



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
RANTOS

delivered on 14 July 2022<sup>1</sup>

**Case C-127/21 P**

**American Airlines Inc.**

**v**

**European Commission**

(Appeal – Regulation (EC) No 139/2004 – Concentrations between undertakings – Air transport market – Concentration declared compatible with the common market – Commitments entered into by the parties to the concentration – Decision granting grandfathering rights)

## **I. Introduction**

1. In the present case, which concerns a concentration between undertakings in the air transport market, the Court of Justice is hearing an appeal brought by American Airlines Inc. ('American') against the judgment of the General Court of the European Union of 16 December 2020, *American Airlines v Commission* (T-430/18, 'the judgment under appeal', EU:T:2020:603), by which the General Court dismissed the action brought by American for annulment of European Commission Decision C(2018) 2788 final of 30 April 2018 (Case M.6607 – US Airways/American Airlines) ('the decision at issue').

2. A distinctive feature of this case is the fact that the Court of Justice will be required for the first time to interpret specific provisions of commitments forming an integral part of a Commission decision concerning a concentration.

## **II. The background to the dispute, the decision at issue and the judgment under appeal**

3. The background to the dispute is set out in paragraphs 1 to 69 of the judgment under appeal and, for the purposes of this Opinion, may be summarised as follows.

<sup>1</sup> Original language: French.

## ***A. The Clearance Decision for the US Airways/American merger***

### ***1. The administrative procedure leading to the Clearance Decision for the US Airways/American merger***

4. On 18 June 2013, the Commission received a notification of a proposed concentration pursuant to which US Airways Group Inc. ('US Airways') would enter into a merger with American ('the parties to the merger').

5. The Commission considered that that transaction gave rise to serious doubts as to its compatibility with the internal market as regards the route between London Heathrow airport (United Kingdom; 'LHR') and Philadelphia International Airport (United States; 'PHL') ('the LHR-PHL route').

6. In order to address the serious doubts expressed by the Commission concerning that transaction, the parties to the merger initially proposed certain commitments on 10 and 14 July 2013. The two sets of draft commitments were rejected by the Commission, which insisted that grandfathering rights 'based on' those in Case COMP/M.6447 – IAG/bmi ('the IAG/bmi case') had to be included in those commitments.

7. On 16 July 2013, the parties to the merger submitted a third set of draft commitments notably introducing grandfathering rights. The document sent to the Commission also included a track-changes version reflecting the changes made.

8. As regards, in particular, the incorporation of grandfathering rights into the revised commitments, the email accompanying the commitments merely stated that grandfathering rights had been included 'as requested' by the Commission. Furthermore, Clauses 1.9 to 1.11 of the draft commitments of 16 July 2013, which were incorporated for the first time in that draft, were worded identically to those adopted in the Commission's final commitments.<sup>2</sup>

9. Moreover, in the Form RM<sup>3</sup> of 30 July 2013 relating to their draft final commitments to the Commission ('the final commitments'), under the heading 'Deviation from Model Texts', the parties to the merger were expected to draw attention to any discrepancies between the proposed commitments and the standard-form commitments published by the Commission's services and to explain the reasons underlying those discrepancies.

10. In that regard, in Section 3 of that form, the parties to the merger stated the following:

'The commitments offered by the [parties to the merger] 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].

<sup>2</sup> See point 19 of this Opinion.

<sup>3</sup> 'The Form RM'. See 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').

In order to assist in the assessment of the Proposed Commitments, the [parties to the merger] 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.’

11. As regards the grandfathering provisions, no departure from the IAG/bmi commitments was pointed to in the Form RM of 30 July 2013.

*2. The Clearance Decision for the US Airways/American merger and the commitments entered into by the parties to the merger*

12. 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 Regulation (EC) No 139/2004,<sup>4</sup> 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’).

13. In paragraph 160 of the Clearance Decision, the terms of the 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 [LHR – PHL] airport pair and cannot be used on another city pair unless the prospective entrant has operated such service during the Utilisation Period ... 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.’

14. In paragraphs 176, 178 to 181, 186 and 197 to 199 of the Clearance Decision, in its analysis of the 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.

<sup>4</sup> Council Regulation of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1; ‘the Merger Regulation’).

(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 [LHR] 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 [LHR-PHL] route.

(181) ... This intrinsic attractiveness of the slots is enhanced in the Commitment package by the prospect of acquiring grandfathering rights ...

(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 [LHR-PHL] route. The scope of entry on this route will suffice to resolve the serious doubts identified on this market ...

(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. ...

(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.'

15. 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. 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'.

16. In the first paragraph of the preamble of the final commitments as provided in an annex to the Clearance Decision, the parties to the merger stated that they provided the final commitments in order to enable the Commission to declare the merger compatible with the internal market.

17. In the third paragraph of that preamble, 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].'

18. In the ‘Definitions’ section of the final commitments, certain terms are defined 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’).

19. Clauses 1.9 to 1.11 of the final commitments provide:

‘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 ...’

20. Clause 1.13 of those commitments states:

‘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);

...’

21. Under Clause 1.24 of those commitments:

‘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 ...’

22. 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.’

23. Clause 1.27 of those commitments stipulates:

‘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 ... 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.

...’

### ***B. The Commission decision on the allocation of slots to Delta***

24. On 9 October 2014, the intervener, Delta Air Lines Inc. (‘Delta’), 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 LHR-PHL route with one daily frequency over six consecutive IATA Seasons as of summer 2015.

