2013').

22 The wording of Clauses 1.9 to 1.11 of the Final Commitments remained the same as that appearing in the Draft Commitments of 16 July 2013, as reproduced in paragraph 17 above.

23 In Section 1, point 1.1(i), the Form RM of 30 July 2013 stated as follows:

'The Slot Commitment is primarily based on the Commission practice in the most recent cases involving airlines mergers such as [the] IAG/bmi [Case]. In particular, to increase the attractiveness of the remedy, the Proposed Commitments include provisions on Grandfathering of the slots released by the Parties once the new entrant has operated a non-stop service on the Airport Pair for six consecutive seasons.'

24 In Section 3, under the heading 'Deviation from Model Texts', of the Form RM of 30 July 2013, the Parties were expected to draw attention to any discrepancies between the proposed commitments and the standard-form commitments published by the Commission's services, as revised periodically, and to explain the reasons underlying those discrepancies.

25 In the present case, in Section 3 of the Form RM of 30 July 2013, the Parties stated the following:

'The commitments offered by the Parties diverge from the Model Commitments texts published by Commission services to the extent necessary to deal with specific requirements of a structural remedy in the specific context of air transport.

As noted in the previous discussions, the Proposed Commitments are based on the commitments accepted by the Commission in other airline merger cases. In particular, for the most part they are based on the commitments offered in [the] IAG/bmi [Case].

In order to assist in the assessment of the Proposed Commitments, the Parties identify below the points where the Proposed Commitment diverge from the commitments accepted in [the] IAG/bmi [Case]. These do not include minor linguistic changes and clarifications required by the specific circumstances of this case, particularly in the section on definitions.'

26 As regards the Grandfathering provisions, no departure from the IAG/bmi Commitments was pointed to in the Form RM of 30 July 2013.

27 The passages of the Form RM of 30 July 2013 reproduced in paragraph 25 above correspond, moreover, to the Form RM of 18 July 2013, the only difference being that, in Section 1, point 1.1(i) of the Form RM of 18 July 2013, reference was made to 'eight' consecutive seasons rather than 'six'.

28 By Decision C(2013) 5232 final of 5 August 2013 (Case COMP/M.6607 – US Airways/American Airlines) (OJ 2013 C 279, p. 6), adopted pursuant to Article 6(1)(b) of the Merger Regulation, read in conjunction with Article 6(2) of that regulation, the Commission declared the merger compatible with the internal market, subject to certain conditions and commitments ('the Clearance Decision').

29 In paragraph 160 of the Clearance Decision, the terms of the Final Commitments relating to Grandfathering rights were summarised as follows:

'As a general rule, the Slots obtained by a prospective entrant under the Final Commitments must be used to provide a non-stop scheduled passenger air transport service operated on the London Heathrow – Philadelphia airport pair and cannot be used on another city pair unless the prospective entrant has operated such service during the Utilisation Period (six consecutive IATA seasons). Once the Utilisation Period has elapsed, the prospective entrant will be entitled to use the Slots on any city pair ("grandfathering"). However, grandfathering is subject to approval of the Commission, advised by the Monitoring Trustee.'

30 In paragraphs 176, 178 to 181, 186 and 197 to 199 of the Clearance Decision, in its analysis of the Final Commitments, the Commission made the following findings:

'(176) 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 are intended not to prevent a significant impediment on effective competition but rather to clearly dispel all serious doubts in that regard. The Commission enjoys a broad discretion in assessing whether these remedies constitute a direct and sufficient response capable of dispelling any such doubts.

(178) The Commission's assessment has concluded that the final Commitments address all serious doubts identified in the course of the procedure. As such, the Commission comes to the conclusion that the final Commitments entered into by the Parties are sufficient to eliminate the serious doubts as to the compatibility of the Transaction with the internal market.

(179) In airline cases, slot release commitments are acceptable to the Commission where it is sufficiently clear that actual entry by new competitors would occur that would eliminate any significant impediment to effective competition. …

(180) The Slot Commitment is based on the fact that slot availability at London Heathrow is the main entry barrier on the route where serious doubts have been identified. Therefore, it is designed to remove (or at least reduce significantly) this barrier and foster sufficient, timely, and likely entry on the London (Heathrow)-Philadelphia route.

(181) It is important to note also that London Heathrow slots have in themselves a very significant value therefore rendering the Slot Commitment very appealing for prospective entrants. This intrinsic attractiveness of the slots is enhanced in the Commitment package by the prospect of acquiring grandfathering rights after six IATA seasons.

(186) In light of the above and of the other available evidence, in particular considering the interest and indications for a likely and timely entry received during the market test, the Commission concludes that the Slot Commitment is a key element in the timely and likely entry on the London-Philadelphia route. The scope of entry on this route will suffice to resolve the serious doubts identified on this market (on all possible passenger segments).

(197) 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.

(198) … Where a condition is not fulfilled, the [Clearance Decision] 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. …

(199) … , the decision in this case is conditioned on the full compliance with the requirements set out in Sections 1, 2, 3 and 4 of the final Commitments (conditions), whereas the other sections of the final Commitments constitute obligations on the Parties.'

31 In paragraph 200 of the Clearance Decision, it was added that the Final Commitments were annexed to that decision and formed an integral part to the decision.

32 Lastly, in paragraph 201 of the Clearance Decision, the Commission decided to declare the notified transaction, as amended by the Final Commitments, compatible with the internal market 'subject to full compliance with the conditions and obligations laid down in the Final Commitments annexed to the present decision'.

Final Commitments

33 In the first paragraph of the Final Commitments as provided in an annex to the Clearance Decision, the Parties state that they provided the Final Commitments in order to enable the Commission to declare the merger compatible with the internal market.

34 In the third paragraph of the Final Commitments, it is specified as follows:

'This text shall be interpreted in the light of the [Clearance] 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 [the Merger Regulation] and under [the Implementing Regulation].'

35 Certain terms are, first of all, defined in the Final Commitments as follows:

– 'Grandfathering' is defined by reference to Clause 1.10;

– 'Misuse' is defined by reference to Clause 1.13;

– 'Utilisation Period' is defined by reference to Clause 1.9, it being specified that that period should be six consecutive seasons for the purposes of the International Air Transport Association (IATA) ('IATA Seasons').

36 'Appropriate Use' is not, however, defined in the Final Commitments.

37 Clause 1.6 of the Final Commitments is then worded as follows:

'Without prejudice to these Commitments, the Parties shall not be obliged to honour any agreement to make available the Slots to the Prospective Entrant if:

…

(b) the Prospective Entrant has been found to be in a situation of Misuse (as described in Clause 1.13 below).'

38 Clauses 1.9 to 1.11 of the Final Commitments provide as follows:

'1.9 As a general rule, the Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall be used only to provide a Competitive Air Service on the Airport Pair. The Slots cannot be used on another city pair unless the Prospective Entrant has operated a non-stop service on the Airport Pair in accordance with the bid submitted pursuant to Clause 1.24 for a number of full consecutive IATA Seasons ("**Utilisation Period**").

1.10 The Prospective Entrant will be deemed to have grandfathering rights for the Slots once appropriate use of the Slots has been made on the Airport 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 ("**Grandfathering**").

1.11 Grandfathering is subject to approval of the Commission, advised by the Monitoring Trustee at the end of the Utilisation Period …'

39 Clause 1.13 of the Final Commitments provides as follows:

'During the Utilisation Period, Misuse shall be deemed to arise where a Prospective Entrant which has obtained Slots released by the Parties decides:

…

(b) to operate fewer weekly Frequencies than those to which it committed in the bid in accordance with Clause 1.24 or to cease operating on the Airport Pair unless such a decision is consistent with the "use it or lose it" principle in Article 10(2) of Regulation [(EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1)] (or any suspension thereof);

…'

40 Clause 1.14 of the Final Commitments provides as follows:

'If the Parties or the Prospective Entrant which has obtained Slots under the Slot Release Procedure become aware of, or reasonably foresee, any Misuse by the Prospective Entrant, they shall immediately inform the other and the Monitoring Trustee. The Prospective Entrant shall have 30 days after such notice to cure the actual or potential Misuse. If the Misuse is not cured, the Parties shall have the right to terminate the Slot Release Agreement and the Slots shall be returned to the Parties, it being understood that subject to the application of this Clause, the Parties shall remain bound by the undertaking to make slots available to a subsequent Prospective Entrant under Clause 1.1. In cases (a) and (b) of Clause 1.13, the Parties shall then use their best efforts to redeploy the Slots in order to safeguard the historic precedents. If despite their best efforts, the Parties are not able to retain the historic precedent for these Slots, or in case of a Misuse as defined in cases (c), (d) or (e) of Clause 1.13, the Prospective Entrant shall provide reasonable compensation to the Parties as provided for in the Slot Release Agreement pursuant to Clause 1.15. …'

41 Clause 1.24 of the Final Commitments provides as follows:

'1.24 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 Slot, number of frequencies and IATA Seasons to be operated (year-round service or seasonal));

(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 Airport Pair. The latter should specify in detail planned operations on the Airport Pair 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) …'

42 Clause 1.26 of the Final Commitments provides as follows:

'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 Airport Pair in the long term as a viable and active competitive force;

(b) evaluate the formal bids of each Applicant that meet (a) above, and rank these Applicants in order of preference.'

43 Clause 1.27 of the Final Commitments provides as follows:

'1.27 In conducting its evaluation in accordance with Clause 1.26, the Commission shall give preference to the Applicant which will provide the most effective overall competitive constraint on the Airport Pair, without regard to the country in which the Applicant 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 the Applicant meeting one or more of the following criteria:

(a) the largest capacity (as measured in seats offered on services for two (2) consecutive IATA Seasons) and/or the greatest total number of services/frequencies;

(b) year-round service over only IATA Summer or Winter Season service; and

(c) a pricing structure and service offerings that would provide the most effective competitive constraint on the Airport Pair.

If, following the Commission's evaluation, several Applicants are deemed to provide similarly effective competitive constraints on the Airport Pair, the Commission shall rank these Applicants following the ranking provided by the Parties under Clause 1.25.'

