

**CASE COMP/F-1/39.595 – AC/LH/UA**  
**COMMITMENTS TO THE EUROPEAN COMMISSION**

In accordance with Article 9 of Council Regulation (EC) No. 1/2003 (*Regulation 1/2003*), the Parties offer the following commitments (*Commitments*) with a view to remedying the competition concerns expressed by the Commission in the context of its investigation in Case COMP/F-1/39.595 AC/LH/UA and enabling the Commission to adopt a decision confirming that the Commitments meet its concerns (*Commitment Decision*).

Consistent with Article 9 of Regulation 1/2003, these Commitments may not be interpreted as an acknowledgement that the Parties have infringed the EU competition rules or that the A++ Joint Venture is incompatible with Article 101 TFEU. The Parties are acting on the assumption that, by accepting these Commitments, the Commission will confirm that there are no longer grounds for action by the Commission without concluding whether or not there has been an infringement of the EU competition rules.

This text shall be interpreted in the light of the Commitment Decision and in the general framework of EU law, in particular Article 101 TFEU and Regulation 1/2003.

**0. DEFINITIONS**

For the purpose of the Commitments, the subsequently listed terms shall have the following meanings:

<b>Alliance</b>	The Star Alliance, the SkyTeam Alliance, the oneworld Alliance, or any other similar airline alliance that may be developed
<b>Applicant</b>	Any airline with a valid operating licence issued by an EU Member State under Council Regulation (EC) No 1008/2008 or equivalent licence issued by a non-member state of the EU interested in obtaining Slots from the Parties in accordance with these Commitments and having the appropriate traffic rights to operate the Competitive Air Service using the Slots provided under Clause 1.1.1 of these Commitments
<b>A++ Joint Venture</b>	The cooperation envisaged by the Transatlantic Joint Venture Agreement between the Parties of 15 December 2010, involving (a) transatlantic cooperation between the Parties and (b) cooperation between the Parties and other Star Alliance members in connection with the transatlantic cooperation between the Parties
<b>Central America</b>	Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama
<b>Commitment(s)</b>	The Slot commitment for the Identified City Pair and/or, as relevant, the commitment granting the Prospective Entrant access to one of the Parties' Frequent Flyer Programmes on the Identified

	City Pair and/or, as relevant, the commitment relating to fare combinability and/or, as relevant, the commitment relating to Special Prorate Agreements on the Identified City Pair
<b>Competitive Air Service</b>	Scheduled passenger air transport service operated on the Identified City Pair on a non-stop basis (that is, a flight that is constantly in the air between its origin and final destination airports)
<b>DOT</b>	The Department of Transportation of the United States of America
<b>Effective Date</b>	The date of the adoption of the Commitments Decision
<b>Eligible Non-stop Air Services Provider</b>	An airline which operates a non-stop service on the Identified City Pair (whether or not a New Non-stop Air Services Provider) and which does not, alone or in combination with its Alliance partners (if applicable), operate a Hub at one of the airports serving the city at both ends of the Identified City Pair
<b>EU Slot Regulation</b>	Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14 of 22.01.1993), as amended
<b>Europe</b>	Geographical Europe, i.e. West of the Ural Mountains, North of the Caucasus and West of the Bosphorus
<b>FAA</b>	The U.S. Federal Aviation Administration
<b>Fast-Track Dispute Resolution Procedure</b>	This term has the meaning given in Clause 6
<b>FFP Agreement</b>	An agreement by which an airline operating a Frequent Flyer Programme allows another airline to participate in that FFP
<b>Frequency(ies)</b>	A round-trip on an Identified City Pair
<b>Frequent Flyer Programme (or FFP)</b>	A programme offered by an airline to reward customer loyalty under which members of the programme accrue points for travel on that airline which can be redeemed for free air travel and other products or services, as well as allowing other benefits such as airport lounge access or priority bookings

<b>General Slot Allocation Procedure</b>	<p>(a) For Frankfurt airport: the Slot allocation procedure as set out in the EU Slot Regulation and IATA Worldwide Slot Guidelines (including participation at the IATA Slot Conference to try to improve slots and allocation by the slot coordinator from the waitlist following the Slot Return Deadline); and/or, where applicable</p> <p>(b) For JFK and Newark Liberty airports in New York: the generally used operating authorization allocation procedure as defined by the FAA or any other relevant U.S. government agency, as well as the petitioning of the FAA (or any other relevant U.S. government agency administering capacity limitations at the relevant New York area airport) for a new operating authorization beyond those currently allocated at JFK or Newark Liberty airports</p>
<b>Hub</b>	An airport at which an airline concentrates its operations, including focus city airports, whether or not formally designated a hub. For the purpose of these Commitments, as of the date of the Commitment Decision, the following airlines' hub or focus city operations shall be deemed to be Hubs in New York: American, Jet Blue and Delta.
<b>IATA</b>	The International Air Transport Association
<b>IATA Slot Conference</b>	The industry conference of airlines and airport coordinators worldwide to solve scheduling issues where there are discrepancies between the slots requested by the airlines and allocated by the airport coordinators. The IATA Slot Conference for the Winter Season takes place in June, and the one for the Summer Season in November
<b>IATA Season</b>	The IATA Summer Season begins on the last Sunday of March and ends on the Saturday before the last Sunday of October. The IATA Winter Season begins on the last Sunday of October and ends on the Saturday before the last Sunday of March
<b>ICC</b>	International Chamber of Commerce
<b>Identified City Pair</b>	Frankfurt-New York
<b>Initial Submission Deadline</b>	The final date for the request for Slots to the slot coordinator as set out in the IATA Worldwide Slot Guidelines
<b>JFK</b>	John F Kennedy International Airport in New York
<b>Key Terms</b>	The following terms that shall be included in the Applicant's formal bid for Slots: timing of the Slot, number of frequencies and

IATA Seasons to be operated (year-round service or seasonal).