25. Delta was the only applicant for slots under the final commitments.

26. By decision of 6 November 2014, assessing the viability of Delta and evaluating its bid pursuant to Clause 1.21 and 1.26 of the final commitments, the Commission declared that Delta was, first, independent of and unconnected with the parties and had exhausted its own slot portfolio at LHR 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 LHR-PHL route in the long term as a viable and active competitive force.

27. On 17 December 2014, American and Delta 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 Delta on the LHR-PHL route.

28. By decision of 19 December 2014, the Commission, in line with the Monitoring Trustee report of 17 December 2014, approved the Slot Release Agreement. That decision provided that Delta was under an obligation to use US Airways' slots to operate a non-stop scheduled air service on the LHR-PHL route. That decision further stipulated that, once appropriate use of those slots has been made for the utilisation period, Delta would be deemed to have grandfathering rights subject to the approval of the Commission and that, once the Commission approves of grandfathering rights, Delta would retain the released slots and would be entitled to use them on any city pair.

29. Delta started operating on the LHR-PHL route at the beginning of the summer 2015 IATA schedule season.

### ***C. The decision at issue***

30. On 30 April 2018, the Commission adopted the decision at issue, by which it found that Delta had made appropriate use of the slots during the utilisation period and approved the granting of grandfathering rights to Delta pursuant to Clause 1.10 of the final commitments.

31. On the basis of an interpretation of the wording, the context and the purpose of the commitments, the Commission concluded in the decision at issue 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 Clause 1.13 of the final commitments.

32. The Commission then examined in the decision at issue whether Delta 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. In that regard, 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 provided for by Article 10(2) and (3) of Regulation No 95/93<sup>5</sup> in that the use of the slots was always above an 80% threshold. Having found that Delta 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, Delta had made appropriate use of the slots during the utilisation period and approved the granting of grandfathering rights to Delta pursuant to Clause 1.10 of the final commitments.

### ***D. The procedure before the General Court and the judgment under appeal***

33. By application lodged at the Registry of the General Court on 10 July 2018, American brought an action for annulment of the decision at issue, relying on two pleas in law. The first plea in law alleged errors of law made by the Commission in interpreting the term 'appropriate use'. By its second plea in law, American claimed that the Commission had not taken into account all the relevant factors for the grant of grandfathering rights.

<sup>5</sup> 'The Airport Slots Regulation'.

34. By the judgment under appeal, the General Court dismissed the action brought by American in its entirety and ordered American to bear its own costs and pay those incurred by the Commission. The General Court held *inter alia* that the term ‘appropriate use’ in Clause 1.10 had been correctly interpreted by the Commission as meaning ‘absence of misuse’ within the meaning of Clause 1.13.

35. According to the General Court, that interpretation follows, first, from the wording of Clause 1.10 in the light of its context, second, from the objectives pursued by that provision and the rules of which it is part, which seek to facilitate a new entry on the route at issue, and in particular the Airport Slots Regulation, and, third, from the intention of the parties to the merger, which is apparent from the Form RM.

### **III. The procedure before the Court of Justice and the forms of order sought**

36. By document lodged at the Registry of the Court of Justice on 26 February 2021, American brought an appeal against the judgment under appeal.

37. By its appeal, American claims that the Court of Justice should:

- set aside and annul the judgment under appeal;
- annul the decision at issue;
- in the alternative, if deemed necessary, remand the case to the General Court for reconsideration in accordance with the Court of Justice’s judgment;
- order the Commission to pay the costs of these proceedings and of the proceedings before the General Court.

38. The Commission contends that the Court of Justice should:

- dismiss the appeal;
- order American to pay the costs.

39. Delta contends that the Court of Justice should:

- dismiss the appeal in its entirety;
- order American to pay the costs of these proceedings and of the proceedings before the General Court.

### **IV. Analysis**

40. In support of its appeal, American relies on a single ground of appeal, alleging that the General Court erred in law in holding that the term ‘appropriate use’ in Clause 1.10 of the final commitments means ‘absence of misuse’. It further claims that the General Court incorrectly upheld the decision to grant grandfathering rights to Delta in so far as Delta has not operated the slots allocated.

41. This ground of appeal is divided into three limbs. By the first limb, American asserts, in essence, that when interpreting ‘appropriate use’, the General Court failed to take into account the objectives of, respectively, the Merger Regulation, remedies under that regulation and the specific commitments concluded between the parties to the merger. By the second limb, it submits that the General Court erred in ruling that ‘appropriate use’ means ‘absence of misuse’. By the third limb, American alleges that the General Court erred in interpreting the Form RM and Clause 1.9 of the final commitments, specifically the legal implications of the phrase ‘in accordance with the bid’.

42. Having regard to the ground of appeal raised, the central issue in this appeal is the interpretation of the concept of ‘appropriate use’, which is the legal test under Clause 1.10 of the final commitments for granting grandfathering rights.

43. In the absence of a definition of the term ‘appropriate use’ in Clause 1.10 of those commitments, it will have to be determined whether the General Court erred in law in holding that the interpretation adopted in the decision at issue, to the effect 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 objective of the provisions in question and by their context.

#### ***A. The first limb of the single ground of appeal***

44. By the first limb of the single ground of appeal, American disputes, in essence, the purposive and contextual interpretation given by the General Court of the concept of ‘appropriate use’ under Clause 1.10 of the final commitments. American’s arguments can be divided into three parts. It maintains that in the judgment under appeal the General Court failed to take into account in its analysis: first, the objectives of the Merger Regulation and remedies under that regulation, second, the specific objectives of the final commitments and, third, the full remedial framework set up by those commitments. American claims that, in not dealing with these elements, the judgment under appeal is vitiated by a clear error of legal interpretation.