Contested Decision

44 On 9 October 2014, the intervener, Delta Air Lines, Inc., submitted a formal bid for slots pursuant to Clause 1.24 of the Final Commitments. According to its application, the intervener intended to operate on the London Heathrow – Philadelphia International Airport airport pair with one daily frequency over six consecutive IATA Seasons as of Summer 2015.

45 The intervener was the only applicant for slots under the Final Commitments.

46 By decision of 6 November 2014, assessing the viability of the intervener and evaluating its formal bid pursuant to Clause 1.21 and 1.26 of the Final Commitments, the Commission declared that the intervener was, first, independent of and unconnected with the Parties and had exhausted its own slot portfolio at London Heathrow within the meaning of Clause 1.21 of the Final Commitments and, second, a viable potential competitor of the Parties on the Airport Pair for which it has requested slots under the Final Commitments, with the ability, resources and commitment to operate services on the London Heathrow – Philadelphia International Airport route in the long term as a viable and active competitive force.

47 On 17 December 2014, the applicant and the intervener submitted to the Commission the Slot Release Agreement to be concluded between the two companies for the purpose of implementing the commitments with respect to slots requested by the intervener on the London Heathrow – Philadelphia International Airport airport pair. By decision of 19 December 2014, the Commission, in line with the Monitoring Trustee report of 17 December 2014, approved the Slot Release Agreement.

48 The Slot Release Decision of 19 December 2014 provides that the intervener is under an obligation to use the applicant's slots to operate a non-stop scheduled air service between London Heathrow and Philadelphia International Airport. That decision also provides that, once appropriate use of those slots has been made for the utilisation period, the intervener will be deemed to have Grandfathering rights subject to the approval of the Commission and that, once the Commission approves of Grandfathering rights, the intervener will retain the applicant's slots and will be entitled to use them on any city pair.

49 The intervener started operating on the London – Philadelphia route at the beginning of the Summer 2015 IATA schedule season.

50 On 28 September 2015, the applicant sent a letter to the Monitoring Trustee in which the applicant submitted that the intervener's failure to operate the remedy slots in accordance with its bid meant that the intervener had not made 'appropriate use' of the remedy slots in the 2015 summer and 2015/2016 winter seasons and as such those seasons could not count for the acquisition of Grandfathering rights.

51 Subsequently, several exchanges took place, in particular between the applicant and the Commission, in which the applicant stated that the intervener was continuing in its failure to comply with the terms of its bid and could not therefore claim to acquire Grandfathering rights.

52 On 30 April 2018, the Commission adopted Decision C(2018) 2788 final granting Grandfathering rights to Delta Air Lines (Case M.6607 US Airways/American Airlines), by which it found that the intervener had made appropriate use of the slots during the utilisation period and approved the granting of Grandfathering rights to Delta Air Lines pursuant to Clause 1.10 of the Final Commitments ('the Contested Decision').

53 The Contested Decision was addressed to US Airways, AMR Corporation and the intervener. It was notified to AMR Corporation through the offices of its lawyers in Brussels (Belgium).

54 Having found in the Contested Decision that the intervener and the applicant supported differing interpretations as to the conditions to be fulfilled for the granting of Grandfathering rights, the Commission examined the wording, object and context of the Final Commitments.

55 In that regard, the Contested Decision contained an assessment conducted in two stages. In the first stage, the Commission set out the reasons which had led it to find that the term 'appropriate use' should be interpreted as meaning the absence of 'misuse'. In a second stage, the Commission set out the arguments that, in its view, ran counter to the proposition that 'appropriate use' be interpreted as 'use in accordance with the bid'.

56 Thus, having found, first, that the term 'appropriate use' was not defined in the Final Commitments, the Contested Decision stated that it was appropriate to interpret that term in the light of 'the object and the context of the [Final] Commitments'.

57 As regards the object of the Final Commitments, the Commission considered that the Final Commitments aimed to remedy serious doubts as to the compatibility of the merger with the internal market and that the purpose of Clause 1.9 of those commitments was to restore competition on the route in question by establishing a competitive air service.

58 As regards the context of the Final Commitments, the Commission reiterated that Grandfathering rights constituted an incentive for a prospective entrant to operate the route in question. To entice entry by a competitor, a prospective entrant needed clear and verifiable criteria which are not subject to arbitrary considerations.

59 Given that, in ordinary language, misuse may be regarded as inappropriate use and that in the Final Commitments the term 'misuse' was defined while the term 'appropriate usage' was not, the Commission concluded that, in order to give a prospective entrant clear and verifiable guidance, the term 'appropriate usage' should be interpreted as the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments.

60 Next, in the Contested Decision, the Commission refuted the view that the term 'appropriate use' should be interpreted as meaning 'use in accordance with the bid'.

61 In that regard, according to the Contested Decision, first, equating 'appropriate use' with 'use in accordance with the bid' would lead to an almost impossible requirement for any airline.

62 Second, the argument that only 'cancellations for extraordinary operational reasons' would be consistent with 'use in accordance with the bid' was not convincing. Such a criterion was too vague to ensure legal certainty for a potential new entrant. Moreover, there was no support for such a criterion in the wording of the Final Commitments.

63 Third, interpreting 'appropriate use' as meaning 'use in accordance with the bid' would make the Final Commitments much less attractive to a prospective entrant.

64 Fourth, since a level of 80% slot utilisation is the de facto rule in the aviation sector, it would be unreasonable to require a prospective entrant to have a 100% slot utilisation rate.

65 Fifth, according to the Commission, it is clear from the Form RM that, as far as concerns Grandfathering rights, the Final Commitments were, aside from some 'minor linguistic changes and clarifications', largely similar to the IAG/bmi Commitments. In the IAG/bmi Commitments, 'appropriate use' was not a condition for acquiring Grandfathering rights. It follows that the formulation 'in accordance with the bid' in the Final Commitments only constitutes a 'minor linguistic change' as compared to the IAG/bmi Commitments.

66 Sixth, it would be contrary to the scheme of the provisions in question to interpret the term 'appropriate use' in Clause 1.10 of the Final Commitments in the light of Clause 1.9 of those commitments, since Clause 1.9 is intended to identify the purpose of the agreement, namely to provide a competitive air service on the route, whereas Grandfathering rights are defined in Clause 1.10 of the Final Commitments.

67 Following that assessment, the Commission concluded in the Contested Decision that the term 'appropriate use' could not be understood as 'use in accordance with the bid' but that it should be interpreted as meaning the 'absence of misuse' of slots within the meaning of Cause 1.13 of the Final Commitments.

68 Lastly, the Commission examined, in the Contested Decision, whether the intervener had misused the slots within the meaning of Clause 1.13 of the Final Commitments in order to determine whether it should be granted Grandfathering rights.

69 In that regard, the Commission found that the intervener had under-operated the slots as a result of the return of certain slots to the slot coordinator before their expiry date and of the cancellation of certain flights. However, the Commission took the view that the use of the slots, despite being under-operated, was in line with the 'use it or lose it' principle as governed by Article 10(2) and (3) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1, 'the Airport Slots Regulation'), in that the slots returned before the deadline for return were not to be taken into account for the application of that principle and in that the use of the slots was always above an 80% threshold. Having found that the intervener had not misused the slots within the meaning of Clause 1.13 of the Final Commitments, the Commission concluded that, in accordance with the written recommendation of the Monitoring Trustee, the intervener had made appropriate use of the slots during the utilisation period and approved the granting of Grandfathering rights to the intervener pursuant to Clause 1.10 of the Final Commitments.

Procedure and forms of order

70 The applicant brought the present action by application lodged at the Registry of the General Court on 10 July 2018.

71 The applicant claims that the Court should:

– annul the Contested Decision;

– order the Commission and the intervener to pay the costs;

– make any other order as may be appropriate in the circumstances of the case.

72 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

73 The intervener applied for leave to intervene in support of the form of order sought by the Commission by document lodged at the Registry of the General Court on 24 October 2018.

74 The intervener was given leave to intervene in support of the form of order sought by the Commission by decision of the President of the Chamber of 8 January 2019.

75 On 21 March 2019, the intervener lodged a statement of intervention at the Court Registry, in which it claims that the action should be dismissed.

76 The applicant lodged its observations on the statement in intervention on 30 April 2019. The Commission then indicated on 25 April 2019 that it had no comments on that statement.

77 The Court decided, on a proposal from the First Chamber pursuant to Article 28 of the Rules of Procedure, to assign the case to the Chamber sitting in extended composition.

78 On a proposal from the Judge-Rapporteur pursuant to measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court (First Chamber, Extended Composition) requested that the Commission produce certain documents and put questions to the main parties.

79 On 14 February 2020, the Commission produced the requested documents and the main parties replied to the questions put.

80 On 13 March 2020, the applicant submitted its observations on the Commission's replies to the questions put by the Court and on the documents produced by the Commission.

81 On 11 May 2020, the Commission responded to the applicant's replies to the questions put by the Court and to all of the applicant's observations, namely those relating to the documents provided and those relating to the Commission's replies to the questions put by the Court.

82 In those circumstances, and in order to observe the *audi alteram partem* rule, the part of the Commission's observations of 11 May 2020 concerning the applicant's observations on the Commission's replies to the questions put by the Court, namely paragraphs 22 to 26 thereof, has not been taken into account for the purposes of this judgment.

83 Since the parties did not request a hearing, the Court (First Chamber, Extended Composition) decided, pursuant to Article 106(3) of the Rules of Procedure, to give judgment without an oral procedure.

Law

84 In support of its action, the applicant relies on two pleas in law. The first plea in law alleges errors of law made by the Commission in interpreting the term 'misuse'.

85 By its second plea in law, the applicant claims that the Commission did not take into account all the relevant factors for the grant of Grandfathering rights.

The first plea in law

86 The first plea in law is divided into two limbs. By the first limb, the applicant submits that the term 'appropriate use' in Clause 1.10 of the Final Commitments must be understood as referring to 'use in accordance with the bid'. By the second limb, the applicant seeks to show that the term 'appropriate use' does not mean the absence of 'misuse' on the basis that misuse is a concept with a different purpose.

87 Since both limbs of the first plea in law concern the criteria for assessing the concept of 'appropriate use', it is appropriate to examine them together.

