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***Case No COMP/M.5440-  
LUFTHANSA/  
AUSTRIAN AIRLINES***

Only the English text is authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 8 (2)  
Date: 28/08/2009

**Commission Decision**  
**of 28.8.2009**  
**declaring a concentration to be compatible with the common market**  
**and the EEA Agreement**

**(Case No COMP/M.5440 – Lufthansa/ Austrian Airlines)**

(Only the English text is authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to the bilateral Agreement between the European Community and the Swiss Confederation on Air Transport,<sup>1</sup>

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings,<sup>2</sup> and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 1 July 2009 to initiate proceedings in this case,

Having regard to the opinion of the Advisory Committee on Concentrations,<sup>3</sup>

Having regard to the final report of the Hearing Officer in this case,<sup>4</sup>

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1 OJ L 114, 30.4.2002, p. 73.

2 OJ L 24, 29.1.2004, p. 1.

3 OJ 2010/C 16 p.8

4 OJ 2010/C 16 p.10

WHEREAS:

**I. THE PARTIES AND THE TRANSACTION**

- (1) On 8 May 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Regulation (EC) No 139/2004 (hereinafter "the Merger Regulation"), by which the undertaking Deutsche Lufthansa AG (hereinafter "LH") acquires sole control, within the meaning of Article 3(1)(b) of that Regulation, of the undertaking Austrian Airlines (hereinafter "OS") by way of purchase of shares.
- (2) LH is the largest German airline. It provides scheduled passenger and cargo transport and related services (maintenance, repair and overhaul services ("MRO"), in-flight catering and IT services). In 2008, LH carried 45 million passengers to more than 200 destinations in 85 countries with its 272 aircraft. It has hubs at Frankfurt International Airport and Munich airport and a base at Düsseldorf airport. LH also controls Swiss International Air Lines Ltd. ("LX")<sup>5</sup> based at Zurich airport, Air Dolomiti, Eurowings, and Eurowings' subsidiary, the low-cost carrier Germanwings ("4U"), and it recently acquired British Midland ("BMI") and Brussels Airlines ("SN").<sup>6</sup> In addition, LH holds 19% of the shares of Jet Blue, a low-cost airline active in the United States of America. Both LH and LX are members of the Star Alliance.
- (3) OS is the Republic of Austria's largest airline with its principal hub in Vienna. It provides scheduled passenger and cargo transport and related services, and serves 121 destinations in 63 countries (including code-sharing). Its subsidiaries include Lauda Air and Tyrolean Airways. In addition, it holds a stake of 22.5% of the shares of Ukraine International Airlines, a Ukrainian network carrier. OS is a member of the Star Alliance.
- (4) LH intends to acquire sole control over OS. On 5 December 2008, in the context of the privatisation process of OS, LH agreed to indirectly acquire a 41.56% shareholding in OS from the publicly owned Österreichische Industrieholding Aktiengesellschaft ("ÖIAG"). In addition, on 27 February 2009, LH launched a public offer for all remaining free-floating shares in OS, for which it received more than the required amount of declarations of acceptance. Together with the shares it acquired from ÖIAG, LH will be able to acquire an at least 85% shareholding in OS.

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5 See Commission Decision of 4 July 2005 in Case No. COMP/M.3770 - Lufthansa/Swiss, OJ C 240, 20.8.2005, p. 3.

6 The Commission authorized the proposed acquisition of SN by LH subject to conditions on 22 June 2009, see Case No. COMP/M.5335 – Lufthansa/SN Airholdings (Brussels Airlines), not yet published. The Commission approved the proposed acquisition of BMI by LH without conditions on 14 May 2009, see Commission Decision of 14 May 2009 in Case No. COMP/M.5403 - Lufthansa/BMI, OJ C 158, 11.7.2009, p. 1.

- (5) OS is currently encountering financial difficulties.<sup>7</sup> In July 2008, OS's management considered that the stand-alone option was no longer maintainable, and its supervisory board concluded that it would be difficult to continue operating OS as a stand-alone business. Consequently, OS' supervisory board asked that Austria privatise the company and the Austrian Government issued a privatization mandate ("Privatisierungsauftrag") pursuant to which ÖIAG was authorised to dispose of all of its shares in Austrian Airlines. On 19 January 2009, the Commission approved rescue aid in the form of a 100% guarantee on a loan amounting to EUR 200 million for OS.<sup>8</sup> In parallel to its assessment of the transaction under the Merger Regulation, the Commission assessed the terms and conditions of the intended acquisition of Austria's shareholding in OS by LH and a EUR 500 million capital increase in OS under Articles 87 and 88 of the Treaty.
- (6) Collectively, LH and OS are referred to as "the parties" in this Decision.

## II. CONCENTRATION

- (7) As a result of the proposed transaction, LH would acquire sole control over OS. This transaction thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## III. COMMUNITY DIMENSION

- (8) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (LH: EUR 27 870 million; OS: EUR 2 530 million).<sup>9</sup> LH and OS both have a Community-wide turnover in excess of EUR 250 million each (LH: EUR [...]\*; OS: EUR [...]\*), but neither achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The methodology used by the notifying party to calculate the parties' turnover is the "point of sale" methodology, although in any event the thresholds would also be met under the "point of origin" method or "50/50 split" method.<sup>10</sup> The proposed transaction therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

## IV. PROCEDURE

- (9) After examination of the notification, the Commission concluded on 1 July 2009 that the transaction fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement, despite the

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\* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

7 In 2008, OS generated losses of EUR 430 million. According to OS' half-year 2009 financial report, the net result for the period January to June 2009 amounted to a loss of EUR 166.6 million.

8 Commission Decision of 19 January 2009 on State aid NN 72/2008, Austrian Airlines – Rescue aid.

9 Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

10 These three methodologies are explained in Commission Decision of 27 June 2007 in Case No. COMP/M.4439 Ryanair/Aer Lingus, OJ C 47, 20.2.2008, p. 9-20, paragraph 13 et seq.

commitments submitted in phase 1. The Commission therefore initiated proceedings in accordance with Article 6(1)(c) of the Merger Regulation.

- (10) LH submitted commitments on 10 July 2009 pursuant to Article 8(2) of the Merger Regulation. On 17 July 2009 and 27 July 2009, LH submitted revised versions of the commitments. Following the submission of the revised version of the commitments on 27 July 2009, the Commission launched a market test in order to gather competitors', customers' and other market participants' views on these commitments. In light of the results of the market test, LH presented a final version of commitments on 31 July 2009 ("the Commitments"). According to Article 10(2) of the Merger Regulation, decisions pursuant to Article 8(2) of the Merger Regulation shall be taken as soon as it appears that any serious doubts referred to in Article 6(1)(c) of the Merger Regulation have been removed, particularly as a result of modifications made by the undertakings concerned. Accordingly, if parties offer commitments before the Commission has completed its in-depth investigation and issued a Statement of Objections, those commitments must be sufficient to rule out the existence of serious doubts.<sup>11</sup>

## V. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

### A. Scheduled air transport of passengers

#### (1) *Point of origin/point of destination ("O&D") city pairs*

- (11) The Commission has in the past defined the relevant market for scheduled passenger air transport services on the basis of the "point of origin/point of destination" (hereinafter "O&D") city-pair approach.<sup>12</sup> This market definition reflects the demand-side perspective whereby customers consider all possible alternatives (including different modes of transport) of travelling from a city of origin to a city of destination. On this basis, every combination of a point of origin and a point of destination is considered to be a separate market.
- (12) More particularly, with regard to network carriers, the Commission has nevertheless taken into consideration supply-side elements such as network competition between airlines based on the hub and spoke structure of traditional carriers. Although from a supply-side perspective a network carrier could in theory fly from any point of origin to any point of destination, in practice network carriers build their network and decide to fly almost exclusively on routes connecting to their hubs. Similar considerations apply for airlines that focus on point-to-point services. From a demand-side perspective, the Commission has

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11 Cf. the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1, point 18.

12 See Case No. COMP/M.5335 – Lufthansa/SN Airholding (Brussels Airlines), paragraph 12 et seq.; Commission Decision of 9 January 2009 in Case No. COMP/M.5364 – Iberia/Vueling/Clickair, OJ C 72, 26.3.2009, p. 23, paragraph 30; Commission Decision of 11 February 2004 in Case No. COMP/M.3280 – Air France/KLM, OJ C 60, 9.3.2004, p. 5, paragraph 9 et seq.; Case No. COMP/M.3770 – Lufthansa/Swiss, paragraph 12 et seq. The O&D approach was also confirmed by the European courts. See for instance CFI, Case T-177/04 easyJet v Commission, of 4 July 2006 ECR (2006), II-1913, at paragraph 56; or Case T-358/94 AirFrance v Commission, ECR (1996), II 2109.

previously considered that while networks have some importance for corporate customers whose demand is driven both by network effects and O&D considerations, individual customers are mainly concerned with finding the cheapest and most convenient connection between two cities.<sup>13</sup>

- (13) The market investigation has generally confirmed the O&D approach. However, some respondents, particularly traditional network carriers, indicated that the O&D approach fails to take into account the hub and spoke function of major airports and the ensuing network effects. It should also be noted that several carriers pointed out that both the point of origin and the point of destination should include all airports that are substitutable from the perspective of passengers. In the past, the Commission has considered that, in instances where multiple airports serve a single point of origin or destination, such airports may be included in the same relevant market, provided that they are indeed perceived as substitutable by travellers.<sup>14</sup>
- (14) Therefore, the effects of the proposed transaction will be assessed on the basis of various affected city-pair O&Ds while substitutable airports will be included in the respective points of origin and points of destination.

(2) *Flight substitutability from/to different airports*

- (15) Previous Commission Decisions have recognised that flights from or to airports which have overlapping catchment areas can be considered as substitutes.<sup>15</sup> Such airport substitution has often been accepted where several airports are located in the same city;<sup>16</sup> moreover, the Commission recently noted in the Ryanair/Aer Lingus Decision that secondary airports are likely to be *prima facie* in the same catchment area of a city if they are within 100 km or one hour of travel time of the city centre.<sup>17</sup> However, the 100 km/one-hour criterion was viewed as only a first "proxy".<sup>18</sup> Also, the 100 km/one-hour criterion was defined by the Commission in the specific case of routes served out of Dublin by two airlines with typical attributes of low-frills point-to-point carriers. This "rule" is thus not necessarily valid for other cases, such as routes served by two network carriers.<sup>19</sup> Therefore, a more detailed analysis taking into consideration the characteristics of the case at hand rather than a specific proxy should be used to correctly capture the competitive constraint that flights from/to two different airports exert on each other.

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13 See Case No. COMP/M.3280 – Air France/KLM.

14 See Case No. COMP/M.4439 – Ryanair/Aer Lingus.

15 Case No. COMP/M.3280 – Air France/KLM, paragraphs 24 et seq.

16 Case No. COMP/M.3280 – Air France/KLM, paragraphs 31 et seq.

17 See Case No. COMP/M.4439 – Ryanair/Aer Lingus, paragraph 99.

18 This criterion was determined on the basis of information received from 50 different airports that were asked about the "commercial arguments and material that they use for the purpose of marketing airport services towards carriers and attracting them on their tarmac", see Case No. COMP/M.4439 – Ryanair/Aer Lingus, paragraph 82.

19 The Commission for example did not use the 100km/one-hour proxy in a number of cases involving network carriers. See Case No. COMP/M.3280 – Air France/KLM, paragraphs 24-35; Case No. COMP/M.5335 – Lufthansa/SN Airholding, paragraph 54 et seq.; Case No. COMP/M.5403 – Lufthansa/BMI, paragraphs 45-47.

(16) In this case, the issue of whether flights from different airports are substitutable has been investigated in relation to the following airports in particular:

(i) Bratislava Airport ("BTS airport") – Vienna International Airport Schwechat ("VIE airport");

(ii) Frankfurt Hahn Airport ("HNN airport") – Frankfurt International Airport ("FRA airport");

(iii) Cologne-Bonn Airport ("CGN airport") – Düsseldorf International Airport ("DUS airport");

(iv) Brussels South Charleroi Airport ("CRL airport") – Brussels National Airport Zaventem ("BRU airport").

(17) For the O&D pairs at issue in this Decision, it is not always necessary to determine whether the flights from/to the different airports would be substitutable as it does not affect the competitive assessment. However, insofar as it is relevant for the assessment of this case, this issue will be discussed in greater detail in the competitive assessment in section VII.A.

(3) *Time sensitive v. non-time sensitive passengers*

(18) The Commission has previously considered that unrestricted tickets primarily purchased by so-called *time sensitive* passengers may be in a different market from restricted tickets primarily purchased by so-called *non-time sensitive* passengers.<sup>20</sup> On the one hand, time sensitive passengers tend to travel for business purposes, tend to book close to departure, require significant flexibility with their tickets (such as cost-free cancellation and modification of the time of departure), tend to pay higher prices for this flexibility and require a higher number of frequencies on a given O&D pair. On the other hand, non-time sensitive passengers travel predominantly for leisure purposes or to visit friends and relatives, book long in advance and do not require flexibility with their booking. Time sensitive passengers have therefore different preferences than non-time sensitive passengers, which is reflected in the different types of tickets targeted by airlines at these two different groups of passengers.

(19) The investigation of this case has confirmed that there exist broadly two categories of passengers with different needs and different price sensitivities, although some respondents have indicated that the distinction between time sensitive and non-time sensitive passengers is becoming less evident, as even time sensitive travellers have become increasingly price-focused and tend to prefer a restricted ticket over an unrestricted ticket if the price is lower. In fact, in light of the shift towards restricted tickets, most carriers, including low-cost carriers, offer rebooking services for restricted tickets (modifying either the date or the passenger's name) for a fee. Nevertheless, the distinction between non-time sensitive and time sensitive passengers, and hence restricted and unrestricted tickets, remains important. Time sensitive passengers still require a higher number of frequencies and specific departure and arrival times at the point of origin and destination. Finally, given the need for flexibility

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<sup>20</sup> See Commission Decision of 11 August 1999 in Case No. COMP/JV.19 – KLM/Alitalia, OJ C 96, 05.04.2000, p. 5, paragraph 21; Case No. COMP/M.3280 – Air France/KLM, paragraph 19, Case No. COMP/M.3770 – Lufthansa/Swiss, paragraph 15.

and short overall travel time, time sensitive passengers appear to be less inclined to use secondary airports than non-time sensitive passengers.

- (20) Most respondents consider that time sensitive passengers need to maximise their time at destination and minimise their travel time. Hence, for the majority of respondents, this segment of passengers requires early morning and late afternoon flights (with an ideal morning departure at around 7.00 within a maximum time window between 6.30 and 8.30, and an afternoon departure time at around 18.00 or 19.00 in a maximum time window between 17.00 to 20.00). Time sensitive passengers also require a sufficient number of daily flight frequencies. At a minimum, two daily flights are required to allow for a same-day return, although a majority of respondents indicated that more than two daily flights are required for time sensitive passengers depending on the respective destination. This is also related to the type of carrier preferred by time sensitive passengers: the majority of respondents consider that time sensitive passengers prefer full service network carriers to low cost carriers. These views are shared by all of the responding groups: corporate customers, travel agents, and competing airlines.
- (21) The possibility of same-day return trips to short-haul destinations was considered important by all of the responding corporate customers (mostly in view of the time and costs saved), and the majority is even prepared to pay a slight premium in order to benefit from same-day return trips. This is also confirmed in the replies of responding travel agents.
- (22) With respect to the airport location, the majority of the responding travel agents and competitors indicate that primary airports located close to business centres and short travel distances to airports were more important for time sensitive than for non-time sensitive passengers. Corporate customers indicated that they have clear preference for minimising the travel time (and costs for the business trips) of their employees, regardless of whether they considered their employees as time sensitive or non-time sensitive.
- (23) The precise market definition can be left open for the purposes of this case.

*(4) Substitutability of direct and indirect flights*

- (24) The level of substitutability of indirect flights to direct flights largely depends on the duration of the flight. As a general rule, the longer the flight, the higher the likelihood that indirect flights exert a competitive constraint on direct flights.
- (25) With respect to short-haul routes, the Commission has considered in previous Decisions that indirect flights generally do not provide a competitive constraint to direct flights, absent exceptional circumstances (for instance where the direct flight does not provide the option of a convenient one-day return trip, an issue of particular importance for business travellers).<sup>21</sup> The market investigation largely confirmed that for short-haul flights, indirect flights do not generally constitute a competitive alternative to direct flights, as customers indeed prefer direct flights.

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21 See Commission Decision of 12 January 2001 in Case No. COMP/M.2041 – United/US Airways, and Commission Decision of 5 March 2002 in Case No. COMP/M.2672 – SAS/Spainair, OJ C 93, 18.4.2002, p. 7.



- (26) In previous Decisions, the Commission has assessed mid-haul routes,<sup>22</sup> which are routes of more than three hours where direct flights normally do not provide the option of one-day return trips so that indirect flights are able to compete with direct flights. Due to the longer flight duration on such mid-haul routes, indirect flights seem to be more credible alternatives and some respondents indicated that indirect flights, in certain circumstances, constitute a competitive alternative. This is in line with the Commission's previous practice.<sup>23</sup>
- (27) With respect to long-haul flights (flights over six hours covering a distance of over 5 000 km), the Commission has previously found that indirect flights constitute a competitive alternative to non-stop services under certain conditions, in particular when (a) they are marketed as connecting flights on the O&D pair in the computer reservation systems, (b) they operate on a daily basis and (c) they only result in a limited increase in travelling time (maximum 150 minutes).<sup>24</sup> The market investigation largely confirmed that indirect flights constitute a competitive alternative to direct flights when it comes to flights above six hours, and several respondents find them substitutable.

## **B. Air transport of cargo**

- (28) With respect to air cargo transport markets, the Commission found, in previous Decisions, that the O&D approach to market definition with regard to air cargo transport is inappropriate, given that cargo is generally less time sensitive than passengers, and that cargo is usually transported by transmodal means of transport "behind" and "beyond" the origin and destination points. Accordingly, the relevant geographic market should be defined more broadly.
- (29) In line with previous Commission Decisions and the notifying party's submission, the market investigation in this case confirmed that for intra-European cargo transport, the relevant market could be defined as European-wide and would include alternative modes of transport, notably road and train transport, and to a lesser extent sea freight.<sup>25</sup>
- (30) As regards intercontinental routes, the corresponding catchment areas broadly correspond to continents, at least for those continents where adequate transport infrastructure allows onward connections<sup>26</sup> (for instance by train, truck, inland waterways, etc.) such as Europe and North America. In line with previous Commission Decisions and the notifying party's submission, the market investigation in this case confirmed that the transport infrastructure across Asia is insufficient to consider the whole of Asia as a catchment area. Similarly, the transport infrastructure across the Middle East is insufficient to consider the whole of the Middle East as a catchment area. Hence, these catchment areas shall be considered on a country by country basis. Therefore, air cargo transport from Europe towards Asia and

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22 Case No. COMP/M.3770 – Lufthansa/Swiss, paragraph 17, Case No. COMP/M.4439 Ryanair/Aer Lingus, paragraph 288 et seq.

23 See Case No. COMP/M.5335 – Lufthansa/SN Airholding, paragraph 45.

24 See, for example, Cases No. COMP/M.2041 – United/US Airways and No. COMP/M.2672 – SAS/Spanair.

25 See Case No. COMP/JV.19 – KLM/Alitalia and Commission Decision of 10 May 1999 in Case No. IV/M.1506 – Singapore Airlines/Rolls-Royce, OJ C 176, 22.6.1999, p. 11.

26 See Case No. COMP/M.3280 – Air France/KLM and Case No. COMP/M.3770 – Lufthansa/Swiss.

Middle East should be assessed on continent (Europe) to country basis (the respective countries in Asia and Middle East).

- (31) In addition, the market investigation confirmed that, as air cargo transport markets are inherently unidirectional due to differences in demand at each end of the route, they must be assessed on a unidirectional basis.<sup>27</sup>
- (32) In previous cases, the Commission left open the question whether the market for air cargo transport should be further sub-divided according to the nature of the cargo. The Commission, however indicated that some types of goods, such as dangerous goods, may require special handling so that they can be transported only on full-freighter aircraft.<sup>28</sup> The parties argue that this market should not be further divided by category or nature of transported products. In this regard, the market investigation confirmed that a further segmentation of the market would not be necessary. In any event, for the purposes of this Decision, such further segmentation is irrelevant as the proposed transaction would not significantly impede effective competition under any alternative market definition.

### **C. Supply of airline seats to tour operators**

- (33) The Commission has in previous Decisions noted that the wholesale supply of airline seats to tour operators is distinct from the market for supply of scheduled air transport to end customers and that such markets for wholesale supply of airline seats to tour operators are national in scope.<sup>29</sup>
- (34) The notifying party largely accepts the previously applied product market definitions, but submits that a market for the provision of airline seats to tour operators would geographically comprise both Austria and Germany, noting that all major charter operators in Austria are also active in Germany, and that the competitive conditions in both Member States are converging due to the lack of language barriers, similar customer preferences and minimal price differences between Austria and Germany.
- (35) In this case, the market investigation did not contradict the Commission's previous findings on the existence of a separate market of wholesale supply of airline seats to tour operators. Concerning the geographic scope of that market, the investigation did not fully clarify whether it is national in scope or comprises both Germany and Austria. While respondents pointed to different market conditions in Austria and Germany, some respondents also underlined the proximity of the Austrian and German markets, particularly for customers living in the western parts of Austria, for which the German market seems to be a viable alternative.

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27 See Commission Decision of 6 August 2008 in Case No. COMP/M.5181 – Delta Air Lines/Northwest Airlines, OJ C 281, 5.11.2008, p. 3.

28 See Case No. COMP/M.3280 – Air France/KLM.

29 See, for example, Commission Decision of 17 December 2008 in Case No. COMP/M.5141 – KLM/Martinair, OJ C 51, 4.3.2009, p. 4-8, paragraph 121 or Case No. COMP/M.4439 – RyanAir/Aer Lingus, paragraph 299.

(36) For the purposes of this case and in line with previous cases, the relevant product market is the market for wholesale supply of airline seats to tour operators, whereby it can be left open whether it is necessary to distinguish between long-haul and short-haul routes. The geographic market definition can also be left open. The proposed transaction would not significantly impede effective competition under any geographic market definition.

#### **D. Maintenance, Repair and Overhaul ("MRO")**

(37) The Commission has previously distinguished four separate markets within the MRO sector, namely line maintenance, heavy maintenance, engine maintenance and components maintenance.<sup>30</sup>

(38) Although the geographic scope of the market for MRO services is usually considered as at least EEA-wide,<sup>31</sup> the geographic dimension of the market for line maintenance services could be considered narrower (regional). Furthermore, in its most recent Decisions, the Commission has left the geographic market definition with regard to MRO services open.<sup>32</sup>

(39) For the purposes of this Decision, it is not necessary to determine the geographic scope of the market for MRO services as the proposed transaction would not significantly impede effective competition under any possible product market definition.

#### **E. In-flight catering**

(40) In previous cases, the Commission found that the in-flight catering market comprises all in-flight catering services, including for short-haul and medium-haul flights, economy and business class and hot/cold meals and snacks as well as other ancillary services.<sup>33</sup> The Commission has more recently indicated that this market has evolved significantly in the past few years and new types of in-flight catering services have emerged.<sup>34</sup>

(41) For the purposes of this Decision, it is not necessary to determine whether the in-flight catering market should be further segmented into traditional catering services and new type suppliers' services or comprises both, since the proposed transaction would not significantly impede effective competition under any possible product market definition.

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30 See Case No. COMP/JV.19 – KLM/Alitalia, Case No. COMP/M.3280 – Air France/KLM and Commission Decision of 14 April 2004 in Case No. COMP/M.3374 – SR Technics/FLS Aerospace, OJ C 180, 13.7.2004, p. 9.

31 See Case No. COMP/JV.19 KLM/Alitalia.

32 See Case No. COMP/M.3280 - Air France/KLM, Case No. COMP/M.3374 – SR Technics/FLS Aerospace, Commission Decision of 16 February 2009 in Case No. COMP/M.5399 – Mubadala/Rolls Royce/JV, OJ C 58, 12.3.2009, p. 4, and Case No. COMP/M.5403 – Lufthansa/BMI.

33 See Commission Decision of 1 June 2001 in Case No. COMP/M.2190 – LGS/OFSI, OJ C 238, 24.8.2001, p. 4.

34 See Commission Decision of 19 July 2006 in Case No. COMP/M.4170 – Lufthansa Service Holding/Gate Gourmet Switzerland, OJ C 11, 17.1.2007, p. 2.

(42) The geographic market for in-flight catering is considered to be limited to the relevant airport or airport region (where several airports are located in close proximity to each other).<sup>35</sup>

## **F. Groundhandling**

(43) In previous Decisions, the Commission found that groundhandling services – ranging from passenger and baggage registration and handling to leading the aircraft on the ground as well as cleaning and refuelling the aircraft – could be divided into several distinct segments but the determination whether each segment constituted a separate relevant market was left open.<sup>36</sup> The Commission further indicated that the relevant geographic market for groundhandling services is normally restricted to the airport where the groundhandling services are provided.<sup>37</sup>

(44) It is not necessary for the purposes of this Decision to determine an exact market definition, as the transaction would not significantly impede effective competition under any possible product and geographic market definition.

## **VI. CONCEPTUAL FRAMEWORK FOR THE ASSESSMENT OF THE PROPOSED TRANSACTION**

### **A. Introduction**

(45) Prior to the notification of the proposed transaction, the Commission received a notification of a transaction on 26 November 2008 according to which LH intended to acquire sole control of SN Airholding SA/NV, the holding company of SN.<sup>38</sup> Having initiated proceedings in that case pursuant to Article 6(1)(c) of the Merger Regulation on 26 January 2009, the Commission authorised the acquisition of SN by LH subject to conditions on 22 June 2009.

(46) Moreover, on 3 April 2009, the Commission also received notification of a transaction whereby LH intended to acquire sole control of BMI.<sup>39</sup> The Commission approved this transaction on 14 May 2009 without conditions.

(47) Closing of LH's transactions with SN and BMI occurred on 24 June 2009 and 1 July 2009, respectively, and they were subsequently implemented. Both SN and BMI are therefore treated as subsidiaries of LH.

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35 See Case No. COMP/M.4170 – Lufthansa Service Holding/Gate Gourmet Switzerland.

36 See Commission Decision of 11 January 2001 in Case No. COMP/M.2254 — Aviapartner/Maersk/Novia, OJ C 027, 27.1.2001, p. 60, and Commission Decision in Case No. IV/M.1913 – Lufthansa/Menzies/LGS/JV, OJ C 127, 27.4.2001, p. 11.

37 See Case No. COMP/M.1913 – Lufthansa/Menzies/LGS/JV.

38 Case No. COMP/M.5335 – Lufthansa/SN Airholding.

39 Case No. COMP/M.5403 – Lufthansa/BMI.

- (48) Prior to assessing the impact of the transaction on the relevant markets, the conceptual framework for the assessment of the transaction must be determined. In this respect, that transaction raises two conceptual issues.
- (49) The first issue concerns the treatment of LH's and OS's alliance partners for the purposes of both the determination of affected markets and the competitive assessment of the transaction.
- (50) The second issue relates to the determination of the relevant counterfactual for the assessment of the effects of the transaction with respect to the routes where LH (including LX, 4U, SN and BMI) and OS co-operate with each other.

## **B. Treatment of alliance partners**

- (51) Both LH and OS are members of the Star Alliance. The notifying party submits that it would be inappropriate to treat any of its alliance partners as if they were parties to the transaction. First, there would be no legal basis for such a treatment as the Merger Regulation does not provide for an assessment of "spill-over effects" between companies that remain independent. Second, alliance relationships in question would not change the merging parties' incentives to compete because both LH and OS are already part of the same alliance pre-merger and because the overlap routes between OS's and LH's alliance partners are not covered by the respective co-operation agreements. In addition, LH's agreements would not automatically extend to OS and vice versa.

### *(1) Determination of affected markets*

- (52) With respect to the determination of affected markets, horizontally affected markets consist of relevant product markets where the parties to the proposed transaction are engaged in business activities and hence on which the transaction produces merger-specific effects.<sup>40</sup> Accordingly, product markets where one party and a third party's activities overlap are in principle outside of the scope of the investigation as the transaction is not likely to produce merger-specific effects on these markets. However, a transaction may also have a significant impact on other markets in which case the effects on competition on such market should also be assessed.
- (53) In the airline sector, this is in particular the case where a factual inquiry indicates, as a direct result of the merger or as its foreseeable consequence, that close links are to be established between one merging party and a close partner of the other merging party, as was the case between KLM and Alitalia in the Air France/KLM merger case for instance.<sup>41</sup> In such cases, the incentives to compete would indeed be altered as a result of the merger.

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40 See paragraph III (a) in Annex I to the Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1.

41 Case No. COMP/M.3280 – Air France/KLM, paragraph 47.

- (54) In this case, according to the notifying party, LH's co-operation agreements with SAS, LOT, United Airlines and Air Canada will not be extended to OS as the agreements do not provide for such an automatic extension unless they are renegotiated. Similarly, the parties have confirmed that none of the existing agreements between OS and other Star Alliance partners<sup>42</sup> will be automatically extended to LH. As a result, no merger specific spill-over effects are expected to arise in this respect.
- (55) LH's and OS' alliance partners should not be taken into account for the determination of affected markets.

(2) *Competitive assessment*

- (56) With respect to the competitive analysis on the affected markets, the relationship between the airlines and for the subsequent impact on their incentive to compete post-merger ought to be assessed on a route-by-route basis. If it is found that a merging party and a third party have a lower incentive to compete as a consequence of the transaction, this fact must be taken into account in the assessment.

**C. Relevant counterfactual for the routes on which the parties co-operate**

- (57) LH and OS already co-operate in different ways pre-merger in varying degrees. In particular, the following forms of co-operation between the parties can be identified: (i) a cost and revenue sharing joint venture between LH and OS on all routes between Germany and Austria; (ii) a world-wide bilateral co-operation agreement between LH and OS; (iii) a code-share agreement between LX and OS on Switzerland-Austria routes; and (iv) a code-share agreement between BMI and OS on the Vienna-London route.
- (58) The notifying party submits that such pre-merger co-operation should constitute the relevant counterfactual for the assessment of the transaction. The notifying party further argues that, as a result of the existing co-operation agreements, the parties cannot be considered competitors, particularly as far as Austria-Germany routes are concerned, and therefore the transaction cannot result in any decrease in competition between LH and OS. The notifying party further submits that the Commission had previously found in its Lufthansa/Eurowings and Lufthansa/Swiss Decisions<sup>43</sup> that LH and OS did not compete on a global level. In those Decisions, the overlaps between LH, OS and 4U and between LH, OS and LX, respectively, had already been analysed and addressed, and therefore the present transaction could not be found to significantly impede effective competition on these routes.
- (59) Pursuant to paragraph 9 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("the Horizontal Merger Guidelines") "[i]n assessing the competitive effects of a merger, the Commission

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42 None of these agreements goes beyond a bilateral alliance and/or code-share agreement. In particular, none of them even comes close to a profit sharing joint venture such as that existing between LH and OS with respect to the Germany-Austria routes.