<b>Miles</b>	The credits awarded by one of the Parties to members of its FFP. Such credits include standard reward points only and do not include tier or status points
<b>Misuse</b>	Misuse of the type described at Clause 1.2.8
<b>MITA</b>	Multilateral Interline Traffic Agreements Manual published by IATA
<b>Monitoring Trustee</b>	An individual or institution, independent of the Parties, who is approved by the Commission and appointed jointly by the Parties and who has the duty to monitor the Parties' compliance with the conditions and obligations attached to the Commitment Decision
<b>New Non-stop Air Services Provider</b>	An airline which commences a new non-stop service on an Identified City Pair or which increases the number of non-stop Frequencies it operates on the Identified City Pair in accordance with these Commitments
<b>North America</b>	Canada, Mexico and the U.S.
<b>oneworld</b>	The Alliance founded by BA, AA, Cathay Pacific and Qantas in 1999.
<b>Parties</b>	Air Canada (AC), Continental Airlines Inc. (CO), Deutsche Lufthansa AG (LH) and United Air Lines Inc. (UA), each a "Party"
<b>Prospective Entrant</b>	<p>Any Applicant that is able to offer a Competitive Air Service individually or collectively by codeshare and needing a Slot or Slots to be made available by the Parties in accordance with the Commitments in order to operate a Competitive Air Service</p> <p>For the avoidance of doubt, the Prospective Entrant shall comply with the following requirements:</p> <p>(a) it must be independent of and unconnected with the Parties. For the purpose of these Commitments, an airline shall not be deemed to be independent of and unconnected to the Parties when, in particular:</p> <ul style="list-style-type: none"><li>• it is an associated carrier belonging to the same holding company as one of the Parties; or</li><li>• the airline co-operates with the Parties on the Identified City Pair in the provision of passenger air transport services, except if this co-operation is limited to agreements concerning servicing,</li></ul>

deliveries, lounge usage or other secondary activities entered into on an arm's length basis;

- (b) it must have the intention to begin or increase regular operations on the Identified City Pair; and
- (c) to that effect, it needs a Slot or several Slots for the operation of a Competitive Air Service which competes with those of the Parties

**Q/YQ/YR Surcharges**

Charges paid in addition to the base fare amount of a ticket which are allocated to the Q, YQ or YR IATA ticket coding and which are used in particular to recover fuel, insurance and/or security charges

**Requesting Air Services Provider**

This term has the meaning given in Clause 3.1

**Requesting Party**

This term has the meaning given in Clause 6

**SkyTeam**

The Alliance which has developed from the original SkyTeam alliance (founded by Air France, Delta and others) and the Wings alliance (which had involved KLM, Northwest and others)

**Slot Return Deadline**

15 January for the IATA Summer Season and 15 August for the IATA Winter Season

**Slot Release Agreement**

An agreement between any of the Parties and a Prospective Entrant that provides for the exchange of Slot(s) with the Prospective Entrant according to the principles laid down in Clause 1 of these Commitments. For the avoidance of doubt, the Slot Release Agreement shall abide by the EU Slot Regulation and any exchange pursuant to this agreement shall be confirmed by the slot coordinator

**Slot Release Procedure**

This term has the meaning given in Clause 1.2.1

**Slot(s)**

- (a) For Frankfurt airport: the permission given by the slot coordinator in accordance with the EU Slot Regulation to use the full range of airport infrastructure necessary to operate an Air Service at Frankfurt on a specific date and time for the purpose of landing or take-off as allocated by the slot coordinator in accordance with this Regulation and/or, where applicable
- (b) For JFK and Newark Liberty airports: the operating authorization, i.e. a take-off or landing reservation under instrument flight rules allowing the use of the full range of airport infrastructure (to the extent owned or controlled by

the Parties) necessary to operate an Air Service at JFK or Newark Liberty airports on a specific date and time for the purpose of landing or take-off.

<b>Special Prorate Agreement</b>	An agreement between two or more airlines on the apportionment of through-fares on journeys with two or more legs operated by different airlines
<b>Star</b>	The Alliance which has developed from the alliance established in 1997 between Air Canada, Lufthansa, SAS, Thai and United
<b>Straight Rate Prorate</b>	Method of allocating fares between airlines participating in a connecting passenger itinerary under which fares are allocated between the airlines in proportion to their shares of the prorate mileage for the entire journey
<b>TFEU</b>	The Treaty on the Functioning of the European Union

## **1. SLOTS**

### **1.1 Slots for certain Identified City Pairs**

1.1.1 The Parties undertake to make Slots available at Frankfurt and, if applicable, at New York (at the choice of the Prospective Entrant at either JFK or Newark Liberty airports), to allow one or more Prospective Entrant(s) to operate or increase up to seven (7) new or additional Frequencies per week on the Identified City Pair.

1.1.2 If the aggregate number of daily Competitive Air Services operated by third party carriers on the Identified City Pair, without using Slots made available by the Parties under these Commitments, exceeds two (2) for a particular IATA Season (Summer and/or Winter), the number of such additional services shall be deducted from the number of Slots which the Parties have to make available on the Identified City Pair pursuant to Clause 1.1.1 in that particular IATA Season, subject to the condition that the Commission (advised by the Monitoring Trustee) has confirmed that the new services are operated by an airline which is independent and unconnected to the Parties and a viable competitor.

1.1.3 For the avoidance of doubt, an additional Competitive Air Service not using a Slot made available by the Parties shall neither affect the Slot Release Agreements already concluded by the Parties under these commitments nor affect the right of the Prospective Entrant to renew the agreement as long as the Commitment Decision is in force.