88 According to the Contested Decision, the term 'appropriate use' in Clause 1.10 of the Final Commitments should be interpreted as meaning the absence of 'misuse' within the meaning of Clause 1.13 of those commitments and not use 'in accordance with the [intervener's] bid'. Since the fact that the intervener under-operated slots in relation to its bid does not constitute 'misuse', the Commission concluded that the intervener had made 'appropriate use' of the slots and granted the intervener Grandfathering rights over those slots, namely the possibility for the intervener to use the slots for a route other than London-Philadelphia after the utilisation period.

89 In arriving at the interpretation set out in paragraph 88 above, first of all, the Commission noted, in paragraph 51 of the Contested Decision, that the concept of appropriate use was not defined by the Final Commitments and that the applicant and the intervener did not agree on the definition of that concept. Next, in paragraph 52 of the Contested Decision, the Commission took the view that, in the absence of a clear definition, that concept must be interpreted on the basis of the wording, context and object of the provisions of those commitments.

90 The applicant, while criticising the extent of the intervener's under-operation of the slots, does not dispute that its use of the slots does not constitute 'misuse' within the meaning of Clause 1.13 of the Final Commitments.

91 However, the applicant contests the Commission's interpretation of the term 'appropriate use' in Clause 1.10 of the Final Commitments.

92 According to the applicant's interpretation, the term 'appropriate use' should be understood as referring, in principle, to use 'in accordance with the bid', from which it can be inferred that the Commission has a certain discretion in determining whether the use, even if not entirely in accordance with the bid, can still be regarded as 'appropriate use', in particular with a view to the purpose of the commitments.

93 According to the applicant, if the term 'appropriate use' were interpreted in such a way, then it would be clear that the intervener would not have made such 'appropriate use', so that it would not have acquired any Grandfathering rights.

94 The first plea thus relates to the interpretation of the concept of 'appropriate use' in Clause 1.10 of the Final Commitments.

A literal interpretation of the relevant provisions

95 According to paragraph 56 of the Contested Decision, in ordinary language, 'misuse' can be defined as 'an occasion when something is used in an unsuitable way or in a way that was not intended' and 'appropriate use' as use which is 'suitable or right for a particular situation or occasion'. According to the Contested Decision, it follows that 'appropriate use' is the opposite of 'misuse'. Therefore, following a literal interpretation of the concepts used in the Final Commitments, 'appropriate use' of slots should be understood as the absence of 'misuse' of slots.

96 According to paragraph 63 of the Contested Decision, the wording 'in accordance with the bid', which appears in Clause 1.9 of the Final Commitments is merely a 'minor linguistic change' which cannot be decisive in interpreting the term 'appropriate use'.

97 The applicant challenges that assertion.

98 The applicant claims that the Commission's interpretation is inconsistent with the wording of the relevant provisions. It submits that as a result of the Commission's interpretation the wording 'in accordance with the bid' of the second sentence of Clause 1.9 of the Final Commitments, which

should be taken into account in interpreting the term 'appropriate use' in Clause 1.10 of the Final Commitments, is rendered ineffective. Similarly, it alleges that the equivalence adopted in the Contested Decision between 'appropriate use' and absence of 'misuse' is inconsistent with the wording of the provisions in question.

99 In that regard, the Court notes, as a preliminary point, that the Final Commitments contain a section on definitions. However, the term 'appropriate use' in Clause 1.10 of the Final Commitments is not defined.

100 As far as its meaning is concerned, the term 'appropriate use' is not fully operative in itself, but requires a referential context from which it can be determined whether a particular use may be regarded, in a given instance, as 'appropriate' or not.

101 Thus, the approach adopted in the Contested Decision consists in equating 'appropriate use' with the absence of 'misuse', as defined in Clause 1.13 of the Final Commitments, thus providing a referential context for the purposes of determining whether or not Grandfathering rights have been acquired.

102 According to the applicant's interpretation, on the other hand, which is, in substance, based on the wording 'in accordance with the bid' in Clause 1.9 of the Final Commitments, the term 'appropriate use' should be interpreted as referring, in principle, to use 'in accordance with the bid'. The referential context is thus, according to that interpretation, 'in accordance with the bid', as a result of which the Commission has a certain discretion to determine whether a use, even if not entirely in accordance with the bid, can still be regarded as 'appropriate use', in particular in the light of the objective of the commitments, namely to produce maximum competition on the route in question for the benefit of consumers.

103 In that regard, the Court notes that the original language of the Final Commitments is English and that the concept of 'misuse', in Clause 1.13 of the Final Commitments, has a fairly broad meaning and does not necessarily bear a negative connotation. Accordingly, the Commission was correct to take the view, in paragraph 56 of the Contested Decision, that, in ordinary language, the term 'misuse' can be defined as 'an occasion when something is used in an unsuitable way or in a way that was not intended'.

104 In those circumstances, it cannot be considered that equating 'appropriate use' and the absence of 'misuse' in the Contested Decision is irreconcilable with the wording of the provisions concerned.

105 As regards the interpretation supported by the applicant, it should be noted that the proposition that 'appropriate use' should be understood as meaning use which is always completely 'in accordance with the bid' is irreconcilable with the meaning of the term 'appropriate use'. The term 'appropriate' implies a use of slots which may not always be completely 'in accordance with the bid' but nonetheless remains above a certain threshold.

106 In so far as the applicant submits that the term 'appropriate use' should be interpreted as referring, in principle, to use 'in accordance with the bid' yet allowing the Commission a certain discretion as to whether to regard use below 'use in accordance with the bid' as appropriate, it must be concluded that the applicant's interpretation can be reconciled with the term 'appropriate use'.

107 It follows from the foregoing that both the interpretation adopted in the Contested Decision and that supported by the applicant are reconcilable with the wording of the provisions in question, so that a literal interpretation of those provisions alone is not decisive.

108 In those circumstances, in order to examine whether the Commission was entitled to consider, in the Contested Decision, that 'appropriate use' in Clause 1.10 of the Final Commitments was to be understood as meaning the absence of 'misuse', it is necessary, first, to clarify the relevant principles for the interpretation of the term 'appropriate use' in order to examine, second, whether the Commission applied those principles without erring in law.

Principles for the interpretation of the wording 'in accordance with the bid'

109 First, it is a general rule and settled case-law that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see judgment of 7 May 2019, *Germany* v *Commission*, T-239/17, EU:T:2019:289, paragraph 40 and the case-law cited), bearing in mind, however, that no interpretation may exceed the limits of clear and precise wording (see, to that effect, judgment of 15 July 2010, *Commission* v *United Kingdom*, C-582/08, EU:C:2010:429, paragraph 51 and the case-law cited). In addition, the EU courts regularly make use of systemic interpretation.

110 Since, in accordance with paragraph 200 of the Clearance Decision, the Final Commitments form an integral part of the Clearance Decision, the principles set out in paragraph 109 above apply to the interpretation of those commitments, which is also common ground between the parties.

111 Second, account should be taken of the specific rules of interpretation as specified in the third paragraph of the Final Commitments.

112 Thus, the Final Commitments must be interpreted in the light of the Clearance Decision, 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 the Merger Regulation and the Implementing Regulation (OJ 2008 C 267, p. 1, 'the Remedies Notice').

113 As regards, in the first place, the Clearance Decision, it should be recalled that that decision was adopted pursuant to Article 6(1)(b) of the Merger Regulation, read in conjunction with Article 6(2) thereof, namely at the preliminary examination stage, that is to say, during Phase I.

114 According to the case-law, the commitments proposed in Phase I must allow the Commission to form the view that the notified concentration does not raise serious doubts as to its compatibility with the internal market at the stage of the preliminary examination. Those commitments therefore make it possible to avoid the initiation of a detailed investigation phase (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 290 and the case-law cited).

115 Article 8(2) of the Merger Regulation allows the Commission to attach to a decision declaring a concentration compatible with the internal market in accordance with the criterion laid down in Article 2(2) of the regulation 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 (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 291 and the case-law cited).

116 Having regard both to the significance of the financial interests and industrial or commercial stakes inherent in that type of transaction and to the powers available to the Commission in the field, it is in the interest of the undertakings concerned to facilitate the work of the administration. For the same reasons, the Commission must display the utmost diligence in performing its supervisory duties in the field of concentrations (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 292 and the case-law cited).

117 It must also be noted that, in the context of merger control, the Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the internal market (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 293 and the case-law cited).

118 It must be held in that regard that commitments proposed by one of the parties to a merger will meet that condition only in so far as the Commission is able to conclude, with certainty, that it will be possible to implement them and that the remedies resulting from them will be sufficiently workable and lasting to ensure that the creation or strengthening of a dominant position, or the impairment of effective competition, which the commitments are intended to prevent, will not be likely to materialise in the relatively near future (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 294 and the case-law cited).

119 The Commission enjoys a broad discretion in assessing the need for commitments to be given in order to dispel the serious doubts raised by a concentration (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 295 and the case-law cited).

120 The commitments entered into in Phase I are intended to dispel any serious doubts as to whether the concentration would significantly impede effective competition in the internal market or a significant part of it, in particular by creating or strengthening a dominant position. Consequently, having regard to their scope and content, the commitments entered into during the Phase I procedure are such as to permit the Commission to adopt a decision of approval without initiating the Phase II procedure, since the Commission must be entitled, without making a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts (see judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 297 and the case-law cited).

121 As regards, in the second place, the applicant's argument that the Form RM is not relevant to the interpretation of the terms of the Final Commitments, it should be borne in mind that the third paragraph of those commitments provides that the commitments must be interpreted, inter alia, in the light of the Merger Regulation.

122 However, it follows from Article 23(1)(c) of the Merger Regulation that the Commission is empowered to lay down, inter alia, the procedure and time limits for the submission and implementation of commitments pursuant to Article 6(2) thereof. Accordingly, the Commission adopted the Implementing Regulation, Article 20(1a) of which provides that the undertakings concerned shall, at the same time as offering commitments pursuant to Article 6(2) of the Merger Regulation, submit one original of the information and documents prescribed by the Form RM relating to remedies as set out in Annex IV to the Implementing Regulation.