43 See Case No. COMP/M.3770 – Lufthansa/Swiss and Commission Decision of 22 December 2005 in Case No. COMP/M.3940 – Lufthansa/Eurowings, OJ C 18, 25.1.2006, p. 22.

compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted."<sup>44</sup>

(60) In this case it appears, on the basis of the evidence collected in the investigation and in light of the Austrian Government's fundamental decision to find a private investor for OS that absent the acquisition by LH, OS would most likely have been acquired by Air France-KLM in which case the co-operation between OS and LH would have been terminated.

(61) On that basis and on the basis of the evidence available to the Commission, the relevant counterfactual scenarios for the assessment of the effects of the notified concentration on competition are:

(1) the pre-merger state of co-operation between the parties; or

(2) the most likely foreseeable future development in the event that the proposed acquisition of OS by LH does not take place, namely where OS is acquired by another airline, more specifically by Air France-KLM. In this scenario, OS would terminate its pre-merger co-operation with LH as well as its Star Alliance membership and would join Sky Team (the alliance to which Air France-KLM belongs).

(62) Both the counterfactual scenario of pre-merger co-operation and the counterfactual scenario of acquisition of OS by Air France-KLM are explained in paragraphs (63) - (105) in more detail.

*(1) Counterfactual scenario of pre-merger co-operation*

(63) As mentioned in paragraph (57), the following forms of co-operation between the parties can be distinguished: (a) a cost and revenue sharing joint venture between LH and OS on all routes between Germany and Austria; (b) a world-wide bilateral co-operation agreement between LH and OS and (c) a code-share agreement between BMI and OS on the Vienna-London route. In addition, the Commission has previously analysed and assessed (d) the overlaps between LH, OS and 4U in its Lufthansa/Eurowings Decision; and (e) the overlaps between LH, OS and LX in its Lufthansa/Swiss Decision, and where LX and OS currently co-operate under a code-share agreement on Swiss-Austrian routes.

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<sup>44</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p. 5-18.

*a. Cost and revenue sharing joint venture between the parties on all routes between Germany and Austria*

*(i) Description of the pre-merger situation*

- (64) The cost and revenue sharing joint venture provides that the parties pool revenues and costs for all routes between Germany and Austria, and coordinate on fares and other matters, including marketing and branding. Under the joint venture agreement, the parties established a joint route system (specifying which services are operated by which party), joint fare structures and flight schedules. Fares sold in Germany are set by LH, while fares sold in Austria are set by OS. The parties also entered into code-share agreements on all routes between Germany and Austria. On some routes, they both operate their own aircraft and code-share on the other party's flights.<sup>45</sup> On others, one of the parties operates its own aircrafts, whereas the other party is merely a marketing carrier with no operations of its own.<sup>46</sup>
- (65) The parties initially notified the joint venture agreement to the Commission under Article 81(3) of the Treaty in 1999.<sup>47</sup> The Commission found that the agreement restricted actual and potential competition between LH and OS within the meaning of Article 81(1) of the Treaty on all routes between Austria and Germany,<sup>48</sup> but that it also contributed, under certain conditions, to economic progress within the meaning of Article 81(3) of the Treaty. In 2002, the Commission therefore exempted the joint venture agreement pursuant to Article 81(3) of the Treaty until December 2005, subject to commitments aimed at ensuring that consumers would share in the benefits of the expected cost savings, that the restrictions of competition did not go beyond what was necessary and that competitors would be present on the market. The remedies essentially consisted of a commitment to make slots available to a new entrant for any Austria-Germany route chosen by it up to a maximum of 40% of the slots that LH and OS operated on the route in question.<sup>49</sup>
- (66) After the expiry of the exemption decision in 2005, the parties continued to co-operate under the joint venture agreement. Under the new procedural rules for the application of Article 81

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45 This currently occurs on six routes: Vienna-Berlin, Vienna-Düsseldorf, Vienna-Frankfurt, Vienna-Hamburg, Vienna-Munich and Vienna-Stuttgart.

46 OS currently acts as an operating carrier on ten routes: Graz-Düsseldorf; Innsbruck-Frankfurt, Linz-Düsseldorf, Salzburg-Düsseldorf, Salzburg-Frankfurt, Vienna-Cologne, Vienna-Dresden, Vienna-Hannover, Vienna-Leipzig and Graz-Stuttgart. LH is an operating carrier on six routes: Graz to Frankfurt and Munich; Innsbruck-Hamburg, Klagenfurt-Munich, Linz to Frankfurt and Munich. OS ceased its operations on the route Vienna-Nuremberg in March 2009.

47 See Case No. IV/37.730 – Austrian Airlines Österreichische Luftverkehrs AG/Deutsche LUFTHANSA AG, Exemption with condition/obligation decision, Web publication of non-confidential version, OJ L 242, 10.09.2002, p. 25-43; Final version of Art. 19(3) notice, OJ C 356, 14.12.2001, p. 5-8; and Final version of Art. 19(3) notice, OJ C 193, 11.07.2000, p. 7-8.

48 In 1999, there were 33 routes between Austria and Germany. Only one route, namely the route Vienna-Friedrichshafen, was not operated by either LH or OS, but by Rheintalflug. Rheintalflug was taken over by OS in 2001.

49 Moreover, they included fare control remedies as well as capacity freezes in relation to those Austria-Germany routes on which new entrants would start operating.



of the Treaty, notably Regulation 1/2003,<sup>50</sup> it was not possible for the parties to apply for a new exemption. However, the parties carried out a self-assessment of their co-operation under the joint venture agreement with a view to complying with Article 81 of the Treaty.<sup>51</sup>

*(ii) Impact of the transaction on the pre-merger situation*

- (67) As previously stated, the notifying party submits that, as a result of their co-operation, LH and OS cannot be considered as competitors on any Austria-Germany routes, and that the proposed transaction can therefore not result in any lessening of competition between them.
- (68) However, even where a pre-merger situation that effectively limits or eliminates competition between the parties constitutes the relevant counterfactual, this does not automatically mean that the proposed transaction cannot lead to a significant impediment to effective competition. Indeed, where extensive pre-merger co-operation has been replaced by a permanent structural link, the Commission has analysed the specific effects of the creation of that permanent structural link on a route by route basis (in particular on hub-to-hub routes) in order to assess the extent to which competition may be affected post-merger.<sup>52</sup>
- (69) Whether or not the creation of a permanent structural link in this case would lead to a significant impediment of effective competition in the form of elimination of actual or potential competition will therefore be assessed in the competitive assessment of the individual routes at issue in section VII.

*b. World-wide bilateral agreement between LH and OS*

*(i) Description of the pre-merger situation*

- (70) The world-wide bilateral agreement between LH and OS provides for joint network planning, a joint pricing policy and joint budgeting. However, each party is responsible for its own route and network development, bilateral co-operation with other carriers and sales and marketing activities. LH submits that LH and OS do not discuss prices on a regular basis and that the degree of co-operation varies from destination to destination. Nevertheless, LH claims that the scope of LH and OS' world-wide co-operation is already so extensive that they cannot be perceived as competitors for the purpose of establishing the proper counterfactual.
- (71) In 2002, the world-wide bilateral agreement between LH and OS was exempted by the Commission under Article 81(3) of the Treaty until December 2005, but without commitments on the part of LH or OS. In its exemption Decision, the Commission found that, except as regards traffic between Austria and Germany, the networks of LH and OS largely complemented one another. While OS focused on medium-haul routes in Europe, especially in Central and Eastern Europe, LH focused much more on long-haul services. The

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50 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1, 04.01.2003, p.1.

51 The parties have provided the Commission with a copy of the self-assessment which seems to date from 2006.

52 See also Case No. COMP/M.5181 – Delta Air Lines /Northwest Airlines, paragraphs 32 and 33.

Commission found that the combination of these complementary networks resulted in important synergistic effects and attractive connections for consumers and that the establishment of a more comprehensive European network would produce cost savings for LH and OS through an increase in traffic throughout the network, improved network connection, better planning of frequencies, a higher load factor and improved organisation of sales systems and ground handling services.

*(ii) Impact of the transaction on the pre-merger situation*

- (72) As will be demonstrated in the competitive assessment in section VII, the issue whether the scope of LH's and OS' world-wide co-operation is already so extensive that they cannot be perceived as competitors for the purpose of establishing the proper counterfactual can be left open, since the proposed concentration would not significantly impede effective competition on any routes outside Germany and Austria that fall into this worldwide co-operation, irrespective of the precise counterfactual scenario.

*c. Code-sharing between BMI and OS on the Vienna-London route*

*(i) Description of the pre-merger situation*

- (73) OS has standard free-flow code-share agreements with BMI with regard to the Vienna-London route.
- (74) The notifying party submits that under such a code-share agreement, the marketing carrier does not have its own reserved inventory on the aircraft in question, but has real-time electronic access to the operating carrier's seat inventory. This means that prior to confirming a booking on the flight in question, the marketing carrier must ascertain whether a seat in the appropriate category is still available. The operating carrier retains inventory control in order to ensure that the marketing carrier does not fill the flight with low-yield traffic (that is, cheap restricted economy tickets for O&D passengers) when such bookings would squeeze out higher-yield passengers the operating carrier could otherwise attract (namely O&D or connecting business class passengers). This is achieved by a process of "mapping" the carriers' respective fare classes and providing the marketing carrier access to seats in the relevant corresponding fare category on a "first come, first serve" basis. Thus, the marketing carrier is offered equal treatment in terms of accessing seats on a flight, without however undermining the operating carrier's yield management system.
- (75) LH argues that due to OS' control over inventory available to BMI, competition between the parties on this route is limited and, as a result, the proposed concentration would not significantly impede effective competition on this route.

*(ii) Impact of the transaction on the pre-merger co-operation*

- (76) As will be shown in the competitive assessment in section VII, the question whether or not OS and BMI can be perceived as competitors under the current code-share agreement can be

left open, since the proposed concentration would not significantly impede effective competition on this route, irrespective of the precise counterfactual scenario.

*d. Overlap routes between OS and Eurowings, where the Commission found in the Lufthansa/Eurowings merger Decision that LH and OS do not compete*

*(i) Description of the pre-merger situation*

(77) Eurowings was not yet a subsidiary of LH at the time of the exemption Decision and was therefore not covered by the exemption. Moreover, Eurowings does not form part of any of the existing co-operation agreements between OS and LH nor does Eurowings (or its subsidiary 4U) have its own co-operation agreement with OS. The Commission found in its Lufthansa/Eurowings Decision that LH and OS did not compete on a global level. As a consequence, the Commission assessed the effects of a combination of Eurowings and LH, whereby it did not consider OS as a competitor to LH, and authorised the acquisition of Eurowings by LH subject only to slot release commitments with respect to the Vienna-Cologne and Vienna-Stuttgart routes, amongst others, where it considered that the transaction would eliminate Eurowings as LH's only competitor.

(78) As regards overlaps between OS and Eurowings, the notifying party argues that these overlaps have already been analysed and addressed in the aforementioned merger Decision and that, therefore, these overlaps cannot be considered as affected markets or, in any event, the transaction cannot be found to significantly impede effective competition on these routes.

*(ii) Impact of the transaction on the pre-merger situation*

(79) It should be noted that OS was not a formal party to the concentration between LH and Eurowings which were the subject of the previous Decisions nor did the previous Decision relate to the creation of a permanent structural link between OS on the one hand and LH or Eurowings on the other hand. Rather, the overlaps between Eurowings and OS were included in the competitive assessment of this previous Decision because of the extensive contractual co-operation that already existed between LH and OS at the time. Therefore, insofar as the transaction effectively eliminates actual or potential competition between Eurowings and OS, there is no reason why these overlaps could not be subject to review in this case.

(80) In this respect, it is important to note that Eurowings' activities do not in any way form part of the joint venture between LH and OS with respect to the Austria-Germany routes. The extent to which the present transaction eliminates actual competition between OS and 4U will therefore be examined in the competitive assessment in section VII.

e. *Overlap routes between OS and LX where the Commission found in the Lufthansa/Swiss merger Decision that LH and OS do not compete and where LX and OS currently cooperate under a code-share agreement on Swiss-Austrian routes*

(i) *Description of the pre-merger situation*

(81) Similarly, LX did not belong to LH at the time of the 2002 exemption decision and this cooperation was therefore not covered by the exemption of the world-wide bilateral agreement between LH and OS. However, the overlap between LX and OS has also already been subject of the Lufthansa/Swiss Decision where the Commission found that LH and OS could not be considered as competitors on a global level.<sup>53</sup> As a consequence, the Commission assessed the effects of a combination of LX and LH, whereby OS was not considered as a competitor to LH, and authorised the acquisition of LX by LH subject only to slot release commitments on several routes such as the Zurich-Vienna route.

(82) With regard to these overlaps, the notifying party argues that they have already been analysed and addressed in the merger Decision mentioned in the preceding paragraph and that, therefore, these overlaps cannot be considered as affected markets or, in any event, the transaction cannot be found to significantly impede effective competition on these routes. Furthermore, with respect to the code-share agreement between LX and OS in general, LH argues that due to OS' control over inventory available to LX on the Vienna-Zurich, Vienna-Geneva and Vienna-Basle routes and LX's control over inventory available to OS on the Vienna-Zurich route, competition between the parties is limited and, as a result, the transaction would not raise competition concerns with respect to these three routes.

(ii) *Impact of the transaction compared to the pre-merger situation*

(83) It should be noted that after the Commission's Lufthansa/Swiss Decision, LX and OS concluded a standard free-flow code-share agreement relating to all Austria-Switzerland routes. This represents a significant change on those routes, which was not assessed in that Commission Decision. In particular, this code-share agreement has allowed LX to gain a marketing presence on several of these markets, which would make it easier for LX to enter those routes.<sup>54</sup>

(84) As will be shown in the competitive assessment in section VII, the establishment of the precise counterfactual can ultimately be left open since the proposed concentration would not significantly impede effective competition on any route between Austria and Switzerland.

(2) *Acquisition of OS by another airline, more specifically by Air France-KLM as relevant counterfactual for the assessment of the proposed transaction*

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<sup>53</sup> See Case No. COMP/M.3770 – Lufthansa/Swiss.

<sup>54</sup> The assessment of the Vienna-Basel and Vienna-Geneva routes in the Lufthansa/Swiss Decision was based on the fact that LX did not provide direct services on the Vienna-Geneva route and that it had withdrawn from the Vienna-Basel route before the Decision (see paragraphs 90 et seq. of that Decision).

- (85) As indicated in paragraph (61), it appears likely that, absent the acquisition by LH, OS would have been acquired by another airline, namely Air France-KLM. Therefore, the most likely foreseeable alternative counterfactual to the pre-merger situation for the assessment of the transaction, would be a foreseeable situation whereby OS is acquired by another airline, more specifically by Air France-KLM. As a consequence of such a transaction, OS would terminate its existing agreements with LH as well as its Star Alliance membership to join another alliance, namely the SkyTeam Alliance, to which Air France-KLM belongs. As explained in more detail in section VII, OS would then operate several routes in competition with LH, instead of operating them in co-operation with LH, as it currently does (hereinafter the "Air France-KLM counterfactual").
- (86) In light of the fundamental political decision to privatise OS, the bidding process for the privatisation of OS would most likely have been prolonged and negotiations with other interested parties would have continued in case LH would not have made an offer during the initially foreseen deadline for the privatisation process. The evidence available to the Commission<sup>55</sup> suggests that the most likely alternative to an acquisition of OS by LH would have been the acquisition of OS by another airline, more specifically by Air France-KLM. As a consequence of this foreseeable scenario, OS would terminate its existing agreements with LH as well as its Star Alliance membership to join the SkyTeam Alliance, to which Air France-KLM belongs.
- (87) Based on the information available to the Commission, it appears that OS would not be financially viable in the long term without drastic recapitalisation, asset sales and restructuring, but that such drastic restructuring and downsizing would likely entail serious risks and significant negative consequences. Therefore, the privatisation of OS was considered the preferred option.<sup>56</sup> As a result, on 12 August 2008, the Austrian Government issued a privatization mandate ("Privatisierungsauftrag") pursuant to which ÖIAG was authorised to dispose of all of its shares in Austrian Airlines.
- (88) ÖIAG published notices in Austrian and international newspapers on 13 August 2008 inviting potential investors to express their interest on an acquisition of ÖIAG's stake in OS until 24 August 2008. On 28 August 2008 potential investors were notified that an acquisition concept including information on the bidder, a strategic concept on the future of OS, a proposal for the transaction structure, information on the proposed financing and certain additional information should be submitted by 12 September 2008. Only three acquisition concepts were received (namely Air France-KLM, LH and Siberian Airways). On 16 September 2008 the three remaining bidders were invited to submit their final offers excluding the purchase price by 21 October 2008 and their final offer including the purchase price by 24 October 2008.
- (89) On 21 October 2008, LH was the only bidder to submit an offer including contract and strategic concept, excluding price. On 24 October 2008 LH submitted a binding offer stating a negative purchase price for OS. While Siberian Airways submitted an explicitly non-

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<sup>55</sup> See in particular the documents quoted in footnotes 56 and 63.

<sup>56</sup> See [various OS internal documents]\*.

binding offer on 24 October 2008<sup>57</sup>, it does not appear to be or have been a serious candidate for the purchase of OS, in particular since, for the time being, it is (apart from a few direct international connections) focused on flights to Russian destinations and destinations in the Commonwealth of Independent States with a large domestic route network in Russia and its main bases and hubs in Russia. Air France-KLM did not make any offer, binding or non-binding. According to Air France-KLM, the two main reasons why it decided to not submit an offer by 21 October 2008 were that (i) it had come to the conclusion that there was no viable financial offer meeting the conditions imposed by ÖIAG in the privatisation process, and that (ii) Air France-KLM was not provided with all the necessary information that would have enabled it to undertake an in-depth and definitive evaluation of OS' financial situation.<sup>58</sup>

- (90) Following LH's offer, the Austrian authorities prolonged ÖIAG's privatisation order until 31 December 2008 and authorized ÖIAG to grant supporting measures to OS of up to EUR 500 million.<sup>59</sup>
- (91) Despite the fact that Air France-KLM did not formally submit any offer in the context of the privatisation of OS, the Commission's investigation has shown that Air France-KLM would be the most likely alternative buyer. In this respect, it should be noted that, when Air France-KLM became aware of the supporting measures referred to in the preceding paragraph, it once again expressed its interest in continuing the negotiations for a possible purchase of OS by informing ÖIAG that it was prepared to consider submitting a final offer to OS (*"We are writing to you today to confirm that Air France-KLM remains keen to invest in Austrian and to express our willingness to continue to participate to the current privatisation process as the conditions seem to have become materially different from the ones envisaged both in terms of acceptable equity price, amount of debt burden and acceptable date for a fully binding offer"*).<sup>60</sup>
- (92) Internal LH documents seemingly based on OS' business plan, also indicate that LH seriously considered a scenario whereby OS would be acquired by Air France-KLM.<sup>61</sup> It can be assumed that such an alternative scenario would be less profitable for Air France-KLM than for LH since OS would lose revenues from the joint venture with LH and would need to pay alliance exit fees. Nevertheless, OS' current financial situation appears to be such that it would probably be very difficult, if not impossible, for OS to remain independent in the long term and to continue operating on a stand-alone basis without external support.
- (93) Indeed, LH assumes on the basis of OS' financial statements dated October 2008 that, without any external support, OS would be insolvent in the first half 2009.<sup>62</sup> If OS were to

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57 See the article entitled "Zwei Angebote zu AUA: Lufthansa prozesskonform, S7 in Prüfung" at [www.kleinezeitung.at/nachrichten/wirtschaft/aua/1605399/index.do](http://www.kleinezeitung.at/nachrichten/wirtschaft/aua/1605399/index.do).

58 See reply to request for information to Air France-KLM of 18 June 2008, point 1.

59 Letter of the Bundesministerium für Finanzen of 29 October 2008 containing the respective request to the Austrian government.

60 See reply to request for information to Air France-KLM of 18 June 2008, point 2.

61 LH's document entitled [...]\*

62 LH's document entitled [...]\*.

remain independent it is likely that Austria, as the largest and sole controlling shareholder would have to recapitalise and restructure the company.

- (94) OS also assessed different options and an acquisition by Air France-KLM appeared to be the most credible foreseeable alternative to an acquisition by LH<sup>63</sup> and, in particular, the preferred option in comparison to a scenario whereby OS would remain independent, drastically restructure and downsize. More specifically, OS internal documents refer to the option of privatising and selling OS as "Plan A", whereas the option of OS remaining independent, restructuring and downsizing is referred to as "Plan B".<sup>64</sup> This can be further illustrated by the fact that OS estimates that a stand-alone OS operation would require additional funding of EUR 1.2 billion until 2011.<sup>65</sup> This amount significantly exceeds the amount of measures to be granted by ÖIAG in support of the privatization of OS by way of a sale to LH.
- (95) In addition, internal documents of the various parties involved in the privatisation process show a clear political will to privatise OS.
- (96) Finally, if LH would not have submitted an offer, the bidding process for the privatisation of OS would have been prolonged and negotiations with other interested parties would have continued. Air France-KLM was also the most likely alternative purchaser in the bidding process organised in autumn 2008 with a view to privatising OS.
- (97) In this respect, it should be recalled that Air France-KLM refrained from making a final binding offer by 21 October 2008 because of OS's financial situation. When it subsequently became clear that the Austrian authorities would underwrite a EUR 500 million capital increase in OS, however, Air France-KLM re-expressed its interest in acquiring OS under these changed circumstances, but ÖIAG stated that it was obliged to follow the established sales process and refused to re-enter into negotiations with Air France-KLM and, instead, proceeded with the sale of OS to LH.<sup>66</sup>
- (98) On the basis of the evidence available to the Commission, it therefore seems that, if LH would not have submitted an offer, the bidding process for the privatisation of OS would have been prolonged and negotiations with other interested parties would have continued, and the acquisition of OS by Air France-KLM would likely have been the most likely outcome.

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63 See [various OS internal documents]\* From these documents it follows also clearly that an acquisition of OS by Air France-KLM would necessarily imply that OS would need to exit Star Alliance and join SkyTeam.

64 See in particular the documents quoted in footnotes 56 and 63.

65 OS internal document [...]\*

66 See letters of Air France/KLM to Merrill Lynch of 21 October 2008 and 5 November 2008; see further some press articles reporting on the matter, such as the articles entitled "Air France-KLM buhlt um AUA und Alitalia: Wird fristgerecht ihr Angebot einreichen" of 9 September 2008 and "Air France-KLM will wieder ins AUA Rennen: Die ÖIAG lehnt einen erneuten Einstieg ab" at [www.news.at](http://www.news.at), the articles entitled "Airline-Übernahme, Air France zieht bei AUA zurück" of 22 October 2008 and "Übernahmepoker um Austrian Airlines, Air France fühlt sich benachteiligt" of 21 November 2008 at [www.handelsblatt.com/unternehmen](http://www.handelsblatt.com/unternehmen), and the articles entitled "AUA: Air France/KLM hat die Nase vorn" of 7 October 2008 and "AUA-Verkauf: Air France will wieder mitbieten" of 7 November 2008 at [www.diepresse.com](http://www.diepresse.com).

- (99) Based on the evidence available to the Commission, the conclusion would have been no different today compared to when the bidding process took place. Indeed, while the economic environment since the end of the bidding process might have had a negative impact on the airline industry as a whole, including Air France-KLM and OS, it is considered that the main reasons that motivated Air France-KLM to acquire OS in the course of the bidding process are still valid today.<sup>67</sup> Furthermore, adverse economic circumstances in fact reinforce the conclusion reached in paragraph (94) that OS would not be financially viable in the long term without drastic recapitalisation, asset sales and restructuring, that such drastic restructuring and downsizing would likely entail serious risks and significant negative consequences and that the privatisation of OS would therefore also represent the preferred option in the medium- and long-term.
- (100) The fact that the Air France-KLM counterfactual is the most likely future development, if the proposed acquisition of OS by LH were to fail, can be further illustrated by the parties' internal documents which show that both parties seriously considered an alternative acquisition of OS by Air France-KLM. In response to several requests for information, LH did not submit any internal documents in which purchasers other than Air France-KLM are considered. In OS's documents, alternative purchasers are discussed, but LH and Air France-KLM are considered the two preferred options.
- (101) Therefore, the acquisition by Air France-KLM is the most likely foreseeable alternative counterfactual to the pre-merger situation for the assessment of the transaction.
- (102) Taking this counterfactual scenario as a basis for the competitive assessment, the transaction raises serious doubts as to its compatibility with the common market because it may significantly impede effective competition, insofar as the transaction eliminates actual or, at least potential competition between the parties on a number of routes, as set out in more detail in the competitive assessment in section VII, in the foreseeable situation whereby OS would be acquired by Air France-KLM and, as a result, OS would terminate its existing co-operation agreements with LH, exit Star Alliance and join SkyTeam. In particular, as a result of the foreseeable acquisition of OS by Air France-KLM and the subsequent termination of the co-operation agreements between LH and OS, OS and LH would have been actual or potential competitors on the relevant routes.
- (103) In this respect, LH internal documents indicate that LH examined the possible risks of OS terminating the existing co-operation agreements and joining SkyTeam and concluded that, in that foreseeable scenario, LH would need to add frequencies and new routes to its current network <sup>68</sup> [...]\*. In the relevant internal documents, LH noted in particular that it would need to add [...]\* weekly frequencies to the Vienna-Munich and Vienna-Frankfurt routes. The extent to which actual or potential competition between LX and OS on these routes will be eliminated post-merger as compared to the alternative acquisition of OS by Air-France-KLM is therefore assessed in this Decision.

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67 In particular, it follows from an analysis of the network of Air France/KLM and the location of its hubs Paris (CDG) and Amsterdam (AMS) that by purchasing OS Air France/KLM would considerably extend its market position towards destinations in Central and Eastern Europe ("CEE"). [...]\*.

68 LH's document entitled [...]\*.



(104) In contrast, as regards all routes where the transaction would not significantly impede effective competition, the establishment of the proper counterfactual can be left open.

(3) *Conclusion*

(105) The relevant affected markets for air transport of passengers will be assessed both under the counterfactual of the pre-merger situation and under the foreseeable situation whereby OS would be acquired by Air France-KLM, terminate its existing agreements with LH, exit Star Alliance and join SkyTeam where such an assessment is relevant to the question of whether the transaction leads to a significant impediment of effective competition. Ultimately, however, the question as to which of these two counterfactual scenarios constitutes the relevant counterfactual for the assessment of the transaction can be left open, as explained in more detail in the competitive assessment in section VII.

(106) In the assessment in this Decision, the Commission does not take a position on the compatibility of the existing co-operation agreements with Article 81 of the Treaty. The Commission cannot be required to accept pre-merger co-operation between the parties that is contrary to Article 81 of the Treaty as a counterfactual.<sup>69</sup> As the competition concerns identified in this case will be eliminated as a result of the Commitments offered by the parties, it is not necessary for the purposes of this Decision to further discuss the compatibility of the pre-merger co-operation between the parties with Article 81 of the Treaty.

## VII. COMPETITIVE ASSESSMENT

### A. Scheduled passenger air transport services

(107) The transaction gives rise to a number of horizontal overlaps that can be grouped in several categories:

- (i) 23 short-haul routes between Austria and Germany, which are served under the parties' cost and profit sharing joint venture;
- (ii) three short-haul routes between Austria and Switzerland;
- (iii) one short-haul route between Austria and Kingdom of Belgium;
- (iv) one short-haul route between Austria and the United Kingdom of Britain and Northern Ireland;

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<sup>69</sup> In the context of merger control, if the illegality of a pre-merger agreement between the parties could not be taken into account, the parties could argue that there would only be a small reduction or even no reduction of competition as a result of the merger. A merger decision in such circumstances would effectively incorporate and perpetuate the pre-merger illegality forever, since mergers that are approved under the Merger Regulation are no longer challengeable under Article 81 of the Treaty, see paragraph 42 and footnote 30 of the Commission's decision in Case No. COMP/M.5403 – Lufthansa/BMI as well as paragraph 263 and footnote 265 of the Commission's decision in Case No. COMP/M.5335 – Lufthansa/SN Airholding.

(v) "direct-indirect overlaps" (namely routes where one party offers a direct connection while the other party offers an indirect connection); and

(vi) "indirect-indirect overlaps" (namely routes where both parties only offer indirect services).

*(1) Routes between Austria and Germany*

*a. The Vienna-Stuttgart route*

(108) Approximately [300 000 – 350 000]\* passengers travel on the Vienna-Stuttgart route ("VIE-STR") annually, of which approximately [250 000 - 300 000]\* passengers fly from point to point ("O&D" passengers), while the remaining are transfer passengers. According to surveys conducted by the parties, up to [50-60]\*% of the passengers on the VIE-STR route travel for business purposes.

(109) VIE-STR is served by both OS (through Tyrolean) and LH (through Contact Air and City Line). In addition, 4U, which is controlled by LH, operates VIE-STR. LH operates three daily frequencies on weekdays on VIE-STR (22 weekly frequencies), on which OS code-shares. OS (through Tyrolean) operates three daily frequencies (18 weekly frequencies), on which LH code-shares. 4U operates two to three daily frequencies (16 weekly frequencies). Currently no other airline operates this route. Air Berlin discontinued its operations on VIE-STR in May 2008. The notifying party submits that, as regards inter-modal competition, train services do not represent a significant constraint on air travel on this route.

(110) As regards airport substitutability, the parties maintain that VIE airport and BTS airport should be considered as substitutable. BTS airport is situated 87 km from Vienna city centre, which corresponds to a driving time of more than 60 minutes by car and 75-95 minutes by bus. The parties' contention that BTS airport would be substitutable for VIE airport has not been confirmed by the market investigation in this case. However, given that no airline is currently serving Stuttgart airport ("STR airport") out of BTS airport, it is not necessary to determine whether BTS airport is substitutable with VIE airport for the purpose of serving STR airport.

(111) The table below illustrates the market structure of VIE-STR during the IATA Summer season 2008 and the Winter season 2008/2009.