1.1.4 If the aggregate number of daily Competitive Air Services operated by third party carriers reduces below two, then the number of additional Frequencies for which the Parties undertake to make Slots available pursuant to Clause 1.1.1 shall be increased correspondingly. However, if the Parties have already provided one Slot at JFK airport under Clause 1.1.1 and a Prospective Entrant seeking Slots under Clause 1.1.1 to operate additional Frequencies requests a Slot or Slots at JFK airport, the Parties shall not be obliged to make additional Slots available at JFK airport but may instead make Slots available at Newark Liberty airport.

1.1.5 If the Prospective Entrant which has obtained Slots under the Slot Release Agreement ceases to meet the conditions set out in paragraph (a) of the definition of a Prospective Entrant, the Parties shall make slots available to Prospective Entrants pursuant to Clause 1.1.1 of these Commitments as of the next relevant IATA Season.

### **1.2 Conditions pertaining to Slots**

1.2.1 Each Prospective Entrant shall comply with the following procedure to obtain Slots from the Parties (*Slot Release Procedure*).

The Prospective Entrant wishing to commence/increase a Competitive Air Service on one or more of the Identified City Pairs listed at Clause 1.1.1 shall: (i) apply to the slot coordinator and, where applicable, to the FAA (or any other relevant U.S. government agency administering capacity limitations at JFK or Newark Liberty airports) for the necessary Slots through the General Slot Allocation Procedure, and (ii) notify its request for Slots to the Monitoring Trustee, within the period foreseen in Clause 1.3.1.

The Prospective Entrant shall be eligible to obtain Slots from the Parties pursuant to these Commitments only if it can demonstrate that it has exhausted all reasonable efforts to obtain the necessary Slots to operate on the Identified City Pairs through the normal workings of the General Slot Allocation Procedure.

1.2.2 For the purposes of this Clause 1.2, the Prospective Entrant shall be deemed not to have exhausted all reasonable efforts to obtain necessary Slots if:

- (a) Slots at the same airport, within sixty (60) minutes of the times requested, were available through the General Slot Allocation Procedure but such Slots have not been accepted by the Prospective Entrant; or
- (b) Slots at the same airport (for use to operate a Competitive Air Service on the Identified City Pair), for times more than sixty (60) minutes from the times requested, were obtained through the General Slot Allocation Procedure and the Prospective Entrant did not give the Parties the opportunity to exchange those Slots for Slots within sixty (60) minutes of the requested times; or
- (c) It has not exhausted its own Slot portfolio at the airports. For these purposes, a carrier will be deemed not to have exhausted its own Slot portfolio:
  - (i) If the carrier was offering a Competitive Air Service (on its own aircraft or that of an Alliance partner with which it has a transatlantic joint venture) on the Identified City Pair less than four (4) consecutive IATA Seasons before the IATA Season for which it is applying for Slots but where it (or its Alliance partner) has subsequently reduced or cancelled that service and reutilised or intends to reutilise the Slots used for that service on another route so as to present itself as needing Slots to operate a Competitive Air Service on the Identified City Pair. In such circumstances, there will be a presumption that the carrier has reutilised or intends to reutilise its Slots in order to present itself as needing Slots to operate a Competitive Air Service on the Identified City Pair. Exceptionally, however, such a carrier will be deemed to have exhausted its own Slot portfolio if:
    - it can provide detailed compelling evidence satisfying the Commission (following consultation with the Monitoring Trustee and having given the Parties the opportunity to comment)



that there are bona fide reasons why it could not utilise the Slot which it was previously using for that service; or

- it gives the Party holding the Slot covered by the Slot Release Agreement an option to become a lessee of that reutilised Slot at the earliest possible time on reasonable terms and for a duration that runs in parallel with the Slot Release Agreement; or
- (ii) If the carrier has Slots at the airport within sixty (60) minutes of the times requested which are being leased-out to or exchanged with other carriers (unless that lease or exchange was concluded before 10 October 2012 or the carrier can provide reasonable evidence satisfying the Commission (following consultation with the Monitoring Trustee) that there are bona fide reasons for this being done rather than its being a pretext to enable the carrier to present itself as needing Slots to operate a Competitive Air Service on the Identified City Pair); or
- (iii) If the carrier has Slots at the airport which are outside sixty (60) minutes of the times requested and which are leased-out to other carriers, in which case the Prospective Entrant shall be entitled to apply for Slots from the Parties, but only if:
- that lease was concluded before 10 October 2012; or
  - it can provide reasonable evidence satisfying the Commission (following consultation with the Monitoring Trustee) that there are bona fide reasons for leasing the Slot out in this way rather than using it itself; or
  - it gives the Party holding the Slot covered by the Slot Release Agreement an option to become the lessee of the leased-out Slot at the earliest possible time allowed under the applicable lease (on terms substantially the same as that lease and for a duration that runs in parallel with the Slot Release Agreement). If the Slot Release Agreement with the Prospective Entrant does not provide for monetary compensation, then the lease to the Party will likewise not provide for monetary compensation.

For the purposes of Clause 1.2.2(c) (ii) and (iii), the bona fide reasons for leasing out (or, as relevant, exchanging) Slots by the Applicant shall include, but shall not be limited to, a situation where the Applicant can provide clear evidence of an intention to operate those Slots on a specific route and clear and substantiated evidence of its reasons for not currently doing so;

- (iv) In the specific case of Slots at JFK or Newark Liberty airports, if the aggregate holding of Slots held at either JFK or Newark Liberty airport by:

- the Prospective Entrant;
- its regional affiliates (whether wholly owned or otherwise); and
- any other carriers with which it has a transatlantic joint venture which has been granted antitrust immunity by the DOT and those carriers' regional affiliates (whether wholly owned or otherwise),

is greater than the aggregate holding of Slots held by the Parties at that airport.