45. The Commission contests those claims and maintains that in the judgment under appeal the General Court fully addressed the objectives of the Merger Regulation, the remedies under that regulation and the commitments at issue.

46. For its part, Delta raises the inadmissibility of this limb in so far as American merely restates arguments already raised at first instance without conducting a precise analysis of the judgment under appeal.

##### ***1. The admissibility of the first limb***

47. Before examining the three arguments on which the first limb of the single ground of appeal is based, it is necessary to rule on the question, raised by Delta, of the admissibility of this limb.

48. Although in its appeal American does reproduce some of the arguments raised at first instance, it nevertheless seems to me that it indicates clearly and precisely the contested elements of the judgment under appeal which relate to points of law and the legal arguments specifically advanced in support of that first limb. As was noted in point 44 of this Opinion, American disputes the purposive and contextual interpretation given in the judgment under appeal of the concept of ‘appropriate use’.

49. The plea of inadmissibility raised by Delta in this limb cannot therefore be upheld.

## *2. Proposed analysis*

*(a) Did the General Court take into account the objectives of the Merger Regulation and the remedies under that regulation?*

50. American submits, first of all, that the judgment under appeal failed to take into account, in interpreting the term ‘appropriate use’, the objective laid down by the Merger Regulation and by the Commission Notice on remedies acceptable under [the Merger Regulation] and under [the Implementing Regulation] (OJ 2008 C 267, p. 1; ‘the Remedies Notice’), according to which the commitments should ‘entirely eliminate’ the competition problems.

51. It should be observed as a preliminary point that, where a concentration raises competition concerns in that it could significantly impede effective competition, the parties to the merger may propose remedies known as ‘commitments’ in order to eliminate the concerns identified by the Commission.<sup>6</sup>

52. As regards remedies under the Merger Regulation, their purpose is to eliminate entirely the competition concerns identified by the Commission such that a concentration does not significantly impede effective competition. Depending on the stage which the administrative procedure has reached, the commitments proposed must allow the Commission either to form the view that the notified concentration does not raise serious doubts as to its compatibility with the common market at the stage of the preliminary examination (‘Phase I’), under Article 6(2) of the Merger Regulation, or to respond to the objections sustained during the detailed investigation (‘Phase II’), in accordance with Article 18(3) read in conjunction with Article 8(2) of that regulation.

53. It is clear to me that, in the judgment under appeal, the General Court duly examined the objectives of the Merger Regulation and the remedies under that regulation.

54. In that regard, it should be observed, in the first place, that the General Court set out the relevant interpretative framework in paragraphs 111 and 112 of the judgment under appeal, noting that account should be taken of the specific rules of interpretation contained in the third paragraph of the preamble of the final commitments. Under that provision, those commitments must be interpreted ‘in the general framework of EU law, in particular in the light of the Merger Regulation, and by reference to the [Remedies Notice]’.

55. In the second place, the General Court set out the principles forming the basis for merger control in paragraphs 117 to 120 of the judgment under appeal, stating that the commitments must 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’ and that ‘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’. According to the General Court, it follows that ‘having regard to their scope and content, the commitments entered into during the Phase I procedure are such

<sup>6</sup> See recital 30 of the Merger Regulation and paragraphs 5 and 9 of the Remedies Notice.

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'.<sup>7</sup> Furthermore, in the context of the purposive interpretation of 'appropriate use', the General Court held in paragraph 255 of the judgment under appeal that 'the Parties entered into those commitments in order to enable the Commission to find that they had remedied any serious doubts it had'.

56. The fact that the General Court did not expressly mention recital 30 of the Merger Regulation or paragraph 9 of the Remedies Notice in the judgment under appeal does not mean, contrary to the assertion made by American, that it failed to take into account the objectives of the commitments as evident from the applicable rules.

57. It follows that the General Court did not ignore the objective of the remedies under the Merger Regulation in interpreting the concept of 'appropriate use'. The judgment under appeal is not therefore vitiated by an error in law in that regard.

*(b) Did the General Court take into account the commitments entered into by the parties to the merger?*

58. American asserts that the judgment under appeal fails to take into account the specific objective of the commitments entered into by the parties to the merger, consisting in replicating the lost competition on the LHR-PHL route, which would require a stricter interpretation of 'appropriate use'.

59. It submits in that regard that the General Court did not refer, in paragraph 30 of the judgment under appeal, to critical elements of the Commission's findings regarding those commitments mentioned inter alia in paragraphs 176, 178 to 181, 186 and 197 to 199 of the Clearance Decision. In particular, in the judgment under appeal the General Court failed to mention, among other things, the importance of the scale and scope of the remedies, the increment brought about by the transaction, the scope of entry, the fact that the final commitments will allow a sufficient level of competition between airlines on the LHR-PHL route and the structural nature of the remedy.

60. In addition, although the judgment under appeal noted the case-law according to which the commitments must constitute a direct and sufficient response capable of clearly dispelling all serious doubts as to the transaction at issue, American claims that the General Court failed to apply that logic of an effective remedy when interpreting 'appropriate use', since it accepted Delta's failure to operate 470 of the remedy slots.

61. American asserts that, in connection with the purposive interpretation of the relevant provisions of the commitments, in paragraphs 250 to 278 of the judgment under appeal, the General Court focused only on the purpose of grandfathering rights to enhance the intrinsic attractiveness of the slots, without assessing the specific objective of those commitments, which is to replicate the lost competition from the daily service of one of the parties to the merger, ensuring sufficiency of entry. American states in that regard that whether the actual use of the slots met or failed to meet that objective is a critical element of any decision regarding grandfathering rights.