123 Thus, contrary to the applicant's claim, since the existence of the Form RM derives from the Merger Regulation, the terms of the Final Commitments must, in accordance with the third paragraph thereof, be interpreted in the light of that form and of what the Parties indicate in it.

124 In the third place, as regards 'the 'general framework of EU law', account should be taken, in particular, of the Airport Slots Regulation.

125 In the fourth place, it should be noted that, although the commitments are intended to dispel serious doubts as to the compatibility of the concentration with the internal market, they are also relevant for third parties who take over the activities of the parties to a merger. The conditions under which such activities may be taken over are largely determined by the commitments.

Interpretation of the provisions in question in the light of the indications in the Form RM

126 According to paragraph 63 of the Contested Decision, it is clear from the Form RM submitted by the Parties that, as far as concerns Grandfathering rights, the Final Commitments are, aside from some 'minor linguistic changes and clarifications', largely similar to the IAG/bmi Commitments. Although the IAG/bmi Commitments refer to 'appropriate use', they do not require the slots to be used during the utilisation period 'in accordance with the bid'. It follows that the wording 'in accordance with the bid' in the Final Commitments does not result in any change in the requirements for Grandfathering in the present case and only constitutes a 'minor linguistic change' as compared to the IAG/bmi Commitments.

127 The applicant calls that conclusion into question in a series of arguments.

128 In order to examine the legality of the conclusion reached by the Commission in paragraph 63 of the Contested Decision, it is appropriate, as a preliminary point, to set out each of the obligations of the Commission and those of undertakings notifying a merger, in particular as far as commitments are concerned.

129 In that regard, it should be noted that it follows from the provisions of the introduction to Annex IV to the Implementing Regulation that the Form RM 'specifies the information and documents to be submitted by the undertakings concerned at the same time as offering commitments pursuant to Article 6(2)' of the Merger Regulation and that 'if [the undertakings concerned] consider that any particular information requested by this Form may not be necessary for the Commission's assessment, [they] may approach the Commission asking to dispense with certain requirements, giving adequate reasons why that information is not relevant'.

130 Paragraph 7 of the Remedies Notice states the following:

'The Commission has to assess whether the proposed remedies, once implemented, would eliminate the competition concerns identified. Only the parties have all the relevant information necessary for such an assessment, in particular as to the feasibility of the commitments proposed and the viability and competitiveness of the assets proposed for divestiture. It is therefore the responsibility of the parties to provide all such information available that is necessary for the Commission's assessment of the remedies proposal. To this end, the Implementing Regulation obliges the notifying parties to provide, with the commitments, detailed information on the content of the commitments offered, the conditions for their implementation and showing their suitability to remove any significant impediment of effective competition, as set out in the annex to the Implementing Regulation ("Form RM") …'

131 In addition, paragraph 79 of the Remedies Notice states the following:

'In order to form the basis of a decision pursuant to Article 6(2) [of the Merger Regulation], proposals for commitments must meet the following requirements:

(a) they shall fully specify the substantive and implementing commitments entered into by the parties;

…'

132 In addition, paragraph 82 of the Remedies Notice states the following:

'Due to the time-constraints in phase I, it is particularly important for the parties to submit in a timely manner to the Commission the information required in the Implementing Regulation to properly assess the content and workability of the commitments and their suitability to maintain conditions of effective competition in the common market on a permanent basis …'

133 Lastly, the Commission notes, without being contradicted on this point by the applicant, that, given the large amount of facts and data that it has to assess in proceedings under the Merger Regulation and the 'need for speed' that governs such proceedings, notably in case of approvals at the end of 'Phase I' with remedies, the information provided by an undertaking in a Form RM is of utmost importance to allow the Commission to evaluate properly the content, aim, viability and effectiveness of proposed commitments within the limited time available. The Form RM aims to ensure clarity of proposed commitments and to avoid 'Trojan Horses' from being included in them. Moreover, the Form RM sets out the undertaking's own understanding of the commitments it proposes.

134 In the present case, it must be borne in mind that it is common ground that the Final Commitments depart in wording from the IAG/bmi Commitments.

135 As is clear from a comparison of Clause 1.9 of the Final Commitments and Clause 1.3.1 of the IAG/bmi Commitments, the wording 'a non-stop service on the Airport Pair in accordance with the bid submitted pursuant to Clause 1.24' has been inserted into the Final Commitments in place of the wording 'the Relevant City Pair for which these Slots have been transferred' used in the IAG/bmi Commitments.

136 Similarly, in contrast to the Final Commitments, the IAG/bmi Commitments included a section entitled 'Grandfathering of Slots' on the utilisation period, the granting of Grandfathering rights and 'misuse'.

137 In addition, it is also common ground, as stated in paragraphs 23 to 27 above, that the Parties indicated, both in the Form RM of 18 July 2013 and in the Form RM of 30 July 2013, that their commitments were primarily based on the IAG/bmi Commitments. Furthermore, in the section of the Form RM relating to departures from model texts, it is stated that the points where the Final Commitments departed from the IAG/bmi Commitments, with the exception of 'minor linguistic changes and clarifications required by the specific circumstances of this case', were identified 'in order to assist in the assessment of the … Commitments'. In the section of the Form RM relating to changes, the Parties did not identify any departures concerning the Grandfathering provisions in the IAG/bmi Commitments.

138 Thus, either the addition 'in accordance with the bid' in Clause 1.9 of the Final Commitments is only a 'minor linguistic change' unrelated to Grandfathering rights, or that wording was intended to introduce a substantial change from the IAG/bmi Commitments in so far as they relate to Grandfathering rights. In the latter case, the Parties should have identified that as such in the Form RM.

139 In those circumstances, the Commission's finding that the difference in wording between the Final Commitments and the IAG/bmi Commitments constituted only a 'minor linguistic change' appears to be irreproachable.

140 In so far as it is established that the wording of the Final Commitments departs from that of the IAG/bmi Commitments, it is for the applicant to show that, despite the indications in the Form RM, the wording 'in accordance with the bid' is not a mere 'minor linguistic change'.

141 In that context, the applicant raises a series of arguments seeking to call into question the Commission's conclusion in paragraph 63 of the Contested Decision and to demonstrate the relevance of the wording 'in accordance with the bid' for the interpretation of the term 'appropriate use' in Clause 1.10 of the Final Commitments and thus for the grant of Grandfathering rights.

142 In the first place, the applicant submits that it follows from paragraph 7 of the Remedies Notice, referred to in paragraph 113 above, that the obligation to inform the Commission by way of explanations in the Form RM is based on the fact that the merging parties often have, at their disposal only, information which is necessary for the assessment of the commitments and which must therefore

be mentioned in the Form RM. However, with regard to the Grandfathering provisions, the applicant claims that the Parties did not have such exclusive information at their disposal and that the Commission would have been equally well placed to assess the meaning of the wording 'in accordance with the bid'.

143 That proposition cannot be accepted. Since Form RM provides, in Section 3 thereof, for the obligation of the merging parties to report deviations from model texts, the parties must comply with this requirement irrespective of the reasons justifying that rule.

144 In those circumstances, the applicant cannot successfully argue that the Commission, rather than relying on what the Parties indicated in the Form RM, should have assessed the meaning of the wording 'in accordance with the bid' while disregarding what the Parties had indicated in the Form RM.

145 In the second place, the applicant submits that it was not necessary to indicate in the Form RM the difference between the Final Commitments and the IAG/bmi Commitments, since neither the Parties nor the Commission considered at the time that the insertion of the words 'in accordance with the bid' was significant, since it merely reiterated an obvious requirement of the entrant, namely that it would respect its promises.

146 That argument cannot succeed.

147 Given that, in accordance with the 'use it or lose it' principle, as governed by Article 10(2) of the Airport Slots Regulation, a threshold of 80% use is sufficient, it cannot be considered to be self-evident that the entrant is expected to operate, in principle, the airline service in its bid at 100% in order to acquire Grandfathering rights.

148 Furthermore, the applicant's argument does show that the Parties intended, at the time of the negotiations of the commitments with the Commission, that the wording 'in accordance with the bid' would require the entrant to provide an airline service in accordance with its bid in order to obtain Grandfathering rights.

149 However, since the requirement that use be 'in accordance with the bid' does not appear in the wording of the IAG/bmi Commitments, the Parties should have identified in the Form RM that deviation from the wording of the Final Commitments as a substantial change, thereby drawing the Commission's attention to that change.

150 Since the Parties failed to bring this to the attention of the Commission, in breach of the requirements under Annex IV to the Implementing Regulation, the applicant is not entitled to rely on it in support of its interpretation of the Final Commitments.

151 In the third place, the applicant submits that it was not necessary to include the wording 'in accordance with the bid' from Clause 1.9 of the Final Commitments in the Form RM because its meaning is explanatory in nature and neither ambiguous nor unclear.

152 That argument cannot succeed.

153 First of all, given that Section 3 of the Form RM requires the Parties to report any departure from the model texts, the fact that a deviation consists in the addition of an unambiguous or clear term is irrelevant.

154 Moreover, the relevance of this wording to the granting of Grandfathering rights is far from obvious in the circumstances of the present case.

155 According to the scheme of the relevant provisions of the IAG/bmi Commitments resulting from the way in which they are ordered, the conditions relating to the acquisition of Grandfathering rights are governed by Clause 1.3.2, which corresponds to Clause 1.10 of the Final Commitments, while Clause 1.3.1, which corresponds to Clause 1.9 of the Final Commitments, is intended to specify what 'competitive air service' may be operated during the utilisation period.

156 In those circumstances, the Commission was not required to consider whether the addition of the terms 'in accordance with the bid' to Clause 1.9 of the Final Commitments was relevant for the granting of Grandfathering rights.

157 Furthermore, it should be recalled that it appears from the Form RM, filled in by the Parties, that the Grandfathering provisions of the Final Commitments bear the same meaning as those of the IAG/bmi Commitments, with the exception of 'minor linguistic changes'.

158 In those circumstances, the applicant's argument that the Commission should have construed the provisions relating to Grandfathering rights in a different light is unfounded.