1.2.3 If the Prospective Entrant obtains Slots through the General Slot Allocation Procedure but after the IATA Slot Conference:

- (a) which are within the sixty (60) minute window; or
- (b) which (in the case of Slots obtained at both ends of the route) are not compatible with the planned flight duration of the Applicant's operation on the route,

the Prospective Entrant shall remain eligible to obtain Slots from the Parties provided that it gives an option to the Parties to use the obtained Slots on terms substantially the same as the terms of the Slot Release Agreement, and for a duration that runs in parallel with the Slot Release Agreement.

1.2.4 Without prejudice to these Commitments (and, particularly, of this Clause 1), the Parties shall not be obliged to honour any agreement to make available the Slots to the Prospective Entrant if:

- (a) The Prospective Entrant has not exhausted all reasonable efforts in the General Slot Allocation Procedure to obtain the necessary Slots to operate a new or increased service on the Identified City Pair; or
- (b) The Prospective Entrant has been found to be in a situation of Misuse (as described in Clause 1.2.7 below).

1.2.5 The Parties undertake to make available Slots within +/- sixty (60) minutes of the time requested by the Prospective Entrant (if the Parties have Slots within this time-window and in relation to airport infrastructure at JFK and Newark Liberty airports to the extent it is owned or controlled by the Parties). In the event that the Parties do not have Slots within the sixty (60) minute window, they shall offer to release the Slots (and related airport infrastructure at JFK and Newark Liberty airports to the extent it is owned or controlled by the Parties) closest in time to the Prospective Entrant's request. The Parties do not have to offer Slots if the Slots which the Prospective Entrant could have obtained through the General Slot Allocation Procedure are closer in time to the Prospective Entrant's request than the Slots that the Parties have. The arrival and departure Slot times shall be such as to allow for reasonable aircraft rotation, taking into account the Prospective Entrant's business model and aircraft utilisation constraints.

- 1.2.6 The Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall only be used for the purpose of providing the service proposed in the bid in accordance with Clause 1.3.7, for which the Prospective Entrant has requested the Slots, and cannot be used on another route.
- 1.2.7 Misuse shall be deemed to arise where a Prospective Entrant which has obtained Slots released by the Parties decides:
- (a) not to commence services on the Identified City Pair;
  - (b) to operate fewer weekly Frequencies than those to which it committed in the bid in accordance with Clause 1.3.7 on the Identified City Pair or to cease operating on the Identified City Pair unless such a decision is consistent with the "use it or lose it" principle in Article 10(2) of the EU Slot Regulation (or any suspension thereof);
  - (c) to transfer, assign, sell, swap, sublease or charge any Slot released by the Parties on the basis of the Slot Release Procedure, except for changes to the Slot which are within +/- sixty (60) minutes of the time originally requested by the Prospective Entrant and which have been agreed with the slot coordinator or the FAA or any other relevant U.S. government agency;
  - (d) not to use the Slots on the Identified City Pair, as proposed in the bid in accordance with Clause 1.3.7; or
  - (e) not to use the Slots properly: this situation shall be deemed to exist where the Prospective Entrant (i) loses the series of Slots at Frankfurt as a consequence of the principle of "use it or lose it" in Article 10(2) of the EU Slot Regulation or (ii) misuses the Slot at Frankfurt as described and interpreted in Article 14(4) of the EU Slot Regulation or (iii) loses the Slot at JFK or Newark Liberty airports because it failed to comply with the conditions imposed by the FAA or any other U.S. government agency.
- 1.2.8 If the Parties or the Prospective Entrant which has obtained Slots under the Slot Release Procedure become aware of or reasonably foresee any Misuse by the Prospective Entrant, they shall immediately inform the other Parties and the Monitoring Trustee. The Prospective Entrant shall have 30 days after such notice to cure the actual or potential Misuse. If the Misuse is not cured, the Parties shall have the right to terminate the Slot Release Agreement and the Slots shall be returned to the Parties. In cases (a) and (b) of Clause 1.2.7, the Parties shall then use their best efforts to redeploy the Slots in order to safeguard the historic precedents. If despite their best efforts, the Parties are not able to retain the historic precedent for these Slots, or in case of a Misuse as defined in cases (c), (d) or (e) of Clause 1.2.7, the Prospective Entrant shall provide reasonable compensation to the Parties as provided for in the Slot Release Agreement.
- 1.2.9 In view of the Commission's Communication of 30 April 2008, which stated that: "The text of the current Regulation is silent on the question of exchanges

with monetary and other consideration" and that the Commission would therefore "not intend to pursue infringement proceedings against Member States where such exchanges take place in a transparent manner, respecting all the other administrative requirements for the allocation of slots set out in the applicable legislation", the Slot Release Agreement with the Prospective Entrant may provide for monetary and/or other consideration for the Slot at Frankfurt to the extent that secondary trading takes place at Frankfurt and so long as such provisions are clearly disclosed and comply with these Commitments and all other administrative requirements set out in the applicable legislation. Similarly, the Slot Release Agreement may also provide for monetary and /or other coordination for the Slot(s) at JFK or Newark Liberty airports to the extent that secondary trading takes place at those airports and so long as such provisions are clearly disclosed and comply with these Commitments and all other administrative requirements set out in the applicable legislation.