<sup>7</sup> See judgment of 13 May 2015, *Niki Luftfahrt v Commission* (T-162/10, EU:T:2015:283, paragraph 297 and the case-law cited).

62. Lastly, American maintains that, in paragraphs 266 and 267 of the judgment under appeal, the General Court confused the meaning and purpose of grandfathering with the ‘appropriate use’ condition to be satisfied in order to grant grandfathering rights. According to American, given that the object of the slot commitment was to replicate the daily service of one of the parties to the merger and thereby entirely eliminate the competition issue, the extent to which the remedy slots are actually used to achieve that objective is not only fully reconcilable with the determination of ‘appropriate use’ and whether to grant grandfathering rights, it is in fact a critical element in that analysis.

63. In that regard, I note first of all that American’s argument rests on the premiss that the general objective of merger control remedies and the specific objective of the final commitments are to replicate the daily service previously operated by one of the parties to the merger.

64. The examination of the objective pursued by those commitments which follows will show that this is a false premiss.

65. The objective of the commitments entered into by the parties to the merger was to dispel the serious doubts raised by the Commission as to compatibility with the internal market that the transaction would otherwise have caused. The merged entity would have been the only air carrier providing a direct service on the LHR-PHL route. The Commission had found, moreover, that slot availability at LHR was the main entry barrier on the route where serious doubts were identified.<sup>8</sup>

66. The objective of those commitments was therefore to entirely eliminate the competition concerns on the LHR-PHL route by removing (or reducing significantly) the entry barriers at LHR in order to foster sufficient, timely and likely entry by a prospective entrant on that route.

67. As regards the slots released by the parties to the merger and taken over by the prospective entrant, those commitments provide that they must be used to provide a ‘competitive air service’, defined in the final commitments as a ‘non-stop scheduled passenger air transport service operated on the [LHR-PHL] airport pair’.<sup>9</sup> In order to operate a ‘competitive air service’, a prospective entrant was not obliged to operate a particular number of daily flights. While Clause 1.1 of the final commitments simply indicates the maximum number of remedy slots released, it does not identify a fixed, binding number of frequencies that the prospective entrant must operate.

68. Furthermore, the slots obtained by the new entrant could be used only on the LHR-PHL route during the utilisation period. Under Clause 1.10 of the final commitments, grandfathering rights were acquired only once ‘appropriate use’ of those slots had been made on the LHR-PHL route for that period. Once acquired, those rights would allow the new entrant to retain those slots permanently and to use them on any route or city pair.

69. The following conclusions can be drawn in the light of the foregoing considerations.

70. First, the slot commitment is a remedy which seeks to facilitate entry on the LHR-PHL route by removing the main entry barrier without specifying a particular number of frequencies that the prospective entrant(s) should operate. Thus, contrary to the assertion made by American, none of the clauses in the commitments requires the prospective entrant to undertake to use 100% of the remedy slots which it has requested to use or to justify any departure from its bid.

<sup>8</sup> See paragraph 180 of the Clearance Decision.

<sup>9</sup> See Clause 1.9 of the final commitments and paragraph 160 of the Clearance Decision.

71. Second, the objective of that commitment is to replicate not US Airways' daily service but the competitive constraint provided by US Airways before the concentration. The slot commitment thus ensures that, after that concentration, the merged entity will be subject to a constraint by virtue of actual or potential entry. By transferring the slots to a new entrant, the commitments aim to ensure that it is able to use them under the same conditions as US Airways before the merger.<sup>10</sup>

72. Third, the replication of US Airways' daily service is also not a precondition for the grant of grandfathering rights to the potential entrant(s).

73. Fourth, as was held by the General Court in paragraphs 257 to 261 of the judgment under appeal, the objective of grandfathering rights is to make the slot commitment more effective by contributing to the common objective of entirely eliminating the competition concerns identified by the Commission by facilitating sufficient, timely and likely entry on the LHR-PHL route.

74. I further note that, contrary to the criticisms raised by American in its appeal, the General Court did not ignore the objective alleged by it, whereby the commitments seek to replicate the increment brought about by the transaction. The General Court explicitly rejected that argument on the ground that it was not supported by the Clearance Decision, the decision at issue or the final commitments and it was incompatible with the very nature of grandfathering rights and the discretion enjoyed by the Commission when it accepts the remedies proposed by the parties to the merger.<sup>11</sup> I would also add that none of the extracts of the Clearance Decision cited in point 59 of this Opinion supports American's position.

75. Lastly, I consider that American's argument presented in point 61 of this Opinion, alleging that the General Court focused only on the purpose of grandfathering rights to enhance the attractiveness of the remedy slots, while ignoring the broader goal of the commitments to ensure an effective solution to the competition concerns raised by the concentration, should be rejected.

76. As was explained in points 72 and 73 of this Opinion, the grant of grandfathering rights did not pursue a separate objective but aimed to help attain the general objective of the commitments of entirely eliminating the competition concerns on the LHR-PHL route. Thus, the objective of including grandfathering rights in those commitments was to facilitate entry by making the slots more attractive in order to give airlines an incentive to request the use of remedy slots and to enter the LHR-PHL route with a competitive air service, thereby ensuring that those commitments are effectively implemented. The General Court did not therefore err in law by focusing on the purpose of grandfathering rights.