Airline	SS 08 figures on VIE-STR		WS 08/09 figures on VIE-STR	
	Time Sensitive	All passengers	Time Sensitive	All passengers
LH	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%
OS	[10-20]*%	[10-20]*%	[5-10]*%	[10-20]*%
4U	[60-70]*%	[60-70]*%	[70-80]*%	[70-80]*%
<b>Combined</b>	100%	100%	100%	100%

Source: MIDT data provided by the notifying party. Unless indicated otherwise, all market shares mentioned hereinafter are MIDT data (or estimates on the basis of MIDT data) provided by the notifying party.<sup>70</sup>

- (112) VIE-STR was subject to commitments under the Commission's 2002 exemption Decision concerning the joint venture agreement as described in paragraphs (65) et seq. Furthermore, in its Lufthansa/Eurowings Decision, the Commission approved LH's acquisition of 4U subject to commitments on VIE-STR. The commitments included slot releases at VIE airport and STR airport within 30 minutes from the initial request by the new entrant and other ancillary remedies. These commitments are still in place.
- (113) The parties submit that due to their co-operation under the joint venture agreement, LH and OS do not currently compete on this route. They further submit that the overlaps between OS and 4U should not form part of the Commission's assessment as they have already been analysed in the Lufthansa/Eurowings case.
- (114) The Commission found in the Lufthansa/Eurowings case that LH and OS did not compete on VIE-STR because of their joint venture agreement. As a consequence, the Commission assessed the effects of a combination of Eurowings and LH, whereby it did not consider OS as a competitor to LH. The Commission thus considered that the transaction would eliminate 4U as LH's only competitor on VIE-STR.
- (115) It should be noted that despite its acquisition by LH, 4U is not a party to LH's joint venture agreement with OS. The market investigation in phase I and II indicated that OS and 4U compete on prices to some extent. This is due to the fact that while LH and OS operate under a joint venture that shares the resulting profits equally, LH is the sole recipient of any profits from 4U's operations. This therefore implies that OS incentives on the one hand and LH group incentives on the other hand are not currently aligned on this route and that difference in incentives will be eliminated by the transaction.
- (116) A clear majority of respondents to the Commission's market investigation consider that there in fact exists residual competition between OS and 4U. Particularly non-time sensitive passengers recognize that both carriers offer attractive prices and schedules, while time sensitive passengers responded that the carriers compete against each other to a more limited extent. Therefore, the transaction will eliminate OS as 4U's actual competitor. Given that after the transaction both 4U and OS will belong to LH, the transaction leads to a monopoly on VIE-STR.

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<sup>70</sup> LH estimated market shares for some air carriers, whose bookings are not reflected in MIDT (like 4U, Niki, SkyEurope etc.) based on data published by the German Statistical Office and other publicly available information about schedules, frequencies and utilized aircraft, see paragraphs 336-347 of the Form CO. The parties did not consistently provide estimates for all airlines which are only partly covered by MIDT.

- (117) The transaction also raises competition concerns under the alternative counterfactual scenario, whereby OS is acquired by Air France-KLM. Given that both OS and 4U are presently competing on this route to some extent, it can be expected that this actual competition would be even more intensive if OS terminated its joint venture agreement with LH relating to VIE-STR as LH would then not be in a position to influence OS' pricing strategy relating to this route. This is further supported by internal OS documents which indicate that OS would keep operating on this route even in the case of a down-sizing in a stand alone scenario.<sup>71</sup> In that scenario, OS would not only compete against 4U but also against LH.
- (118) In terms of barriers to entry, VIE airport is a level 3 coordinated airport with slot shortage during peak times. Peak times have been indicated as 08.30-11.00 and 16.00-20.45. In the IATA Winter season 2008/2009, runway capacity has also been exhausted in the mornings (as early as 07.35 until 11.50), with capacity being almost full as early as 06.00. In some cases, slot requests by new entrants could only be accommodated within 80 minutes of the initial slot request. The capacity situation at VIE airport is not expected to change within the next three years. LH and OS have been allocated up to 67% of peak time slots at VIE airport.
- (119) With regard to STR airport, which is a coordinated airport, runway capacity constraints also exist during peak times, which are between 08.00-11.00. These constraints are predicted to remain unchanged in the short to medium term.
- (120) It follows that entry barriers, in particular slot constraints at VIE airport and STR airport, render market entry difficult on the VIE-STR route. Additionally several respondents indicated that the transaction will have a negative impact on the entry plans of competitors on VIE-STR.
- (121) It is concluded from the above that regardless of the exact market definition, the transaction raises serious doubts as to its compatibility with the common market on VIE-STR.

*b. Vienna-Cologne*

- (122) On the Vienna-Cologne route ("VIE-CGN"), over [250 000 – 300 000]\* passengers travel every year, of which some [250 000 – 300 000]\* are O&D passengers. According to a study conducted by OS, the share of business passengers on this route is about [40-50]\*% while [50-60]\*% are leisure passengers.
- (123) VIE-CGN is served by OS (through Tyrolean). LH does not operate VIE-CGN itself but markets seats on OS-served flights under a code-share with OS. In addition, 4U (which is indirectly controlled by LH) operates on VIE-CGN. OS operates three daily frequencies on weekdays (18 weekly frequencies) and 4U operates three daily frequencies on weekdays (20 weekly frequencies). Apart from OS and 4U, no other carrier operates this route. TUIfly

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<sup>71</sup> OS' presentation [...]\*.

started marketing its operations on the CGN-VIE route as of 31 August 2009 with two frequencies on weekdays and with one frequency each on Saturdays and Sundays. These flights are also available for booking in the upcoming IATA Winter season 2009/2010. However, TUIfly's City Carrier Business is in the process of being sold to Air Berlin and it is therefore uncertain whether or not VIE-CGN will be actually served if the transaction between TUIfly and Air Berlin is completed. The notifying party submits that train services do not represent a significant constraint on air travel on this route.

- (124) As regards airport substitutability, the parties submit that CGN airport and DUS airport should be considered as substitutable. It should be noted that the distance from DUS airport to the city centre of Cologne is approximately 61 km, which amounts to travel time of slightly more than 40 minutes by car or train. However, as explained in paragraph (15), the distance between airports can only serve as a first "proxy" to define a catchment area; a more detailed analysis is necessary on a case-by-case basis.
- (125) On the demand side, a considerable number of respondents to the Commission's market investigation indicated that CGN airport and DUS airport would not be substitutable for time sensitive passengers. In addition, the Commission also obtained pricing data on a number of common destinations that LH serves from DUS airport and CGN airport, and the resulting movement of fares for flights that originate out of DUS airport and CGN airport is in many instances not consistent with both of those two airports belonging to the same market.
- (126) On the supply side, LH operates on a number of routes out of both airports (including CGN-VIE and DUS-VIE) thereby meeting a specific demand on each of these airports. In addition, there are significant slot constraints at DUS airport unlike at CGN airport (a facilitated airport), which contradicts the idea that the competitive landscape is sufficiently homogenous between the two airports. For the purposes of this Decision, it is therefore concluded that DUS airport cannot be regarded as a substitute to CGN airport, at least for time sensitive passengers travelling on the CGN-VIE route.
- (127) The table below illustrates the market structure of VIE-CGN in the IATA Summer season 2008 and IATA Winter season 2008/2009.<sup>72</sup>

Airline	SS 08 figures on VIE-CGN		WS 08/09 figures on VIE-CGN	
	Time Sensitive	All passengers	Time Sensitive	All passengers
LH	[5-10]*%	[0-5]*%	[5-10]*%	[0-5]*%
OS	[5-10]*%	[5-10]*%	[5-10]*%	[5-10]*%
4U	[80-90]*%	[80-90]*%	[80-90]*%	[80-90]*%
Others	[0-5]*%	[0-5]*%	0%	0%
Combined	100%	100%	100%	100%

<sup>72</sup> LH estimated market shares for some air carriers, whose bookings are not reflected in MIDT (like 4U, Niki, SkyEurope etc.) based on data published by the German Statistical Office and other publicly available information about schedules, frequencies and utilized aircraft, see paragraph 336-347 of the Form CO. The parties did not consistently provide estimates for all airlines which are only partly covered by MIDT.

- (128) Similarly to VIE-STR, VIE-CGN was also subject to commitments in the Commission's 2002 exemption decision and commitments still apply according to the Commission's Lufthansa/Eurowings decision.
- (129) The parties submit that due to their co-operation under the joint venture agreement, LH and OS do not currently compete on this route. They further submit that the overlaps between OS and 4U should not be assessed due to the fact that they were analysed in the Lufthansa/Eurowings case.
- (130) The Commission found in the Lufthansa/Eurowings case that LH and OS did not compete on VIE-CGN due to their joint venture agreement. As a consequence, the Commission assessed the effects of a combination of Eurowings and LH, whereby it did not consider OS as a competitor to LH. The Commission considered that the transaction would eliminate 4U as LH's only competitor on VIE-CGN.
- (131) It should be noted that despite its acquisition by LH, 4U is not a party to LH's joint venture agreement with OS. The market investigation in phase I and II has indicated that OS and 4U compete to some extent on prices. This is due to the fact that while LH and OS are operating under a joint venture that shares the resulting profits equally, LH is the sole recipient of any profits from 4U's operations. This therefore implies that LH's and OS' incentives are currently not aligned on this route and this difference in incentives will be eliminated by the transaction.
- (132) A clear majority of respondents to the Commission's market investigation consider that there is in fact residual competition between OS and 4U. Particularly non-time sensitive passengers recognize that both carriers offer attractive prices and schedules, while time sensitive passengers responded that the carriers compete against each other to a more limited extent. Therefore, the transaction will eliminate OS as 4U's actual competitor. Given that after the transaction both 4U and OS will belong to LH, the transaction would lead to a monopoly on VIE-STR.
- (133) As regards TUIfly's plans to start operations on VIE-CGN, it is not yet clear what, if any, competitive constraint TUIfly will exercise on the parties given that TUIfly's City Carrier Business is in the process of being sold to Air Berlin and it is uncertain whether this route will be actually operated on once the transaction between TUIfly and Air Berlin is completed. In any event, the announced entry of TUIfly on a route that would become a monopoly route post merger, is not sufficient to dismiss serious doubts regarding this route.
- (134) The transaction also raises competition concerns under the alternative counterfactual scenario, whereby OS is acquired by Air France-KLM. Given that both OS and 4U are presently competing on this route some extent, it can be expected that this actual competition would be even more intensive if OS terminated its joint venture agreement with LH relating to VIE-CGN as LH would then not be in a position to influence OS' pricing strategy relating to this route. This is further supported by internal OS documents which indicate that OS would keep operating on this route even in the case of down-sizing in a

stand alone scenario.<sup>73</sup> In that scenario, OS would not only compete against 4U but also against LH.

- (135) Entry barriers exist on VIE-CGN as a result of significant slot constraints at VIE airport, as described in detail in paragraph (118). CGN airport is a schedules facilitated rather than coordinated and there are no material slot constraints in CGN.
- (136) It is concluded from the above that the transaction raises serious doubts as to its compatibility with the common market at least with regard to time sensitive passengers on VIE-CGN. It is not necessary to conclude whether or not the transaction raises serious doubts on a possible market for non-time sensitive passengers or the market comprising all passengers travelling on VIE-CGN given that the Commitments proposed by LH address competition concerns under any alternative market definition.

*c. Vienna-Munich*

- (137) On the Vienna-Munich route ("VIE-MUC") [350 000 – 400 000]\* passengers travel annually, out of which some [200 000 – 250 000]\* are O&D passengers, the rest being transfer passengers. The parties estimate that up to [60-70]\*% of passengers on this route travel for business purposes.
- (138) VIE-MUC is served by both OS (through OS and Tyrolean) and LH (through LH and Cityline). Additionally, the parties market seats on each other's flights. OS (together with Tyrolean) operates four daily frequencies on weekdays (26 weekly frequencies), LH (together with Cityline) operates five daily frequencies on weekdays (33 weekly frequencies). The only other air carrier active on this route is Niki Luftfahrt GmbH ("Niki"), with three daily frequencies on weekdays (17 weekly frequencies), which began operating flights on the route in November 2007 and was granted slots through the normal slot allocation procedure. Air Berlin code-shares on Niki's services. Deutsche Bahn and ÖBB offer an average of 6 daily direct train connections (ICE/IC) between Vienna (Westbahnhof) and Munich (Hauptbahnhof) with a duration of 4.10-4.17 and a number of indirect one-stop connections.
- (139) The table below illustrates the market shares of air carriers active on VIE-MUC in the IATA Summer season 2008 and Winter season 2008/2009 estimated by the parties according to the MIDT data.<sup>74</sup>

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<sup>73</sup> OS' presentation [...]\*.

<sup>74</sup> LH estimated market shares for some air carriers, whose bookings are not reflected in MIDT (like 4U, Niki, SkyEurope etc.) based on data published by the German Statistical Office and other publicly available information about schedules, frequencies and utilized aircraft, see paragraph 336-347 of the Form CO. The parties did not consistently provide estimates for all airlines which are only partly covered by MIDT.

Airline	SS 08 figures on VIE-MUC		WS 08/09 figures on VIE-MUC	
	Time Sensitive	All passengers	Time Sensitive	All passengers
LH	[50-60]*%	[30-40]*%	[40-50]*%	[30-40]*%
OS	[20-30]*%	[20-30]*%	[20-30]*%	[10-20]*%
<b>Combined LH+OS</b>	<b>[70-80]*%</b>	<b>[50-60]*%</b>	<b>[70-80]*%</b>	<b>[50-60]*%</b>
Niki	[20-30]*%	[40-50]*%	[20-30]*%	[30-40]*%
Air Berlin	[0-5]*%	[0-5]*%	[0-5]*%	[10-20]*%
Others	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%
<b>Combined all</b>	100%	100%	100%	100%

(140) On the basis of the market investigation the Commission has endeavoured to reconstruct the market for all passengers for the IATA Summer season 2008 and Winter season 2008/2009. The market shares are based on figures of flown passengers provided by the parties and Niki.<sup>75</sup>

Figures on VIE-MUC: all passengers		
Airline	SS 08	WS 08/09
LH	[30-40]%	[30-40]%
OS	[20-30]%	[20-30]%
<b>Combined LH+OS</b>	<b>[60-70]%</b>	<b>[50-60]%</b>
Niki <sup>76</sup>	[30-40]%	[40-50]%
<b>Combined all</b>	100%	100%

(141) With respect to inter-modal competition, the parties consider that train services on VIE-MUC should be seen as a viable competitive alternative to flights on this O&D city pair and should therefore be included in the market. The parties estimate that some [60 000 – 70 000]\* O&D passengers travel yearly on VIE-MUC by train, out of which around [10 000 – 20 000]\* passengers are time sensitive. According to the parties' estimates, if train services are included in the relevant market, train passengers would account for around [20-30]\*% of all passengers on this route ([20-30]\*% of time sensitive passengers) and the parties' combined market share would total [40-50]\*% ([50-60]\*% for time sensitive passengers). In such a scenario, the parties estimate Niki's market share would be [10-20]\*% for time sensitive passengers and [30-40]\*% for all passengers.

(142) The market investigation has, however, shown that given the short total travel time by plane on VIE-MUC, the train service does not a viable alternative for time sensitive passengers. The parties estimate the total travel time by plane to be 3.10 to 3.25. Even if the parties' assumptions were taken as a basis for comparison, the total travel time by plane is considerably less than the train journey alone of 4.10 to 4.17 (even using the city centre as a benchmark, that is, ignoring the journey to/from the train station, boarding the train etc.<sup>77</sup>).

75 The comparability of the data collected in the market investigation from different companies may be affected by possibly different methods of data collection. In particular, the parties provided various sets of "flown passenger data".

76 Including Air Berlin's passengers.

77 Since for most travellers the train station is not their real point of origin or destination, a realistic total travel time by train should also include the average travel time between the train station and the real point of origin and destination. In a large city (like Vienna and Munich), this travel time is likely to amount to at least 20



Indeed, a clear majority of respondents did not consider train services to be a credible alternative for time sensitive passengers on this route. They consider the travel time to be too long and the cost saving in terms of ticket prices not sufficient to compensate for the longer travel time. As pointed out by respondents to the market investigation, train services on this route also do not cater for typical one day return business trips due to the train's late arrival in the morning and early departure in the evening. Where a time sensitive passenger needs to attend a morning meeting in one of the two cities, the earliest arrival time in Vienna (Westbahnhof) of a non-stop train is 11.40 and 10.31 in Munich (Hauptbahnhof). By that time, four planes operated by the parties have already landed at VIE airport and two planes operated by the parties have already landed at MUC airport.

- (143) As regards non-time sensitive passengers, the views of the respondents to the Commission's market investigation questionnaires on the substitutability between plane and train services on this route were rather varied.
- (144) In addition to the qualitative market investigation, the Commission also obtained pricing data from Deutsche Bahn on the MUC-VIE route to compare them with the fares of OS and LH. OS' and LH's average fully-flexible economy and unrestricted business fares are more than three times as expensive as Deutsche Bahn's average fully-flexible first-class fares. OS' and LH's average semi-flexible economy fares are more than twice as expensive as Deutsche Bahn's average fully-flexible second-class fares. Even OS' and LH's average non-flexible economy fares are more than [50-60]\*% more expensive than Deutsche Bahn's average fully-flexible second-class fares. These considerable price differences suggest that train travel cannot be considered as a close competitor to air travel, particularly for time sensitive passengers.
- (145) As regards the relevant counterfactual, VIE-MUC is one of the routes where LH and OS operate under the joint venture agreement, according to which all revenues and costs incurred in connection with the operation of this route are shared between LH and OS. The market investigation revealed that the current competition between the parties on this route is at the most rather limited. In fact, the main consequence of the creation of a permanent structural link between the parties is the elimination of potential competition between them on the VIE-MUC route. However, the question whether the creation of a permanent structural link between LH and OS as such significantly impedes effective competition on the common market due to the elimination of potential competition between the parties can be left open since, in any event, the transaction raises serious doubts as to its compatibility with the common market under the Air France-KLM counterfactual scenario whereby OS is acquired by Air France/KLM and subsequently terminates its co-operation with LH, and the Commitments proposed by LH solve competition concerns under each alternative counterfactual scenario.

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minutes. Equally, boarding/arrival times for train services should also be taken into account. Although there is no check-in for ICE services, travellers need around 10 minutes to go from the station entrance to the train and also around 10 minutes to disembark and reach the station exit; see Case No. COMP/M.5335 – Lufthansa/SN Airholding, paragraph 121.

- (146) First of all, VIE-MUC is a thick route with a large number of O&D and transfer passengers. Currently, LH and OS both operate a significant number of frequencies on VIE-MUC and MUC airport is a hub for LH, while VIE airport is a hub for OS. Given the specific features of this route and the fact that OS and LH are both presently active on this route, it is reasonable to assume that both carriers would maintain those operations if OS terminated its joint venture agreement with LH. This scenario is supported by internal OS documents that indicate that OS would keep operating on the VIE-MUC route even in the case of down-sizing in a stand alone scenario.<sup>78</sup> As this route is already served by more than one (network-) carrier pre-merger, it is reasonable to assume that demand on the route will stay sufficiently large for more than one (network-) carrier to sustainably operate on this route regardless of whether these carriers belong to the same alliance or not. Secondly, according to the Air France-KLM counterfactual scenario, for the two alliances to be able to compete effectively for traffic to/from their respective hubs, both LH and OS would probably have to maintain, if not increase, the frequencies of their flights. In fact, as noted at paragraph (103), LH's internal documents indicate that LH would need to add [...] weekly frequencies on VIE-MUC if OS is acquired by Air France-KLM and joins SkyTeam. On that basis, the proposed concentration would eliminate actual or at least potential competition between the parties.
- (147) The market investigation (including quantitative and qualitative evidence) shows that the remaining competition from Niki on VIE-MUC would not sufficiently constrain the merged entity to prevent anti-competitive effects at least for time sensitive passengers. Moreover, it is clear from paragraphs (142) to (144) above that train services cannot be considered a credible alternative to air transport for time sensitive passengers on this route, while the same train services seem to exert some competitive constraint on non-time sensitive passengers.
- (148) A majority of respondents do not consider the presence of Niki a sufficient competitive constraint on the parties. In particular, Niki is not perceived as a credible alternative to the LH/OS merged entity in terms of its flight times and the number of frequencies it offered for time sensitive passengers. Several respondents indicated that the parties have an important competitive advantage vis-à-vis Niki on VIE-MUC due to their higher number of flight frequencies. In addition, some respondents considered the morning departure time from VIE airport (6.15; arrival at MUC airport at 7.20) offered by Niki as too early and the evening departure from MUC airport (21.30; arrival at VIE airport at 22.35) as too late, and thus inconvenient for business travellers.<sup>79</sup> Moreover, several respondents concluded that a competitor (such as Niki) would need to offer at least four frequencies on VIE-MUC to be able to offer a sufficiently attractive schedule for time sensitive passengers.
- (149) The results of the market investigation, finding that Niki does not sufficiently constrain OS/LH at least as far as time sensitive passengers are concerned, are also supported by the data analysis that was based on the pricing data obtained from the parties which assessed the

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78 OS' presentation [...]\*.

79 This evidence is supported by the fact that, according to the Commission's market investigation, time sensitive passengers have a very clear preference for morning departures after 7.00 and return flights in the evening between 18.00 and 19.00 (not later than 21.00).

effect of Niki's November 2007 entry on the parties' prices. The analysis suggests that Niki's entry in November 2007 had no impact at least on LH's and OS' fares for time sensitive passengers. This evidence supports the finding that, at least in the case of time sensitive passengers, Niki does not constitute a strong constraint on the parties.

(150) The Commission further found that with respect to tickets purchased close to the flight date which appear to be purchased by time sensitive passengers, Niki's position is considerably weaker than LH's and OS' and than estimated by the parties in their notification. The Commission further found that LH and OS charge significantly higher fares than Niki to passengers booking close to the flight date. These large price differences are further evidence that Niki is not viewed as a close competitor by time sensitive passengers, as the parties can extract significantly higher rents than Niki thanks to more flight frequencies and more convenient schedules.

(151) With regard to barriers to entry, although Niki managed to obtain three frequencies on VIE-MUC in 2007, there currently remain considerable barriers to entry or expansion for competitors in particular for time sensitive passengers, who require a larger number of frequencies at convenient times. Significant slot constraints exist at VIE airport (paragraph (118)) as well as at MUC airport. In the most recent IATA season, capacity was exhausted at MUC airport between 06.00-10.00 and 15.00-22.00 of any given weekday. Indeed, time sensitive passengers have a very clear preference for morning departures after 7.00 and return flights in the evening between 18.00 and 19.00 (and not later than 21.00). Given that these are precisely the times when capacity at MUC airport is exhausted, competitors currently face significant barriers to entry or to expansion should they want to offer a credible service catered to time sensitive passengers. This situation will remain unchanged until at least 2011.<sup>80</sup>

(152) In conclusion, therefore, the proposed transaction raises serious doubts as to its compatibility with the common market under the Air France-KLM counterfactual at least for time sensitive passengers on VIE-MUC. It is not necessary to determine whether or not the transaction raises serious doubts on a possible market for non-time sensitive passengers or the market comprising all passengers travelling point-to-point on VIE-MUC given that the Commitments proposed by LH address any competition concerns under an alternative market definition.

*d. Vienna-Frankfurt*

(153) On the Vienna-Frankfurt route ("VIE-FRA"), [400 000 – 450 000]\* passengers travelled point-to-point in 2008. Over [600 000 – 650 000]\* passengers travelled on this route when transfer passengers are included. The parties estimate that up to [50-60]\*% of passengers travel for business purposes on VIE-FRA.

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<sup>80</sup> It should be noted that MUC airport expects significant capacity extensions to be in place as of 2011. In particular, a third runway is currently in the second phase of an extensive approval process and is expected to be operational as of 2011. This third runway will increase co-ordination of up to 120 movements per hour compared to 90 movements per hour with the existing two-runway system and will be available to both terminals at MUC airport.

- (154) Both OS (through OS and Tyrolean) and LH operate on VIE-FRA. The parties market seats on each other's flights. Additionally, Adria Airways, a Star Alliance member based in Slovenia operates flights on this route, on which LH code shares.<sup>81</sup> The other competitors are Niki and Air Berlin. Air Berlin merely code-shares on Niki's services. Currently, those carriers have the following number of flight frequencies: LH and OS – five daily frequencies each (35 weekly each), Adria Airways – three daily frequencies (16 weekly); Niki – two daily frequencies (11 weekly).
- (155) Frankfurt is served by two airports: FRA airport and HHN airport. OS, LH, Adria Airways and Niki fly from VIE airport to FRA airport. Ryanair (FR) currently operates three weekly frequencies between BTS airport and HHN airport. The parties consider that FR exerts at least some competitive pressure on them, particularly in relation to non-time sensitive passengers. Based on the results of the market investigation, the Commission considers that FR's services do not constrain the parties on VIE-FRA to any meaningful degree, regardless of whether there is a separate market for time sensitive passengers or not. First, given the considerable distance from Vienna to BTS airport and from Frankfurt to HHN airport, the total travel time is much longer than a trip involving VIE airport and FRA airport. BTS airport is situated 87 km from Vienna city centre, which corresponds to a driving time of more than 60 minutes by car and 75 to 95 minutes by bus. Bus connections are generally infrequent; notably there are only three 75 minute-bus connections on Vienna-BTS airport daily. HHN airport is situated 124 km from Frankfurt city centre, which corresponds to 85 minutes by car and 105 minutes by bus. Secondly, respondents to the market investigation in this case did not consider BTS airport a substitute for VIE airport, at least in relation to time sensitive passengers. Moreover, the majority of respondents did not consider HHN airport to be a substitute for FRA airport, even in relation to non-time sensitive passengers. Lastly, the parties have not provided any data in support of their contention that FR should be regarded as their competitor on VIE-FRA despite the Commission's repeated request for the parties' data and estimates as to the structure of the market comprising carriers active on VIE airport-FRA airport as well as BTS airport-HHN airport.
- (156) As regards inter-modal competition, the notifying party submits that train services do not represent a significant constraint on air travel on this route.
- (157) The table below provides the market shares of air carriers active on the VIE-FRA route in the IATA Summer season 2008 and Winter season 2008/2009 estimated by the parties according to the MIDT data.<sup>82</sup>

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81 The code-share agreement between LH and Adria Airways is a standard free-flow code-share agreement.

82 LH estimated market shares for some air carriers, whose bookings are not reflected in MIDT (like 4U, Niki, SkyEurope etc.) based on data published by the German Statistical Office and other publicly available information about schedules, frequencies and utilized aircraft, see paragraph 336-347 of the Form CO. The parties did not consistently provide estimates for all airlines which are only partly covered by MIDT.

Airline	SS 08 figures on VIE-FRA		WS 08/09 figures on VIE-FRA	
	Time Sensitive	All passengers	Time Sensitive	All passengers
LH	[50-60]*%	[30-40]*%	[50-60]*%	[40-50]*%
OS	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%
Combined LH+OS	[70-80]*%	[60-70]*%	[70-80]*%	[60-70]*%
Adria Airways	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%
Niki	[20-30]*%	[20-30]*%	[20-30]*%	[20-30]*%
Air Berlin	[0-5]*%	[5-10]*%	[0-5]*%	[5-10]*%
Others	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*
Combined all	100%	100%	100%	100%

(158) On the basis of the market investigation, the Commission has endeavoured to reconstruct the market for all passengers for the IATA Summer season 2008 and Winter season 2008/2009. The market shares are based on figures of flown passengers.<sup>83</sup>

Figures on VIE-FRA: all passengers		
Airline	SS 08	WS 08/09
LH	[30-40]%	[40-50]%
OS	[20-30]%	[20-30]%
Combined LH+OS	[60-70]%	[60-70]%
Adria Airways	[0-5]%	[0-5]%
Niki <sup>84</sup>	[30-40]%	[20-30]%
Combined all	100%	100%

*(i) Competitive assessment of creation of permanent structural link between the parties*

(159) As regards the relevant counterfactual, VIE-FRA is one of the routes where LH and OS operate under the joint venture agreement, according to which all revenues and costs incurred in connection with the operation of this route are shared between LH and OS. The market investigation revealed that the current competition between the parties on this route is at most rather limited. In fact, a consequence of the creation of a permanent structural link between the parties would be the elimination of potential competition between them on the VIE-FRA route.

(160) However, it is to be recalled that the parties' joint venture was temporarily exempted by the Commission under Article 81(3) of the Treaty subject to commitments. When the Commission's 2002 exemption Decision expired in 2005, the parties continued their joint venture co-operation based on a self-assessment of the compliance with Article 81 of the Treaty of their co-operation.

(161) The self-assessment conducted by the parties of the compliance with Article 81 of the Treaty of their co-operation categorises the VIE-FRA route as a route with a "high" risk

<sup>83</sup> The comparability of the data collected in the market investigation from different companies may be affected by possibly different methods of data collection. In particular, the parties provided various sets of "flown passenger data".

<sup>84</sup> Including Air Berlin's passengers.

grade, that is, according to the parties' assessment, that "serious concerns" regarding its compatibility with Article 81 of the Treaty exist on this route. The self-assessment thus concludes that it is "very likely" that slots will need to be transferred to competitors and that the transfer of three to four slots following a request by another airline, possibly in combination with further measures, is therefore necessary in order to remove these competition concerns.<sup>85</sup>

(162) On the basis of that self-assessment, LH transferred two slots at Frankfurt airport to its competitor Niki in 2006, so as to enable Niki to enter VIE-FRA with two daily frequencies. In July 2009, LH transferred a further slot to Niki, so as to enable Niki to operate a third frequency on VIE-FRA as of the IATA winter season 2009/2010.<sup>86</sup> The relevant slot lease agreements between LH and Niki are unlimited in time but will end, with the result that Niki will have to hand back the Frankfurt slots to LH, if the joint venture between LH and OS is terminated.<sup>87</sup> Moreover, following the completion of the proposed acquisition of OS by LH, namely, when OS and LH belong to the same group, Article 81 of the Treaty will cease to be applicable to the parties' pre-merger co-operation under the joint venture agreement and therefore the underlying reason for the slot transfer to Niki for VIE-FRA will no longer exist. As a consequence of the proposed transaction, the joint venture between the parties will likely cease to exist and, in any event, the decision whether or not to terminate the joint venture will be fully with LH. The transaction will thus not only convert the parties' contractual co-operation into a permanent structural link, eliminating potential competition between the parties on VIE-FRA, but it will also allow LH to terminate the slot lease agreements with Niki.

(163) As a result of the termination of the slot lease agreements, Niki would effectively have to exit the VIE-FRA route. Indeed, the market investigation revealed that FRA Airport is congested throughout the day and that access to requested slots is therefore virtually impossible. Niki would thus not only have to return its current slots to LH but would also have difficulty obtaining any own slots at all due to the congestion at FRA airport, and even less any morning and evening slots, under the normal slot allocation procedure. The transaction would thus eliminate the parties' most important competitor on VIE-FRA. In view of the elimination of actual competition from a third party, the extent to which the creation of a permanent structural link between the parties also leads to the elimination of potential competition between them on VIE-FRA can be left open.

(164) Therefore, the only remaining competitor on the VIE-FRA route would be Adria Airways, which would not sufficiently constrain the parties to counterbalance the elimination of Niki as an actual competitor.

(165) The parties submit that Adria Airways should be regarded as a competitor on this route as the code-share agreement between LH and Adria Airways does not provide for price

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85 See "LH/AUA Self-Assessment", pp. 4, 13 and 14.

86 See "Annex Update Agreement" of 29 June 2009.

87 According to section 9 of the slot lease agreement between LH and Niki, the agreement will be terminated when Niki transfers all of LH's slots back to LH. According to section 10 of the slot lease agreement, Niki is obliged to return LH's slots if the joint venture between LH and OS is terminated.

coordination. However, the Commission considers that Adria Airways, a Star Alliance member, cannot be considered as exercising a strong constraint, if one at all, on the merged entity.