- 1.2.10 The Slot Release Agreement may (i) contain prohibitions on the Prospective Entrant transferring its rights to the Slots to a third party, making the Slots available in any way to a third party for the use of that third party, or releasing, surrendering, giving up or otherwise disposing of any rights to the Slots, (ii) provide that at the expiry of the agreement, the Prospective Entrant shall release the Slots back to the Parties by way of an exchange, and/or (iii) provide for reasonable compensation to the Parties in case of Misuse. If for any reason (including, but without limitation, the insolvency of the Prospective Entrant) the Parties are unable to receive reasonable compensation for the Slots being either lost or not returned within sufficient time for the Parties to preserve their grandfathering rights, such Slots shall be counted against the maximum number of Slots to be released in accordance with the Commitments.
- 1.2.11 The Slot Release Agreement shall have the following duration: (i) if the Slot Release Agreement starts applying before IATA Winter Season 2013/14 (inclusive), the Slot Release Agreement shall have an effective duration of up to ten (10) years at the choice of the Prospective Entrant; or (ii) if the Slot Release Agreement starts applying after IATA Winter Season 2013/14, the Slot Release Agreement shall have an effective duration for a period of up to the end of IATA Winter Season 2021/22 or (if later) up to five (5) years at the choice of the Prospective Entrant. If the Prospective Entrant elects to have a shorter initial duration than that to which it was entitled pursuant to this Clause 1.2.12, it shall have a right to renew the Slot Release Agreement on an evergreen basis for further periods of one (1) year (i.e. rolled over on the same terms) as long as these Commitments are in force, provided the Prospective Entrant exercises its right of extension by informing the Parties in writing no later than two (2) weeks after the IATA Slot Conference preceding the requested extension.
- 1.2.12 The Slot Release Agreement shall provide that the Prospective Entrant will be able to terminate the agreement at the end of each IATA Season without penalty, provided the Prospective Entrant notifies the termination of the agreement to the Parties in writing no later than two (2) weeks after the IATA Slot Conference.

**1.3 Selection procedure, role of Monitoring Trustee and approval by Commission**

1.3.1 At least seven (7) weeks before the Initial Submission Deadline, any airline wishing to obtain Slots from the Parties pursuant to the Slot Release Procedure shall:

- (a) inform the Monitoring Trustee of its proposed Slot Request (indicating the arrival and departure times);
- (b) submit to the Monitoring Trustee the list of its leased out or exchanged Slots at Frankfurt, and where applicable at JFK and Newark Liberty airports, along with the date at which the leases or exchanges were concluded. The Monitoring Trustee or the Commission may also request additional information from the Applicant to enable assessment of its eligibility pursuant to Clause 1.2.2(c) and Clause 1.3.4;
- (c) request anonymity in accordance with Clause 1.3.3, if it so wishes.

If the Applicant requests Slots at a New York airport, it shall at the same time also apply to the FAA (or any other relevant U.S. government agency administering capacity limitations at JFK and Newark Liberty airports), for the Slots at both JFK and Newark Liberty airports in accordance with the applicable rules and procedures.

1.3.2 At least six (6) weeks before the Initial Submission Deadline, the Monitoring Trustee shall forward the Slot Request to the Parties and to the Commission. Once informed of the Slot Request, the Parties may discuss with the Applicant the New York airport at which they propose to offer the Slots, the timing of the Slots to be released and the types of compensation which could be offered. The Parties shall copy the Monitoring Trustee on all correspondence between the Parties and the Applicant which relates to the Slot Release Procedure. The Parties shall not share any information about such discussions with other Applicants and may require the Applicant not to share any such information with other Applicants. At least six (6) weeks before the Initial Submission Deadline, the Monitoring Trustee shall also inform the managers of Frankfurt Airport and JFK and Newark Liberty airports and the slot coordinator of the Slot Request and, subject to the Applicant's consent, disclose to them any relevant information regarding the Slot Request. The Monitoring Trustee shall ask the Managers of Frankfurt, JFK and Newark Liberty airports and the slot coordinator to inform it of any likely impediments to the satisfaction of the request, in particular due to the availability of terminal facilities and infrastructure.

1.3.3 At least three (3) weeks before the Initial Submission Deadline the Monitoring Trustee conducts an assessment on the aggregate number of daily Competitive Non-stop Air Services operated by third party carriers on the Identified City Pair without using Slots made available by the parties. Based on the report of the Monitoring Trustee, the Commission determines the availability of Slots on the Identified City Pair in accordance with Clause 1.1.2 two (2) weeks before the Initial Submission Deadline at the latest. If the Commission decides that the Parties shall not release Slots on the

Identified City Pair under Clause 1.1.2, the Commission will dismiss the received Slot applications.

- 1.3.4 If Slot applications are not dismissed under Clause 1.3.3, then the Slot Release Procedure will continue as envisaged in Clauses 1.3.5-1.3.15.
- 1.3.5 Until the beginning of the IATA Slot Conference, the Monitoring Trustee shall not disclose to the Parties the identity of the Applicant, if the Applicant so requests in accordance with Clause 1.3.1(c). In such a case, the procedure set down in this Clause 1.3 shall apply, save that, until the beginning of the IATA Slot Conference, any communication or correspondence between the Parties and the Applicant shall go through the Monitoring Trustee, who shall ensure the protection of the anonymity of the Applicant.
- 1.3.6 After being informed of the Slot Request in accordance with Clause 1.3.2, the Commission (advised by the Monitoring Trustee) shall assess whether the Applicant meets the following criteria:
- (a) the Applicant is independent of and unconnected to the Parties; and
  - (b) the Applicant has exhausted its own Slot portfolio at Frankfurt and/or, where applicable, at JFK and Newark Liberty airports in accordance with Clause 1.2.2(c).

If the Commission decides that the Applicant does not fulfil the above criteria, the Commission shall inform the Applicant and the Parties of that decision at least two (2) weeks before the Initial Submission Deadline.