*(c) Did the General Court take into account the full remedial framework of the commitments?*

77. American asserts that the General Court erred in its contextual interpretation of the concept of 'appropriate use' because it confined its analysis to Clause 1.13 of the final commitments in isolation, without taking into consideration the full remedial framework of those commitments. According to American, the contextual interpretation should take into account at least Clauses 1.1, 1.24, 1.26, 1.27, 1.10 and 1.11 of the final commitments. Considering those provisions together demonstrates that they form a coherent system which ensures that the remedy achieves the core goal of 'entirely eliminating' the competition concern.

<sup>10</sup> See points 88 and 89 of this Opinion.

<sup>11</sup> See paragraphs 262 to 270 of the judgment under appeal.

78. It should be noted, first, that a contextual or systemic interpretation does not mean that a legal provision must be interpreted in the light of all the other provisions of the legislation of which it forms part. Those other provisions must therefore be assessed only in so far as they are relevant.

79. With regard, second, to the analysis of the full remedial framework set up by the commitments, it is clear from reading the judgment under appeal that the General Court did analyse the other provisions of the final commitments, including those invoked by American. However, their relevance to the analysis of the term ‘appropriate use’ was rejected, since those provisions do not relate to the grant of grandfathering rights. In that regard, as the General Court correctly found in paragraphs 246 to 249 of the judgment under appeal, Clauses 1.1, 1.24, 1.26 and 1.27 of the final commitments govern a prospective entrant’s bid and are relevant to the granting of remedy slots, not the granting of grandfathering rights.

80. As the General Court held in paragraph 239 of the judgment under appeal, the only provision of the final commitments which actually relates to the use of the slots in question is Clause 1.13 on misuse. More specifically, Clause 1.13(b) of the final commitments mentions the number of frequencies which must be operated for the operation of fewer weekly frequencies than the prospective entrant proposed to use not to be considered ‘misuse’. Such utilisation must be consistent with the ‘use it or lose it’ principle under Article 10(2) of the Airport Slots Regulation, which provides, in essence, that for an air carrier to be able to operate the slots allocated during the next period, it must demonstrate that it has operated those slots for at least 80% of the time during the scheduling period for which those slots have been allocated (‘the 80/20 rule’).

81. Furthermore, as was also mentioned in point 70 of this Opinion, none of the clauses of the final commitments requires the prospective entrant to undertake to use 100% of the remedy slots which it has requested to use or to justify any departure from its bid.

82. In the light of the foregoing considerations, I am therefore of the view that the first limb of the single ground of appeal should be rejected.

### ***B. The second limb of the single ground of appeal***

83. By the second limb of the single ground of appeal, American asserts, in essence, that the General Court erred in concluding that the concept of ‘appropriate use’ means ‘absence of misuse’.

84. That argument is divided into two parts. First, American submits that applying the ‘absence of misuse’ standard in interpreting ‘appropriate use’ results in a slot usage level that is inconsistent with the very objectives of the commitments drawn up by the parties to the merger. Second, American maintains that the General Court made a number of errors in the judgment under appeal in finding that the concept of ‘appropriate use’ means ‘absence of misuse’.

85. For their part, the Commission and Delta contend that none of the arguments advanced by American in this limb of the appeal demonstrates any errors in the General Court’s analysis.

*1. Utilisation level corresponding to absence of ‘misuse’*

86. American asserts that, on each day a remedy slot was not operated, the objective of ‘entirely eliminating’ the competition problem was not achieved, constituting a ‘significant impediment to effective competition’. According to American, although the Commission has a broad discretion in assessing whether the commitments constitute a sufficient response capable of dispelling all serious doubts, it cannot modify those binding commitments through an interpretation of the concept of ‘appropriate use’ that is inconsistent with the objectives and terms of those commitments.

87. In my view, that argument should be rejected, particularly given that the requirement to use the slots for the grant of grandfathering rights, as advocated by American, is contrary to the provisions and objectives of the commitments and could jeopardise their effectiveness.

88. First, adopting the interpretation advocated by American would impose on any prospective entrant a utilisation rate higher than 80%, which is the sectoral norm.<sup>12</sup> Thus, there is no reason why, in order to obtain grandfathering rights, Delta should be required to comply with stricter operating conditions than those provided for by the standard regulatory framework, which thus applied to US Airways before the merger and apply to American after the merger.

89. Second, setting a higher level of operation for any new prospective entrant than for its competitors would run counter to the need to ensure fair conditions of competition on the LHR-PHL route. Such a requirement would deprive Delta of the flexibility offered by the 80/20 rule, placing it at a disadvantage in relation to American, which would continue to benefit from it. Since the objective of the commitments is to ensure effective competition on the LHR-PHL route, Delta’s situation should be comparable to that of any other airline, particularly companies operating on that route. It follows that only utilisation of the slots by a new entrant having regard to the conditions laid down in Clause 1.13 of the final commitments ensures that that new entrant – in this case Delta – can carry on its activities on an equal footing with its main competitor, namely American.

90. Third, the position advocated by American would not be compatible with the specific objective of the commitments, which is to facilitate entry on the LHR-PHL route. Adopting a utilisation rate above the sectoral norm would be liable to dissuade any prospective entrant, depriving the commitments of the incentive effect pursued through the inclusion of grandfathering rights and reducing the effectiveness of the slot commitment.