159 In the fourth place, as regards, in particular, the exchanges between the Parties and the Commission during the period in which the Commission required them to include 'grandfathering rights' in their commitments, the Commission states, in response to a question from the Court, that it 'understands' that, between 18 and 25 July 2013, there had been a discussion 'with the parties on certain divergences between the [Draft Commitments of] 16 July 2013 and the [IAG/bmi Commitments]'.

160 However, at no time, not during the written phase of the procedure, in response to the questions put by the Court, nor in reply to the Commission's statements referred to in paragraph 159 above, did the applicant maintain that the Parties expressly brought to the Commission's attention, during the negotiation of the commitments, their construction of the commitments, according to which the entrant would be obliged to provide an airline service in accordance with its bid in order to obtain Grandfathering rights.

161 In so far as it is for the applicant, as stated in paragraph 140 above, to prove that the Parties had drawn the Commission's attention to the difference in wording between the Final Commitments and the provisions relating to Grandfathering in the IAG/bmi Commitments, and in so far as the applicant has not provided any relevant evidence concerning the exchanges between the Parties and the Commission, referred to in paragraph 159 above, it must be concluded that the Parties did not bring that difference in the wording of the commitments to the Commission's attention during those exchanges.

162 In the fifth place, the applicant submits that it follows from the elaboration of the Final Commitments that the wording 'in accordance with the bid' comes from the A++ Commitments, which formed the 'state of the art' in terms of airline slot commitments. Moreover, the applicant claims that, in several respects, the Commission relied on those commitments in the negotiations leading to the Final Commitments. The applicant therefore maintains that the Parties were not required to highlight that addition in comparison with the IAG/bmi Case.

163 This argument cannot succeed since it is not factually accurate.

164 First, the wording taken from the A++ Commitments is not the 'state of the art', at least in relation to Grandfathering.

165 It is common ground that the A++ Commitments did not provide for the grant of Grandfathering rights. Clause 1.2.6 of those commitments did not therefore concern the conditions for granting Grandfathering rights.

166 Furthermore, it was for that reason that the Parties were expected to introduce in their commitments, at the Commission's express request, Grandfathering provisions based on those contained in the IAG/bmi Commitments.

167 Moreover, the fact, as pointed out by the applicant, that, as far as certain clauses in the Final Commitments were concerned, the Commission had asked the Parties to reproduce the commitments in Case A++ is irrelevant. The clauses in Case A++ to which the applicant refers do not relate to Grandfathering rights.

168 Second, the applicant's claims concerning the elaboration of the Final Commitments are inaccurate.

169 On 10, 14, 16 and 25 July 2013, the Parties submitted to the Commission different versions of the commitments drafted by them for the Commission to asses.

170 It is true that the wording 'in accordance with the bid' was inserted into the Draft Commitments of 14 July 2013, which, moreover, was reflected in the comparative version drawn up by the applicant and referred to in paragraph 11 above.

171 However, there is no continuity between the relevant provisions of the Draft Commitments of 14 July 2013 and Clause 1.9 of the Final Commitments.

172 Clauses 1.9 to 1.11 of the Final Commitments are not amendments to the corresponding earlier clauses, but form a new text, inserted verbatim into the Commitments of 16 July 2013, as is apparent from the comparative version of the Draft Commitments of 14 July 2013 and the Draft Commitments of 16 July 2013, provided by the applicant as Annex A 7 to its Application.

173 This is further corroborated by the applicant itself, which acknowledges, in paragraph 127 of the Application, that the Parties took the IAG/bmi Commitments as the basis for the wording of the Draft Commitments of 16 July 2013, so that it cannot be maintained that there is any continuity between Clause 1.11 of the Draft Commitments of 14 July 2013 and Clause 1.9 of the Final Commitments.

174 In addition, it should also be noted that, as set out in paragraph 12 above, the Commission had twice expressly requested that Grandfathering rights be included in the commitments and specified, in its e-mail of 13 July 2013, that Grandfathering rights 'based on' those proposed in the IAG/bmi Case had to be included.

175 In that regard, it is important to note that, in response to that request, the Parties specified that Grandfathering rights had been included 'as requested' by the Commission, as is clear from the e-mail accompanying the Draft Commitments of 16 July 2013, which was the first time Grandfathering provisions were included, and that they were identical to those in the Final Commitments.

176 Furthermore, the Parties confirmed, in the Form RMs of 18 and 30 July 2013, compliance with the IAG/bmi Commitments, without making any reference to any difference in wording regarding the Grandfathering provisions.

177 In those circumstances, the applicant's arguments based on the elaboration of the Final Commitments and the alleged 'state of the art' nature of the A++ Commitments cannot be accepted.

178 In the sixth place, the applicant submits that the difference in wording between its commitments and the IAG/bmi Commitments, and in particular the wording 'in accordance with the bid', is explained by the fact that, as opposed to the IAG/bmi Case, the present case concerns only one city pair.

179 In so far as the applicant's allegations should be construed to the effect that the changes in wording must be interpreted as 'clarifications required by the particular circumstances of this case', as indicated in the Form RM, that argument also cannot be accepted.

180 First, that contention is contradicted by the applicant itself. It states, in paragraph 3 of its written replies of 14 February 2020 to questions put by the Court, that the Parties did not consider that the wording 'in accordance with the bid' was covered by 'clarifications required by the particular circumstances of this case'.

181 Second, in any event, the Court finds that the number of city pairs is irrelevant to the question of the level at which slots should be operated to constitute 'appropriate use' for the purpose of granting Grandfathering rights.

182 It is appropriate to examine, in the seventh place, several other claims made by the applicant. The applicant maintains that the Commission should have been aware of the change in the wording of the Final Commitments as compared with the corresponding provisions of the IAG/bmi Commitments and was '[required to] assess the language and its potential implications'. Furthermore, in its replies to the questions put by the Court, the applicant considers that the Commission carried out a 'meticulous review' of the wording of the relevant provisions and had understood and, at the time, approved the inclusion of 'technical elements' of the A++ Commitments.

183 The applicant states, at the same time, that 'in reality, there was no reason for anyone to discuss the specific language now in dispute' and that 'there was no need either for the Parties or the Commission to discuss the language' in question.

184 In any event, the applicant's arguments cannot succeed.

185 In so far as the applicant's argument be construed to the effect that it claims that the Commission was aware of the change in wording resulting from the insertion of the words 'in accordance with the bid', that argument is irrelevant.

186 The Commission does seem to acknowledge that it noted the changes in the wording of the commitments. However, that does not mean that the Commission should have concluded that those changes were material to the interpretation of the notion of 'appropriate use' in Clause 1.10 of the Final Commitments and not a mere 'minor linguistic change'.

187 For the same reasons, the argument that the Commission had understood and approved the fact that 'technical elements' of the A++ commitments had been reproduced cannot prevail.

188 By regarding the wording 'in accordance with the bid' as a 'minor linguistic change', the Commission did in fact consider that addition to be 'technical' in nature rather than material.

189 If the applicant's contention be understood as meaning that, if the Commission had carried out its examination to the requisite standard, it should not only have noted the change in wording, but should also have construed that change as relevant and material to the grant of Grandfathering rights, such an argument would be unfounded.

190 In that regard, the Court points to the respective obligations of the Commission and the undertakings notifying a concentration, as set out in paragraphs 129 to 133 above.

191 It is true, as recalled in paragraph 116 above, that the Commission must 'display the utmost diligence in performing its supervisory duties in the field of concentrations'.

192 However, that obligation is not intended to relieve the notifying undertakings of their obligation to provide complete and accurate information in the Form RM.

193 An undertaking which has provided information in the Form RM cannot, in principle, claim that the Commission must disregard that information and examine more closely the wording of the proposed commitments.

194 The applicant's argument precisely implies that the Commission should have understood the wording 'in accordance with the bid' as relevant for the grant of Grandfathering rights, despite the fact that the information provided by the Parties in the Form RM was to a different effect.

195 However, in the present case, the Commission, without erring in law, was entitled to find, in the Contested Decision, that the wording 'in accordance with the bid' in Clause 1.9 of the Final Commitments was irrelevant for the purpose of granting Grandfathering rights.

196 In view of the elaboration of the commitments, referred to in paragraphs 169 to 175 above, the Commission was not required to regard the difference between the wording of the Draft Commitments of 14 July 2013 and that of the Draft Commitments of 16 July 2013 as material in nature.

197 That applies with greater force because, according to the scheme of the relevant provisions of the IAG/bmi Commitments resulting from the way in which they are ordered, the conditions governing the acquisition of Grandfathering rights are governed by the clause corresponding to Clause 1.10 of the Final Commitments.

198 Thus, in so far as the applicant amended Clause 1.9 of the Final Commitments by adding the wording 'in accordance with the bid', the Commission had even less reason to assume that that change in wording could be anything other than a 'minor linguistic change' within the meaning of the Form RM.

199 Furthermore, if the Parties had intended to give a different meaning to the Grandfathering clauses contained in the Final Commitments than those contained in the IAG/bmi Commitments, they could and should have informed the Commission accordingly by clearly indicating that in the Form RM.

200 It follows from all the foregoing that the applicant has not succeeded in negating the finding made in paragraph 63 of the Contested Decision. It follows that the wording 'in accordance with the bid' in Clause 1.9 of the Final Commitments is a mere 'minor linguistic change' to the IAG/bmi Commitments, according to which the granting of Grandfathering rights is not subject to the requirement that the airline service must have been operated during the utilisation period in accordance with the bid.

A systemic interpretation of the relevant provisions

201 According to paragraph 57 of the Contested Decision, the existence of a definition of 'misuse' but not of 'appropriate use' in the Final Commitments points towards equating 'appropriate use' with 'absence of misuse'. Thus, a situation that does not amount to 'misuse' of slots can be regarded as 'appropriate use'.

202 Paragraph 64 of the Contested Decision states that Grandfathering rights are governed by Clause 1.10 of the Final Commitments, whereas Clause 1.9 relates to the purpose of the slot commitment. Thus, according to the Contested Decision, it would be contrary to the scheme of the provisions in question to subject the granting of Grandfathering rights to conditions drawn from Clause 1.9 of the Final Commitments.