- 1.3.7 At least one (1) week before the Initial Submission Deadline, the Parties shall indicate to the Monitoring Trustee and each Applicant which Slots at Frankfurt and/or, where applicable, at JFK or Newark Liberty airport they would release, if necessary, during the time window (+/- sixty (60) minutes of the Applicant's requested time). If the Applicant requests Slots at both Frankfurt and either JFK or Newark Liberty, the Slots at each end of the route shall be compatible with the planned flight duration of the Applicant's operations on the route.
- 1.3.8 By the Initial Submission Deadline, each Applicant shall send its request for Slots (at the same time(s) as those requested through the Slot Release Procedure) to the slot coordinator in accordance with the General Slot Allocation Procedure.
- 1.3.9 By the Initial Submission Deadline, each Applicant shall also submit its formal bid for the Slots to the Monitoring Trustee. The formal bid shall include at least:
- (a) the Key Terms (i.e. timing of the Slot, number of frequencies and IATA Season(s) to be operated).
  - (b) a detailed business plan. This plan shall contain a general presentation of the company, including its history, its legal status, the list and a description of its shareholders and the two most recent yearly audited

financial reports. The detailed business plan shall provide information on the plans that the company has in terms of access to capital, development of its network, fleet etc. and detailed information on its plans for the Identified City Pair. The latter should specify in detail planned operations on the Identified City Pair over a period of at least two (2) IATA Seasons (size of aircrafts, seat configuration, total capacity and capacity by each class, number of frequencies operated, pricing structure, service offerings, planned time-schedule of the flights) and expected financial results (expected traffic, revenues, profits, average fare by cabin class). The Monitoring Trustee and/or the Commission may also request any additional information and documents from the Applicant required for their assessment, including a copy of all cooperation agreements the Applicant may have with other airlines. Business secrets and confidential information will be kept confidential by the Commission and the Monitoring Trustee and will not become accessible to the Parties, other undertakings or the public.

- 1.3.10 In parallel, if an Applicant is offering compensation for the Slot(s) it has requested pursuant to these Commitments, it will send to the Parties, copying the Monitoring Trustee, a detailed description of the compensation which it is willing to offer in exchange for the release of the Slots for which it has sent bids. Within two (2) weeks, the Parties shall provide the Monitoring Trustee with a ranking of these offers.
- 1.3.11 Having received the formal bid(s), the Commission (advised by the Monitoring Trustee) shall:
- (a) assess whether each Applicant is a viable existing or potential competitor, with the ability, resources and commitment to operate services on the Identified City Pair in the long term as a viable and active competitive force; and
  - (b) evaluate the formal bids of each Applicant, that meets (a) above, and rank these Applicants in order of preference.
- 1.3.12 In conducting its evaluation in accordance with Clause 1.3.9, the Commission shall give preference to the Applicant (or combination of Applicants) which will provide the most effective competitive constraint on the Identified City Pair(s), without regard to the country in which the Applicant(s) is licensed or has its principal place of business. Furthermore, the Commission shall take into account the strength of the Applicant's business plan and in particular give preference to Applicants meeting one or more of the following criteria:
- year-round service over only IATA Summer or Winter Season service;
  - the greatest total number of services/frequencies on the Identified City Pair;
  - the largest capacity on the Identified City Pair, as measured in

seats for the entire IATA Season; and

- a pricing structure and service offerings that would provide the most effective competitive constraint on the Identified City Pair.

If, following the Commission's evaluation, several Applicants are deemed to provide similarly effective competitive constraints on the Identified City Pair, the Commission shall rank these Applicants following the ranking provided by the Parties under Clause 1.3.8.

1.3.13 In advance of the beginning of the IATA Slot Conference, the Monitoring Trustee shall inform each Applicant (if the latter did not receive Slots within the time-window of +/- sixty (60) minutes and the slot coordinator:

- (a) whether the Applicant qualifies for the Slots Commitment; and
- (b) the Applicant's ranking.

In any case, the Applicant shall attend the IATA Slot Conference and try to improve its Slots. Following confirmation of the Commission's approval pursuant to Clause 1.3.9, the Applicants and the Parties shall be deemed to have agreed the Key Terms of the Slot Release Agreement, as well as any compensation which was offered by the Applicant to the Parties under Clause 1.3.8. The Key Terms may only be changed after such date by mutual agreement between the Applicant and the Parties if the Monitoring Trustee confirms that the changes are not material or if the Commission (advised by the Monitoring Trustee) approves the changes.

1.3.14 Within two (2) weeks of the end of the IATA Slot Conference, each Applicant shall inform the Monitoring Trustee and the Parties whether it will commit to operate the Slots offered eventually by the Parties in case it has not obtained them through the General Slot Allocation Procedure.

1.3.15 Within three (3) weeks of the end of the IATA Slot Conference, the Monitoring Trustee shall confirm to the highest ranked Applicant(s) that has provided the confirmation in accordance with Clause 1.3.12 that it is entitled to receive Slots from the Parties. The Parties shall offer the dedicated Slots for release to such Applicant. The Slot Release Agreement shall be subject to review by the Monitoring Trustee and approval of the Commission. Unless both the Parties and the relevant Applicant agree to an extension and subject to Clause 1.2.3, the Slot Release Agreement shall be signed and the Slot release completed within six (6) weeks after the IATA Slot Conference, and the slot coordinator shall be informed of the Slot exchange in order to obtain the required confirmation.

## **2. FARE COMBINABILITY**

2.1 At the request of an Eligible Non-stop Air Services Provider which, after the Effective Date, operates or has started to operate new or increased Competitive Air Service on the Identified City Pair (whether or not such service uses Slots



released to that carrier pursuant to these Commitments), the Parties shall enter into an agreement that arranges for fare combinability on the Identified City Pair. This agreement will provide for the possibility for the Eligible Non-stop Air Services Provider, or travel agents, to offer a return trip on the Identified City Pair comprising a non-stop service provided one way by one of the Parties and a non-stop service provided the other way by the Eligible Non-stop Air Services Provider. At the request of the Eligible Non-stop Air Services Provider, the agreement shall apply in relation to all of the Eligible Non-stop Air Services Provider's services on the Identified City Pair.