- (166) Despite its 16 weekly frequencies and the fact that it has been operating on this route for several years now (Adria Airways entered VIE-FRA in the IATA Winter season 2001/2002), Adria Airways has never gained a meaningful market share of this route and currently accounts for about [0-5]% of the market. This is because it uses small aircraft and its load factor is relatively low ([50-60]-[60-70] %). Furthermore, it is to a large extent dependent on LH for its customer base, illustrated by the high percentage of passengers it transports with a ticket issued by LH. It is thus clear that Adria Airways, at best, exercises a limited competitive constraint upon the parties, as is also illustrated by the statements of respondents to the Commission's market investigation. Several respondents pointed out that Adria Airways does not compete on prices with LH/OS but, rather, that its prices are adjusted to match those of LH. Some respondents consider that this is due to the code-share agreement with LH, others think that the underlying reason might be that Adria Airways participates in LH's Partner Plus contracts with corporate customers. As a consequence, several respondents perceive Adria Airways' service as an additional LH service rather than an independent service offered by a competitor. It is pointed out that some corporate customers/travel agents whose employees/customers fly on VIE-FRA are not even aware of the presence of Adria Airways on this route or the proportion of their bookings with Adria Airways is very low (below 5%). In addition, Adria Airways is considered by some respondents to offer an inferior level of on board service, low capacity and a relatively unattractive schedule.
- (167) Moreover, even if the presence of Adria Airways on this route is considered a constraint, it is not clear to what extent Adria Airways will be able to operate on VIE-FRA in the future. Since the IATA Winter season 2006, LH has been granting slots for Adria Airways' operations on a season-by-season basis. The initial Slot Exchange Agreement between LH and Adria Airways was terminated in July 2006 and, since then, LH and Adria Airways have entered into a Slot Exchange Renewal Agreement in advance of every season. Since there is no longer a long-term slot lease agreement with LH in place, LH can withdraw slots from Adria Airways after every season. Given that slot capacity at FRA airport is exhausted throughout the entire day, it is doubtful whether Adria Airways would be able to continue offering its VIE-FRA service if LH withdraws slots from Adria Airways.
- (168) Taking into account the fact that Adria Airways is largely dependent on LH to fill its planes due to its low load factor, its low market share, the results of the market investigation that dismiss Adria Airways as an important source of competition on the VIE-FRA route, and the uncertainty of how long Adria Airways will operate on the route, it is clear that this marginal player cannot sufficiently constrain LH/OS.
- (169) It must therefore be concluded that the creation of a permanent structural link between LH and OS as a result of the proposed concentration raises serious doubts as to its compatibility with the common market on VIE-FRA.

*(ii) Competitive assessment of the proposed concentration under the Air France-KLM counterfactual*

- (170) Moreover, the transaction raises serious doubts as to its compatibility with the common market under the Air France-KLM counterfactual scenario whereby OS is acquired by Air France-KLM. The acquisition of OS by Air France-KLM would likely lead to the termination of the joint venture agreement between LH and OS and in case of the termination of the joint venture agreement, the relevant slot lease agreements between LH and Niki will come to an end and consequently, Niki will have to return the Frankfurt slots to LH.<sup>88</sup> As a result of the termination of the slot lease agreements, Niki would effectively have to exit the route, given that FRA airport is congested throughout the day and that access to requested slots is therefore virtually impossible. Niki would thus not only have to return its current slots to LH, but would also have difficulty obtaining any own slots under the normal slot allocation procedure.
- (171) On the other hand, the evidence available to the Commission suggests that, under the Air France-KLM counterfactual, both LH and OS would likely operate the VIE-FRA route in competition with each other.
- (172) First of all, VIE-FRA is a thick route (in fact the thickest route affected by this transaction), with a large number of O&D and transfer passengers travelling in both directions and with a large proportion of business travellers. As this route is served by more than one (network-) carrier already pre-merger, it can generally be assumed that it is sufficiently large for more than one (network-) carrier to sustainably operate it.
- (173) Secondly, both LH and OS already operate a significant number of frequencies on VIE-FRA. Given the features of this route and the fact that OS and LH are presently both active on this route, it can be expected that both carriers would maintain their operations if OS terminated its joint venture agreement with LH. This is supported by internal OS documents which indicate that OS would continue operating on the VIE-FRA route even in the case of down-sizing in a stand alone scenario.<sup>89</sup> In the Air France-KLM counterfactual scenario, for the two alliances to be able to compete effectively against each other, both LH and OS would not only have to continue operating flights in competition on this route in order to attract traffic to/from their respective hubs but also they would probably even increase their frequencies. Indeed, as noted in paragraph (103), LH's internal documents indicate that LH would need to add [...] weekly frequencies on VIE-FRA, if OS is acquired by Air France-KLM and joins Sky Team.
- (174) On the basis of this counterfactual scenario, the proposed concentration would thus eliminate actual or at least potential competition between the parties.

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<sup>88</sup> According to section 9 of the slot lease agreement between LH and Niki, the agreement will be terminated when Niki transfers all LH's slots back to LH. According to section 10 of the slot lease agreement, Niki is obliged to return LH's slots back to LH if the joint venture between LH and OS is terminated.

<sup>89</sup> OS' presentation "[...]".



- (175) Therefore, also under this counterfactual, the only remaining competitor on the route would be Adria Airways. However, for the reasons set out in more detail in paragraphs (165) to (168), Adria Airways is unlikely to sufficiently constrain the parties to prevent anti-competitive effects on passengers.
- (176) Moreover, even if Niki were to continue operating its services on the VIE-FRA route under the Air France-KLM counterfactual (*quod non*), the evidence available to the Commission shows that it would not place a sufficient constraint on LH/OS to compensate for the elimination of competition between LH and OS.
- (177) For good measure, the Commission also investigated the constraint that Niki currently places on LH/OS. The market investigation shows that several corporate customers consider that the parties have an unmatched competitive advantage towards Niki on VIE-FRA due to better frequency offering that is particularly valued by time sensitive passengers. In particular, Niki's morning departure from FRA airport (9.40) is considered to be too late and thus inconvenient for time sensitive passengers. This evidence is supported by the Commission's market investigation which revealed that time sensitive passengers have a very clear preference for morning departures after 7.00 and return flights in the evening between 18.00 and 19.00 (not later than 21.00). Moreover, several respondents considered that a competitor (such as Niki) would need to offer at least five frequencies on VIE-FRA in order to be able to offer a sufficiently attractive schedule for time sensitive passengers. In addition, the majority of respondents reported that the proportion of their bookings with Niki on VIE-FRA is around or below 10%, which is consistent with the findings that corporate customers do not view Niki as a credible alternative. Some travel agents also characterize competition from Niki as limited.
- (178) The results of the market investigation are supported by the Commission's pricing analysis that, using the passenger-level data requested from the parties, examined the effect of Niki's entry in October 2006 on the parties' prices on this route. Niki's entry had no effect on OS' and LH's prices for fully flexible business and economy tickets. Somewhat of an impact by Niki's entry was observed in relation to LH's non flexible economy tickets, however less of an impact was noticeable in relation to OS' non flexible tickets. This suggests that Niki does not constitute a strong constraint on the parties at least in relation to time sensitive passengers but probably for all passengers.
- (179) Furthermore, the slots currently held by Niki have several shortcomings: first, Niki's morning slot in Frankfurt is 30 minutes later than Niki's initial slot request. As a result, Niki has inconvenient arrival and departure slots at morning peak times in Frankfurt, as a result of which Niki's morning flight from FRA airport arrives at VIE airport at 10.55. Second, the slot lease agreement between Niki and LH does not provide for grandfathering rights on slots granted to Niki and Niki is required to try to obtain suitable slots at FRA airport from the slot coordinator every season prior to obtaining them from LH. Third, Niki needs to comply with a contractual obligation with LH to use its slots according to the 80%-"use-it or-lose-it rule", while other airlines currently do not need to comply with this rule since the relevant regulation has been suspended for the IATA Summer 2009 season.<sup>90</sup> Lastly, the slot

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<sup>90</sup> See paragraph (384) below.

lease agreement with Niki foresees very high penalties if a slot is lost and no obligation for LH to safeguard LH's grandfathering rights with regard to slots leased to Niki exists. These shortcomings translate into less flexibility of Niki to respond to changes in passenger demand. Consequently, Niki has a significant competitive disadvantage vis-a-vis the parties.

(180) In addition, given that slot capacity at FRA airport is exhausted throughout the day, it is noted that Niki's entry on VIE-FRA was only possible because LH leased FRA slots to Niki. However, Niki would lose these slots if the parties terminate the joint venture following an acquisition by Air France-KLM as the slot lease agreement between LH and Niki contains a provision whereby LH may terminate that agreement if the joint venture between LH and OS is terminated.

(181) In the course of the Commission's in-depth investigation of the transaction, LH and Niki extended their slot lease agreement to include a third slot at FRA airport at 16.45 (arrival from VIE airport) and 17.25 (departure to VIE airport) as of the IATA Winter season 2009/2010, which will enable Niki to operate three frequencies on VIE-FRA as of the Winter season. The timing of these additional slots is nearly exactly that requested by Niki. The parties claim that this will further increase the already strong competitive pressure exercised by Niki on this route. However, this additional slot will not alter the fact that Niki's morning flight is inconvenient for the purposes at least of time sensitive passengers. Moreover, given the shortcomings of the slot lease agreement between LH and Niki, Niki's competitive pressure stemming from its three operations a day under the current conditions would in any case be limited.

(182) Finally, significant barriers to entry exist on this route, and thus the threat of potential entry cannot discipline OS/LH on this route either. Indeed, the VIE-FRA route is characterised by significant barriers to entry. A first barrier to entry is the congestion of the airports at both ends of the VIE-FRA route. Both VIE airport and FRA airport experience significant levels of congestion. As regards VIE airport, slot shortage exists from 07.35 until 11.50 and from 16.00 to 20.45, as explained in paragraph (118). FRA airport is congested throughout the day and competitors have unanimously indicated that access to requested slots at FRA airport is virtually impossible.

(183) It must therefore be concluded that the proposed concentration also under the Air France-KLM counterfactual, raises serious doubts as to its compatibility with the common market on VIE-FRA.

*(iii) Conclusion on the competitive assessment of the transaction regarding VIE-FRA*

(184) In conclusion, the proposed transaction raises serious doubts on the VIE-FRA route as to its compatibility with the common market both under the pre-merger situation and under the Air France-KLM counterfactual and regardless of the precise market definition.

*e. The Vienna-Berlin, Vienna-Düsseldorf, Vienna-Hamburg, Vienna-Hannover and Vienna-Nuremberg routes*

(185) On several routes between Austria and Germany, namely the Vienna-Berlin ([400 000 – 450 000]\* O&D and [450 000 – 500 000]\* total passengers), Vienna-Düsseldorf ([450 000 – 500 000]\* O&D and [500 000 – 550 000]\* total passengers), Vienna-Hamburg ([350 000 – 400 000]\* O&D and [400 000 – 450 000]\* total passengers), Vienna-Hannover ([200 000 – 250 000]\* O&D and [200 000 – 250 000]\* total passengers) and Vienna-Nuremberg ([100 000 – 150 000]\* O&D and [100 000 – 150 000]\* total passengers) routes, the parties face significant competition from Air Berlin in particular. Indeed, as is illustrated by the table below for the IATA seasons winter 2008/2009 and summer 2008, no competition concerns arise on these routes as a result of the limited market shares of the parties (below [20-30]\*% in all possible markets) and the strong market position of Air Berlin.

	WS 08/09 figures				SS 08 figures			
	Time Sensitive		All passengers		Time Sensitive		All passengers	
	Parties	Competitors	Parties	Competitors	Parties	Competitors	Parties	Competitors
Vienna-Berlin	LH [10-20]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [5-10]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [10-20]*% OS [5-10]*% Total [20-30]*%	Air Berlin [70-80]*%	LH [10-20]*% OS [5-10]*% Total [20-30]*%	Air Berlin [70-80]*%
Vienna-Düsseldorf	LH [10-20]*% OS [5-10]*% Total [20-30]*%	Air Berlin [70-80]*%	LH [10-20]*% OS [10-20]*% Total [20-30]*%	Air Berlin [70-80]*%	LH [10-20]*% OS [5-10]*% Total [20-30]*%	Air Berlin [70-80]*%	LH [10-20]*% OS [10-20]*% Total [20-30]*%	Air Berlin [70-80]*%
Vienna-Hamburg	LH [10-20]*% OS [5-10]*% Total [20-30]*%	Air Berlin [70-80]*%	LH [10-20]*% OS [10-20]*% Total [20-30]*%	Air Berlin [70-80]*%	LH [10-20]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [10-20]*% OS [5-10]*% Total [20-30]*%	Air Berlin [70-80]*%
Vienna-Hannover	LH [5-10]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [5-10]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [5-10]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [0-5]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%
Vienna-Nuremberg	LH [0-5]*% OS [5-10]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [0-5]*% OS [0-5]*% Total [5-10]*%	Air Berlin [40-50]*% HG [40-50]*%	LH [5-10]*% OS [10-20]*% Total [10-20]*%	Air Berlin [80-90]*%	LH [0-5]*% OS [10-20]*% Total [10-20]*%	Air Berlin [80-90]*%

(186) The absence of competition concerns is confirmed by the market investigations both in phase I and phase II which did not reveal any specific substantiated concerns for these routes. Although a few responding travel agents and corporate customers voiced single concerns, with respect to potential price increases and reduction of frequencies for instance, the vast majority of the respondents does not see any impact on the competitive situation on these routes as a result of the transaction.

(187) In phase II, the position of Air Berlin and the closeness of services between LH/OS and Air Berlin on the Vienna-Berlin, Vienna-Düsseldorf, Vienna-Hamburg and Vienna-Hannover routes were further investigated. The vast majority of respondents (both travel agents and corporate customers as well as competitors) clearly indicate that they perceive Air Berlin as a credible alternative to an LH/OS merged entity in terms of the timing and the frequencies of its flights when compared to the timing and frequencies of the LH/OS flights.

This is valid both for time sensitive and non-time sensitive passengers. Concerning the levels of service both at airports and on board, and concerning the frequent flyer programmes ("FFP") offered by LH and OS on the one hand, and by Air Berlin and Niki on the other hand, the opinions of the respondents have been varied. One group of respondents considered the services offered by Air Berlin inferior to those offered by LH and OS, particularly due to perceived more limited advantages of Air Berlin's FFP. However, another group of respondents clearly perceives Air Berlin's services as on par or comparable to those provided by LH and OS. In sum, it is concluded that the respondents to the market investigation largely perceive Air Berlin as a valid alternative to LH and OS on these routes.

(188) The transaction does not, therefore, significantly impede effective competition on any of these routes, regardless of the relevant counterfactual.

*f. The Munich-Linz route*

(189) On the Munich-Linz route (it is estimated by the parties that [50 000 – 60 000]\* O&D passengers travel on this route by plane or train), the parties are the only air carriers present (LH as operating carrier and OS as marketing carrier) but they face strong competition from the train services offered by Deutsche Bahn and ÖBB on this route. In addition to a number of indirect connections, Deutsche Bahn and ÖBB offer an average of nine to ten direct train connections between Linz (Hauptbahnhof) and Munich (Hauptbahnhof) a day, with travel times mostly less than or around 3 hours, that is to say travel times which are comparable to the total travel time by plane of approximately 3:00h from city centre to city centre. The market investigation confirmed that those train services represent a viable competitive alternative for both time sensitive passengers and non-time sensitive passengers on this O&D pair. They therefore belong to the same market. In view of the strong market position of the train services, which according to the parties' estimate amount to a market share above [90-100]\*% both for time sensitive and non-time sensitive passengers and which has broadly been confirmed by the market investigation, no competition concerns arise in relation to this route, irrespective of whether or not OS can be considered as a potential entrant on this route.

(190) The transaction does not, therefore, significantly impede effective competition on this route, regardless of the relevant counterfactual.

*g. Routes which are only operated by OS and where the transaction could eliminate LH as a potential competitor*

(191) On the Vienna-Dresden, Vienna-Leipzig, Salzburg-Düsseldorf, Graz-Düsseldorf, Linz-Düsseldorf, Graz-Stuttgart, Innsbruck-Frankfurt and Salzburg-Frankfurt routes, only OS is active as an operating carrier while LH merely markets seats on OS's flights within the framework of the parties' profit and loss sharing joint venture. In view of the absence of actual competition between the parties pre-merger (as a result of their joint venture co-operation), the proposed transaction could significantly impede effective competition only if it resulted in the elimination of LH as a potential competitor.

(192) However, the market investigation revealed that LH would not enter any of these routes absent the co-operation with OS.

(193) At the outset, it should be noted that demand on all these routes is rather low (between [10 000 – 20 000]\* and [40 000 – 50 000]\* O&D passengers per year). The market investigation indicated that it is not usual for traditional network carriers to enter European short-haul routes of such a limited size in competition to another operating carrier.<sup>91</sup> Accordingly, none of the routes currently operated by OS were operated in parallel by both LH and OS before they began to co-operate with each other in 2000. Also, LH's self-assessment referred to in paragraph (66) considers almost all relevant routes as too thin to attract entry by another player.<sup>92</sup> Those findings strongly indicate that it would not be economically sustainable for both LH and OS to be present as operating carriers on these routes.<sup>93</sup>

(194) In addition, as explained in more detail hereafter for each route, a review of internal LH documents on entry strategies and other route-specific elements confirm that LH would not enter any of these routes in competition to OS.

*(i) Vienna-Dresden and Vienna-Leipzig*

(195) The Vienna-Dresden ([10 000 – 20 000]\* O&D and [10 000 – 20 000]\* total passengers) and Vienna-Leipzig ([10 000 – 20 000]\* O&D and [20 000 – 30 000]\* total passengers) routes are thin routes. This is evidenced by the fact that OS bundles these routes together as a stop-over connection. LH has operated only one intra-European route in the form of such a stop-over since 2008<sup>94</sup> and is therefore unlikely to adopt the same strategy as OS to serve these routes. The low local traffic on these routes indicates that these routes will most likely not viably sustain an operation by both OS and LH.

(196) Furthermore, LH has no international flights departing from Dresden and Leipzig but rather connects both cities to its hubs in Munich and Frankfurt and to its base in Düsseldorf. The unlikelihood of LH's entry on these routes is further underlined by a internal LH document that analyses a possible acquisition of OS by another carrier and clearly states that LH would not enter the Vienna-Leipzig route. [...]\*<sup>95</sup>

(197) LH's subsidiary 4U, which already operates out of Dresden airport, previously assessed a business case issued by Dresden airport in April 2006 in which its entry onto the Vienna-Dresden route is discussed. 4U did not execute these plans in 2006 nor the following years, which confirms the parties' submission that 4U did not consider that the operation of this route would be commercially profitable.<sup>96</sup>

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91 See replies to question 11 of the phase II market investigation questionnaire to competitors.

92 See "LH/AUA Self-Assessment", pp. 4, 6-8. [...]\*

93 The parties further argue that on several routes currently operated by OS, OS would leave the route absent the transaction for various reasons [...]\*.

94 See reply to question 3 of request for information to LH of 4 June 2009.

95 LH's internal document [...]\*.

96 See reply of LH to request for information of 30 July 2009 and follow-up correspondence of 5 August 2009.

*(ii) Salzburg-Düsseldorf, Graz-Düsseldorf, Linz-Düsseldorf*

(198) The Salzburg-Düsseldorf ([20 000 – 30 000]\* O&D and [20 000 – 30 000]\* total passengers), Graz-Düsseldorf ([30 000 – 40 000]\* O&D and [30 000 – 40 000]\* total passengers) and Linz-Düsseldorf ([30 000 – 40 000]\* O&D and [30 000 – 40 000]\* total passengers) routes are thin routes. The low local traffic on these routes thus indicates that it would not be economically sustainable for both LH and OS to be present as operating carriers on these routes. This is further underlined by the fact that OS operates the Linz-Düsseldorf route as one leg of the Salzburg-Linz-Düsseldorf and Graz-Linz-Düsseldorf routes in order to bundle demand for travel to Düsseldorf.

(199) In addition, it should be noted that it is very unusual for LH to operate routes out of Düsseldorf below [40 000 – 50 000]\* O&D passengers on which a competitor is active.<sup>97</sup> Also an internal LH document comparing the importance of destinations out of Düsseldorf conveys a low ranking for Graz, Linz and Salzburg ([...]\*)<sup>98</sup>, and a further internal LH document explains that [LH would not enter]\* if OS was acquired by another carrier.<sup>99</sup>

(200) LH's subsidiary, 4U, which already has operations out of Salzburg airport, is unlikely to enter the Salzburg-Düsseldorf route since it does not currently operate any flights out of DUS airport and has never made a business case to enter this route.<sup>100</sup>

*(iii) Graz-Stuttgart*

(201) The Graz-Stuttgart ([30 000 – 40 000]\* O&D and [30 000 – 40 000]\* total passengers) route is served by OS since April 2009, while it had previously been served by LH. [...]\*<sup>101</sup>

(202) In addition to OS, the Graz-based local airline Robin Hood is also active on the route, having entered the route in November 2008 with small aircraft. In view of the relatively low traffic on this route and the presence of two operating carriers, it is unlikely that it would be economically sustainable for both LH and OS to be present as operating carriers on this route.<sup>102</sup>

(203) LH's subsidiary, 4U, which already has operations out of STR airport, is unlikely to enter the route since it does currently not operate any flights from Graz airport [...]\*.<sup>103</sup>

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97 See reply of LH to request for information of 10 June 2009.

98 LH's internal document [...]\*.

99 LH's internal document [...]\*.

100 See reply of LH to request for information of 30 July 2009.

101 [...]\*

102 Similarly, in a scenario where the route would still be operated by OS it is unlikely that OS would enter this route absent its co-operation with LH in view of the presence of two operating carriers and the fact that the only international route out of Graz served by OS is part of the joint venture (Graz-Düsseldorf, except for some leisure routes in Greece served by Lauda Air).

103 See reply of LH to request for information of 30 July 2009.

*(iv) Innsbruck-Frankfurt*

(204) The Innsbruck-Frankfurt route ([20 000 – 30 000]\* O&D and [60 000 – 70 000]\* total passengers) is a relatively thin route. Accordingly, a internal LH document states that due to [...] LH would not enter this route if OS was acquired by another carrier.<sup>104</sup> It follows that this route is unlikely to sustain an operation by both LH and OS.

(205) LH's subsidiary, 4U, is unlikely to enter the route since it does not have any operations at either end of the route and [...]\*.<sup>105</sup>

*(v) Salzburg-Frankfurt*

(206) The Salzburg-Frankfurt route ([40 000 – 50 000]\* O&D and [100 000 – 150 000]\* total passengers) is the thickest of all routes between Austria and Germany operated by OS only. [...]\*<sup>106</sup>

(207) However, an internal LH document explains that LH would not enter this route in case of a possible acquisition of OS by another carrier [...]\*.<sup>107</sup> This conclusion is confirmed by information received in the course of the market investigation according to which Salzburg is within the overall catchment area of MUC airport.<sup>108</sup>

(208) LH's subsidiary, 4U, which already operates out of Salzburg airport, is unlikely to enter the route since it does not currently operate any flights from FRA airport and has never made a business case to enter this route.<sup>109</sup>

*(vi) Conclusion*

(209) It can therefore be concluded that, due to the low demand on all routes mentioned in (i) – (v) above and on the basis of a review of relevant internal LH documents on entry strategies and other route-specific elements LH is unlikely to enter any of those routes. Hence the elimination of LH as a potential competitor does not significantly impede effective competition, regardless of the relevant counterfactual.<sup>110</sup>

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104 LH's internal document [...]\*.

105 See reply of LH to request for information of 30 July 2009.

106 [...]\*

107 LH's internal document [...]\*.

108 See reply of MUC airport to question 12 of the phase I market investigation questionnaire to airports.

109 See reply of LH to request for information of 30 July 2009.

110 This conclusion is not altered by the fact that most of these routes have been operated profitably by OS in recent years. Indeed, Graz-Düsseldorf, Düsseldorf-Linz, Dresden-Vienna, Frankfurt-Salzburg and Stuttgart-Graz were operated profitably in recent years while the Innsbruck-Frankfurt, Düsseldorf-Salzburg and Vienna-Leipzig routes have been loss-making in one or more recent years, see reply of the parties to question 9 of request for information of 27 April 2009.



*h. Routes which are only operated by LH and where the transaction could eliminate OS as a potential competitor*

- (210) Only LH is active as operating carrier on the Innsbruck-Hamburg, Klagenfurt-Munich, Graz-Frankfurt, Graz-Munich and Linz-Frankfurt routes, while OS merely markets seats on those flights in the framework of the parties' joint venture. In view of the absence of actual competition between the parties pre-merger, the proposed concentration could significantly impede effective competition on these routes only if it resulted in the elimination of OS as a potential competitor on these routes.
- (211) However, the market investigation revealed that OS would not enter any of these routes absent the co-operation with LH.
- (212) Indeed, demand on these routes is often relatively low and none of the routes currently served by LH (except the Graz-Frankfurt route) was served by both parties before they started their co-operation in 2000. [...] <sup>111</sup> These findings strongly indicate that it would not be economically sustainable for both LH and OS to be present as operating carriers on these routes.
- (213) Furthermore, none of these routes are mentioned in an internal OS document that sets out the restructuring measures to be taken if OS were to remain independent, <sup>112</sup> which is in line with the fact that OS has no hubs at either end of any of these routes. This further underlines the fact that OS would not enter any of these routes absent the co-operation with LH.
- (214) Furthermore, OS argues that in view of its financial situation it will henceforth focus on routes with high passenger rates, which further underlined that it would not enter any of the routes at issue. In line with that submission, OS appears to have decided to remove a number of 50-seater aircraft and partly replace them by larger aircraft from the existing OS fleet. <sup>113</sup>
- (215) In addition to these general observations, a review of internal OS documents on entry strategies and other route-specific elements confirm that OS would not enter these routes in competition to LH.

*(i) Klagenfurt-Munich and Innsbruck-Hamburg*

- (216) The Klagenfurt-Munich ([0 – 10 000]\* O&D and [10 000 – 20 000]\* total passengers) and Innsbruck-Hamburg ([0 – 10 000]\* O&D and [0 – 10 000]\* total passengers, a seasonal route) routes are thin routes.

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111 [...]\*

112 OS document [...]\*.

113 See reply of OS to request for information of 5 August 2009; see also <http://www.nur-flug-tours.de/news/airlinenews-8140.htm>. It should also be noted in this context that apart from the Graz-Frankfurt route, the Graz-Munich, Innsbruck-Hamburg, Klagenfurt-Munich and Linz-Frankfurt routes have been loss-making in one or more recent years, see reply of the parties to question 9 of request for information of 27 April 2009.

(217) Out of Klagenfurt airport, OS currently only serves Vienna (it ceased operations on the Klagenfurt-Frankfurt route in April 2008) which underlines that Klagenfurt airport is not of strategic importance to OS' international flights. As regards the Innsbruck-Hamburg route, it should be noted that Transavia entered in December 2008 with five weekly frequencies in winter seasons and that TUIfly announced a direct service in winter seasons starting in Winter 2009/2010. Consequently, several players will henceforth be active on the route and it is therefore unlikely that OS would enter this thin route as a further player. In view of these reasons, OS is unlikely to enter both routes absent its co-operation with LH.

*(ii) Frankfurt-Graz and Graz-Munich*

(218) In the case of the Frankfurt-Graz route ([50 000 – 60 000]\* O&D and [100 000 – 150 000]\* total passengers), local traffic may sustain the operation of two carriers while local traffic is more limited in case of the Graz-Munich ([10 000 – 30 000]\* O&D and [80 000 – 90 000]\* total passengers/year) route.<sup>114</sup>

(219) However, an analysis of the routes where OS entered in the recent past strongly indicates that OS is unlikely to enter the Frankfurt-Graz route or Munich-Graz route: indeed, OS' last entry from Graz was in 2003 (the Graz-Düsseldorf route in the framework of the joint venture with LH). In the more recent past, OS most often entered routes that connect Vienna with a destination in the East, [...]\*<sup>115</sup> Entering the Frankfurt-Graz route or the Munich-Graz route would thus not fit into OS' entry strategy. In addition, an analysis of OS' recent entries revealed that it is very unusual for OS to enter intra-European routes against existing competition.<sup>116</sup>

*(iii) Frankfurt-Linz*

(220) For similar reasons, OS is also unlikely to enter the Linz-Frankfurt ([40 000 – 50 000]\* O&D and [100 000 – 150 000]\* total passengers) route absent the co-operation with LH. While local traffic is rather limited and it is therefore unclear if the route might sustain the presence of two operating carriers, it is to be recalled that before the parties' co-operation began in 2000, only one of the parties was active on this route. OS' last entry involving Linz airport was in 2003 (Düsseldorf-Linz-Graz/Salzburg, that is to say a stop-over) and an analysis of the routes where OS entered in recent years showed that OS mostly entered routes that connect Vienna with a destination in the East, [...]\*.

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114 It should be noted that prior to the co-operation between the parties, the Frankfurt-Graz route was operated by the regional airline Tyrolean Airways, which OS acquired in 1998 shortly before LH and OS entered into their co-operation. The parties argue that it was natural to shift Tyrolean Airways' operations to LH upon their co-operation.

115 [OS internal documents]\*

116 See reply of OS to question 7 of request for information of 4 June 2009 and to question 2 of request for information of 10 June 2009 according to which - apart from seasonal routes and the Vienna-Luxembourg route which was before operated by OS as a stop-over connection via Strasbourg - OS has entered only the Vienna-Basel route (35 000 O&D passengers and 45 000 total passengers in the year of entry) against existing competition.

*(iv) Conclusion*

(221) It can therefore be concluded that due to the relatively low demand on all these routes and on the basis of a review of the relevant internal OS documents on entry strategies and other route-specific elements, the transaction does not eliminate OS as a likely potential competitor on any of those routes and does therefore not significantly impede effective competition on these routes, regardless of the relevant counterfactual.

(222) As the proposed transaction does therefore not lead to the elimination of potential competition on either of the routes on which OS currently operates, nor on the routes which are currently only served by LH, no competition problems arise, regardless of the counterfactual situation.

*(2) Routes between Austria and Switzerland*

(223) Direct-direct "overlaps" between OS and LH's subsidiary LX exist on the following routes between Austria and Switzerland.

(i) Vienna-Basel: served by OS; LX markets seats under code share;

(ii) Vienna-Geneva: served by OS; LX markets seats under code share;

(iii) Vienna-Zurich: served by both LX and OS who also code share.

(224) With regard to the Vienna-Geneva ("VIE-GVA") and Vienna-Basel ("VIE-BSL") routes, LX does not operate on these routes, but rather markets seats under a code-share agreement with OS. The parties submit that on both routes the code-share arrangement eliminates competition between LX and OS and that there is no residual competition.

(225) According to the notifying party, the code-share agreement between LX and OS is a standard "free-sale" (also "free-flow") agreement. The notifying party submits that the marketing carrier does not have its own reserved inventory on the aircraft in question. Instead, under a free-sale code-share agreement, the marketing carrier has real-time electronic access to the operating carrier's seat inventory. This means that prior to confirming a booking on the flight in question the marketing carrier must ascertain whether a seat in the appropriate category is still available. The operating carrier retains inventory control in order to ensure that the marketing carrier does not fill the flight with low-yield traffic (such as cheap restricted economy tickets for O&D passengers) when such bookings would squeeze out higher-yield passengers that the operating carrier could otherwise attract (such as O&D or connecting business class passengers). This is achieved by a process of "mapping" the carriers' respective fare classes and providing the marketing carrier access to seats in the relevant corresponding fare category on a "first come, first serve" basis. Thus, the marketing carrier is offered equal treatment in terms of accessing seats on a flight, without however undermining the operating carrier's yield management system.