203 The applicant challenges that interpretation in a series of arguments.

204 In the first place, in order to examine the Commission's interpretation in the Contested Decision in the light of the applicant's arguments, it should be noted, first, that, as regards the equivalence between 'appropriate use' and the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments, as applied in the Contested Decision, it is noted, in paragraph 100 above, that the term 'appropriate use' is not fully operative in itself, but requires a referential context from which it can be determined whether a particular use may be regarded as 'appropriate'.

205 In those circumstances, there is no reason of a general order not to rely on other provisions of the Final Commitments to give a precise meaning to the notion of 'appropriate use'.

206 Second, equating 'appropriate use' with the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments is justified in several respects.

207 The notion of 'misuse' has a meaning that can be understood as 'unsuitable or inappropriate use', as found in paragraph 103 above, so that equating 'appropriate use' with the absence of 'misuse' seems plausible.

208 Next, the applicant alleges that the intervener under-operated slots. Clause 1.13(b) of the Final Commitments specifically governs the case of under-operation of slots as 'misuse'.

209 It should also be noted that in the IAG/bmi Commitments, which the Parties should have taken, at the express request of the Commission, as a model for Grandfathering rights in the Final Commitments, the clauses on 'misuse' appear in the section entitled 'Grandfathering of Slots'. Therefore, it must be found that, in accordance with the way in which those commitments are ordered, the clauses on 'misuse' are relevant for the granting of Grandfathering rights.

210 Contrary to what the applicant maintains, section headings in legal texts are relevant to the systemic interpretation of their provisions.

211 As noted in paragraph 200 above, the Parties were supposed to introduce Grandfathering rights 'based on' those proposed in the IAG/bmi Case and the Commission was entitled to consider that the difference in wording between Clause 1.3.1 of those commitments and Clause 1.9 of the Final Commitments was only a 'minor linguistic change' which did not reflect an intention of the Parties to attribute a different meaning to the Grandfathering rights provided for in the Final Commitments.

212 Thus, the Court considers that the clauses on 'misuse' can be relevant in this case in connection with the granting of Grandfathering rights.

213 In the second place, as already mentioned in paragraph 197 above, according to the scheme of the relevant provisions of the IAG/bmi Commitments, the conditions governing the acquisition of Grandfathering rights are set out in Clause 1.3.2, which corresponds to Clause 1.10 of the Final Commitments, while Clause 1.3.1 of the IAG/bmi Commitments, which corresponds to Clause 1.9 of the Final Commitments, is intended to specify the 'competitive air service' authorised to be operated during the utilisation period.

214 The same structure is reflected in the Final Commitments, as is clear from the definitions of the terms contained therein.

215 The structure of the textual provisions in question becomes even clearer when the clauses relating to the specification of 'competitive air service' in the A++ Commitments and the IAG/bmi Case are compared with Clause 1.9 of the Final Commitments.

216 Indeed, it follows from Clause 1.2.6 of the A++ Commitments, which, moreover, do not provide for a Grandfathering option, that the entrant is supposed to use the slots only for the purpose of 'providing the service proposed in the bid' and cannot be used on another route. In that regard, the reference to the bid serves to clarify what lawful use of slots on the airline routes in question is.

217 With regard to Clause 1.3.1 of the IAG/bmi Commitments on 'competitive air service', it specifies, as does Clause 1.2.6 of the A++ commitments, what lawful use of slots is. Instead of referring in that regard to the entrant's bid, the concept of lawful use is clarified in the first sentence, namely the provision of a service between the airport pair concerned. However, given that, in the IAG/bmi Case, the entrant had the option of acquiring Grandfathering rights, which specifically implied the possibility of using slots on any airline route, it was useful to clarify, in the second sentence of Clause 1.3.2, that the prohibition on using slots at another airport pair did not apply without qualification, but only during the utilisation period and until the entrant had acquired Grandfathering rights.

218 Thus, in the context of the IAG/bmi Commitments, the second sentence of Clause 1.3.1 thereof can be regarded as a mere clarification.

219 Clause 1.9 of the Final Commitments follows, in principle, the model of Clause 1.3.1 of the IAG/bmi Commitments. In the first sentence of Clause 1.9 of the Final Commitments, lawful use of slots is specified by stating that 'as a general rule' the entrant may operate the slots only to serve the route between the city pair concerned. In the second sentence of Clause 1.9 of the Final Commitments, it is specified that that prohibition does not apply if the entrant has operated the service during the utilisation period.

220 In those circumstances, it appears that the addition of the wording 'in accordance with the bid', in so far as those words should be understood as a 'de facto' definition of Grandfathering, as the applicant submits, departs in wording significantly from the scheme of the corresponding provisions of the IAG/bmi Commitments, which the Parties were supposed to take as a model.

221 The second sentence of Clause 1.3.1 of the IAG/bmi Commitments is merely intended to clarify that the prohibition to use the slots for another city pair does not apply to Grandfathering. Thus, that sentence does not provide any qualitative requirements for the use of slots for other routes.

222 Furthermore, in the A++ Commitments, the reference to the entrant's bid merely serves to clarify that the slots can only be used on the route covered by the bid and does not impose any requirements as to the operation of those slots.

223 While it is clear from the above that the Parties, by combining the provisions taken from the IAG/bmi Commitments with part of a sentence taken from the A++ commitments, departed from the IAG/bmi Commitments which they were supposed to take as a model, it should be pointed out that the interpretation that Clause 1.9 of the Final Commitments contains the 'de facto' definition of Grandfathering rights is in several respects irreconcilable with the scheme of the provisions in question.

224 First, as appears from Clauses 1.9 and 1.10 of the Final Commitments and is further corroborated by the section on definitions of the Final Commitments, Clause 1 aims at specifying the use that can be made of slots during the utilisation period whereas Clause 2 specifies the requirements that must be met in order to acquire Grandfathering rights.

225 In those circumstances, it would be contrary to the scheme of the provisions in question to regard the second sentence of Clause 1.9 of the Final Commitments as the 'de facto' definition of the conditions for granting Grandfathering rights.

226 Second, if the submission that Clause 1.9 of the Final Commitments contains a 'de facto' definition of the conditions for granting Grandfathering rights were followed, not only would there be two definitions of Grandfathering rights, but that would result in conflicting conditions for the grant thereof.

227 On the one hand, the second sentence of Clause 1.9 of the Final Commitments would require the entrant to have operated the airline service 'in accordance with the bid' during the utilisation period and, on the other, Clause 1.10 of the Final Commitments would require the entrant to have made 'appropriate use' of the slots during the utilisation period.

228 The applicant's argument in that regard seeking to reconcile that contradiction is unconvincing.

229 According to the applicant, it is necessary, in order to 'avoid a conflict between Clause 1.9 and Clause 1.10' of the Final Commitments, to analyse, in order to determine whether there has been 'appropriate use', whether the slots were operated 'in accordance with the bid'.

230 However, the applicant's submission means, first, making the wording 'in accordance with the bid' in Clause 1.9 of the Final Commitments a condition for the grant of Grandfathering rights, thereby creating a contradiction with Clause 1.10 of those commitments, and, second, avoiding that contradiction by equating 'appropriate use' with 'use in accordance with the bid'.

231 Such an interpretative approach is not only artificial in nature, but also runs contrary to the fact that Clause 1.10 of the Final Commitments expressly states that it contains the definition of Grandfathering rights, stipulating the conditions for the grant of such rights.

232 Third, it is clear from an examination of the relevance of the indications in the Form RM that the wording 'in accordance with the bid' constitutes only a 'minor linguistic change'.

233 In those circumstances, the applicant's approach of transforming the wording 'in accordance with the bid' into a material condition for the grant of Grandfathering rights, replacing in practice the condition expressly laid down in Clause 1.10 of the Final Commitments, cannot be followed.

234 It thus appears that the difficulty in interpreting the notion of 'appropriate use' in Clause 1.10 of the Final Commitments results from the fact that the Parties incorporated the wording 'in accordance with the bid' into Clause 1.9 of the Final Commitments. Rather than using provisions based on the IAG/bmi Commitments, as expressly requested by the Commission, the Parties chose to combine the provisions of those commitments with parts reproduced from the A++ Commitments, while adding the wording 'in accordance with the bid' to Clause 1.9 of the Final Commitments.

235 In the third place, it must be held that the applicant has not succeeded in putting forward any arguments relating to the general scheme of the relevant provisions contained in the Final Commitments which might call into question equating 'appropriate use' with the absence of 'misuse' within the meaning of Clause 1.13 of those commitments.

236 The applicant submits in that regard, first, that the 'misuse' provisions in Clauses 1.13 and 1.14 of the Final Commitments have their own purpose, as a result of which the term 'misuse' in Clause 1.13 of the Final Commitments cannot be used to determine the meaning of the term 'appropriate use' in Clause 1.10 of the Final Commitments.

237 In that regard, the applicant notes that the slot commitments accepted by the Commission in the past contained 'misuse' clauses even when they did not provide for Grandfathering rights, such as the A++ Commitments.

238 In that connection, the applicant also maintains that the object of 'misuse' clauses is to protect the integrity of the slot commitment and the airline making the slots available.

239 Those arguments are irrelevant. Suffice it to note in that regard, as the Commission rightly does, that the fact that the provisions on 'misuse' have their own purpose does not preclude the fact that Clause 1.13 of the Final Commitments relating to 'misuse' may also be relevant in determining what constitutes 'appropriate use'.

240 Second, the applicant submits that an assessment of 'misuse', as set out in Clauses 1.13 and 1.14 of the Final Commitments, takes place on an ongoing basis during the slot utilisation period, that is over six IATA seasons, whereas an assessment of 'appropriate use', as set out in Clause 1.11 of the Final Commitments, takes place at the end of the utilisation period.

241 The applicant infers as a result that it is 'artificial and nonsensical' to asses, at the end of the utilisation period, whether there has been 'misuse'. The rules in Clause 1.14 of the Final Commitments provide that, in the event of 'misuse' of slots by the entrant, the slot release agreement may be terminated, so as to '[exclude] any possibility that an entrant in a situation of misuse could reach the end of the utilisation period and be considered for Grandfathering rights'.