91. Fourth, adopting the interpretation advocated by American could jeopardise the legal certainty needed for ensuring the application of the decision at issue and the effectiveness of the commitments. I note in that regard that, as the General Court rightly pointed out in paragraphs 125 and 275 of the judgment under appeal, aside from their objective of dispelling serious doubts as to the compatibility of the concentration with the internal market, the commitments are also relevant for third parties who take over the activities of the parties to a merger, in so far as the conditions under which such activities may be taken over are largely determined by those commitments. To that end, it is important that clear and verifiable principles, which are not subject to arbitrary considerations, apply to the grant of grandfathering rights. Adopting American’s position would thus be tantamount to accepting that any departure from the bid made by an entrant taking over slots – in this case Delta – should be justified on the

<sup>12</sup> See point 80 of this Opinion.

basis of vague criteria not specified in the commitments. As the General Court rightly notes in paragraph 250 of the judgment under appeal, 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 for any prospective entrant.

92. Fifth, it should be noted that, in order for the commitments proposed by parties to a merger to be likely to eliminate the competition concerns identified, there has to be an effective implementation and ability to monitor the commitments.<sup>13</sup> For the reasons mentioned in the preceding point of this Opinion, only the reference to Clause 1.13 of the final commitments fulfils this condition.

93. Sixth, because such an interpretation of conditions for the grant of grandfathering rights is imprecise, it could not, in principle, be accepted during Phase I, the aim of which is, I would reiterate, to dispel all serious doubts as to the compatibility of a concentration with the internal market.<sup>14</sup>

94. Furthermore, in my view, American’s argument that the General Court erred, in paragraph 291 of the judgment under appeal, in holding that the fact that Delta’s slot utilisation rate ranges between 76.4% and 81% cannot mean that the object of the commitments was compromised should be rejected. American notes in that regard that Delta chose not to operate 470 services (total outward and return journeys) on the LHR-PHL route and that, consequently, the objective of the commitments in this case was not met in so far as those slots were ultimately not provided by any airline. According to the appellant, that result is a strong indication that the ‘absence of misuse’ is the wrong legal interpretation to be given to ‘appropriate use’.

95. It should be noted that the argument advanced by American concerning the methodology employed by the Commission to calculate utilisation rates concerns matters of fact (and factual assessments) which were definitively resolved in paragraphs 285 to 291 of the judgment under appeal, whose distortion has not been raised by the appellant. It was also noted in paragraphs 90, 290 and 294 of the judgment under appeal that the appellant, while criticising the extent of Delta’s under-operation of the slots, does not dispute that Delta is in a situation of use in accordance with the 80/20 rule.

## *2. Other factors in support of the interpretation of the term ‘appropriate use’ as ‘absence of misuse’*

96. First, American asserts that, in paragraphs 95, 103, 104 and 207 of the judgment under appeal, the General Court incorrectly relied on the ordinary meaning of the term ‘misuse’ in concluding that it could be reconciled with the concept of ‘appropriate use’. American submits that the General Court should have recognised that the ordinary meaning of ‘misuse’ covered a situation, like that in the present case, where a promise made to secure a legal benefit, including grandfathering rights, is not respected without sufficient justification.

97. It should be noted in that regard that it is clear from the judgment under appeal that the General Court did not base its conclusions on the ordinary meaning or a literal interpretation of the term ‘misuse’. It is partly because the General Court concluded in paragraph 107 of the judgment under appeal that the literal interpretation was ‘not decisive’ that it turned to the contextual interpretation of the commitments.

<sup>13</sup> See paragraph 13 of the Remedies Notice.

<sup>14</sup> See point 55 of this Opinion.

98. Second, American asserts that, in paragraphs 209 and 210 of the judgment under appeal, the General Court incorrectly relied on the fact that the clauses on ‘misuse’ appeared in the section entitled ‘Grandfathering of Slots’ in the IAG/bmi case, concluding that that term means ‘inappropriate use’. American notes in that regard that the commitments in the present case do not contain that heading. Furthermore, it maintains that this section of the IAG/bmi commitments, which was deemed to relate to ‘grandfathering’, in reality concerns other aspects that are irrelevant to the interpretation of ‘appropriate use’.

99. As was explained in point 6 of this Opinion, the IAG/bmi commitments served as a model for the commitments in the present case. Furthermore, as is made clear in points 118 and 119 of this Opinion, if the parties had wished to depart from that model or provide a different interpretation to that of the IAG/bmi commitments, this should have been indicated in the commitments. Accordingly, the fact that the IAG/bmi commitments contain the heading ‘Grandfathering of Slots’ and the section entitled ‘Grandfathering of Slots’ includes provisions unrelated to grandfathering does not call into question the statement in paragraph 209 of the judgment under appeal that the IAG/bmi commitments form a sound basis for the interpretation of the commitments in the present case.<sup>15</sup>

100. Third, American asserts that the judgment under appeal did not undertake a single, complete analysis of the reasoning according to which Clause 1.13 of the final commitments, relating to the concept of ‘misuse’, provides the standard for determining ‘appropriate use’. In addition, American alleges that the General Court made a number of errors in law in that reasoning, in particular in paragraphs 236 to 240, 276 and 277 of the judgment under appeal.

101. In my view, while it is true that the structure of the judgment under appeal is not always very clear and at times makes it difficult to read and understand, this does not mean that the General Court erred in its assessment that the concept of ‘misuse’ provides the standard for determining ‘appropriate use’.

102. Fourth, American alleges that the General Court made a manifest error of interpretation in paragraphs 279 to 292 of the judgment under appeal in holding that the ‘contextual interpretation’ of the commitments should be carried out in light of the Airport Slots Regulation. It asserts that this reasoning is inconsistent with the wording of the third paragraph of the preamble of the final commitments in so far as that provision does not mention the Airport Slots Regulation among the legislation in accordance with which the commitments must be interpreted, although it is referred to in other parts of the commitments. In addition, it submits that the objective of the Airport Slots Regulation does not match the objectives of Merger Regulation remedies and the specific remedies in this case.