(226) In standard free-sale code share agreements, the marketing carrier remains free to set its fares, subject to the "mapping" process that aligns the marketing and operating carrier's

booking classes. The operating carrier typically retains the revenue for the sector in question and pays the marketing carrier a commission. For direct flights on the route in question, the relevant revenue is the marketing carrier's ticketed fare, for indirect flights (for instance the Geneva-Vienna-Tel Aviv route), part of the ticketed fare for the whole journey is pro-rated to the code shared sector (for instance the VIE-GVA route) based on general industry principles or a specific agreement among the carriers (so-called special prorate agreements, or SPAs). The marketing carrier sells the tickets for a flight of the operating carrier exclusively under its own code.

*a. The Vienna-Basel route*

- (227) The total number of passengers on the VIE-BSL route in 2008 was approximately [40 000 – 50 000]\*, out of which [30 000 – 40 000]\* passengers were O&D passengers. On VIE-BSL, the parties do not face competition from another operating carrier. The joint venture agreement between LH and OS does not cover the operations of LX, and therefore does not cover the routes between Austria and Switzerland. The route is currently served by OS while LX markets the seats of OS flights under a free-sale code-share agreement. The market investigation has indicated that there is no or limited competition between OS and LX due to their code-share agreement.
- (228) While internal LH documents show that LH would consider entering the route if OS was bought by Air France-KLM,<sup>117</sup> and further review of documents for the Swiss Management Board on the "Basel update and outlook"<sup>118</sup> suggested that Swiss was considering possibly adding another aircraft to its Basel base, it seems unlikely that LH's subsidiary LX would enter this route. The route is currently served with [30 000 – 40 000]\* O&D passengers and [40 000 – 50 000]\* total passengers. As Basel airport is not a hub for LX, it could not rely on any large feeder traffic element, and it is thus unlikely that the route is thick enough to support two carriers that would have to share the current number of O&D passengers (although it is likely that Swiss would generate some additional demand on the route on its own).<sup>119</sup> This is further confirmed by LX's profitability analysis that the Commission requested during phase II [...]\*<sup>120</sup>. Moreover, the Basel update also notes that "under the aspect of the unsatisfying results in the first year as well as the uncertain outcome of 2008 results it is questionable if a capacity increase should already be considered." Given the currently negative economic conditions that also characterized 2008, it thus follows that it is unlikely that Swiss will base another aircraft at Basel airport in the near future.
- (229) The conclusion that the VIE-BSL route is not thick enough to support two carriers is also supported by internal OS documents indicating that OS would exit this route in case of

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117 LH's internal document [...]\*.

118 Management Board, 4.4. 2008, Basel update and outlook.

119 Moreover, with two carriers competing on the route, prices would be bound to go down, which further decreases the attractiveness of entering the route.

120 [...]\*.

down-sizing in a stand alone scenario, which was further confirmed by OS' submission that shows that the route has been loss-making [...] <sup>121</sup>.

(230) It follows that the transaction is unlikely to eliminate LX as a potential competitor on this route which is currently served by OS. As the transaction does therefore not lead to the elimination of a likely potential competitor on the route, it would not significantly impede effective competition, regardless of the relevant counterfactual or the precise market definition.

*b. Vienna-Geneva*

(231) In 2008 approximately [100 000 – 150 000]\* passengers travelled on the route VIE-GVA, out of which [60 000 – 70 000]\* passengers were O&D passengers. The route is served by OS while LX markets seats under the code-share agreement the details of which have been set out above.

(232) The route is served by OS while LX is only a marketing carrier. Considering the commercial balance between the operating and the marketing carrier in such code-share agreements it seems that there is limited residual competition between the parties on VIE-GVA and that the marketing carrier has limited ability and incentive to compete aggressively with the operating carrier for O&D traffic. This has been confirmed by the market investigation which showed that LX and OS currently compete only to a very limited extent on this route.

(233) An internal LH document indicates that if OS was acquired by Air France/KLM, LH would consider entry on VIE-GVA with [...] <sup>\*</sup> weekly frequencies if this is justified by [...] <sup>\*</sup>. <sup>122</sup> The Commission thus investigated whether there would be sufficient corporate demand such that LX would likely enter this route in the future.

(234) In recent years, LX significantly downscaled its operations out of Geneva airport ("GVA airport") in favour of its hub at Zurich Airport ("ZRH airport"). Its strategy from 1995 was to favour ZRH airport" as a hub and to limit its activities out of GVA airport. From 2002 (LX's first full year of operation) to 2006 (LX's first profitable year, following its acquisition by LH and turnaround), LX further downscaled operations out of GVA airport. The overall number of LX's planes was reduced by 50%, the number of intra-European routes from GVA airport was reduced by 60%, and the number of GVA flights was cut by 64%. Today, LX has only four or five aircraft based at GVA airport (out of 100 LX' aircraft based in Switzerland, principally in Zurich) and maintains a minimal level of activity at GVA airport to maintain its image as the Swiss national flag carrier.

(235) Moreover, during the phase II investigation, LH submitted a profitability analysis of all of LX's eleven intra-European routes out of GVA airport, [...] <sup>\*</sup>. It is particularly noteworthy that two of these nine routes [...] <sup>\*</sup> have a significant O&D element of more than 100 000 passengers, and yet they are highly unprofitable. It would thus seem likely that the entry on

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121 OS' presentation [...] <sup>\*</sup>.

122 LH presentation entitled [...] <sup>\*</sup>.

VIE-GVA would not be profitable for LX, as the total traffic of [100 000 – 150 000]\* passengers (including the [60 000 – 70 000]\* O&D passengers) would be divided between LX and OS. Moreover, prices would be reduced as a result of two carriers competing on the route.

(236) On the basis of the above, it is concluded that LX would not be likely to enter the market in the absence of the merger. It follows that the transaction is unlikely to eliminate LH/LX as a likely potential competitor on this route which is currently served by OS. The transaction therefore would not significantly impede effective competition on the common market on VIE-GVA, regardless of the relevant counterfactual or the precise market definition.

*c. The Vienna-Zurich route*

(237) Annually about [500 000 – 550 000]\* air passengers travel on the Vienna-Zurich route ("VIE-ZRH") out of which [300 000 – 350 000]\* passengers are O&D passengers. Both OS and LX operate on this route. They also code-share their flights on this route.

(238) On VIE-ZRH, LX currently operates 28 weekly frequencies and OS operates 27 weekly frequencies. Niki is the only competitor and operates 18 weekly frequencies albeit with larger aircrafts. Niki operates three daily frequencies on weekdays, one daily frequency on Saturdays and one daily frequency on Sundays. Since its entry in 2004 Niki has increased its weekly frequencies from 12 to 18, and in the relatively short period since its entry, Niki has been able to increase its market share significantly.

(239) According to the parties' estimates the market structure on the VIE-ZRH route in the Summer season 2008 and the Winter season 2008/2009 was as follows:

Airline	SS 08 figures on VIE-ZRH		WS 08/09 figures on VIE-ZRH	
	Time Sensitive	All passengers	Time Sensitive	All passengers
LX	[10-20]*%	[20-30]*%	[10-20]*%	[20-30]*%
OS	[10-20]*%	[10-20]*%	[10-20]*%	[10-20]*%
Combined	[30-40]*%	[30-40]*%	[30-40]*%	[30-40]*%
Niki	[60-70]*%	[60-70]*%	[60-70]*%	[50-60]*%
Air Berlin	0%	0%	0%	[5-10]*%
Others	0%	0%	0%	[0-5]*%

Source: Estimates of the parties on the basis of MIDT data<sup>123</sup>

(240) On the basis of the market investigation the Commission has endeavoured to reconstruct the market for all passengers for the IATA summer season 2008 and the winter season 2008/09. The market shares are based on figures of flown passengers.<sup>124</sup>

123 LH estimated market shares for some air carriers, whose bookings are not reflected in MIDT (like 4U, Niki, SkyEurope etc.) based on data published by the German Statistical Office and other publicly available information about schedules, frequencies and utilized aircraft, see paragraphs 336-347 of the Form CO. The parties did not consistently provide estimates for all airlines which are only partly covered by MIDT.

<b>Figures on VIE-ZRH: all passengers</b>		
<b>Airline</b>	<b>SS 08</b>	<b>WS 08/09</b>
<b>LX</b>	[40-50]%	[30-40]%
<b>OS</b>	[20-30]%	[10-20]%
<b>Combined</b>	[60-70]%	[50-60]%
<b>Niki (incl. Air Berlin)</b>	[30-40]%	[40-50]%

- (241) The market investigation has indicated that LX and OS compete on this route to a limited extent.
- (242) As regards Niki's position on VIE-ZRH, a considerable number of corporate customers does see Niki as a credible alternative to LH/OS for time sensitive customers and consider Niki's frequencies, flight schedules and prices attractive. In addition, the clear majority of travel agents consider Niki a credible alternative for time sensitive passengers. Thus, to a certain extent, Niki seems a credible alternative for both time sensitive and non-time sensitive passengers.
- (243) The finding that Niki constrains the merging parties to quite some extent is further confirmed by the additional booking analysis performed in phase II.
- (244) It results from this analysis that Niki is the largest carrier for the non-time sensitive segment that generally seems to book fairly early prior to departure, while it seems to constrain the parties to a considerable extent with regard to time sensitive passengers booking close to the date of departure, which is consistent with the findings from the qualitative analysis.
- (245) The finding that Niki represents, to a considerable extent, a credible constraint for time sensitive passengers is confirmed by the comparison of the average prices of the tickets bought by passengers that book close to the date of departure on the three carriers. Niki's prices seem to be more or less comparable to Swiss' prices, and, in certain months, Niki's tickets appear to be on average more expensive. Moreover, when compared with OS, Niki's tickets are consistently, albeit only slightly, more expensive.
- (246) In addition to this quantitative and qualitative analyses which indicate that Niki exerts a considerable competitive constraint on the parties, it is to be recalled that the VIE-ZRH route has already been examined in the previous Lufthansa/Swiss merger Decision<sup>125</sup> where the Commission authorised the acquisition of LX by LH subject to slot release remedies on several routes. With regard to the VIE-ZRH route, LH committed to release slots necessary to support up to four daily frequencies operated by a new entrant. This remedy will continue to be in place for this route after the closing of the transaction.

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124 The comparability of the data collected in the market investigation from different companies may be affected by possibly different methods of data collection. In particular, the parties provided various sets of "flown passenger data".

125 See Case No. COMP/M.3770 – Lufthansa/Swiss.

(247) This possibility to obtain slots under the remedies of the Lufthansa/Swiss Decision considerably lowers entry barriers which would otherwise exist due to the fact that both VIE airport and ZRH airport are congested. In particular, with regard to ZRH airport, runway constraints exist during peak hours and most peak hours are completely full. The peak arrival times are between 06.00 to 06.55, 08.00 to 08.55, 11.00 to 11.55, 16.00 to 16.55, 19.00 to 19.55 and 21.00 to 21.55 and peak departure times are between 07.00 to 07.55, 09.00 to 09.55, 12.00 to 12.55 and 17.00 to 17.55. It follows that the remedies of the Lufthansa/Swiss Decision which will continue to be in place will significantly facilitate entry.<sup>126</sup> Those remedies not only enable new entrants to enter the route, but also allow Niki to further increase its frequencies on the route which would strengthen its market position in particular in relation to time sensitive passengers.

(248) Accordingly, in view of the competitive constraint exercised by Niki, combined with reduced barriers to entry on VIE-ZRH stemming from the remedies under the Lufthansa/Swiss Decision which will continue to be in place after the completion of the proposed transaction, the transaction would not significantly impede effective competition regardless of the relevant counterfactual or the precise market definition.

(3) *The Vienna-Brussels route*

(249) With respect to the Vienna-Brussels route ("VIE-BRU"), someone which [250 000 – 300 000]\* O&D and [350 000 – 400 000]\* total passengers travelled in 2008, OS operates five daily frequencies on weekdays and three and four frequencies on Saturday and Sunday respectively. In the IATA Summer season 2009 SN operates 3 daily frequencies on weekdays and 1 and 2 on Saturday and Sunday respectively, a total of 18 weekly frequencies. In the IATA Winter season 2008/09 SN operated 21 weekly frequencies and will also operate those frequencies in the coming winter season. SkyEurope, a low-cost carrier, entered this route in March 2007 and operates one daily frequency, albeit with larger planes. On 22 June 2009, Sky Europe filed for bankruptcy. However, it is still operating and it recently appears to have received some additional funds.<sup>127</sup>

(250) It should be noted that FR started operations between the secondary airports on BTS airport – CRL airport in April 2009 with three weekly frequencies.

(251) As regards the relevant counterfactual, SN and OS currently compete on VIE-BRU. OS and SN do not have any bilateral or alliance agreement with respect to this route.

(252) According to the parties' estimates the market structure is as follows:<sup>128</sup>

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126 It should be noted that Niki entered VIE-ZRH with slots acquired under the normal slot allocation procedure in 2004, namely before the remedies of the Lufthansa/Swiss decision were in effect.

127 See: [http://www.ftd.de/unternehmen/handel\\_dienstleister/:Angeschlagene-Fluglinie-SkyEurope-findet-Investor/547636.html](http://www.ftd.de/unternehmen/handel_dienstleister/:Angeschlagene-Fluglinie-SkyEurope-findet-Investor/547636.html).

128 LH estimated market shares for some air carriers, whose bookings are not reflected in MIDT (like 4U, Niki, SkyEurope etc.) based on data published by the German Statistical Office and other publicly available information about schedules, frequencies and utilized aircraft, see paragraphs 336-347 of the Form CO. The parties did not consistently provide estimates for all airlines which are only partly covered by MIDT.



Airline	SS 08 figures on VIE-BRU		WS 08/09 figures on VIE-BRU	
	Time Sensitive	All passengers	Time Sensitive	All passengers
<b>SN</b>	[0-5]*%	[20-30]*%	[0-5]*%	[20-30]*%
<b>OS</b>	[50-60]*%	[30-40]*%	[60-70]*%	[40-50]*%
<b>BMI</b>	[0-5]*%	0%	[0-5]*%	[0-5]*%
<b>Combined</b>	[50-60]*%	[50-60]*%	[60-70]*%	[60-70]*%
<b>SkyEurope</b>	[40-50]*%	[40-50]*%	[30-40]*%	[30-40]*%

Source: Estimates of the parties on the basis of MIDT data.

(253) The combined market share of the parties for time sensitive passengers seems to have been underestimated as the parties have based their market share estimates on a split between business class and economy class tickets and SN does not offer any business class tickets, but only flexible economy tickets. SN's response also suggests that SN sells a considerable percentage of fully flexible economy class tickets. Taking into account the fact that many corporate customers consider fully flexible tickets as suited to their needs in view of their time constraints, these tickets should be also considered as belonging to the market of time sensitive passengers. Also, SkyEurope's market share for time sensitive figures as provided by the parties seems highly overestimated.

(254) The table below illustrates the parties' and competitors' market shares on VIE-BRU on the basis of the market investigation.<sup>129</sup>

WS 08/09 figures on VIE-BRU	
Airline	All passengers <sup>130</sup>
<b>SN</b>	[30-40]%
<b>OS</b>	[40-50]%
<b>BMI</b>	[0-5]%
<b>Combined</b>	[70-80]%
<b>NE (SkyEurope)</b>	[20-30]%

Source: transported passengers figures provided by the parties and SkyEurope.

(255) The parties argue that significant slot constraints are absent at BRU airport and VIE airport and that there would therefore be no substantial barriers to entry. According to the parties, competition concerns are unlikely to arise with respect to this route given that the parties face competition from SkyEurope and Ryanair and, in addition, EasyJet has operations at both VIE airport and BRU airport and could easily enter this route if OS/SN were to increase prices.

(256) In the market investigation, the majority of travel agents responded that customers would not switch to a competing carrier even in the case of a significant price increase by OS/SN.

<sup>129</sup> The comparability of the data collected in the market investigation from different companies may be affected by possibly different methods of data collection. In particular, the parties provided various sets of "flown passenger data".

<sup>130</sup> The Commission was not able to reconstruct the market for time sensitive passengers since SkyEurope does not distinguish between time sensitive and non-time sensitive passengers, but offers only one fare class and the price of tickets is purely driven by demand. It provided only a very rough estimate which could not be used for the purpose of market reconstruction. Its estimate seemed too high given its low number of frequencies and the average split between time sensitive and non-time sensitive passengers.

They also predicted a price increase by OS/SN on this route. In addition, many corporate customers stated that the merger will have an impact on this route and voiced concerns that the merger will reduce competition which will lead to increased prices.

- (257) In light of the above, under the current conditions and at the current level of services SkyEurope does not exert sufficient competitive pressure on the parties. The in-depth investigation has clearly confirmed that SkyEurope is not seen as credible alternative to the merged entity even for non-time sensitive passengers. With seven weekly frequencies, namely one daily flight, SkyEurope's services are clearly not an alternative for time sensitive passengers because this frequency does not allow for one-day return trips. In addition, the future of SkyEurope is unclear since the company has recently filed for bankruptcy and might undergo a restructuring process.
- (258) A pricing analysis conducted by the Commission also confirmed that SkyEurope does not constitute a strong constraint for the parties in the market for time sensitive passengers. In relation to business class tickets, the entrance of SkyEurope did not have a noticeable impact on SN and OS's prices. In relation to fully flexible tickets only SN's prices seemed affected while OS' prices seemed unaffected. Regarding non-time sensitive passengers the data did not allow for a conclusive answer.
- (259) FR's activities on BTS airport – CRL airport do not constrain the parties to any meaningful degree. FR started operating on BTS airport – CRL airport in April 2009 with three weekly frequencies. The market investigation has confirmed that flights from VIE airport to BRU airport and BTS airport to CRL airport are not in the same market, as (i) BTS airport is situated 87 km from Vienna city centre, which corresponds to a driving time of more than 60 minutes by car and 75 to 95 minutes by bus, and (ii) CRL airport is located 46 km from the centre of Brussels and is reachable by car in 45 minutes, by bus in 45 minutes or by train in 50 minutes. In addition, the operations between two secondary airports represent a far less immediate constraint than operations between two primary airports. The in-depth market investigation has confirmed that FR operations on CRL-BTS would not act as a competitive constraint on the merged entity, but rather, will create its new demand.
- (260) As regards the Air France-KLM counterfactual, it can be reasonably expected that OS and SN will continue to compete on this route and the transaction therefore raises serious doubts as to its compatibility with the common market also under this alternative foreseeable scenario.
- (261) In terms of barriers to entry, as explained in paragraph (118), VIE airport is congested during peak times. Peak times for VIE airport are between 08.30 and 11.00 and between 16.00 and 20.45. In the IATA Winter season 2008/2009 runway capacity has also been exhausted in the mornings as early as 07:35 until 11:50, with capacity being close to full as early as 06.00. Moreover, there are runway capacity limitations from 21.00 until 06.55. Regarding BRU Airport, although SkyEurope was able to enter the route in March 2007, the market investigation has shown that this airport is currently capacity-constrained during peak times (08.00-10.00 and 18.00-20.00). The capacity constraints at both airports mean that market entry is difficult.

(262) It is concluded from the above that regardless of the exact market definition, the proposed transaction raises serious doubts as to its compatibility with the common market on VIE-BRU, under any possible counterfactual and any possible market definition.

(4) *The Vienna-London route*

(263) On the Vienna-London route ([300 000 – 350 000]\* O&D and [500 000 – 550 000]\* total passengers), an overlap between the parties arises since OS operates Vienna-Heathrow while BMI code-shares on OS on this route by way of a standard free-flow code-sharing agreement. Irrespective of whether or not the transaction leads to the elimination of actual or potential competition, the parties face significant competition coming from British Airways ("BA") in any event, which also operates flights to Vienna from London Heathrow. The current competitive situation on the route is illustrated as follows.

Airline	SS 08 figures on Vienna-London		WS 08/09 figures on Vienna-London	
	Time Sensitive	All passengers	Time Sensitive	All passengers
OS	[50-60]*%	[40-50]*%	[50-60]*%	[50-60]*%
BMI	[0-5]*%	[0-5]*%	[0-5]*%	[0-5]*%
Combined	[50-60]*%	[50-60]*%	[50-60]*%	[50-60]*%
BA	[40-50]*%	[40-50]*%	[40-50]*%	[40-50]*%

(264) In addition, EasyJet serves Vienna-London Luton, and Aer Lingus opened a new base at London Gatwick in April 2009 from which it started operating flights to Vienna.

(265) It can be left open whether the services offered by Easyjet and Aer Lingus belong to the same market as the parties' services on London Heathrow-Vienna, since in any event no competition concerns arise due to the limited increment brought about the transaction and the presence of BA as a strong competitor of the parties on Vienna-Heathrow. This has also been confirmed by most respondents to the market investigation.

(266) It follows that also in relation to the Vienna-London route, the transaction would not significantly impede effective competition, regardless of the relevant counterfactual or the precise market definition.

(5) *Direct-indirect and indirect-indirect overlaps*

(267) The proposed transaction gives rise to a large number of affected routes concerning direct-indirect overlaps between LH and OS both within Europe and from European airports to extra-European destinations. The routes include both short- and medium-haul routes, and long-haul routes. In addition, numerous affected routes, on which both LH and OS provide indirect services, were identified. Also these routes include routes for short-, medium- and long-haul distances both within Europe, and from European airports to extra-European destinations.

(268) The routes were analysed with respect to the market position of the parties and the market share increment brought about by the transaction. Furthermore, the presence and position of

competitors and the number of passengers on each route were assessed. Where necessary, the number and duration of frequencies offered by competitors and their suitability for time sensitive passengers, in particular, were assessed. On the basis of these criteria, no competition concerns were identified. In addition, the market investigation did not reveal any competition concerns with respect to the identified direct/indirect and indirect/indirect overlaps with the exception of LH's and OS' market position in Central and Eastern Europe ("CEE").

- (269) Some respondents to the market investigation in phase I voiced concerns with respect to the strong market position of LH and OS in CEE, concerning mainly the post-transactional control by LH of a very substantial part of a so-called Central European market, particularly as a result of their control of the most important hubs catering CEE and their well-developed networks concerning this area. The results of the more refined phase II market investigation showed, however, that the vast majority of corporate customers in particular do not see any negative impact in relation to a potentially strengthened position of the merged entity for flights serving the CEE and indicated existing alternative competitors.
- (270) OS served 48 destinations in CEE,<sup>131</sup> and LH 40 destinations<sup>132</sup> in 2008, with 26 destinations being served by both LH and OS.<sup>133</sup> There appear, however, to be other significant competitors that serve CEE. In particular, Europe's largest carrier Air France/KLM serves 15 destinations in CEE using its own network, while it serves an additional 11 destinations in co-operation with its SkyTeam partners Aeroflot (the national airline of Russia that has a significant network in CEE due to its current and historical links with CEE countries) and CSA (the Czech flagship carrier).<sup>134</sup> In addition, the third largest European airline, BA, serves 13 destinations in CEE using its own network, while Malev (the Hungarian flagship carrier), a BA partner in the oneworld alliance, serves 22 destinations in CEE. Hence, there are other important carriers that serve CEE and that can provide an alternative to LH and OS.
- (271) The finding that Eastern European carriers can also provide an alternative to LH/OS is further confirmed by the market investigation that revealed that the vast majority of travel agents compare the LH/OS's prices with those of alternative carriers, including Eastern European carriers (such as MALEV or Czech Airlines). Also, the majority of corporate customers indicate that they do not procure their flights from one airline, but, depending on the CEE destination, search for flight alternatives with other carriers, including Eastern European carriers. It thus appears that there are other carriers competing with LH/OS in CEE and can offer alternatives to customers who want to fly to CEE destinations.

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131 Source: OS internal documents, OS Management presentation dated September 2008, p. 3. From the 48 destination, 5 destinations are operated by partner airlines.

132 Source: OS internal documents, OS Management presentation dated September 2008, p. 3. From the 40 destinations served by LH, 23 destinations were served from the LH hub Munich.

133 In 2008, LH, LX and OS served each the following 8 destinations in CEE: Sofia, Prague, Budapest, Warsaw, Bukarest, Belgrade, Moscow, St. Petersburg. Moreover, LH and OS served each further 18 destinations: Tirana, Yerevan, Baku, Sarajevo, Minsk, Tbilisi, Zagreb, Astana, Vilnius, Riga, Krakow, Sibiu, Timisoara, Nizhniy Novgorod, Rostov, Ekaterinburg, Donetsk, Kiev.

134 Source: OS internal documents, BCG presentation to the Supervisory Board dated 28 July 2009, p. 90.

- (272) Some competitors indicated in the market investigation that a lack of air traffic rights to non-EU countries in CEE poses barriers to competition with regard to services to CEE destinations. The Commission is aware of the situation regarding traffic rights, however, recalls that Member States have the obligation to review the allocation of rights under air service agreements, and are also encouraged to give a prominent role to the competition criterion in this review.
- (273) On the basis of Regulation (EC) No 847/2004,<sup>135</sup> and in particular Article 5 thereof, Austria has to ensure the distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory procedure when it concludes an agreement, or amends an agreement or its Annexes, that provide for limitations on the use of traffic rights or the number of Community air carriers eligible to take advantage of traffic rights. On the basis of Article 6 of Regulation (EC) No 847/2004, Austria notified the Commission of the procedures that will be applied, which are about to be published in the Official Journal of the European Union for information purposes. In those procedures,<sup>136</sup> the promotion of competition between providers of air services is one of the elements in the allocation of traffic rights under paragraphs 15 (3), (4), (5) of the procedures.
- (274) In light of the above, it is concluded that the proposed concentration would not significantly impede effective competition with respect to those routes.

## **B. Air transport of cargo**

- (275) LH is active in the air cargo market through its wholly-owned subsidiaries LH Cargo AG and Swiss WorldCargo. It currently operates 15 freighter aircrafts<sup>137</sup> and sells capacity on chartered freighters, in addition to the "belly space" of its passenger flights. OS's activities in the cargo sector are rather limited as they rely on "belly space" cargo capacity on passenger flights.
- (276) As regards intra-European routes, the parties have estimated their combined market share to be approximately [10-20]\*% in volume of the total air cargo transport in Europe and well below that percentage if alternative means of transport are taken into account.
- (277) As mentioned in section V of this Decision, air cargo markets are unidirectional and, regarding routes from Europe to Asia and the Middle East, are assessed on a continent to country basis. On intercontinental routes, the figures provided by the parties and based on

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135 Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, OJ L 157, 30.4.2004, p. 7.

136 96. Bundesgesetz über den zwischenstaatlichen Luftverkehr 2008 (BGzLV 2008), published on 2 July 2008 in the Bundesgesetzblatt für die Republik Österreich. Paragraph 16 (3) of the procedures foresees the reallocation of allocated scarce traffic rights by the Austrian Ministry for Transport, Innovation and Technology on the expiry of five years after a previous allocation of traffic rights.

137 In March 2009 Lufthansa Cargo decided to temporarily remove four freighters from its fleet.

the parties' best estimates<sup>138</sup> show that combined, the parties will exceed [10-20]\*% of the market share on the following routes: Europe-North America, North America-Europe, Europe-Iran, Iran-Europe, Europe-India, Armenia-Europe, Europe-Kazakhstan.

(278) On the routes Europe-North America, North America-Europe, Europe-Kazakhstan, Europe-Iran, the increment after the merger is very small, as OS has a market share of less than [0-5]\*% on all these trade-lanes. Moreover, on all these trade-lanes the parties' combined market share does not exceed [20-30]\*% (on the basis of incomplete CASS data) or [10-20]\*% (on the basis of the parties' best estimates).

(279) With regard to the other routes, the overlap is more significant but still small:

	Market shares based on parties' estimates	
	LH's market share (including LX and BMI)	OS's market share
<b>Armenia – Europe route</b>	[10-20]*%	[5-10]*%
<b>Europe – India route</b>	[20-30]*%	[0-5]*%
<b>Iran – Europe route</b>	[10-20]*%	[0-5]*%

Source: Form CO.

(280) Armenia-Europe is a thin route with outbound traffic of less than [500 – 1000]\* tonnes a year. On such small trade lanes, the merged entity still will face competition from Aeroflot, Air Armenia, Armavia, Czech Airlines and Air Baltic.

(281) Iran to Europe is also a relatively thin route with traffic of [1 000 – 5 000]\* tonnes a year. The parties' market shares are outweighed by those of Iran Air ([40-50]\*%) and Air France-KLM ([20-30]\*%). Other competitors such as Emirates and Turkish Airlines are present on this market.

(282) With regard to Europe-India, the merged entity still will face competition from important and effective competitors such as BA, whose market shares are comparable to those of the parties, and Singapore Airlines, Cathay Pacific and Jet Airways.

(283) The Commission has also analyzed these markets on the basis of CASS and/or WorldACD data only. On such a basis, the merged entity would have market shares exceeding [10-20]\*% on five additional routes: India-Europe, Israel-Europe, Russia-Europe, Europe-Armenia and Syria-Europe.

(284) According to such data, the parties' market share would be over [40-50]\*% on the trade lane from Israel to Europe and from Russia to Europe only. However, as noted, no reliable, public market data for the transport of cargo is available and CASS and/or WorldACD data do not reflect the entire air cargo markets. CASS does not include sales to agents that are not

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138 It should be noted that as there are no public sources offering reliable market data for the transport of cargo towards Asian and Middle Eastern countries, the market shares referred to in this analysis are based on the parties' best estimates on the basis of incomplete CASS data.

registered with IATA, nor direct sales to end-customers. Further, CASS does not include cargo transported by integrators such as DHL, FedEx and UPS. WorldACD data reflect an even smaller proportion of the market as only twenty-four carriers provide their data to WorldACD.

- (285) As a matter of fact, on the trade lane from Israel to Europe, other important carriers like EL Al, CAL (an Israeli all cargo airline) and MNG (an all cargo airline) are also active and are not reflected in the data referred to in the preceding paragraph. Similarly on the trade lane from Russia to Europe, Aeroflot, whose activities are not reflected in the available data, also operates on that route, as well as other significant competitors such as Air France-KLM and Cargolux (an all cargo airline). In the same way, other effective competitors such as BA, Singapore Airlines, Cathay Pacific and Jet Airways (from India to Europe), Aeroflot, Air Armenia, Armavia, Czech Airlines and Air Baltic (from Europe to Armenia) and Cargolux and Turkish Airlines (from Syria to Europe) operate on the India-Europe, Europe-Armenia and Syria-Europe trade lanes. Again, many of those competitors' activities are not reflected in the available data.
- (286) The available data are therefore substantially incomplete: the data do not represent all the players on the markets and do not reflect the real markets sizes and therefore significantly overestimate the parties' market shares. For this reason and in light of the presence of strong competitors on all of the five trade-lanes, the Commission considers that these routes do not raise any competitive issue.
- (287) More generally, it follows from the above that on all the affected routes, other significant competitors are present (combined airlines, all cargo carriers and, to a lesser extent, integrators) that are in a position to substantially constrain the competitive position of the parties in all possible segments of the market. Barriers to entry are lower than in the scheduled passenger air transport services, given the existence of the flexibility of cargo carriers as regards schedules and the possibility to use alternative airports, as shown by the market investigation. The Commission has found that companies operating freighter aircrafts can easily enter new routes in response to demand. As a matter of fact new entrants have entered some of the above routes. Moreover, the market investigation indicated that there is available capacity on the market.
- (288) Finally, the market investigation revealed that contracts are normally concluded for a short duration (six months to a year) and with no exclusivity clause, which allows customers to switch easily between different suppliers.
- (289) In the light of the above, the proposed transaction would not significantly impede effective competition on any of these markets.