- 2.2 Any such agreement shall be subject to the following restrictions:
- (a) it shall apply only to business class and first class cabins, and fully flexible economy class tickets;
  - (b) it shall provide for fare combinability on the basis of the Parties' published one-way fares, and, for Eligible Non-stop Air Service Providers which are not members of a transatlantic joint venture which has been granted antitrust immunity by the DOT, it shall also provide for access to the Parties' other published fares. Where this provides for a published round-trip fare, the fare can be comprised of half the round-trip fare of the relevant Party and half the round-trip fare of the Eligible Non-stop Air Services Provider;
  - (c) it shall provide for the appropriate division or recovery of any applicable Q/YQ/YR Surcharges;
  - (d) it shall be limited to true origin and destination traffic on the Identified City Pair operated by the Eligible Non-stop Air Services Provider; and
  - (e) it shall be subject to the MITA rules.
- 2.3 Subject to Clause 2.7, any term included in the agreement (for example, interline service charge, number of booking classes included) can never be less favourable than the corresponding term in any fare combinability agreement which the relevant Party and the Eligible Non-stop Air Services Provider have in place as at 10 October 2012.
- 2.4 Subject to seat availability in the relevant fare category, the Parties shall carry a passenger holding a coupon issued by an Eligible Non-stop Air Services Provider for travel on the Identified City Pair. The Parties may require that the Eligible Non-stop Air Services Provider or the passenger, where appropriate, pay the (positive) difference between the fare charged by the Parties and the fare charged by the Eligible Non-stop Air Services Provider if one of the Parties was not the original ticketed carrier on the Identified City Pair. In cases where the Eligible Non-stop Air Services 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 Eligible Non-stop Air Services Provider. An Eligible Non-stop Air Services Provider shall enjoy the same protection in cases where the Parties' fare is lower than the value of the coupon issued by it.

- 2.5 Within four (4) weeks of the date of the request for a fare combinability agreement by an Eligible Non-stop Air Service Provider, the Parties shall propose a draft fare combinability agreement to the Monitoring Trustee in compliance with Clause 2. At the same time, the Parties shall submit supporting evidence, as necessary, in particular with regard to Clause 2.3.
- 2.6 Considering the comments of the Eligible Non-stop Air Service Provider and after having consulted the Commission, the Monitoring Trustee may request clarification and further evidence from the Parties. The Parties shall provide the requested clarification and evidence within two (2) weeks of the request from the Monitoring Trustee, unless the Parties present *bona fide* reasons for the Commission to extend this deadline.
- 2.7 If the Monitoring Trustee confirms that the provided clarification and evidence are sufficient, the Parties shall revise the draft fare combinability agreement, as necessary, within two (2) weeks of the confirmation from the Monitoring Trustee. If the Monitoring Trustee requests further clarification and evidence, the Parties shall proceed in accordance with Clause 2.6.
- 2.8 Upon the request of the Eligible Non-stop Air Service Provider, the draft fare combinability agreement proposed by the Parties under Clause 2.5 may be applied provisionally without prejudice to subsequent negotiations on the fare combinability agreement.
- 2.9 The fare combinability agreement entered into pursuant to this Clause 2 for the particular Identified City Pair shall have the following duration: (i) if the fare combinability agreement starts applying before IATA Winter Season 2013/14 (inclusive), the fare combinability agreement shall have an effective duration of up to ten (10) years at the choice of the Eligible Non-stop Air Services Provider; or (ii) if the fare combinability agreement starts applying after IATA Winter Season 2013/14, the fare combinability agreement shall have an effective duration for a period of up to the end of IATA Winter Season 2021/22 or (if later) of up to five (5) years at the choice of the Eligible Non-stop Air Services Provider. If the Eligible Non-stop Air Services Provider elects to have a shorter initial duration than that to which it is entitled pursuant to this Clause 2.5, it shall have a right to renew the agreement on an evergreen basis for further periods of one (1) year (i.e. rolled over on the same terms) as long as these Commitments are in force, provided it exercises its right of extension by informing the Parties in writing no later than thirty (30) days before the expiry of the agreement. The Eligible Non-stop Air Services Provider also has a right to terminate the agreement, at any time during the initial term or the extensions, upon thirty (30) days' written notice.
- 2.10 All agreements entered into pursuant to this Clause 2 for the Identified City Pair shall lapse automatically in the event that the Eligible Non-stop Air Services Provider ceases to operate the new or increased service on the Identified City Pair.

- 2.11 The conclusion of the fare combinability agreement shall be subject to the approval of the Commission, as advised by the Monitoring Trustee, in particular as to whether its terms are reasonable.