103. I note, in the first place, that the fact that the Airport Slots Regulation is specifically mentioned in the commitments leaves no doubt that it is one of the elements which must be taken into consideration in the contextual analysis to be carried out. I would also observe that the third paragraph of the preamble of the final commitments states that the commitments are to be interpreted *inter alia* in the ‘general framework of EU law’. For that reason, the General Court held in paragraph 124 of the judgment under appeal that account should be taken of the Airport Slots Regulation, which forms part of the ‘general framework of EU law’.

<sup>15</sup> Furthermore, as noted by the Commission, recitals 644 and 645 of the decision in the IAG/bmi case support a link between the grant of grandfathering rights and the concept of misuse in so far as the subheading ‘1.1.3 Grandfathering rights’ deals with both grandfathering rights and misuse, thus establishing a link between the two concepts.

104. In the second place, as was explained in points 80 and 88 of this Opinion, since the utilisation rate provided for in that regulation constitutes the sectoral norm, the General Court correctly held that Delta could expect to carry on its activities on the basis of the standard regulatory framework. In addition, in so far as the provisions of Article 10(2) and (3) of the Airport Slots Regulation constitute the standard regulatory framework in the European Union, the General Court rightly held, in paragraph 283 of the judgment under appeal, that 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, which is not the case here.

105. I consider, in the third and last place, that, contrary to the assertion made by American, the fact that the Airport Slots Regulation pursues different objectives from the Merger Regulation does not prevent it from being taken into consideration in the context of merger control. Thus, as was explained in point 89 of this Opinion, the application of the 80/20 rule is not solely motivated by air traffic considerations, but is also necessary to ensure fair conditions of competition between Delta and its main competitor on the LHR-PHL route, namely American. Furthermore, in its task, the Commission is required to consider all relevant factors relating to the proposed remedy by reference to the structure and particular characteristics of the market in which the competition concerns arise.<sup>16</sup>

106. In the light of the foregoing considerations, I consider that the second limb of the single ground of appeal should be rejected.

### *C. The third limb of the single ground of appeal*

107. By the third limb of the single ground of appeal, American asserts, in essence, that the General Court accorded a disproportionate and unjustified importance to the content of the Form RM in interpreting the concept of ‘appropriate use’.

#### *1. The admissibility of the third limb*

108. I note in that regard that the Commission contends that this argument is inadmissible since it was not raised at first instance.

109. I consider, however, that American’s argument is admissible in so far as it disputes the General Court’s findings in the judgment under appeal to the effect that the information in the Form RM suggests that the wording ‘in accordance with the bid’ is not relevant in interpreting the notion of ‘appropriate use’ within the meaning of Clause 1.10 of the final commitments.

#### *2. Proposed analysis*

110. American alleges, in the first place, that the Form RM is a preparatory document and that the analysis in the judgment under appeal is therefore inconsistent with the Court’s case-law according to which ‘*travaux préparatoires*’ are not considered as methods of interpretation that can alter the content or finality of a provision of EU law.

<sup>16</sup> See paragraph 12 of the Remedies Notice.

111. In that regard, it should be noted, first, as the General Court rightly held in paragraphs 122 and 123 of the judgment under appeal, that the existence of the Form RM derives directly from the Merger Regulation. Since the terms of the final commitments must, in accordance with the third paragraph of the preamble thereof, be interpreted in the light of that regulation, the Form RM was correctly taken into account by the General Court in its analysis.<sup>17</sup>

112. Second, as regards the content of the Form RM, Article 20(1a) of the Implementing Regulation provides that undertakings are required to specify in that form the information and documents which they have to submit at the same time as offering commitments. In addition, Annex IV to that regulation stipulates that the information in the Form RM is necessary to allow the Commission to examine whether the commitments are capable of rendering the concentration compatible with the common market in that they will prevent a significant impediment to effective competition. I further note that the Remedies Notice also makes reference to the Form RM in paragraph 7 thereof, stating that it is the responsibility of the parties to a merger, which alone have all the relevant information, to provide ‘all such information available that is necessary’ for the Commission’s assessment of the remedies proposal.

113. It follows that the Form RM is not a purely preparatory document, as the appellant claims, but a document complementing the commitments which, as the General Court held in paragraph 133 of the judgment under appeal, is intended specifically to assist the Commission in evaluating the content, aim, viability and effectiveness of proposed remedies and to set out the undertaking’s own understanding of those remedies.

114. It should be noted, third, that, although the analysis of the Form RM plays an important role in the judgment under appeal,<sup>18</sup> American’s argument that the General Court accorded disproportionate importance to the form must be rejected. It is quite clear from the judgment under appeal that the analysis of the Form RM is just one of the elements taken into consideration by the General Court in its contextual analysis in concluding that ‘appropriate use’ could be interpreted as an absence of ‘misuse’ within the meaning of Clause 1.13 of the final commitments.<sup>19</sup>

115. In the light of the foregoing considerations, I am of the view that the General Court did not err in law in finding that the terms of the final commitments must be interpreted having regard to the Form RM.

116. In the second place, American claims that the General erred in the interpreting Clause 1.9 of the final commitments, specifically the legal implications of the phrase ‘in accordance with the bid’ in the light of the Form RM. According to American, that phrase is not a simple ‘linguistic change’ to the commitments, since it comes from other remedy templates recently accepted by the Commission.