### **C. Supply of airline seats to tour operators**

- (290) Both LH and OS sell airline seats to tour operators. In addition, LH exercises, together with Turkish Airlines, joint control over the airline SunExpress, which sells seats to tour

operators and is active in both Germany and Austria. LH and OS are selling more seats to tour operators on short- and medium-haul flights than on long-haul flights.

- (291) The notifying party estimates the size of the market of supply of airline seats to tour operators on short- and medium-haul flights in 2008 at [0-5]\* million seats sold in Austria and [20-30]\* million seats sold in Germany; a combined Austria-Germany market would thus amount to [20-30]\* million seats in 2008.
- (292) On the basis of a combined Austrian-German market for short- and medium-haul flights, the combined market share of the parties would be [10-20]\*% (LH [5-10]\*%<sup>139</sup>/SunExpress [0-5]\*% and OS [0-5]\*%). For the German market, OS has a market share of [0-5]\*% and LH [5-10]\*%/SunExpress [0-5]\*%. The combined market share would be [5-10]\*%. Neither a combined Austrian-German market nor a German market for short- and medium-haul flights would be technically affected as the combined market share of the parties is below [10-20]\*%.
- (293) On an Austrian market for short- and medium-haul flights, OS has a market share of [30-40]\*%, LH has a market share of [0-5]\*% and Sun Express has a market share of [5-10]\*%. The combined market share of the parties would be [40-50]\*%. The notifying party estimated that the biggest competitor, FlyNiki, also has a market share of [40-50]\*%.<sup>140</sup> Further competitors Tunis Air and Nouvel Air have market shares of around [5-10]\*% each.
- (294) The market of the supply of airline seats to tour operators on long-haul flights was estimated by the notifying party at [300 000 – 350 000]\* seats sold in Austria and [3 500 000 – 4 000 000]\* seats sold in Germany. A combined market Austria-Germany would thus amount to [3 500 000 – 4 000 000]\* seats in 2008.
- (295) The combined market shares of the parties on a German, Austrian and a combined Austrian-German market for long-haul flights are in all three cases between [5-10]\*% and [5-10]\*% and thus below [10-20]\*%. On this basis, the markets are technically not affected.
- (296) In the market investigation, some competitors pointed to a strengthening of the position of the combined entity. While some customers indicated that they see a risk of reduction of OS services following the transaction as well as a possible worsening of competitive conditions offered to tour operators, the majority of customers did not see any major impact on their activities.
- (297) In view of the above, and in particular due to the strong market presence of FlyNiki in the Austrian market and the relatively small increment brought about by the transaction, the proposed transaction would not significantly impede effective competition on the market for the supply of airline seats to tour operators.

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139 The market share of LH entails a [0-5]\*% market share of 4U which is only active in the German market for wholesale supply of airline seats to tour operators.

140 The market investigation suggests that the parties overestimated their own market shares.



#### **D. MRO services**

- (298) LH is active in MRO through its wholly-owned subsidiary Lufthansa Technik ("LHT") and provides line maintenance, heavy maintenance, components maintenance and engine maintenance services. OS is active in the provision of line maintenance for its own fleet and for several third party customers through Austrian Technik. OS also provides limited heavy maintenance services at VIE airport and BTS airport and limited components maintenance services at VIE airport.
- (299) With regard to heavy maintenance, components maintenance and engine maintenance services, the overlap between the parties' activities is marginal, in light of the fact that OS' market shares both at a world-wide level and at a European level do not exceed [0-5]\*%. Moreover, in a market characterized by the presence of many important providers of MRO services (such as Air France Industries, KLM Engineering, SAS Components, British Airways Engineering & Maintenance as well as independent providers such as SR Technik, Aveos, Delta Tech Ops and others), the combined entity's market shares will not exceed [10-20]\*% in any of the relevant markets. In light of the limited market shares of the parties, the transaction does not raise any vertical issue.
- (300) With regard to line maintenance, OS is only active in Austria, where LH does not operate. Consequently, no horizontal overlap arises between the parties' activities. With respect to vertical issues, it should be noted that Austrian Technik provides limited line maintenance services to LH: at VIE airport the line maintenance services provided by Austrian Technik to LH represent only [5-10]\*% of the line maintenance services provided to third customers. Similarly, the line maintenance services provided to OS represents a limited percentage of LHT line maintenance services in each of the airports where LHT is active: with regard to German airports, the line maintenance services provided by LH to OS represent [0-5]\*% of all line maintenance services provided to third customers in Germany. Moreover, LHT only accounts for 10 to 20% of the line maintenance provided out of BRU airport and does not provide line maintenance to OS, while SN does not provide MRO services to third parties.<sup>141</sup> Consequently, the transaction will only have limited effects on those markets. For these reasons, the Commission considers that the transaction will not lead to any foreclosure by the parties in these markets.
- (301) In light of the above the proposed transaction would not significantly impede effective competition on any of the above markets for MRO services.

#### **E. In-flight catering**

- (302) LH is active in the in-flight catering markets through LSG Lufthansa Service Holding AG ("LSG"), operating under the brand name LSG SkyChefs, which provides catering services

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<sup>141</sup> With the exception of one or two customers per year and limited to Avro aircrafts.

to LH as well as to third party customers. OS does not have any activities in these markets but purchases catering services from external suppliers.

- (303) As mentioned in the market definition (section V of this Decision), the Commission has recently found that new types of in-flight catering services have come to existence. However, as LH is only active in the traditional catering services, the following analysis only refers to that segment.
- (304) With regard to vertical relationships between the parties, LSG used to provide catering to OS at several European airports but since October 2008 the latter has opted for return catering for all its short- and medium-haul flights, loading catering for both outbound and inbound flights at Vienna. In any event, the transaction will only have limited effects on those markets. In 2008, LGS accounted for approximately [0-5]\*% of OS' total catering costs; moreover, the percentage of in-flight catering provided to OS represented a small percentage of LSG overall in-flight catering sales at each of the airports where LSG used to provide catering to OS (such percentage was below [0-5]\*% at the majority of these airports and did not exceed [5-10]\*% at any of them). For these reasons, the Commission considers that the transaction will not lead to any foreclosure by LH in these markets.
- (305) In light of the above, the proposed transaction would not significantly impede effective competition on the market for in-flight catering.

## **F. Groundhandling**

- (306) Through local groundhandling companies, LH is active at Dresden airport, Leipzig airport, Friedrichshafen airport, and MUC airport. OS provides groundhandling services mainly at VIE airport and to some limited extent at other airports in Austria and abroad.
- (307) The parties' groundhandling activities do not overlap at any airport. On the other hand, the parties provide groundhandling services to one another at some airports. Within the EU, OS provides services to LH at VIE airport and at Timisoara airport, while LH provides services to OS at MUC airport and Dresden airport.
- (308) In light of the significant presence of the parties on the downstream market of scheduled air passenger transport, the markets for ground-handling at VIE, MUC and Dresden airports are considered vertically affected markets. However, it should be noted that at each of these airports, the parties' market shares in the markets for groundhandling never exceed 15%.
- (309) At VIE airport, OS' market shares in the groundhandling segment do not exceed [0-5]\*% while many other effective competitors are active at that airport, such as Fraport Ground Services Austria GmbH and Flughafen Wien AG which operates VIE Airport and is the main provider of ground-handling services.
- (310) Similarly, the dominant provider of groundhandling services at MUC airport is the operator of the airport, Flughafen München GmbH, with a market share of [80-90]\*%, while other competitors such as Aviapartner GmbH, Aerogate München Gesellschaft für

Luftverkehrsabfertigungen mbH and AHS Aviation Handling Services GmbH are also active. Consequently LH's market share at MUC airport is only marginal.

- (311) At Dresden airport, the main provider of groundhandling services is PortGround GmbH, an indirect subsidiary of the operator of the airport, which provides ramp handling services. Passenger handling services are provided by AHS Aviation Handling Services GmbH and Lufthansa Airport Services Dresden GmbH. The latter's market shares do not exceed 15%.
- (312) In light of the above the proposed transaction would not significantly impede effective competition on the market for groundhandling.

### **G. Impact of State aid granted to OS on effective competition**

- (313) The Commission approved EUR 200 million rescue aid for OS on 19 January 2009.<sup>142</sup> This rescue aid consisted of a cash deposit of EUR 200 million provided by ÖIAG in order to secure a EUR 200 million term loan facility for OS [...]\*.
- (314) Furthermore, ÖIAG and LH have agreed that ÖIAG will grant EUR 500 million for a capital increase in OS.
- (315) By Decision adopted by the Commission on the same day as this Decision, the Commission has found that the granting of EUR 500 million by ÖIAG constitutes restructuring aid in favour of OS.<sup>143</sup> As a further consequence of this Decision, the rescue aid will have to be brought to an end.<sup>144</sup>
- (316) This Decision needs to take into account the consequences which the rescue aid and the restructuring aid in favour of OS may have on the maintenance of effective competition in the markets described in sections A to F above.<sup>145</sup>
- (317) Such additional funds at OS' disposal could strengthen its commercial position. However, it is to be recalled that OS is at present in a dire financial situation. Indeed, on 19 December 2008 Austria notified the Commission of its decision to grant rescue aid to the OS Group. On 22 December 2008 the Commission learned that a first tranche of EUR 67 million of this rescue aid was granted to OS to allow it to continue operations, before the Commission could take a position on its compatibility with the common market.
- (318) OS' perilous financial situation is further illustrated by the fact that any stand-alone OS operation would require additional funding, extending significantly beyond the amount of the rescue aid and the restructuring aid.<sup>146</sup> Furthermore, the rescue aid of EUR 200 million

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142 Commission Decision of 19 January 2009 on State aid NN 72/2008, Austrian Airlines – Rescue aid.

143 Commission decision of on State aid C 6/2009.

144 Commission Decision of 19 January 2009 on State aid NN 72/2008, Austrian Airlines – Rescue aid, paragraph 71.

145 CFI, Case T-156/98 RJB Mining, of 31 January 2001 ECR (2001), II-337, paragraph 114, CFI, Case T-374/00 Verband der freien Rohrwerke and Others v Commission, of 8 July 2003, ECR (2003), II-2275, paragraph 169, and CFI, Case T-114/02 BaByliss v Commission, of 3 April 2003, ECR (2003), II-1279, paragraphs 440-441.

146 According to OS internal document [...]\*.

has to a very large extent already been exhausted by OS in order to repay aircraft financing.<sup>147</sup>

- (319) The extent of OS' financial needs is in line with the findings in Commission Decision C6/2009 adopted on the same day as this Decision, according to which the overall cost of restructuring OS exceeds EUR 500 million very significantly.<sup>148</sup>
- (320) Against this background, OS is unlikely to have used or to use the rescue aid and the restructuring aid in a way that would call into question any of the findings in sections A to F above, such as preventing the expansion of competitors. Both the rescue and the restructuring aid aim at rendering the acquisition of OS by LH economically sustainable, in particular at securing the liquidity for OS, reducing its liabilities and restoring its profitability in the long term. The use of these funds by OS will also be monitored by the Commission in the future.<sup>149</sup>
- (321) The rescue and restructuring aid at issue therefore primarily serve the purpose of helping to ensure the survival of OS.<sup>150</sup> Due to this purpose and due to their low level compared to the overall financial need of OS, it follows that none of the conclusions mentioned in sections A to F above are altered by the rescue and restructuring aid.
- (322) That conclusion is further underlined by the strong financial position of LH. Indeed, LH achieved operating results above EUR 1 billion both in 2007 and 2008 and had a total liquidity of EUR 5.2 billion (out of which a strategic minimum liquidity of EUR 2 billion) on 31 March 2009.<sup>151</sup> Compared to such financial strength, any impact of the rescue and restructuring aid on the overall strength of the merged entity is limited.
- (323) In addition to all these reasons, with regard more in particular to the VIE-BRU, VIE-STR, VIE-CGN, VIE-FRA and VIE-MUC routes, the conclusion remains unchanged that the proposed transaction raises serious doubts as to its compatibility with the common market because it may significantly impede effective competition on these routes.
- (324) As regards all other markets mentioned in sections A to F above, for the reasons set out in this section, the State aid will not lead to any significant impediment of effective competition. With regard more in particular to the Vienna-Berlin, Vienna-Düsseldorf, Vienna-Hamburg, Vienna-Hannover, Vienna-Nuremberg, Munich-Linz, Vienna-Zurich and Vienna-London routes as well as the cargo markets, the markets for supply of airline seats to tour operators, MRO services, in-flight catering and groundhandling, it is to be further underlined that strong competitors are present on these markets.

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147 According to OS internal document [...]\*.

148 See paragraph 307 of the Commission decision on State aid C 6/2009.

149 Pursuant to Article 2(5) of Commission Decision C6/2009, the Commission shall until 2015 be provided with annual reports on the implementation of the restructuring plan assessed in that Decision.

150 Accordingly, clause 2 of the Amendment and Waiver Agreement between the Parties states that the amount of EUR 500 million is granted "for the purpose of financial restructuring". See also paragraph 268 of the Commission decision on State aid C 6/2009.

151 See LH financial outlook of 25 June 2009, accessible at <http://investor-relations.lufthansa.com/fileadmin/downloads/en/charts-speeches/LH-Financial-Outlook-2009-06-25-e.pdf>.

(325) Furthermore, as regards the direct-direct routes which are only served by one of the parties, the market investigation has not revealed that the granting of the additional funds to OS would change the findings in relation specifically to these routes, that is to say that the transaction would lead to the elimination of potential competition. On the contrary, the main reasons why no competition concerns arise in relation to these routes (namely low demand on most of these routes, entry strategies of LH and OS as evidenced by internal documents, absence of parallel operations pre-co-operation on almost all of these routes) apply irrespectively of the State aids at issue. Furthermore, with regard more in particular to the entry strategy of OS, the market investigation did not reveal any indications that OS would change its entry strategy in view of the additional funds at issue, which is also evidenced by the fact that OS already exhausted almost all the rescue aid without changing its entry strategy. It is therefore unlikely that OS would use any such additional funds to enter these routes.

## **VIII. EFFICIENCIES**

(326) While the notifying party argues that the proposed transaction will likely generate significant cost savings and other efficiency gains for the benefit of consumers, LH has not put forward any evidence in support of such efficiencies. In particular, LH merely notes that small carriers such as OS suffer from inherent competitive disadvantages in areas such as fleet optimization and that without the transaction, OS would likely have to discontinue or at least massively reduce its activities. At the same time, LH points to its successful integration of LX and argues that the transaction will have comparable benefits to OS and its customers as LX' turnaround had on LX and its customers. As set out in the Horizontal Merger Guidelines, the three following cumulative conditions apply: (i) the efficiencies will benefit consumers, (ii) the efficiencies are merger specific and (iii) the efficiencies are verifiable. LH's broad claims clearly do not provide the necessary evidence for the Commission to accept that these three conditions are satisfied. It is thus concluded that there is not sufficient evidence that the efficiencies are verifiable, merger-specific, and that they would benefit consumers. Consequently, the Commission rejects the claim that efficiencies generated by the merger counteract the negative effects on competition identified in Section VII.

## **IX. COMMITMENTS SUBMITTED BY LH**

(327) In order to address the competition concerns identified by the Commission during its market investigation on the VIE-STR, VIE-CGN, VIE-MUC, VIE-FRA, and VIE-BRU routes, LH submitted commitments on 10 July 2009 pursuant to Article 8(2) of the Merger Regulation. On 17 July 2009 and 27 July 2009, LH submitted revised versions of the commitments. Further to the submission of the revised version of the commitments on 27 July 2009, the Commission launched a market test in order to gather the opinion of competitors and customers on these commitments. In light of the results of the market test, LH presented a final version of commitments on 31 July 2009 ("the Commitments"), which addressed weaknesses identified in its previous proposal.

(328) The Commitments submitted by LH aim at reducing the barriers to entry and at facilitating entry of (a) New Entrant(s) or expansion of competitors already present on any

of the above-mentioned routes. The Commitments comprise a number of measures and consist, in particular, in the release and transfer of a number of slots at the airports in Vienna, Stuttgart, Cologne/Bonn, Munich, Frankfurt and Brussels, as well as several ancillary measures.

**A. Description of the Commitments**

*(1) Commitments concerning slots*

*a. Slot release on city pairs with competition concerns*

(329) Under the Commitments, the parties commit to make slots<sup>152</sup> available, according to a specific procedure, at the airports in Vienna, Stuttgart, Cologne/Bonn, Munich, Frankfurt and Brussels on the five routes on which the Commission identified competition concerns<sup>153</sup> (hereafter the "Identified City Pairs").

(330) The number of slots to be made available shall enable a New Air Service Provider<sup>154</sup> (hereafter also referred to as the "New Entrant") to operate the following numbers of frequencies on the Identified City Pairs:

(i) VIE-STR: up to three (3) frequencies per day;

(ii) VIE-CGN: up to three (3) frequencies per day, but not more than 18 frequencies per week;

(iii) VIE-FRA: up to five (5) frequencies per day;

(iv) VIE-MUC: up to four (4) frequencies per day;

(v) VIE-BRU: up to four (4) frequencies per day, but not more than 24 frequencies per week.

(331) The number of slots will be reduced by the number of slots already transferred to a New Entrant under the Commitments, unless these slots cease to be served by the New Entrant and revert subsequently to the parties.

(332) With regard to all Identified City Pairs except for VIE-FRA and VIE-MUC, where specific provisions apply, frequencies already served by an airline independent of or

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152 That is to say, a permission given to an aircraft to use infrastructure at a given airport on a specific date and time for the purpose of landing and take-off.

153 These are routes between the following city pairs: VIE-STR, VIE-CGN, VIE-MUC, VIE-FRA and VIE-BRU.

154 Defined as "Any airline or airlines that are each members of the same alliance (other than the Parties including all airlines controlling it/them or controlled by it/them), that individually, or collectively by Codeshare, provide(s) a new or additional Competitive Air Service". 4U or any other carriers controlled by the parties at any time during the application of the Commitments are not considered as eligible to obtain slots under the Commitments.

unconnected to the parties on an Identified City Pair shall be counted against the number of slots to be made available by the parties to that airline under the Commitments.

- (333) With regard to the VIE-FRA route, the two daily frequencies currently operated by Niki (three frequencies to the extent that Niki obtains a third slot from LH as from the IATA Winter Season 2009/2010) will be deducted from the number of slots to be made available under the Commitments. If Niki were to exit one or more of these frequencies in advance of acquiring grandfathering rights, such frequencies will be made available to New Entrants under the Commitments.
- (334) Niki will be entitled to exchange the slots it received from LH in Frankfurt according to the existing slot lease agreement between LH and Niki against slots, which LH makes available under the Commitments. However, in order to take LH's wave structure at FRA airport into account, LH shall not be obliged to transfer to Niki more than one slot at FRA airport during each of the following time periods:<sup>155</sup>

Arrival	Departure
05:35 - 08:00	06:30 - 08:15
08:05 - 10:20	08:20 - 11:35
10:25 - 14:00	11:40 - 15:05
14:05 - 15:30	15:10 - 16:15
15:35 - 17:50	16:20 - 19:45
17:55 - 21:50	19:50 - 22:25

- (335) Furthermore and regardless of whether Niki opts for obtaining new slots from the parties in exchange for its current slots at FRA airport,<sup>156</sup> LH undertakes to amend its existing slot lease agreement with Niki to reflect the provisions of the Commitments, in particular as regards the possibility for Niki to acquire grandfathering rights with regard to these slots, as described in more detail in paragraph (342) (whereby the period necessary to obtain grandfathering rights foreseen in the Commitments will begin with the start of the IATA Winter Season 2009/2010).
- (336) In addition, and only if no applicant that is not member of Star Alliance requests a remedy slot for the IATA Summer season 2010 (or the first season for which the procedures for implementation of the Commitments would be in place, whichever is the later) one frequency operated by Adria Airways will be deducted from the number of slots to be made available under the Commitments. Such a deduction would initially apply for a period of four consecutive IATA seasons and for every subsequent period of two years until a Non-Star Alliance applicant requests a remedy slot.

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<sup>155</sup> If Niki already has two slots in one time period, LH shall be obliged to grant any request by Niki to exchange up to two slots in that time period, but shall be entitled to ensure that the relevant slots are at least 105 minutes apart.

<sup>156</sup> Niki may retain any or all of its existing slots for which it would not seek an exchange.

- (337) Moreover, LH undertakes to amend its existing agreements with Adria Airways with respect to one slot to reflect the provisions of the Commitments, provided however that Adria Airways shall not acquire grandfathering rights.
- (338) With respect to the VIE-MUC route, where Niki currently operates three daily frequencies for which it received slots via the normal slot allocation procedure, the Commitments provide that Niki will be entitled to exchange its current slots on this route against slots which LH makes available under the Commitments. Regardless of whether or not Niki decides to re-time its current slots under the Commitments, Niki's frequencies shall be deducted from the total number of slots to be made available by the parties on this route. If Niki were to exit from one or more of its frequencies,<sup>157</sup> such frequencies will be made available to New Entrants under the Commitments.
- (339) Finally, with respect to the routes VIE-STR and VIE-CGN, LH is already obliged to make slots available to New Entrants on the basis of a previous merger decision, namely the Commission's Decision in case COMP/M.3940 – Lufthansa/Eurowings.<sup>158</sup> To the extent that the parties have already made slots available to a New Entrant pursuant to the commitments in that case, such slots will be counted against the number of slots to be made available pursuant to the Commitments in this case. New Entrants will be able to choose slots for these two routes pursuant to which commitments they want to apply, namely those submitted in the previous case or those submitted in this case.

*b. Conditions pertaining to the slot transfer*

- (340) The slot transfer procedure foreseen by the Commitments will run in parallel with the normal slot allocation procedure. An airline wishing to obtain slots on one of the Identified City Pairs will request slots through the normal slot allocation procedure and apply for a slot transfer under the Commitments at the same time. If the applicant's slot request to the slot coordinator is not met as a result of the IATA Scheduling Conference, the Commitments provide that the parties must offer to transfer the requested slots to the applicant within one week following the applicant's commitment to operate them. Slots must be released free of charge and within 20 minutes of the time requested by the applicant if either of the parties has slots available in this timeframe. Otherwise, the parties must offer the slots closest in time to the applicant's request.
- (341) The slot lease agreement between the parties and the applicant must be signed and the transfer performed within three weeks after the Slot Handback Deadline, which is 15 January for the IATA Summer season and 15 August for the IATA Winter season. The slot lease agreement will have a duration equal to the Utilization Period of the relevant Identified City Pair,<sup>159</sup> but the New Entrant will have the right to terminate the agreement at the end of

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<sup>157</sup> As regards slot obtained by Niki under the present Commitments, this only applies if Niki has not yet obtained grandfathering rights at the time of its exit.

<sup>158</sup> Case No. COMP/M.3940 – Lufthansa/Eurowings.

<sup>159</sup> I.e. two consecutive IATA seasons for all Identified City Pairs except for the route VIE-FRA, and eight consecutive IATA seasons for VIE-FRA.



each IATA season without penalty. Finally, the Commitments provide that a New Entrant who decides to operate the greatest number of routes will be favoured.<sup>160</sup>

*c. Grandfathering rights*

(342) The Commitments also provide for the New Entrants' possibility to acquire grandfathering rights in relation to slots obtained from the parties. The New Entrant will obtain grandfathering rights over these slots, that is to say, will be entitled to use the slots transferred from the parties at both ends of any Identified City Pair for a different intra-European city pair than the Identified City Pairs, once it has served the relevant Identified City Pair(s) during two full consecutive IATA seasons for all Identified City Pairs except for the VIE-FRA route; and eight consecutive IATA seasons for the VIE-FRA route (respectively, the "Utilization Period"). By contrast, if the New Entrant ceases to operate the slots transferred in the relevant Identified City Pair before the end of the Utilization Period, these slots will be handed back to LH and will be made available under the Commitments for another New Entrant.

*d. Star Alliance members as New Entrants*

(343) The above described provisions are only fully applicable to New Entrants which are not members of Star Alliance.

(344) In principle, Star Alliance members can also obtain slots in the framework of the Commitments but non-Star Alliance members will be given a higher priority if several potential entrants apply for slots on the same route under the Commitments. Priority will always be given to a non Star Alliance applicant, that is, even if the Star Alliance Member applies for a larger number of routes than a non-Star Alliance applicant.

(345) Furthermore, a Star Alliance entrant will not have the possibility to acquire grandfathering rights in relation to slots obtained from the parties. A Star Alliance entrant will not be able to enter into code-share agreements or revenue-sharing/profit-sharing joint ventures with the parties or other Star Alliance partners on the Identified City Pairs. When the Star Alliance member ceases operating any of the slots released under the Commitments, the parties have to offer these slots to New Entrants again.

(346) Lastly, if a Star Alliance member obtains slots under the Commitments, specific conditions can be imposed by the Commission, notably to guarantee the independence of the Star Alliance applicant from the parties.

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<sup>160</sup> This applies only in case there are at least two applicants that are not member of Star Alliance.

(2) *Other commitments and other provisions*

a. *Special prorate and code-share agreements*

(347) The Commitments offer a New Entrant the possibility to enter into a special prorate and code-share agreement allowing the New Entrant to place its codes on flights with a true origin and destination in either Austria, Germany and/or Belgium, provided part of the journey involves an Identified City Pair. The conditions of such a special prorate agreement shall be such that the New Entrant has equal treatment with LH's Star Alliance partners on the same Identified City Pair.

b. *Other provisions*

(348) The slot release commitments are supplemented by other commitments such as the possibility for a New Entrant to conclude interlining and Frequent Flyer Programme access agreements with the parties as well as intermodal agreements with a railway or other surface transport company.

(349) The Commitments foresee the appointment of a Monitoring Trustee who will monitor the parties' compliance with the Commitments and will assist the Commission during the slot transfer procedure provided for by the Commitments.

(350) The Commitments also contain provisions on fast-track dispute resolution according to which the New Entrant can decide to settle any dispute with the parties in relation to the Commitments through arbitration. Both the New Entrant and the parties will then be bound by the arbitration decision. The burden of proof in any dispute requires the New Entrant to provide *prima facie* evidence of its case and the parties to provide evidence to the contrary.

(351) The Commitments, in particular the obligation of slot transfer, are indefinite in time but contain a review clause.

**B. Analysis of the Commitments**

(352) Concerning the suitability of commitments aiming at facilitating entry of a new competitor, the Commission notice on remedies acceptable under the Merger Regulation and under Commission Regulation (EC) No 802/2004<sup>161</sup> ("the Commission notice on remedies") states that "[o]ften, a sufficient reduction of entry barriers is not achieved by individual measures, but by [...] a commitments package aimed at overall facilitating entry of competitors by a whole range of different measures."

(353) The Commitments submitted by the notifying party constitute a comprehensive package which takes into consideration past experience with commitments in merger cases in the

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<sup>161</sup> OJ C 267, 22.10.2008, p. 1.

aviation sector. The Commitments have generally received a positive evaluation from the competitors, customers and other market participants who replied to the market test.

(1) *Slots*

(354) The Commitments take account of the fact that slot congestion is the main entry barrier on the problematic routes in this case. In effect, with the exception of CGN airport, which is a "Schedules Facilitated" airport,<sup>162</sup> all the airports concerned by the Identified City Pairs are congested (and in some cases heavily so). In the light of this, the Commitments are designed to remove this barrier and foster entry on the routes where competition concerns were identified.<sup>163</sup>

a. *Number of slots*

(355) The slots made available by the parties will enable existing competitors or one or more New Entrants to sufficiently replace the competitive pressure between the parties that is eliminated by the proposed transaction.<sup>164</sup>

(356) Concerning all Identified City Pairs the market test has largely confirmed that the number of slots offered in the Commitments is sufficient for another player(s) who will offer new or additional frequencies to effectively compete with the parties.

(357) Some respondents have voiced concerns with regard to the fact that the Commitments foresee a deduction of frequencies of existing players on the VIE-FRA and VIE-MUC routes from the number of slots to be made available under the Commitments for these routes and thus limit in particular entry on these routes.

(358) However, both the VIE-FRA and the VIE-MUC route present particular circumstances which justify such a deduction of frequencies of existing players in this case:

*Vienna-Frankfurt*

(359) As regards the VIE-FRA route, it should be noted that both Niki and Adria Airways have entered this route on the basis of slots that LH made available to these players with a view to

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162 A "scheduled facilitated airport" is an airport with potential for congestion but which is amenable to resolution by voluntary co-operation between air carriers and where a schedules facilitator has been appointed to facilitate the operations of current and intended operators at that airport.

163 Although CGN airport is not coordinated, VIE airport is congested with slot shortage during peak times. The slot pairs offered on the VIE-CGN route will therefore also serve to facilitate entry on this route, notably at VIE airport.

164 In this regard, it should be noted at the outset that the level of frequencies presently operated by the parties does not result from an independent operation pre-merger, but is primarily based on a "divisions of tasks" in the framework of their joint venture co-operation. Indeed, the parties' joint venture co-operation has for operational reasons led at various instances to a change of operating carriers and/or level of frequencies operated by both parties (See for example Form CO p. 63, "LH/AUA Self-Assessment" p. 4 and reply of the parties to question 21 of request for information of 27 April 2009). It follows that the level of frequencies currently operated by the parties only has a limited relevance for the level of frequencies required under the Commitments in order to remove the serious doubts identified for the relevant routes.

complying with Community competition rules. As explained in paragraph (65), the Commission exemption decision of 2002 essentially consisted in a commitment of the parties to make slots available to (a) New Entrant(s) for any Austria-Germany route chosen by it/them up to a maximum of 40% of the slots that LH and OS operated on the route in question. LH appears to have made available slots to Adria Airways in 2001 by means of a lease agreement in view of the imminent exemption decision.<sup>165</sup> Similarly, as explained above in paragraph (162), Niki entered the route in 2006 on the basis of two slots at FRA airport which LH transferred to Niki by means of a lease agreement with a view to complying with Article 81 of the Treaty following the parties' self-assessment, and it recently received a further slot from LH in order to operate a third frequency on the route as of the winter season 2009/2010.

(360) As the slots currently used by Niki were thus effectively made available by LH, it appears justified to deduct Niki's frequencies from the number of slots to be made available under the Commitments, subject to the further provisions in the Commitments (such as the possibility of re-timing). For the same reason, and taking into account the fact that the competitive constraint emanating from Adria Airways upon the parties is limited, it appears justified to further deduct one frequency of Adria Airways, subject to the further provisions in the Commitments (temporary restriction of such a deduction etc.). However, such a deduction of an Adria Airways' slot only takes place unless an applicant that is not member of Star Alliance submits a slot request for the summer season 2010.<sup>166</sup> In addition, the deduction of an Adria Airways' slot is not permanent but New Entrants have the opportunity to apply for that slot every four IATA seasons or in case Adria Airways ceases its operations on the VIE-FRA route.