242 In that regard, it is important to note that, contrary to the applicant's contention, it cannot be inferred from the fact that the 'misuse' assessment takes place on an ongoing basis during the utilisation period that an assessment of 'appropriate use' at a later time would be unnecessary. It is always possible that the procedure provided for in Clause 1.14 of the Final Commitments may not be followed, that the Entrant puts an end to the 'misuse' within the time limit, or that the Parties do not elect to terminate the slot release agreement following misuse by the entrant.

243 Third, the applicant claims that equating 'appropriate use' with the absence of 'misuse' renders the procedure unnecessary as provided for in Clause 1.11 of the Final Commitments, according to which the Commission, advised by the Monitoring Trustee, approves, where appropriate, Grandfathering rights. To the extent that an entrant complies with the 'use it or lose it' principle under the Airport Slots Regulation and furthermore operates the slots without 'misuse', the entrant would be automatically re-allocated the slots for the next scheduling season pursuant to Article 8(2) of the Airport Slots Regulation. If this was all that was required to obtain Grandfathering, the commitments would have deemed the entrant to have Grandfathering provided that the air carrier could demonstrate at the end of the utilisation period continued operation of the slots in question in accordance with the Airport Slots Regulation.

244 However, in that regard, the Commission points out, in paragraph 83 of the Defence, without being contradicted by the applicant, that the applicant errs in limiting the scope of the rules on 'misuse' in Clause 1.13 of the Final Commitments to the 'use it or lose it' principle. Indeed, it is clear from the very terms of Clause 1.13 of the Final Commitments that mere compliance with those rules is not sufficient to establish the absence of 'misuse'.

245 Fourth, the applicant's argument based on an allegedly 'coherent system' is unconvincing.

246 In that regard, according to the applicant, it follows from Clauses 1.1, 1.9, 1.10, 1.24, 1.26 and 1.27 of the Final Commitments that they form a coherent system within which slots are made available to entrants to operate a daily frequency on the airport pair up to a maximum of 7 weekly frequencies. According to the applicant, entrants must specify the number of frequencies and therefore the slots they are seeking as 'key terms' of their formal bid. Formal bids are evaluated, and if necessary ranked, according to the effectiveness of the competitive constraint they will provide and the number of frequencies sought is one of the criteria in this regard. Once slots are granted on the basis of a formal

bid, the entrant is expected to operate those slots according to the bid for six consecutive seasons before they can be approved to use the slots on another city pair as part of the assessment of whether 'appropriate use' has been made of the slots.

247 The Court notes that the applicant's argument consists in particular in drawing inferences from the provisions governing the new entrant's tender and the assessment of that tender for the interpretation of the term 'appropriate use' contained in Clause 1.10 of the Final Commitments relating to the granting of Grandfathering rights.

248 However, as rightly asserted by the Commission, the provisions governing a new entrant's bid and the evaluation of that bid are relevant for the granting of remedy slots to the new entrant, but do not, in terms of systemics, serve the purpose of laying down the conditions to be satisfied by the new entrant for the grant of Grandfathering rights. For the same reason, the applicant cannot rely on the evaluation of the intervener's tender by the Commission and the Monitoring Trustee.

249 It follows from the foregoing that, according to a systemic interpretation of the provisions in question, the term 'appropriate use' in Clause 1.10 of the Final Commitments may be construed as the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments. The applicant has thus failed to demonstrate that the systemic interpretation adopted by the Commission in the Contested Decision ran counter to the general scheme of the provisions of the Final Commitments.

Purposive and contextual interpretation of the provisions in question

250 According to paragraphs 54 to 57 of the Contested Decision, granting Grandfathering rights is intended to incentivise a prospective entrant to operate the London-Philadelphia route. To that end, it is important that clear and verifiable principles apply to the grant of Grandfathering rights and ensure legal certainty for the entrant. Only by interpreting 'appropriate use' as the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments is the necessary degree of legal certainty ensured.

251 The applicant challenges that interpretation in a series of arguments.

252 The applicant claims, in particular, that the interpretation adopted in the Contested Decision fails to have regard to the object and context of the provisions at issue.

253 In the first place, as regards the object of the provisions at issue, in the light of which the concept of 'appropriate use' must be interpreted, the applicant maintains that the object of the Final Commitments is to ensure that remedy slots will be used in a manner during the six seasons of the utilisation period that produces the maximum competitive constraint and therefore the maximum possible benefits to consumers; in particular, by replicating US Airways previous daily service to the extent possible. In that context, the applicant submits that the object of the Final Commitments is to remove all serious doubts raised by the merger. Thus, the Commission's interpretation is wrong in that it attributes too much importance to the objective of making slots more attractive.

254 In that regard, it should be recalled that the commitments form an integral part of clearance decisions and must be interpreted in the light of those decisions, as stated in paragraph 112 above.

255 As is apparent in particular from the first paragraph of the Final Commitments, the Parties entered into those commitments in order to enable the Commission to find that they had remedied any serious doubts it had and thus to declare the merger compatible with the internal market.

256 As the applicant acknowledges in paragraph 14 of the Application, the Commission was of the view that Grandfathering rights were necessary in order to remove all serious doubts regarding the merger.

257 In that regard, it follows from paragraph 179 of the Clearance Decision that the slot commitments were acceptable to the Commission only where it was sufficiently clear that actual entry by a new entrant would occur in respect of the slots.

258 Thus, the stated objective of granting Grandfathering rights was, as follows from point 1.1 of the Form RM of 30 July 2013 and is confirmed by paragraph 181 of the Clearance Decision, to make the slot offer more attractive.

259 In addition, it should be recalled that the Commission concluded in paragraph 186 of the Clearance Decision that, in particular with regard to the 'indications for a likely and timely entry', the slot commitment was 'a key element in the timely and likely entry on the London-Philadelphia route'.

260 Moreover, as is clear from the case-law referred to in paragraph 118 above, the Commission must be able to conclude, with certainty, that it will be possible to implement the commitments.

261 It follows that, as stated in paragraph 55 of the Contested Decision, the inclusion of Grandfathering rights in the Final Commitments was intended to constitute an incentive for an entrant to take over the slots, thereby making it sufficiently likely that the commitments would be effectively implemented.

262 However, the applicant's argument relating to 'maximum competitive constraint', meaning in particular that the daily service previously operated by US Airways would be reproduced as far as possible, cannot be accepted.

263 First, the argument based on maximum competitive constraint is not supported by the Clearance Decision, as is clear from the above analysis. Although the applicant relies in that regard on paragraphs 180 and 186 of the Clearance Decision, it is sufficient to note that the actual wording of those paragraphs does not support its argument.

264 Second, nor is the argument based on maximum competitive constraint supported by the terms of Clauses 1.24 to 1.27 of the Final Commitments relating to a potential new entrant's bid and the selection procedure, which, according to the applicant, result in the operator to be chosen being the one which would exert the most effective competitive constraint.

265 In that regard, suffice it to note that the Court has found in paragraph 248 above that the provisions governing a new entrant's bid and the evaluation of that bid are relevant for the award of remedy slots to the new entrant, but do not serve the purpose of determining the conditions to be satisfied by the new entrant for the grant of Grandfathering rights.

266 Third, the very nature of Grandfathering rights is irreconcilable with the applicant's argument that the concept of 'appropriate use' should be interpreted so as to ensure 'maximum competitive constraint'.

267 Granting Grandfathering rights enables the entrant to use the slots on any airline route after an operating period of six IATA seasons. In those circumstances, the inclusion of Grandfathering rights in the Final Commitments cannot pursue the object of exerting maximum competitive constraint on the London-Philadelphia route.

268 Fourth, in any event, the Court notes that, according to the case-law referred to in paragraphs 119 and 120 above, the Commission enjoys a broad discretion in assessing whether the commitments constitute a direct and sufficient response capable of clearly dispelling all serious doubts.

269 Thus, in so far as the Commission, in exercising its discretion when adopting the Clearance Decision, considered that the inclusion of the possibility to acquire Grandfathering rights was necessary to make the slots more attractive to increase the likelihood sufficiently of the entry of a competitor and to ensure that the commitments could dispel its doubts as to the compatibility of the merger with the

internal market, the applicant cannot supplant that assessment with its own assessment according to which the grant of the slots pursued the object of ensuring that maximum competitive constraint be exercised on the potential entrant to the London-Philadelphia route.

270 That applies with greater force because the applicant has not criticised the Commission for any manifest error of assessment in the assessment which led to the Clearance Decision.

271 It follows that the Commission rightly considered in the Contested Decision that the possibility of granting Grandfathering rights furthered the object of making the slots more attractive.

272 In the second place, the applicant contests the Commission's interpretation, set out in paragraph 57 of the Contested Decision, that, in order to ensure the necessary degree of legal certainty, the term 'appropriate use' must be interpreted as the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments.

273 According to the applicant, interpreting 'appropriate use' as including 'in accordance with the bid' provides even more legal certainty for the entrant since it is the entrant that defines the terms of its bid. The fact that an entrant departs from its bid could, of course, be a source of insecurity, but the entrant would itself be responsible for that departure.

274 In that regard, first, it is necessary to emphasise the importance of legal certainty for the entrant.

275 It should be recalled that it follows from paragraph 125 above that the wording of the Final Commitments is also relevant for third parties taking over the activities of the parties to a merger in that the conditions for taking over such activities are determined to a large extent by the commitments, which are thus important for their commercial choices and are likely to give rise to legitimate expectations on their part.

276 Second, it should be recalled that, according to the applicant's interpretation, the concept of 'appropriate use' means that the Commission has discretion in determining whether a slot operation which is not fully 'in accordance with the bid' can nevertheless be regarded as 'appropriate use'.

277 In principle, the very existence of such discretionary power for the Commission to grant Grandfathering rights means that the grant of such rights is less predictable for the entrant than if the provisions on 'misuse' applied. That applies with greater force in the present case, since the Final Commitments do not contain clear and precise parameters for the exercise of that discretion, with the exception of the provisions on 'misuse', which, according to the applicant, should not be taken into account.

278 It follows from the above that the Commission's interpretation that the notion of 'appropriate use' must be understood as the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments is consistent with the object of the provisions in question.