117. For the reasons set out below, I consider that this argument is also flawed.

118. It should be noted that the Commission expressly insisted that the commitments offered by the parties to the merger include grandfathering rights based on the IAG/bmi case in order for the merger to be able to be declared compatible with the internal market. On that basis, Section 3 of the Form RM submitted to the Commission by the parties to the merger explicitly stated that the

<sup>17</sup> See points 17 and 54 of this Opinion.

<sup>18</sup> See paragraphs 126 to 200 of the judgment under appeal.

<sup>19</sup> See paragraph 292 of the judgment under appeal.

commitments were based on the commitments in the decision in the IAG/bmi case and that the points where the parties diverged from those commitments would be indicated in the Form RM.<sup>20</sup> In addition, the parties to the merger specified that those points did not include ‘minor linguistic changes’ and clarifications required by specific circumstances. As regards the grandfathering provisions more specifically, no departure from the IAG/bmi commitments was pointed to in the Form RM.

119. The General Court was therefore right to recognise, in paragraphs 143 and 144 of the judgment under appeal, that it was the responsibility of American to indicate in the Form RM any substantial change from the IAG/bmi commitments, which served as a model in the present case. Because the concept of ‘in accordance with the bid’ was not included in the IAG/bmi commitments and the addition of those terms was not pointed out as a change from the IAG/bmi commitments, the General Court did not err in holding, in paragraph 139 of the judgment under appeal, that that wording should be considered a ‘minor linguistic change’ to the commitments.

120. These considerations cannot be called into question by American’s assertions that the origin of the wording ‘in accordance with the bid’ is other remedy templates and that the slot commitment in this case contains numerous provisions taken from the COMP/AT.39595 – A++ commitments.<sup>21</sup> The only model on which the Commission expressly insisted in the commitments offered for the grant of grandfathering rights was the IAG/bmi case. Therefore, the provisions of the other commitments are not relevant to the interpretation of the concept of ‘appropriate use’ and of the grant of grandfathering rights, especially since the other models of commitments claimed did not concern grandfathering rights.

121. It should be made clear in that regard that, although in its task of demonstrating that a merger is capable of significantly impeding competition the Commission is required to verify the information provided by the parties to a merger, it cannot, however, be expected to anticipate any possible interpretation of the commitments offered by those parties, in particular where that interpretation not only departs from the analytical framework which the parties themselves had accepted and the standard sectoral norms in the market concerned, but also is not evident from the text of the commitments. I consider that, if the parties to the merger wished to give a different interpretation to that for the IAG/bmi commitments, using ‘the bid’ as the reference point for the grant of grandfathering rights, this should be clear from the Form RM, or at least be mentioned there, as the General Court rightly noted in paragraphs 138, 149, 151 to 158 and 199 of the judgment under appeal.

122. In the third place, American claims that the General Court errs in interpreting Clause 1.9 of the final commitments. It maintains in that regard that, when the wording ‘in accordance with the bid’ and Clause 1.9 read in conjunction with Clause 1.10 are correctly interpreted, it is clear from the provisions of the commitments that an entrant’s bid must be seen as a starting point for the ‘appropriate use’ analysis and deciding whether to grant grandfathering rights.

123. For the reasons examined in points 64 to 73 of this Opinion, I am of the view that that argument cannot be upheld.

<sup>20</sup> See points 9 to 11 of this Opinion.

<sup>21</sup> Case which gave rise to Commission Decision C(2013) 2836 of 23 May 2013 (OJ 2013 C 201, p. 8)

124. Moreover, the fact that the wording ‘in accordance with the bid’ was already contained in the initial draft commitments submitted by the parties to the merger, which did not provide for grandfathering rights, shows that that clause had a purpose other than determining the conditions for granting grandfathering rights.<sup>22</sup>

125. In those circumstances, I consider that the third limb of the single ground of appeal should be rejected and the appeal dismissed in its entirety.

#### **D. Costs**

126. In the present proceedings before the Court of Justice, Delta has claimed that American should be ordered to pay the costs incurred not only in the present proceedings but also in the proceedings before the General Court.

127. For the following reasons, I consider that that claim cannot be upheld.

128. It should be noted that, since Delta did not apply for costs at first instance, in the judgment under appeal the General Court ordered it to bear its own costs pursuant to Article 134(1) and Article 138(3) of the Rules of Procedure of the General Court.

129. It should also be noted that, where an appeal is unfounded, the Court of Justice is to make a decision as to costs pursuant to Article 184(2) of the Rules of Procedure of the Court of Justice. Furthermore, Article 138(1) of those rules of procedure, which applies *mutatis mutandis* to the procedure on an appeal under Article 184(1) of the Rules of Procedure, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.

130. Nevertheless, those provisions must be interpreted as meaning that the Court of Justice may order a party to pay the costs incurred by another party to the proceedings before the General Court only if that other party had applied for costs before the General Court.<sup>23</sup> If that is not the case and the claim for costs in respect of the proceedings before the General Court was not made until the stage of the proceedings before the Court of Justice, that claim should be rejected, irrespective of the appeal not being upheld, as I propose in the present case.

#### **V. Conclusion**

131. In the light of the foregoing considerations, I propose that the Court of Justice should:

- dismiss the appeal;
- order American Airlines to bear its own costs and to pay those incurred by the European Commission and Delta Air Lines (only in relation to the proceedings before the Court of Justice).

<sup>22</sup> See point 6 of this Opinion.

<sup>23</sup> See, to that effect, judgment of 29 April 2004, *Parliament v Ripa di Meana and Others* (C-470/00 P, EU:C:2004:241, paragraphs 83 to 90).