(361) This conclusion is reinforced by the fact that the Commitments on VIE-FRA are designed so as to allow either expansion of Niki, which could obtain up to two additional slots in addition to the three slots already transferred to it, or entry of a new player with two frequencies, subject to the circumstances outlined above.<sup>167</sup>

(362) These considerations are confirmed by the positive overall assessment of the remedies for this route in the market test. Indeed, a majority of respondents take the overall view that the Commitments will enable Niki and/or a New Entrant to provide a competitive and viable air service on the VIE-FRA route. Furthermore, respondents widely agree that the Commitments overall sufficiently facilitate and increase the likelihood of entry/expansion, and thus solve the competition concerns on the VIE-FRA route.

#### *Vienna-Munich*

(363) As regards the VIE-MUC route, it is to be recalled that Niki already operates the route with three frequencies which it obtained under the normal slot allocation procedure. In order to assess the impact of a deduction of Niki's existing frequencies on the effectiveness of the

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165 See reply to request for information to Adria Airways of 22 July 2009.

166 Or the first season whereby the procedures for implementation of the present Commitments would be in place.

167 In particular, in order to receive more than one additional slot, Niki and/or a new entrant need to apply for remedy slots for the IATA season summer 2010 or periods of two years afterwards.

Commitments, it is illustrative to distinguish the situations in which Niki may either wish (i) to expand its existing services; (ii) to exit the route; or (iii) to maintain the current level of frequencies.

(i) With regard to an expansion of Niki's existing services, it should be recalled that according to the findings of the market investigation mentioned in paragraphs (147) et seq., Niki does not represent a sufficient competitive constraint on the parties, due in particular to the timing of its flights and the number of its frequencies. The Commitments allow Niki both to obtain an additional slot as well as to re-time all of its existing frequencies and therefore sufficiently address the shortcomings of Niki's existing services on the route. Accordingly, almost all respondents to the market test consider that the Commitments enable Niki to provide a viable and competitive air service.

(ii) If Niki decided to leave the route, the Commitments would enable (a) New Entrant(s) to enter the route with up to four frequencies, thus allowing the New Entrant(s) to provide a viable and competitive air service.

(iii) If Niki decided to maintain its current level of frequencies, any New Entrant would only be able to obtain one slot under the Commitments. While the provision of competitive air services in particular for time sensitive passengers generally requires more than one daily frequency, it should be noted, as mentioned in footnote 80 above that MUC airport expects significant capacity extensions to be in place in the near future. In particular, a third runway is currently in the second phase of an extensive approval process and is expected to be operational as of 2011. This third runway will increase co-ordination of up to 120 movements per hour compared to 90 movements per hour with the existing two-runway system and will be available to both terminals at MUC airport. These planned capacity extensions increase the likelihood that New Entrants would in the near future (in particular once the economic climate for air transport services referred to below in paragraphs (384) and seq. has improved) be able to obtain slots under the normal slot allocation procedure.<sup>168</sup> At the same time, they can obtain one slot under the Commitments in relation to which they can have grandfathering rights after two seasons and which will therefore further incentivise them to enter the route.

(364) The Commission considers that these elements taken together justify a deduction of Niki's existing frequencies from the slots to be made available under the Commitments and will therefore allow Niki and a New Entrant to adequately reproduce the constraining effect that LH and OS would exercise upon each other in the absence of the transaction.

(365) Those conclusions are further in line with the overall assessment of the remedies for this route in the market test. In particular, respondents widely agree that the Commitments solve the competition concerns on the VIE-MUC route. Furthermore, a majority of respondents take the view that the Commitments overall sufficiently facilitate and increase the likelihood of entry/expansion, and thus enable Niki and/or a New Entrant to provide a competitive and viable air service on the route.

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<sup>168</sup> In this context it should be noted that Niki was able to commence its services on the VIE-MUC route in 2007 on the basis of slots it has obtained in the normal slot allocation procedure.

*b. Allocation of slots*

- (366) The slots must be allocated within only 20 minutes from the initial request which allows tightly adjusted schedules in order to ensure short turnaround times. Furthermore, apart from LH's wave structure at FRA airport referred to in paragraph (334), the Commitments contain no limitations concerning the transfer of slots in peak times, which increases the attractiveness of the slots offered. Moreover, the Commitments contain more convenient and efficient procedures for the allocation of slots than the procedures foreseen by remedies in previous airline merger cases. The enhanced slot allocation mechanism in this case enables New Entrants to submit their slot allocation requests much earlier in the season, thus giving such New Entrants sufficient time to launch and market their new services.
- (367) Moreover, already for the duration of the slot lease agreement and, in any case, once the New Entrant has acquired grandfathering rights, it will not have to go through the slot allocation procedure provided for in the Commitments every season.<sup>169</sup> The market test has confirmed the efficiency of the slot allocation mechanism proposed. In fact, a large majority of the respondents considered that the procedure foreseen by the proposed remedies for the slot release would allow a New Entrant to obtain the required slots in a timely and satisfactory manner.

*c. Possibility for Niki to exchange slots on the Vienna-Frankfurt and Vienna-Munich routes and amendment of existing slot lease agreement regarding the Vienna-Frankfurt route so as to include the provisions of the Commitments*

- (368) The Commitments provide that Niki will be entitled to exchange its current slots on the VIE-FRA and VIE-MUC routes against slots which LH makes available under the Commitments and that the existing slot lease agreement between LH and Niki for the VIE-FRA route will be amended so as to reflect the provisions in the Commitments (in particular, concerning the possibility of Niki to acquire grandfathering rights). These provisions enable Niki to better adapt the timing of its slots to demand and to improve its current offer and market position on both routes. As a result, Niki's offer is likely to become more attractive and Niki will be able to exert increased competitive pressure on the parties.
- (369) While the possibility for Niki to exchange its current slots for the VIE-FRA route is restricted by Section 1.1.3(iii) of the Commitments in view of LH's wave structure at FRA airport, that is, that LH shall not be obliged to transfer to Niki more than one slot at FRA airport during each wave as defined in that Section, the revised version of the Commitments of 31 July 2009 introduced several improvements in that regard.
- (370) First of all, if Niki already has two slots in one time period, LH shall be obliged to grant any request by Niki to exchange up to two slots in that time period, but shall be entitled to ensure that the relevant slots are at least 105 minutes apart. This ensures that Niki will be able to maintain its two slots in the attractive afternoon/evening wave (from 16.20 to 19.45) and to re-time all its existing slots.

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<sup>169</sup> This is of particular relevance for the VIE-FRA route where the Utilization Period necessary for grandfathering is eight IATA seasons.

(371) Furthermore, the revised Commitments of 31 July 2009 clarify that Niki will also be free to retime any or all of its slots.<sup>170</sup>

(372) These improvements ensure the effectiveness of the re-timing provisions on the route VIE-FRA.

*d. Grandfathering rights*

(373) The attractiveness of the Commitments is also enhanced by the prospect of acquiring grandfathering rights after a Utilization Period of only two full consecutive IATA seasons for slots on all Identified City Pairs except the VIE-FRA route, and eight full consecutive IATA seasons for the VIE-FRA route. Granting of grandfathering rights represents an additional incentive for New Entrants to enter on the Identified City Pairs as slots are particularly valuable assets especially at FRA, VIE and MUC airports due to considerable slot constraints at these airports.

(374) As regards the VIE-FRA route, while some respondents have voiced concerns as regards the length of this period, the longer Utilisation Period is justified by the higher value of the slots at FRA airport, which in turn increases the risk that an entrant would enter on the VIE-FRA route merely to obtain these valuable slots and to use them subsequently on other routes.<sup>171</sup> Indeed, the market investigation revealed that FRA airport is far more congested than any other airport subject to the Commitments (see paragraph (182)) and in order to ensure utilisation of the slots to be made available by LH at FRA airport on the very route VIE-FRA a longer utilisation period appears to be justified. Furthermore, in line with previous Commission decision practice,<sup>172</sup> a Star Alliance entrant will not have the possibility to acquire grandfathering rights in relation to slots obtained from the parties.

(375) The majority of the respondents to the market test confirmed that they consider the Utilization Period proposed in the Commitments after which grandfathering rights will be granted to the New Entrant as adequate.

*(2) Other commitments and other provisions*

*a. Special prorata and code-share agreement*

(376) Many respondents to the market test considered the possibility offered to the New Entrant(s) to enter into a special prorata and code-share agreement with the parties as an additional incentive to enter on the Identified City Pairs, while several other respondents only see limited added value in such agreements.

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170 In addition, the revised Commitments of 31 July 2009 provide, with regard to the interaction of the "20 minute-rule" (see paragraph (340)) and LH's wave structure, that, in case a slot is granted by LH in a different wave than in which Niki had requested it, such a slot will be deemed to be granted in the time period in which Niki had requested it. This ensures that the "20 minute-rule" will not have a negative impact on the ability of Niki to obtain slots in LH's wave structure.

171 See also Case No. COMP/M.5335 – Lufthansa/SN Airholding, paragraph 454.

172 See Case No. COMP/M.5335 – Lufthansa/SN Airholding, paragraph 440.

*b. Other provisions*

- (377) As regards other provisions in the Commitments, such as the possibility for a New Entrant to participate in Frequent Flyer Programs, interlining agreements or intermodal agreements, respondents to the market test considered these provisions generally as additional, although not critical, incentives for a New Entrant. As regards interlining agreements, the Commission's investigation indicated that the lack of such a solution was in fact one of the reasons for third party carriers to exit routes between Germany and Austria.
- (378) As a further improvement introduced in the Commitments of 31 July 2009, a Monitoring Trustee, approved by the Commission, will have to be appointed before the closing of the transaction, thereby ensuring a swift implementation of the Commitments.
- (379) The Commitments of 31 July 2009 further foresee that the Monitoring Trustee will ensure that the availability of slots is made public well in advance of each IATA season. This provision will ensure and increase the future effectiveness of the Commitments. This is of particular importance for the VIE-FRA route where the slots currently held by Adria Airways will become available in two years intervals.

**C. Overall assessment of the Commitments**

- (380) With respect to commitments aiming at facilitating entry of new competitors, the Commission notice on remedies states they can be sufficient to remove the competition concerns raised by a proposed concentration in that they entirely remove any obstacle to effective competition, if they "actually make the entry of new competitors timely and likely". If it cannot be concluded that the lowering of the entry barriers by the proposed commitments will likely lead to the entry of new competitors in the market, however, the remedies package will normally be rejected.<sup>173</sup>

*(1) Interest expressed by competitors in entering or expanding on the Identified City Pairs*

- (381) In this case, several competitors responding to the market test expressed interest in entering some or all Identified City Pairs in the IATA Summer season 2010. In particular, M.A.P. Management + Planning GmbH, a charter airline, expressed interest in entering all routes at issue with one to two frequencies. Furthermore, Croatia Airlines and Robin Hood expressed interest, under certain reservations, to enter with two frequencies on the VIE-MUC route and, respectively, on the VIE-STR and VIE-BRU routes.
- (382) It should also be noted in this context that some of the parties' most important competitors already have bases at almost all the airports concerned. More specifically, Niki has a base at

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<sup>173</sup> It should be noted, however, that paragraph 63, footnote (4), of the Commission notice on remedies state that, in air transport mergers, a mere reduction of barriers to entry by a commitment of the parties to offer slots on specific airports may not always be sufficient to ensure the entry of new competitors on those routes where competition problems arise and to render the remedy equivalent in its effects to a divestiture.



VIE airport while its partner Air Berlin has bases at the airports of FRA, MUC and STR.<sup>174</sup> Furthermore, TUIfly, which currently does not compete with the parties on any of the Identified City Pairs and is in the process of being acquired by Air Berlin, has bases at FRA, MUC, STR and CGN airport. Moreover, SkyEurope which is currently under insolvency protection but reportedly received new capitals also has a base at VIE airport. These airlines therefore appear as plausible candidates for taking up the slot remedies at least on some of the routes.

(383) The market test of the commitments submitted on 27 July 2009 and the market investigation thus revealed some interest and indications for a likely and timely entry or expansion of competitors on the Identified City Pairs.

(2) *Evaluation in the current economic context of the air transport industry and attractiveness of the remedies package as a whole*

(384) Furthermore, in assessing the likelihood of entry on any of the Identified City Pairs in this case, the Commission must take into account the fact that the air transport industry is facing a dire crisis at the time of the market test (i.e. in July 2009). These difficulties are recognised in the recent suspension of the "use it or lose it" rule of Article 10 of Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports.<sup>175</sup>

(385) This greater than usual uncertainty about the evolution of the market in the coming months is also reflected in the limited interest or reservations expressed by competitors to enter and/or expand on the Identified City Pairs. Indeed, in the present exceptional economic circumstances, any such expressions of interest are more cautious than they would have been under normal circumstances.

(386) That the crisis is likely to have seriously reduced any entry or expansion plans of many airlines on any routes, including the Identified City Pairs, is also illustrated by the statements of several corporate customers responding to the market tests in phase I and II which explicitly noted that the current general economic situation is likely to constitute a significant obstacle for air carriers to enter or expand services on any of the Identified City Pairs. For instance, one corporate customer stated that the "significantly decreased total travel demand could reduce the likelihood that competitors will start or expand operations" while another corporate customer emphasised that the "current economic climate could be an obstacle to enter (or expand) on the Identified City Pairs".<sup>176</sup>

(387) Against this background, the expression of interest expressed by competitors in entering the Identified City Pairs or expanding services on them mentioned above in paragraph (381)

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174 See reply to question 43 of the phase I market investigation questionnaire competitors and reply to question 14 of the phase II market investigation questionnaire competitors.

175 OJ L 14, 22.1.1993, p. 1. See Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, OJ L 167, 29.6.2009, p. 24. Section 1.3.4 of the present Commitments refer to Article 10 of Regulation (EEC) No 95/93 in the context of defining situations of "Misuse" and thus make clear that any suspension of the "use it or lose it" rule under EU law also applies for slots available under the Commitment.

176 Replies to question 12 of the phase II market test.

rather illustrate that the Commitments make entry/expansion as timely and likely as possible under the present economic circumstances. Furthermore, it is clear that these exceptional circumstances are temporary in character and first signs of recovery have already been reported for several Member States as well as non-EU countries such as the United States of America, whereas the Commitments remain in place for an indefinite time period.

(388) That the Commitments are likely to result in actual entry or expansion, in particular once the current crisis is over, is further illustrated by the following considerations.

*a. Attractiveness of Identified City Pairs as such*

(389) All of the Identified City Pairs included in the remedies package are highly attractive in that these routes connect some of the main business centres in Europe and therefore attract a significant proportion of high yield business traffic.<sup>177</sup> This is illustrated by the fact that the VIE-FRA ([600 000 – 650 000]\* total passengers, and thereof [400 000 – 450 000]\* O&D passengers) and VIE-MUC ([350 000 – 400 000]\* total passengers, and thereof [200 000 – 250 000]\* O&D passengers) routes are highly profitable and very commercially attractive routes for both parties.<sup>178</sup>

*b. Improvements in comparison with previous cases in the air transport sector*

(390) Moreover, in comparison with previous practice in the air transport sector<sup>179</sup> the Commitments in this case introduce some major improvements designed to ensure their effectiveness and to increase their attractiveness to competitors wishing to enter the Identified City Pairs or to expand their existing services on them.

(391) As already explained in more detail in paragraph (342), improvements include, firstly, the possibility to acquire grandfathering rights for the slots transferred under the Commitments once these slots have been used for only two IATA seasons with respect to all of the Identified City Pairs, except VIE-FRA, for which such grandfathering rights will be acquired after eight IATA seasons. This possibility to acquire grandfathering rights after a relatively short period significantly improves the incentive of the parties' competitors to enter the Identified City Pairs.

(392) Secondly, the slots must be allocated within only 20 minutes from the initial request (instead of 30 minutes, as provided for in the above mentioned previous air transport cases).

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177 According to passenger surveys conducted by the parties the percentages of business travellers on these routes are as follows: up to [50-60]\*% for VIE-STR, [40-50]\*% for VIE-CGN, [60-70]\*% for VIE-MUC and [60-70]\*% for VIE-FRA. Whilst for the VIE-BRU route, the parties did not provide figures of the basis of passengers surveys, it appears that also this route is characterised by a high percentage of business traffic.

178 See reply of the parties to question 9 of request for information of 27 April 2009.

179 See for instance Case No. COMP/M.3280 – Air France/KLM and Case No. COMP/M.3940 – Lufthansa/Eurowings.

(393) Thirdly, apart from the (wave structure) restriction for Niki to re-time its existing slots on the VIE-FRA route (see paragraph (334)) the Commitments do not contain any specific limitation regarding the number of slots to be released at peak hours.

(394) Finally, the Commitments contain more convenient and efficient procedures for the allocation of slots than the procedures foreseen by remedies in the above mentioned previous air transport case.

*c. Attractiveness of the remedies package in view of congestion levels at relevant airports*

(395) Some of the airports for which the parties offer to make slots available under the Commitments are highly congested. This is particularly true for FRA airport, for which the market investigation has confirmed that it is one of the most congested airports in Europe. Consequently, slots at FRA airport are highly valuable, rendering the Commitments particularly attractive for the FRA-VIE route.

(396) However, even more importantly, also VIE airport is congested at peak hours (namely between 8.30 and 11.00 and between 16.00 and 20.45) (see paragraph (118)) and, under the Commitments, slots at VIE airport will have to be made available by the parties for each of the Identified City Pairs. This leaves New Entrants at this airport a choice between several different destinations and thereby increases the likelihood of entry on the Identified City Pairs

(397) The remedies comprise slots on five routes from and to VIE airport with altogether up to 19 daily frequencies (and up to 126 weekly frequencies). This considerable number of slots facilitates the establishment of a base by a new entrant and/or the enlargement of the bases of the competitors already present at VIE airport.<sup>180</sup> It has to be borne in mind that in the allocation of slots preference shall be given to those applicants that intend to operate the greatest number of Identified City Pairs. Indeed, some respondents indicated that they do not rule out the possibility of establishing a base at VIE airport.

(398) In addition, the parties propose a particularly short Utilization Period of only two consecutive IATA seasons for the acquisition of grandfathering rights for the slots to be obtained by competitors under the Commitments for all Identified City Pairs except VIE-FRA.

(399) This particularly short Utilization Period gives strong additional incentives to the parties' competitors to enter or expand on the Identified City Pairs, at the latest once the current crisis is over.

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<sup>180</sup> As regards establishment of a base at VIE airport, the market investigation indicates that, depending on the business model of an air carrier, the minimum investment required might be as low as EUR 350 000.

*d. Confirmation of attractiveness and effectiveness of remedies packages by the market test*

(400) Finally, the large majority of respondents to the market test confirmed that, overall, the Commitments would sufficiently facilitate entry or expansion on the Identified City Pairs and solve the competition concerns raised by the proposed concentration.

*(3) Conclusion on the overall assessment of the Commitments*

(401) Considering all these elements together and, especially taking into account the effect of the current but temporary crisis in the air transport industry and the particular attractiveness of some elements of the remedies package, such as the short Utilization Period for the acquisition of grandfathering rights, and on the basis of the information available to the Commission, it is concluded that the Commitments are likely to lead to entry by one or several airlines on the Identified City Pairs in a timely manner and that this entry will suffice to remove the serious doubts identified on these markets.

**X. CONDITIONS AND OBLIGATIONS**

(402) Pursuant to the second subparagraph of Article 8(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 common market.

(403) The fulfilment of the measures that give rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's Decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance Decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Article 14(2) and Article 15(1) of the Merger Regulation.

(404) In accordance with the distinction between conditions and obligations, this Decision should be made conditional on full compliance by the notifying party with Sections 1.1.1, 1.1.3 (iii), 1.2.2, 1.2.5, 1.2.8, 1.3.2, 2, 4.1, 5.1, 6.1 and 7.1 of the Commitments submitted by the notifying party on 31 July 2009. All other Sections of the Commitments should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the Commitments is set out in the Annex to this Decision and constitutes an integral part thereof.

## **XI. CONCLUSION**

- (405) It is accordingly concluded that the Commitments as set out in the Annex to this Decision modify the notified concentration to such an extent that the serious doubts of the Commission as to the compatibility of that concentration with the common market are removed. The concentration should, therefore, be declared compatible with the common market pursuant to Article 8(2) of the Merger Regulation and with the EEA Agreement pursuant to Article 57 thereof, subject to compliance with the Commitments set out in the Annex which is an integral part of this Decision.
- (406) This conclusion holds true irrespective of the rescue aid and the restructuring aid mentioned in section VII.G due to the fact that those funds primarily serve the purpose of ensuring the survival of OS and due to their low amount as compared to the overall financial needs of OS and the overall financial strength of LH.

HAS ADOPTED THIS DECISION:

*Article 1*

The notified concentration whereby Deutsche Lufthansa AG acquires control of Austrian Airlines within the meaning of Article 3(1)(b) of Regulation (EC) No 139/2004 is hereby declared compatible with the common market and the EEA Agreement.

*Article 2*

Article 1 is subject to compliance with the conditions set out in Sections 1.1.1, 1.1.3 (iii), 1.2.2, 1.2.5, 1.2.8, 1.3.2, 2, 4.1, 5.1, 6.1 and 7.1 of the Annex.

*Article 3*

Deutsche Lufthansa AG shall comply with the obligations set out in the sections of the Annex not referred to in Article 2.

*Article 4*

This decision is addressed to:

Deutsche Lufthansa AG  
Von-Gablenz-Strasse, 2-6  
D-50679 Köln  
Germany

To be delivered to:

Wilmer Cutler Pickering Hale and Dorr LLP  
Bastion Tower  
Place du Champ de Mars 5,  
B-1050 Brussels  
Belgium

Done at Brussels, 28.8.2009

For the Commission  
*(signed)*  
Neelie KROES  
Member of the Commission

31 July 2009

**PHASE II COMMITMENTS PACKAGE**

**CASE COMP/M.5440 - Lufthansa /Austrian Airlines**

Pursuant to Article 8(2) of Council Regulation (EC) 139/2004 (“Merger Regulation”), Deutsche Lufthansa AG (“Lufthansa”) submits the commitments specified below (the “Commitments”) in order to enable the European Commission (“Commission”) to declare the proposed concentration between Lufthansa and Austrian Airlines (“Concentration”) compatible with the common market by means of a decision pursuant to Article 8(2) of the Merger Regulation (“Decision”).

These Commitments shall take effect upon receipt of the Commission’s Decision declaring the Concentration compatible with the common market and will be binding on Lufthansa, its subsidiaries, successors and assigns. These Commitments are offered exclusively in the context of the notified concentration between Lufthansa and Austrian Airlines and are without prejudice to the position of Lufthansa and/or its alliance partners in other cases examined by the European Commission.

This text shall be interpreted in the light of the Decision to which the Commitments are attached as conditions and obligations, and in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies.

**0 DEFINITIONS**

**Blocked Space Agreement**

An agreement on the purchase of reserved seating capacity by one airline (the marketing airline) on flights operated by another airline (the operating airline).

**Brussels Airport**

Means Brussels Zaventem Airport (BRU).

**Codeshare**

Means an enhanced form of interlining that includes one airline (the marketing airline) marketing services on flights operated by the other airline (the operating airline) under its own name and under its own designator code, regardless of whether it is construed in form of a free-flow or blocked space agreement or in other form.

**Competitive Air Service**

A non-stop scheduled passenger air service that is operated on one or more of the Identified City Pairs.

**Consummation of the Concentration**

The date on which Lufthansa, through Gomele Beteiligungsverwaltungs GmbH and Sobire Beteiligungsverwaltungs GmbH, acquires at least 75% of the share capital in Austrian Airlines as provided for in the Amendment and Waiver Agreement dated 5 December 2008.

**Effective Date**

The date of the Decision.

**Frequency**

Means a roundtrip on an Identified City Pair.

**FFP (Frequent Flyer Program)**

A program offered by airlines to reward customer loyalty under which airline customers enrolled in the program accrue points for travel on that airline that can be redeemed for free air travel and other products or services, as well as allowing passengers to have increased benefits, such as airport lounge access, or priority bookings.

**IATA Scheduling Period or IATA Season**

The IATA Summer Scheduling Period (also known as IATA Summer Season) starts on the 4th Sunday in March and ends on the 4th Saturday in October. The IATA Winter Scheduling Period (also known as IATA Winter Season) starts on the 4th Sunday in October and ends on the 4th Saturday in March.

**Identified City Pairs**

Vienna-Frankfurt, Vienna-Munich, Vienna-Cologne/Bonn, Vienna-Stuttgart, Vienna-Brussels..

**Indemnified Party**

Has the meaning given to it in Section 8.2.6.

**Interline Agreement**

An agreement between two or more airlines under which the contracting airlines accept each other's travel documents (tickets).

**Intermodal Partner**

Has the meaning given to it in Section 6.1.

**Lufthansa**

Deutsche Lufthansa AG and Austrian Airlines AG, and companies and/or affiliated businesses controlled by these entities after the Consummation of the Concentration.

**Misuse**

This term will have the meaning provided under Section 1.3.4.



**MITA**

Multilateral Interline Traffic Agreements Manual published by the International Air Transport Association (IATA).

**Monitoring Trustee**

Means an individual or institution, independent from Lufthansa and Austrian Airlines, who is approved by the Commission and appointed by Lufthansa and who has the duty to monitor Lufthansa's compliance with the conditions and obligations attached to the Decision as more fully described in Section 8.

**New Air Service Provider**

Any airline or airlines that are each members of the same alliance (other than the Parties including all airlines controlling it/them or controlled by it/them), that individually, or collectively by Codeshare, provide(s) a new or additional Competitive Air Service.

**Parties**

Lufthansa, Austrian Airlines and any undertakings controlled by either Lufthansa or Austrian Airlines.

**Prospective New Entrant**

Any airline or airlines that are each members of the same alliance (other than the Parties, including all airlines controlling either of them or controlled by either of them), able to offer a new or additional Competitive Air Service individually or collectively by Codeshare and needing a slot or slots to be made available by Lufthansa in accordance with the Commitments to operate a Competitive Air Service.

**Published Fare**

Refers to applicable IATA fares, carrier fares that are distributed to CRS via the public tariff data base of ATPCO (Airline Tariff's Publishing Corporation), and fares marketed on the Internet where such fares are available to the general public, excluding network-wide fuel, passenger or service surcharges.

**Review Section**

Has the meaning given to it in Section 11.

**Slot**

Shall mean the arrival and departure at a scheduled time available or allocated to an aircraft movement on a specific date at the airport of origin and destination.

**Slot Handback Deadline**

15 January for the IATA Summer Scheduling Period and 15 August for the IATA Winter Scheduling Period.

**Slot Transfer Agreement**

Has the meaning given to it in Section 1.2.6.

### **Slot Transfer Procedure**

Has the meaning given to it in Section 1.2.1.

### **Standard Slot Allocation Procedure**

Has the meaning given to it in Section 1.2.1.

## **1 SLOTS**

### **1.1 SLOTS FOR CERTAIN IDENTIFIED CITY PAIRS**

**1.1.1** The Parties undertake to make available Slots at Vienna and/or Frankfurt and/or Munich and/or Cologne/Bonn and/or Stuttgart and/or Brussels to allow one or more Prospective New Entrant(s) to operate a new or additional Competitive Air Service on the following Identified City Pairs. The Parties shall be obliged to make available to Prospective New Entrants the number of Slots needed to support in aggregate:

- **Vienna-Frankfurt:** up to five (5) frequencies per day;
- **Vienna-Stuttgart:** up to three (3) frequencies per day;
- **Vienna-Cologne/Bonn:** up to three (3) frequencies per day, but not more than 18 frequencies per week;
- **Vienna-Brussels:** up to four (4) frequencies per day, but not more than 24 frequencies per week; and
- **Vienna-Munich** up to four (4) frequencies per day.

**1.1.2** The number of Slots the Parties to be made available under Section 1.1.1 shall be reduced by the number of Slots already transferred to a Prospective New Entrant except for Slots that have been handed back to the Parties pursuant to Section 1.2.8 or Section 1.3.4. Subject to the provisions in Sections 1.1.3 and 1.1.4 below, Frequencies of a Competitive Air Service already operated by an airline independent of and unconnected to the Parties on an Identified City Pair shall be counted against the number of Slots to be made available by the Parties to that airline under Section 1.1.1 for this Identified City Pair.

**1.1.3** Notwithstanding the provisions of 1.1.2, with respect to the Vienna-Frankfurt City Pair, on which Niki Luftfahrtgesellschaft mbH (“Niki”) currently operates a Competitive Air Service with two (2) Frequencies for which it has obtained from Lufthansa two (2) Slots at Frankfurt, and Adria Airways currently operates a Competitive Air Service with three (3) Frequencies for which it has obtained from Lufthansa three (3) Slots at Frankfurt, the following shall apply:

- (i) The two (2) Frequencies currently operated by Niki based on slots leased from Lufthansa (three (3) Frequencies to the extent that Niki obtains a third slot from Lufthansa as from the IATA Winter Seasons 2009/2010), shall be counted against the number of Slots to be made available by the Parties under Section 1.1.1 for the Vienna-Frankfurt City Pair. For the avoidance of doubt, if Niki were to exit from one or more of these frequencies in advance of acquiring grandfathering rights, such frequencies will be made available in accordance with section 1.1.1.

- (ii) In case no Non-Star Alliance Applicant (as defined in Section 3.5) requests Slots for the Vienna-Frankfurt City Pair for the IATA summer season 2010 or the first season for which the procedures for implementation of the present commitments would be in place, whichever is the later, one (1) Frequency operated by Adria Airways shall be counted against the number of Slots to be made available by the Parties under Section 1.1.1 for the Vienna-Frankfurt City Pair until the end of three subsequent IATA seasons, and for every subsequent period of 2 years until such time as a non-Star Alliance Applicant requests such slot. For the avoidance of doubt, this exceptional mechanism shall cease to apply should Adria Airways at any stage cease to operate frequencies on the Vienna-Frankfurt City Pair.
- (iii) Lufthansa undertakes to amend its existing agreements with Niki to reflect the provisions of these Commitments. For the IATA summer season 2010 and IATA winter season 2010/2011, Niki may request to exchange its existing Slots for Slots at different times pursuant to Section 1.2.1 of these Commitments, for these and subsequent IATA seasons, provided that Lufthansa shall not be obliged to transfer to Niki more than one Slot at Frankfurt during each of the time periods defined in the table below. If Niki has already two Slots in one time period, Lufthansa shall be obliged to grant any request by Niki to exchange up to two Slots in that time period, but shall be entitled to ensure that the relevant Slots are at least 105 minutes apart. For the avoidance of doubt, Niki may retain any or all of its existing Slots for which it would not seek an exchange under this paragraph.