279 In the third place, as regards a contextual interpretation of the Final Commitments, it should be noted, first, that it was found in paragraph 124 above that those commitments should be interpreted in the light of the Airport Slots Regulation.

280 In that regard, it is common ground that the use of slots by the intervener during the utilisation period complied with the requirements of Article 10(2) and (3) of the Airport Slots Regulation to maintain the slots.

281 It is true that the fact that the use of the slots has been in accordance with Article 10(2) and (3) of the Airport Slots Regulation does not necessarily mean that that use must be regarded as an 'appropriate usage' within the meaning of Clause 1.10 of the Final Commitments. As the applicant points out, the object pursued by Article 10(2) and (3) of the Airport Slots Regulation is separate and cannot be confused with the purpose of granting Grandfathering rights.

282 However, the applicant's interpretation departs from the relevant provisions of the relevant EU rules.

283 Thus, to the extent that the provisions of Article 10(2) and (3) of the Airport Slots Regulation constitute a standard regulatory framework in the European Union, it could have been expected that, if the conditions for granting Grandfathering rights had deviated from that framework, that would have been made clear in the wording of the Final Commitments. As is clear from the examination carried out above, that is not the case here. The interpretation advocated by the applicant is essentially based on the wording 'in accordance with the bid' in Clause 1.9 of the Final Commitments, which constitutes, as noted in paragraph 200 above, only a 'minor linguistic change'.

284 Second, the applicant points to the extent of the intervener's under-operation of the slots, which, in its view, is unprecedented, and submits that it is inconceivable that, in view of that unjustified under-operation, the intervener be able to acquire Grandfathering rights.

285 Furthermore, the applicant submits that, according to its calculations and supposing that the Commission's interpretation is correct, the intervener could operate the slots only at 65% and still be entitled to Grandfathering rights, thus undermining the object of the Final Commitments and thereby demonstrating that the Commission's interpretation is erroneous.

286 In that regard, according to the tables provided by the applicant in paragraph 42 of the Application, the under-operation during the utilisation period is, inter alia, due to the fact that the intervener returned 389 slots to the coordinator before the deadline for return, while only 81 slots were not used due to flight cancellations.

287 Furthermore, it appears from those tables that the intervener's use of the slots, excluding returned slots, varied between 92% and 100% during the utilisation period.

288 It follows that the level of under-operation complained of by the applicant stems, in particular, from the fact that the intervener made use of the possibility, recognised in Article 10(3) of the Airport Slots Regulation, of returning the slots to the coordinator before the deadline for return, as a result of which the slots returned were not taken into account for the calculation of the 80% operating rate, in accordance with the rule laid down in Article 10(2) of that regulation.

289 The question whether the reference in Clause 1.13 of the Final Commitments to the 'use it or lose it' principle in Article 10(2) of the Airport Slots Regulation must be interpreted as implicitly referring also to Article 10(3) of the Airport Slots Regulation does not arise in the present case.

290 The applicant has not challenged before the General Court the Contested Decision in its application of Article 10(3) of the Airport Slots Regulation to conclude, in paragraph 83 thereof, that the returned slots should not to be taken into account for the 'use it or lose it' principle nor the 80% threshold resulting from Article 10(2) of that regulation. The applicant has expressly acknowledged, in paragraph 7 of the Reply, that the intervener was not in a situation of 'misuse' within the meaning of Clause 1.13 of the Final Commitments.

291 In any event, the applicant's argument that even operation of the slots at only 65% would have enabled the intervener to be granted Grandfathering rights is hypothetical. According to the tables provided by the applicant, the intervener's slot utilisation rate, even taking into account both slots returned and

slots not used due to flight cancellations, ranged between 76.4% and 81% over the course of the six IATA seasons. In those circumstances, it cannot be held, contrary to the applicant's claim, that the object of the Final Commitments was compromised.

292 In the light of the foregoing, the interpretation in the Contested Decision that 'appropriate use' is to be understood as the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments is supported by the object of the provisions in question and their context.

Conclusion of the Court

293 It follows from all the foregoing that the interpretation adopted by the Commission in the Contested Decision that the term 'appropriate use' in Clause 1.9 of the Final Commitments must be interpreted as referring to the absence of 'misuse' within the meaning of Clause 1.13 of those commitments, is not vitiated by error and is supported both by a literal and systemic interpretation of the provisions in question and by an interpretation taking into account the Form RM, the object of the relevant provisions and their context.

294 In so far as the applicant does not contest the conclusion drawn in paragraphs 77, 86 and 90 of the Contested Decision that the use of the slots by the intervener is not 'misuse' within the meaning of Clause 1.13 of the Final Commitments, it must be concluded that the Commission did not err in granting Grandfathering rights to the intervener and the action must therefore be dismissed.

295 In those circumstances, the applicant's arguments, which have not formed part of the above examination and call into question the Commission's reasoning in paragraphs 58 to 65 of the Contested Decision, in which the Commission rejects the interpretation advocated by the applicant, concern reasons for that decision included purely for the sake of completeness and are therefore ineffective. There is thus no need to examine whether those arguments are well founded.

296 It follows from all of the foregoing that the first plea in law must be dismissed.

The second plea in law

297 By its second plea in law, which consists of four limbs, the applicant claims that the Commission did not take into account all the relevant evidence for the grant of Grandfathering rights. In that regard, it maintains that the Commission failed to assess the profitability of the services provided by the intervener in relation to the value of the slots granted (first limb), the implications of the intervener not seeking a special prorate agreement (second limb), the level of non-operation of slots by the intervener in comparison with other EU airline commitment cases (third limb) and the efficiencies submitted by the applicant (fourth limb).

298 The Commission considers that the second plea in law is ineffective.

299 In that regard, it should be noted that it is apparent from paragraph 148 of the Application that the applicant 'submits [the] second plea as an additional and/or alternative argument to support annulment of the Contested Decision, in particular to the extent the Court concludes that it is necessary to consider the specific conduct of [the intervener] in assessing "appropriate use" including the standards that [the intervener] must satisfy in order for the Commission to approve the grant of Grandfathering'.

300 In addition, it is apparent from paragraph 7 of the Reply that the applicant expressly acknowledges that the intervener was not in a situation of 'misuse' of the slots within the meaning of Clause 1.13 of the Final Commitments, and 'confirms … that if the Court concludes that the [Contested] Decision was

correct that the only analysis required to approve Grandfathering was to confirm whether [the intervener] [did] not [commit] "Misuse" within the meaning of Clause 1.13 of the [Final] Commitments, then the Commission will prevail'.

301 Thus, in so far as, according to the assessment of the first plea in law, the concept of 'appropriate use' is to be interpreted as referring to the absence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments, it is not necessary to examine the substance of the evidence relied on in support of the second plea in law.

302 Furthermore, the assessment of the various items of evidence relied on by the applicant in its second plea, namely the profitability of the services provided by the intervener in relation to the value of the slots granted, the implications of the intervener not seeking a special prorate agreement, the level of non-operation of slots by the intervener in comparison with other European Union airline commitment cases and, lastly, the efficiencies submitted by the applicant, is irrelevant to the assessment of the existence of 'misuse' within the meaning of Clause 1.13 of the Final Commitments.

303 It follows from the foregoing that the second plea must be rejected.

The third plea in law

304 In the Application, the applicant claims that the Court should 'make any other order as may be appropriate in the circumstances of the case'.

305 In addition, the applicant requests that the Commission be asked to produce a number of documents.

306 The applicant has subsequently withdrawn part of its request for disclosure of evidence while maintaining its request for documents to be produced relating to the intervener's formal bid of 9 October 2014 for the remedy slots, the Trustee report of 23 October 2014 evaluating the intervener's formal bid for the remedy slots, the confidential version of the slot award decision and the confidential versions of the Monitoring Trustee end-of-season Compliance Reports for the six seasons corresponding to the utilisation period, including the Monitoring Trustee report on Grandfathering.

307 The intervener produced, in its statement in intervention, the business plan included in its bid. In so far as the applicant, in its observations on that statement in intervention, has not repeated its request that the entire bid be produced, but observes that the intervener 'provided the bid and the business plan', it must be held that the applicant waived its request for the intervener's bid to be produced.

308 By a measure of organisation of procedure, the Court asked the Commission to produce the remaining documents requested by the applicant, with the exception of the 'confidential versions of the Monitoring Trustee end-of-season compliance reports for the six seasons corresponding to the utilisation period'.

309 As regards the latter documents, it must be borne in mind that it is for the Court to appraise the usefulness of measures of organisation of procedure and of investigation (see, to that effect, judgment of 9 March 2015, *Deutsche Börse* v *Commission*, T-175/12, not published, EU:T:2015:148, paragraph 417 and the case-law cited).

310 In so far as it follows from the above examination that it is necessary to assess, for the purposes of granting Grandfathering rights, whether or not the operation of slots by the intervener constitutes 'misuse' within the meaning of Clause 1.13 of the Final Commitments and that it is common ground between the parties that that is not the case, the production of 'the [Monitoring] Trustee end-of-season compliance reports' is not relevant to the outcome of the dispute.

311 Thus, if the third plea in law relates to measures of organisation of procedure ordered by the Court, it must be dismissed.

312 If, however, the third head of claim is to be construed as a request that the Court issue directions to the Commission, it must be declared inadmissible. In that regard, it must be recalled that it is settled case-law that the Courts of the European Union are not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. It is for the institution concerned, under Article 266 TFEU, to adopt the measures required to give effect to a judgment delivered in an action for annulment (see judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 35 and the case-law cited).

313 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

314 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 138(3) of the Rules of Procedure, the Court may order an intervener to bear its own costs.

315 Since the applicant has been unsuccessful and the intervener has not applied for costs, the applicant must be ordered to bear its own costs and to pay those incurred by the Commission, while the intervener must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders American Airlines, Inc. to bear its own costs and pay those incurred by the European Commission;**

3. **Orders Delta Air Lines, Inc. to bear its own costs.**

Kanninen Jaeger Półtorak

Porchia Stancu

Delivered in open court in Luxembourg on 16 December 2020.

E. Coulon
Registrar

M. van der Woude
President

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