Arrival	Departure
05:35 - 08:00	06:30 - 08:15
08:05 - 10:20	08:20 - 11:35
10:25 - 14:00	11:40 - 15:05
14:05 - 15:30	15:10 - 16:15
15:35 - 17:50	16:20 - 19:45
17:55 - 21:50	19:50 - 22:25

The Utilization Period required for the acquisition of grandfathering rights for the two (2) Frequencies currently operated by Niki based on slots leased from Lufthansa (three (3) Frequencies to the extent that Niki obtains a third slot from Lufthansa as from the IATA Winter Season 2009/2010) shall begin with the start of the IATA Winter Season 2009/2010, irrespective of whether Niki exchanges such Slots for Slots at different times in accordance with this paragraph. For the avoidance of doubt any Slot granted by Lufthansa under the present Commitments to Niki in a different time period, as defined in the table above, from the time period for which Niki had requested the Slot shall be deemed to be granted in that latter time period for the purposes of the present paragraph (iii).

- (iv) Lufthansa undertakes to amend its existing agreements with Adria Airways with respect to one (1) slot to reflect the provisions of these Commitments, provided however that Adria Airways shall not acquire grandfathering rights.

**1.1.4** Notwithstanding the provisions of 1.1.2, with respect to the Vienna-Munich City Pair, on which Niki Luftfahrtgesellschaft mbH (“Niki”) currently operates a Competitive Air Service with three (3) Frequencies, Niki may request, to exchange these existing Slots for

Slots at different times pursuant to Section 1.2.1 of these Commitments. Niki's Frequencies shall be counted against the number of Slots to be made available by the Parties under Section 1.1.1 for the Vienna-Munich City Pair. For the avoidance of doubt, if Niki were to exit from one or more of the frequencies obtained under these Commitments in advance of acquiring grandfathering rights and/or from one or more of the frequencies currently operated, a corresponding number of frequencies will be made available by Lufthansa in accordance with section 1.1.1.

**1.1.5** To the extent that the Parties make available Slots to a Prospective New Entrant for the operation of a new or additional Competitive Air Service on the Identified City Pairs Vienna-Stuttgart and/or Vienna-Cologne/Bonn pursuant to Section 2.1.1 of Lufthansa's commitments in case COMP/M.3940 – *Lufthansa/Eurowings*, these Slots shall be counted against the number of Slots to be made available pursuant to this Section 1.1.1. Conversely, to the extent that the Parties make available Slots to a Prospective New Entrant for the operation of a new or additional Competitive Air Service on the Identified City Pair Vienna-Stuttgart and/or Vienna-Cologne/Bonn pursuant to this Section 1.1.1, these Slots shall be counted against the number of Slots to be made available pursuant to Section 2.1.1 of Lufthansa's commitments in case COMP/M.3940. For the avoidance of doubt, a Prospective New Entrant on these Identified City Pairs shall have the choice of whether to avail itself of the commitments in Case COMP/M.3940 or the present Commitments.

**1.1.6** Lufthansa will inform the Monitoring Trustee and the Commission in accordance with Section 8 of the announced commencement by a carrier of a new or additional Competitive Air Service on an Identified City Pair that does not use Slots made available by the Parties as soon as possible following the announcement of that service, and of the amendments to existing agreements in accordance with Section 1.1.3.

## **1.2 CONDITIONS PERTAINING TO SLOTS**

**1.2.1** The Prospective New Entrant shall comply with the following procedure to obtain slots from the Parties ("***Slot Transfer Procedure***").

The Prospective New Entrant wishing to commence/increase a new additional Competitive Air Service on one or more of the Identified City Pairs shall notify in writing its request for Slots to (i) the slot coordinator, through the normal slot allocation procedure ("***the Standard Slot Allocation Procedure***"); and (ii) the Monitoring Trustee, within the period provided for in Clause 3.1.

The Prospective New Entrant shall be eligible to receive slots pursuant to these Commitments only if it can demonstrate that all reasonable efforts to obtain slots for the Identified City Pair(s) through the Standard Slot Allocation Procedure before the beginning of the relevant IATA traffic season have failed, including the allocation of Slots by the coordinator from the waitlist following the Slot Handback Date. The Prospective New Entrant shall request slots for use during a full IATA Season unless it can demonstrate a compelling business need to start its services during the Season.

The Prospective New Entrant will be deemed not to have exhausted all reasonable efforts to obtain slots, if:

- (i) slots were obtained through the Standard Slot Allocation Procedure within twenty (20) minutes of the times requested, but such slots have not been accepted by the Prospective New Entrant; and/or
  - (ii) slots were obtained through the Standard Slot Allocation Procedure more than twenty (20) minutes from the times requested and the Prospective New Entrant did not give the Parties the opportunity to exchange those slots for slots within +/- twenty (20) minutes of the times requested.
- 1.2.2** The slots released by the Parties shall be within +/- twenty (20) minutes of the time requested by the Prospective New Entrant, if the Parties have slots available within this time-window. In the event that the Parties do not have slots available within this time-window, they shall offer to release the slots closest in time to the Prospective New Entrant's request. Arrival and departure slots shall be such as to allow for reasonable aircraft rotation taking into account the Prospective New Entrant's business model. The Parties do not have to offer slots, however, if the slots that the Prospective New Entrant can obtain through the Standard Slot Allocation Procedure are closer in time to the Prospective New Entrant's request than the slots that the Parties have available.
- 1.2.3** Any slot transferred on an indefinite basis in accordance with the Slot Transfer Procedure under Section 1.3 shall reduce the maximum number of slots to be transferred in accordance with the Commitments.
- 1.2.4** To ensure that the slots released by the Parties are used in a manner consistent with these conditions, the Prospective New Entrant should inform the Monitoring Trustee in accordance with Section 3.5.
- 1.2.5** Slots made available by the Parties under these Commitments shall be offered without any compensation.
- 1.2.6** The Parties shall enter into a slot transfer agreement with the Prospective New Entrant (the "*Slot Transfer Agreement*"). Such an agreement shall be subject to review by the Monitoring Trustee and approval by the Commission and shall provide for fast-track dispute resolution according to Section 9. The agreement may (i) contain prohibitions on the Prospective New Entrant transferring any slots released by the Parties to a third party, swapping such slots for other slots with a third party, making available such slots in any way to any third party for the use of that third party, or releasing, surrendering, giving up or otherwise disposing of such slots; and (ii) provide for reasonable financial compensation to the Parties in case of Misuse as defined in Sections 1.3.4 and 1.3.5. The duration of the Slot Transfer Agreement shall be the Utilization Period, as defined in 1.3.1 below, except if the Prospective New Entrant is a member of the Star Alliance. If the Prospective New Entrant is a member of the Star Alliance, the agreement shall include the obligations listed in 1.3.6 and, if appropriate, specific conditions imposed on the Prospective New Entrant by the Commission according to Section 3.3. c), and the

Commission's approval of the agreement shall be conditional on the Prospective New Entrant committing to comply with these obligations and conditions.

- 1.2.7** The slot transfer agreement shall provide that the Prospective New Entrant will be able to terminate the slot transfer agreement at the end of each IATA season without penalty, provided the Prospective New Entrant notifies the termination of the agreement to the Parties in writing before the Slot Handback Deadline for the relevant IATA season.
- 1.2.8** Upon termination of the agreement, the slots will be handed back to the Parties and will be available for a new entrant under Section 1.1.1, unless the Prospective New Entrant has acquired Grandfathering rights according to Section 1.3.

### **1.3 GRANDFATHERING OF SLOTS**

- 1.3.1** As a general rule, the slots obtained by the Prospective New Entrant from the Parties as a result of the Slot Transfer Procedure shall be used only to provide a Competitive Air Service on the Identified City Pairs for which the Prospective New Entrant has requested them from the Parties through the Slot Transfer Procedure. These slots can not be used on another city pair unless
- the Prospective New Entrant has operated the Identified City Pair for which these slots have been transferred for a number of full consecutive IATA Seasons ("*Utilization Period*") and
  - the Prospective New Entrant is not a member of the Star Alliance.

The Utilization Periods for the Identified City Pairs Vienna-Frankfurt shall be 8 (eight) consecutive IATA Seasons, and 2 (two) consecutive IATA seasons for all other Identified City Pairs.

- 1.3.2** The slot transfer will become definitive and the Prospective New Entrant will be deemed to have grandfathering rights for the slots once appropriate use of these slots has been made on the Identified City Pair during the Utilization Period. In this regard, once the Utilization Period has elapsed, the Prospective New Entrant will be entitled to use the slot(s) obtained on the basis of these Commitments exclusively for intra-European City Pair operated by the Prospective New Entrant, or operated by one of the Prospective New Entrant's alliance partners and marketed by the Prospective New Entrant on a code-share basis ("*Grandfathering*").
- 1.3.3** Grandfathering is subject to the approval of the Commission, advised by the Monitoring Trustee, in accordance with Section 3.3. The Commission's approval shall be conditional on the Prospective New Entrant committing that if it ceases to use the Slots in question for purposes described in Section 1.3.2, it will return those Slots to the slot coordinator.

**1.3.4** During Utilization Period, the Prospective New Entrant shall not be entitled to transfer, assign, sell, swap or charge in breach of these Commitments any Slot transferred by the Parties in the Slot Transfer Procedure. During the Utilization Period, a situation of Misuse shall be deemed to arise where a Prospective New Entrant that has obtained slots released by the Parties decides: (i) not to commence services on a Identified City Pair(s); (ii) to operate fewer daily Frequencies on the Identified City Pair(s) or to cease operating on the Identified City Pair(s) during such period; (iii) to transfer, assign, swap or sell in breach of these Commitments any Slot transferred by the Parties in the Slot Transfer Procedure; (iv) not to use the slots for the Identified City Pair(s); and (v) not to use the slots properly. The Prospective New Entrant does not use the slots properly, if (a) it loses the slots as a consequence of the principle of “*use it or lose it*” in Article 10 of Regulation (EEC) No. 95/93 or (b) it misuses the slot as described and interpreted in Art. 14 (4) of the Slot Regulation 793/2004.

**1.3.5** During the Utilization Period, the Prospective New Entrant who has obtained slots under the Slot Transfer Procedure and has been found to or is anticipated to be found in a situation of Misuse as defined in Section 1.3.4 shall immediately inform the Monitoring Trustee and Lufthansa and hand back the Slots. In cases (i) and (ii) identified in Section 1.3.4, 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 precedents for these slots, or in case of a Misuse as defined in (iii), (iv), and (v)(b) of Section 1.3.4, the Prospective New Entrant shall provide reasonable compensation to the Parties as provided for in the Slot Transfer Agreement.

**1.3.6** If the Prospective New Entrant is a member of the Star Alliance at the time of the signature of the Slot Transfer Agreement, or becomes a member of the Star Alliance between the signature of the Slot Transfer Agreement and the end of the Utilization Period (Star Alliance New Entrant), the Prospective New Entrant will not acquire grandfathering rights of the slots released.

A Star Alliance New Entrant shall not be entitled to transfer, assign, swap or sell any slot transferred by the Parties. All provisions of Sections 1.3.4 and 1.3.5 foreseen for the Utilization Period apply to a Star Alliance New Entrant without any limitation in time.

Furthermore, the Star Alliance New Entrant shall not enter into a code share agreement with the parties or any other airline that is a member of the Star Alliance with respect to the Identified City Pairs on which it operates a Competitive Air Service, and more generally shall not operate a Competitive Air Service collectively with the Parties or any other airline that is a member of the Star Alliance.

## **2 DURATION OF THE SLOT TRANSFER**

The Parties’ obligations to transfer slots are unlimited in duration and may be invoked at any time by a Prospective New Entrant, subject to the limitations set out in Sections 1 and 11.

### **3 SELECTION PROCEDURE, ROLE OF THE MONITORING TRUSTEE AND APPROVAL OF THE COMMISSION**

- 3.1** Before the deadline for the submission of slot applications to slot coordinators (i.e. currently 35 days before the IATA Scheduling Conference)(the “*Final Slot Request Date*”), any airline wishing to obtain Slots from the Parties pursuant to the Transfer Procedure shall send a slot request to (i) the slot coordinator; and (ii) the Monitoring Trustee.
- 3.2** At latest three (3) weeks before the IATA Scheduling Conference of the relevant season, the Monitoring Trustee forwards the slot requests to Lufthansa and asks, if necessary, which slots the Parties would release within +/- twenty (20) minutes of the time a Prospective New Entrant requested. Lufthansa’s proposal shall refer to IATA’s Slot Preliminary Allocation List (SAL). Lufthansa will respond to the Monitoring Trustee within two (2) weeks upon the Monitoring Trustee’s request.
- 3.3** Between the Final Slot Request Date and the beginning of the IATA Scheduling Conference the Commission, advised by the Monitoring Trustee:
- (a) assesses whether each applicant would qualify as a Prospective New Entrant and whether the service to be provided by the Applicant qualifies as a Competitive Air Service;
  - (b) if there is more than one applicant, ranks the applicants by order of preference;
  - (c) if the Prospective New Entrant is a member of the Star Alliance, or is anticipated to become a Member of the Star Alliance, assesses whether specific conditions should be imposed on the Prospective New Entrant; and
- 3.4** In its assessment according to Section 3.3 (a), the Commission shall decide after considering the advice of the Monitoring Trustee whether it considers the applicant to be a Prospective New Entrant pursuant to the following criteria:
- the Prospective New Entrant is independent of and unconnected to the Parties;
  - the Prospective New Entrant is a viable existing or potential competitor, with the ability, resources and commitment to operate the Identified City Pair in the long term as a viable and active competitive force.
- 3.5** In its assessment according to Section 3.3. (b), the Commission shall decide, after considering the advice of the Monitoring Trustee, how to rank the applicants by order of preference using notably the following criteria:
- Preference shall be given to applicants that are not members of the Star Alliance or anticipated to become members of the Star Alliance (Non Star Alliance Applicants) over applicants that are members of the Star Alliance or anticipated to become members of the Star Alliance (Star Alliance Applicants), regardless of the



number of Identified City Pairs or Frequencies the Star Alliance Applicant(s) is/are proposing to operate.

- If there is more than one Non Star Alliance Applicant, preference shall be given to the Non Star Alliance Applicant that intends to operate the greatest numbers of Identified City Pairs.
  - If there is more than one Star Alliance applicant, preference shall be given to the Star Alliance Applicant that intends to operate the greatest number of Identified City Pairs.
- 3.6** In its assessment according to Section 3.3 (c), the Commission shall decide, after considering the advice of the Monitoring Trustee, whether specific conditions should be imposed on a Star Alliance Applicant in order to guarantee the independence of the Star Alliance Applicant from the Parties.
- 3.7** To assist the Monitoring Trustee in the preparation of his advice and/or the Commission in taking its decision, the Monitoring Trustee and/or the Commission shall request the Prospective New Entrant to provide to the Monitoring Trustee and/or the Commission with 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 plan shall provide information on the plans that the company has in terms of development of its network, fleet etc, and detailed information on its plans for the Identified City Pairs on which it wants to operate. The company should specify in detail planned operations (size of aircraft, number of frequencies operated, planned time-schedule of the flights) and expected financial results (expected traffic, revenues, profits) on the Identified City Pairs on which it wants to operate during the Utilization Period for the respective Identified City Pair. The Monitoring Trustee and/or the Commission may also request a copy of all co-operation agreements the Prospective New Entrant may have with other airlines. Business secrets and confidential information will be kept confidential by the Commission and the Monitoring Trustee and will not become accessible to other undertakings or to the public.
- 3.8** Upon receiving the SAL messages from the slot coordinator, and in advance of the beginning of the IATA Scheduling Conference, the Monitoring Trustee informs each applicant not having received slots within the time-window of +/-twenty (20) minutes as indicated through the SAL and the slot coordinator:
- (i) whether it qualifies for the Slot Commitment;
  - (ii) whether it is:
    - a) The only applicant or the preferred applicant; or
    - b) Not the preferred applicant

(iii) whether specific conditions are imposed by the Commission under Section 3.3  
(c)

(iv) the exact Slot(s) that the Parties would release through the Slot Transfer Procedure.

In any case, the applicant shall go to the IATA Scheduling Conference and try to improve its slots.

**3.9** At the end of the IATA Scheduling Conference, it will be clear, also for the Monitoring Trustee, for instance through the *European Union Airport Coordinators Association* (EUACA) database, whether each Prospective New Entrant will have received slots within the window of +/- twenty (20) minutes through the Standard Slots Allocation Procedure.

**3.10** Within two (2) weeks of the end of the IATA Scheduling Conference, the preferred applicant informs the Monitoring Trustee and Lufthansa whether it will commit to operate the slots offered eventually by the Parties, in case the Standard Slot Allocation Procedure does not provide for them. If not, the Monitoring Trustee offers the slots to the next applicant (if any) by order of preference.

**3.11** Within one (1) week of the confirmation that the applicant will operate the slots, the Parties offer the dedicated slots for transfer to the preferred applicant. The Slot Transfer Agreement shall be signed and the slot transfer performed within three weeks after the Slot Handback Deadline, and the slot coordinator is informed of the transfer in order to get the required confirmation.

## **4 INTERLINING AGREEMENTS**

**4.1** At the request of a New Air Service Provider, the Parties shall enter into an interline agreement concerning any Identified City Pair operated by the New Air Service Provider.

**4.2** Any such interline agreement shall be subject to the following restrictions:

- it shall apply to the business and economy class only;
- it shall provide for interlining on the basis of the Parties' published one-way fares when a one-way ticket is issued or half of the Parties' published round-trip fares when a round-trip ticket is issued;
- it shall be limited to true origin and destination traffic on the Identified City Pair operated by the New Air Service Provider;
- it shall be subject to the MITA rules and/or normal commercial conditions;

- it shall include the possibility for the New Air Service Provider, or travel agents, to offer a return trip comprising services provided one-way by the Parties and one-way by the New Air Service Provider.
- 4.3** Subject to seat availability in the relevant fare category, the Parties shall carry a passenger holding a coupon issued by a New Air Service Provider for travel on an Identified City Pair. However, to avoid abuse, the Parties may require that the New Air Service Provider or the passenger, where appropriate, pay the (positive) difference between the fare charged by the Parties and the fare charged by the New Air Service Provider. In cases where the New Air Service Provider's fare is lower than the value of the coupon issued by it, the Parties may endorse its coupon only up to the value of the fare charged by the New Air Service Provider. A New Air Service Provider shall enjoy the same protection in cases where the Parties' fare is lower than the value of the coupon issued by it.
- 4.4** All interline agreements entered into pursuant to this Section 4 for a particular Identified City Pair shall lapse automatically in the event that the New Air Service Provider ceases to operate that City Pair.

## **5 SPECIAL PRORATE AND CODE SHARE AGREEMENTS**

- 5.1** At the request of a Prospective New Entrant, the Parties shall enter into a special prorate agreement with the Prospective New Entrant for traffic with a true origin and destination in either Austria and/or Germany or Austria and/or Belgium, provided part of the journey involves the Vienna-Frankfurt, Vienna-Munich, Vienna-Cologne, Vienna-Stuttgart, or Vienna-Brussels routes. The conditions for a special prorate agreement shall be on terms such that the New Air Service Provider shall have equal treatment with Lufthansa's Star Alliance partners on the same Identified City Pair. Financial conditions will be reasonable and in particular reflect the average conditions agreed upon with Lufthansa's alliance partners. The conclusion of the special prorate agreement is subject to the approval of the Commission, advised by the Monitoring Trustee. The Commission will in particular assess whether the financial conditions of the special prorate agreement are reasonable.

## **6 COMMITMENT TO FACILITATE INTERMODAL SERVICES**

- 6.1** At the request of a railway or other surface transport company operating between Austria, Belgium, and/or Germany (an Intermodal Partner), the Parties shall enter into an intermodal agreement whereby they provide passenger air transport on their services on any of the Identified City Pairs as part of an itinerary that includes surface transportation by the Intermodal Partner.
- 6.2** Any intermodal agreement entered into pursuant to this Section 6 shall be based on the MITA principles (including the Intermodal Interline Traffic Agreement - Passenger and IATA Recommended Practice 1780e) and normal commercial conditions. The Parties shall accept full pro-rating according to the terms applied by MITA members, including on routes where only rail services are provided. No restrictions shall apply to fare

combinations between carriers that are IATA intermodal MITA members and the most restrictive conditions rule shall apply only for the applicable segment and its carrier. The Parties and the Intermodal Partner may waive minimum stay requirements on any fare and any City Pair they operate. Such decisions are respected and published reciprocally. Where the Intermodal Partner requires notification of a sector mileage, a location identifier or an add-on fare, the Parties shall make such a request to IATA under normal IATA procedures.

- 6.3** At the request of a potential Intermodal Partner, the Parties shall make efforts in good faith to reach an agreement on conditions comparable to those granted to other Intermodal Partners, provided that the necessary requirements are met especially with regard to safety, quality of service, insurance coverage and liability limits. The conditions of such an agreement shall override the general obligations arising pursuant to this Section 6.

## **7 FREQUENT FLYER PROGRAM**

- 7.1** At the request of a New Air Service Provider that does not participate in Lufthansa's frequent flyer program ("Miles&More"), Lufthansa shall allow it to be hosted in Miles&More for the Identified City Pairs operated by the New Air Service Provider. The agreement with the New Air Service Provider shall be on terms such that the New Air Service Provider shall have equal treatment with Lufthansa's alliance partners. Financial conditions will reflect the average conditions agreed upon with Lufthansa's alliance partners.
- 7.2** Any agreement relating to a particular Identified City Pair and entered into pursuant to this Section 7 shall lapse automatically in the event that the New Air Service Provider ceases to operate that City Pair.

## **8 MONITORING TRUSTEE**

### **8.1 APPOINTMENT OF MONITORING TRUSTEE**

- 8.1.1** A Monitoring Trustee shall be appointed in accordance with the procedure described in Section 8.1.2. The Monitoring Trustee must be familiar with the airline industry and have the experience, competence and independence necessary for this appointment. The Monitoring Trustee will have had no direct or indirect employment, consultancy or other relationship with Lufthansa or Austrian Airlines during the past two years and will have no such relationship with Lufthansa for the three years following the completion of its mandate.
- 8.1.2** The Parties shall ensure that the Monitoring Trustee's remuneration shall be sufficient to guarantee the effective and independent compliance of its mandate.

Within one (1) week of the Effective Date, Lufthansa, in agreement with Austrian Airlines, shall submit a list of one or more persons whom Lufthansa proposes to appoint as the Monitoring Trustee to the Commission for approval.

The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out in Section 8.1.1 and shall include:

- (i) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments;
- (ii) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks.

The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, Lufthansa shall appoint or cause to be appointed the individual or institution concerned as Monitoring Trustee. If more than one name is approved, Lufthansa shall be free to choose the Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one (1) week of the Commission's approval, in accordance with the mandate approved by the Commission. Lufthansa commits not to close the notified transaction before the appointment of the Monitoring Trustee.

If all the proposed Monitoring Trustees are rejected, Lufthansa shall submit the names of at least two more individuals or institutions within one (1) week of being informed of the rejection, in accordance with the requirements and the procedure set out in Section 8.1.1.

If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom Lufthansa shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

## **8.2 MONITORING TRUSTEE'S MANDATE**

**8.2.1** The Monitoring Trustee's mandate shall include, in particular, the following responsibilities:

- (i) to monitor the satisfactory discharge by the Parties of the obligations entered into in these Commitments in so far as they fall within the scope of these Commitments;
- (ii) to propose to the Parties such measures as the monitoring Trustee considers necessary to ensure the Parties' compliance with the conditions and obligations attached to the Decision;

- (iii) to advise and make a written recommendation to the Commission as to the suitability of the Slot Transfer Agreement and any Prospective New Entrant submitted for approval to the Commission under Section 1 and 3;
- (iv) to provide written reports to the Commission on the progress of the discharge of its mandate, identifying any respects in which the Parties have failed to comply with these Commitments and in which the Monitoring Trustee has been unable to discharge its mandate;
- (v) to mediate any disagreements relating to these Commitments;; if mediation is agreed to by the other party or parties to the agreement in question, and submit a report upon the outcome of the mediation to the Commission; and
- (vi) at any time, to provide to the Commission, at its request, a written or oral report on matters falling within the scope of these Commitments;
- (vii) to review and report on the amendments to the agreements referred to in Section 1.1.3.
- (viii) to grant adequate publicity in trade journals and by any other appropriate means sufficiently in advance of the beginning of the slot allocation procedure for each IATA Season to those remedies under the present Commitments which have not yet been taken up by competitors or which may become available.

**8.2.2** The Parties shall receive simultaneously a non-confidential version of any written recommendation made by the Monitoring Trustee to the Commission (as provided for in Section 8.2.1(iii)).

**8.2.3** The reports provided for in Section 8.2.1(iii) to (vii) shall be prepared in English. The reports provided for in Section 8.2.1(iv) shall be sent by the Monitoring Trustee to the Commission within ten (10) working days from the end of every IATA season following the Monitoring Trustee's appointment or at such other time(s) as the Commission may specify, and shall cover developments in the immediately preceding IATA season. The Parties shall receive simultaneously a non-confidential copy of each Monitoring Trustee report.

**8.2.4** The Parties shall provide the Monitoring Trustee with such assistance and information, including copies of all relevant documents, as the Monitoring Trustee may reasonably require in carrying out its mandate and shall pay reasonable remuneration for its services.

**8.2.5** The Monitoring Trustee shall have full and complete access to any of the Parties' books, records, documents, management or other personnel facilities, sites, technical information necessary for fulfilling its duties.

**8.2.6** The Parties shall indemnify the Monitoring Trustee (and, where appropriate, its employees and agents) (each an Indemnified Party) and hold each Indemnified Party

harmless, and hereby agrees that an Indemnified Party shall have no liability to the Parties for any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee (or, where appropriate, its employees, advisors and agents).

**8.2.7** At the expense of the Parties, the Monitoring Trustee may appoint advisors, subject to the Commission's prior approval, if the Monitoring Trustee considers the appointment of such advisors necessary for the performance of its duties under the mandate, provided that any fees incurred are reasonable and upon consultation of the Parties.

### **8.3 TERMINATION OF MANDATE**

**8.3.1** If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a conflict of interest:

(i) the Commission may, after hearing the Monitoring Trustee, require the Parties, to replace the Monitoring Trustee; or

(ii) the Parties, with the prior approval of the Commission, may replace the Monitoring Trustee.

**8.3.2** If the Monitoring Trustee is removed the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has affected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to Section 8.1.2.

**8.3.3** Aside from being removed in accordance with Section 8.3.1, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the Commitments might not have been fully and properly implemented.

## **9 FAST TRACK DISPUTE RESOLUTION**

**9.1** In the event that a Prospective New Entrant or a New Air Services Provider has reason to believe that the Parties are failing to comply with the requirements of the Commitments vis-à-vis that party, the fast track dispute resolution procedure described in this Section 9 will apply.

**9.2** Any Prospective New Entrant or New Air Services Provider who wishes to avail itself of the fast track dispute resolution procedure ("Requesting Party") must notify the Parties in writing setting out in detail the reasons leading that party to believe that the Parties are failing to comply with the requirements of the Commitments ("Notice"). The Requesting Party and the Parties will use their best efforts to resolve all differences of opinion and to

settle all disputes that may arise through co-operation and consultation within a reasonable period of time not to exceed fifteen (15) business days after receipt of the Notice.

- 9.3** Should the Requesting Party and the Parties fail to resolve their differences of opinion through cooperation and consultation as provided for in Section 9.2, the Requesting Party shall nominate an arbitrator.
- 9.4** The Parties shall, within two (2) weeks of receiving notification in writing from a Requesting Party of the appointment of the Requesting Party's arbitrator, nominate its arbitrator and provide to the Requesting Party in writing detailed reasons for its challenged conduct.
- 9.5** The arbitrators nominated by the Parties and the Requesting Party shall, within one (1) week from the nomination of the former, agree to appoint a third arbitrator. If the arbitrators nominated by Lufthansa and the Requesting Party cannot agree on the nomination of a third arbitrator, they shall ask the President of the International Chamber of Commerce ("ICC") to appoint the third arbitrator.
- 9.6** The arbitrators shall be instructed to establish an arbitration tribunal and to make a preliminary ruling on the contested issues within one (1) month of the appointment of the third arbitrator, which may be extended, if necessary, by the unanimous agreement of all arbitrators. The preliminary ruling shall be applicable immediately and until the final decision is issued. The final decision shall be taken by the arbitrators within six (6) months of the appointment of the third arbitrator, which may be extended, if necessary, by the unanimous agreement of all arbitrators.
- 9.7** In their preliminary ruling and their final decision, the arbitrators shall also decide the action, if any, to be taken by the Parties in order to ensure compliance with the Commitments vis-à-vis the Requesting Party, including making a preliminary or final binding determination of the disputed contractual conditions.
- 9.8** Any of the arbitrators will be entitled to request any relevant information from the Parties or the Requesting Party in order to enable the arbitrators to reach a decision.
- 9.9** The burden of proof in any dispute under this fast track dispute resolution procedure shall be borne as follows: i) the Requesting Party must produce evidence of a *prima facie* case, and ii) if the Requesting Party produces evidence of a *prima facie* case, the arbitrator must find in favour of the Requesting Party unless the Parties can produce evidence to the contrary.
- 9.10** The arbitrators shall be instructed not to disclose confidential information and to apply the standards attributable to confidential information and business secrets by European Community competition law.



- 9.11** The arbitration shall be in English and conducted pursuant to the ICC rules. The arbitration award shall, in addition to dealing with the merits of the claim, impose the fees and costs of the prevailing party upon the party that is unsuccessful. The arbitration award shall be final and binding on the parties.
- 9.12** In the event of disagreement between the parties to the arbitration regarding the interpretation of the Commitments, the arbitrators shall inform the Commission and may seek the Commission's interpretation of the Commitments before finding in favour of any party to the arbitration. The Commission may, at any time, issue a submission during the arbitration procedure.
- 9.13** Nothing in the arbitration procedure shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the EC Treaty.

## **10 GENERAL PROVISIONS**

- 10.1** If the Concentration is abandoned, abrogated, unwound, not approved or disapproved by a relevant Government Authority, or otherwise terminated, then these Commitments shall automatically cease to apply.
- 10.2** If the approval of the Concentration by another governmental authority is made subject to requirements that are potentially inconsistent with these Commitments, Lufthansa may request a review and adjustment of these Commitments in order to avoid such inconsistencies.

## **11 REVIEW SECTION**

- 11.1** The Commission may, if appropriate, in response to a request from Lufthansa duly justified and provided together with the relevant report prepared by the Monitoring Trustee, in exceptional circumstances, waive, modify or substitute one or more of the obligations stated in these Commitments, in particular as regards the necessity of making available a fifth slot to a Non-Star Alliance Applicant to ensure effective competition on the Vienna-Frankfurt route.

**11.2** The Commission may, if appropriate, in response to a request from Lufthansa duly justified and provided together with the relevant report prepared by the Monitoring Trustee, grant an extension of the terms foreseen in these Commitments. In case Lufthansa asks for any term extension, such a request shall be filed no later than one (1) month before the end of the period. Only in exceptional circumstances shall Lufthansa be entitled to request an extension within the last month of any period.

31 July 2009

**Deutsche Lufthansa Aktiengesellschaft**

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Armin Herzwurm  
Vice President Corporate Strategy &  
Group Development

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Michael Niggemann  
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