### **3. SPECIAL PRORATE AGREEMENTS**

- 3.1 At the request of a New Non-stop Air Services Provider, irrespective of whether the **non-stop** Competitive Air Service is commenced on the basis of Slots obtained from the Parties under the Commitments, the Parties shall enter into a Special Prorate Agreement with such airline (*Requesting Air Services Provider*) for traffic with a true origin/destination in Europe or Israel, and a true destination/origin in North America, the Caribbean and Central America, provided that part of the journey involves the Identified City Pair on which the Competitive Air Service is offered. At the request of the Requesting Air Services Provider, the Special Prorate Agreement shall apply to all of the Requesting Air Services Provider's air services on the Identified City Pair on which the Competitive Air Service is offered.
- 3.2 In order to be eligible for a Special Prorate Agreement, the Requesting Air Services Provider must not, alone or in combination with carriers who are part of the same Alliance as the Requesting Air Services Provider, have Hubs at both ends of the Identified City Pair.
- 3.3 Subject to Clause 3.1, for each of the Parties with whom it proposes to enter a Special Prorate Agreement pursuant to these Commitments, the Requesting Air Services Provider may select up to a maximum of fifteen (15) behind/beyond routes which are operated by the relevant Party and to which the Special Prorate Agreement will apply, it being understood that the number of routes included for the Identified City Pair cannot be lower than the number of routes that is, at 10 October 2012, included in an existing special prorate agreement between the Requesting Air Services Provider and the same Party and that the Special Prorate Agreement shall only apply to frequencies on the behind/beyond route operated by the relevant Party.
- 3.4 The Requesting Air Services Provider may also select the fare class(es) to which the Special Prorate Agreement will apply, provided that each selected fare class is included in at least one existing special prorate agreement which the relevant Party has agreed with any other carrier with regard to the routes concerned, excluding any agreements (or terms therein) which are excluded pursuant to Clause 3.8 and any codeshare terms within an existing agreement. Subject to the previous sentence of this Clause 3.4, the number of fare classes that the Requesting Air Services Provider may select shall be up to the maximum number of fare classes per cabin that is granted by the relevant Party under an existing special prorate agreement of the same type (Straight Rate Prorate or fixed rate as the case may be) to any other carrier.
- 3.5 If the Special Prorate Agreement provides for Straight Rate Prorate terms:
- (a) straight rate proration shall apply only to published fares;

- (b) it shall include arrangements for the proration or remittance of any applicable Q/YQ/YR Surcharges; and
  - (c) it shall not prohibit the relevant Party from making adjustments to ATPCo chart 2 in accordance with normal business practices in managing Straight Rate Prorate agreements. Should the Requesting Air Services Provider believe that the relevant Party has made adjustments to ATPCo chart 2 which are not in accordance with normal business practices but rather an attempt by that Party to restrict the Requesting Air Services Provider's inventory access, it may ask the Monitoring Trustee to verify whether the relevant Party's adjustments comply with these Commitments.
- 3.6 Subject to the provisions of the remainder of this Clause 3, the Special Prorate Agreement shall:
- (a) be on terms (rates and interline service charges) which are at least as favourable as the terms agreed by the relevant Party under an existing special prorate agreement with any other carrier for the same route and in the same fare class (other than any terms excluded by virtue of Clause 3.8). If the relevant Party does not have an equivalent rate with any other carrier, the rate shall be determined in accordance with Clause 3.9;
  - (b) grant the Requesting Air Services Provider equivalent inventory access to that given to the other Parties; and
  - (c) ensure minimum connection times which are based on standard practices at the airport and terminal in question and which are reasonable. The Requesting Air Services Provider shall have the option to agree to minimum connection times on the same terms as those that the Parties grant to each other to the extent that this is reasonable *inter alia* in light of the infrastructure investments involved.
- 3.7 Subject to Clause 3.14, any term included in the Special Prorate Agreement (for example, rates and interline service charge, number of fare and booking classes included) can never be less favourable than the corresponding term in any special prorate agreement which the relevant Party and the Requesting Air Services Provider have in place as of 10 October 2012 (other than any code share terms within existing special prorate agreements and any terms excluded by virtue of Clause 3.8).
- 3.8 For the purposes of Clause 3.4 and Clause 3.6(a), the relevant Party may exclude any existing special prorate agreement which that Party has with any other carrier which it would be unreasonable to include, for example because:
- (a) the agreement is *de minimis* (in that fewer than 1,000 sectors were flown on the relevant Party's metal pursuant to that agreement in the last financial year); or
  - (b) the agreement is obsolete; or

- (c) the agreement does not involve interlining at Frankfurt, JFK or Newark Liberty airports.

In addition, the Monitoring Trustee shall exclude any existing special prorate agreements or any individual terms of such agreements which the relevant Party has demonstrated, to the satisfaction of the Monitoring Trustee, that it would be unreasonable to include because, due to exceptional circumstances, the relevant agreements or terms are exceedingly favourable.

3.9 For the purposes of Clause 3.6(a):

- (a) where the selected route is included in at least one existing special prorate agreement which the relevant Party has with another carrier and which has not been excluded pursuant to Clause 3.8, but is included in a different fare class to the one selected by the Requesting Air Services Provider, the terms will be calculated by applying a ratio of the average difference in fares as between the fare class selected by the Requesting Air Services Provider and the fare class on which terms with another carrier are available;
- (b) where the selected route is not included in any fare class in any existing special prorate agreements which the relevant Party has with other carriers, the rate on that route will be either the rate agreed by the relevant Party and the Requesting Air Services Provider or the most favourable rate that applies to the most comparable route (considering factors such as yield and length of haul) which is included in an existing special prorate agreement of the relevant Party. In the event that the relevant Party can establish that clear and material differences exist between the selection route and the most comparable route, the Monitoring Trustee may make appropriate adjustments to the rate.

3.10 Clauses 3.4, 3.5(c) and 3.6(a) in conjunction with Clauses 3.8 and 3.9, shall, subject to Clause 3.14, be applied on the basis of the more favourable (to the Requesting Air Services Provider) of the following:

- (a) special prorate agreements (and the terms therein) between the relevant Party and any other carrier as existing at 10 October 2012, subject to reasonable indexation that takes account of standard industry practices (including practices between the Parties); and
- (b) special prorate agreements (and the terms therein) between the relevant Party and any other carrier as existing at the date of the request for negotiation or re-negotiation of the Special Prorate Agreement.

3.11 The Special Prorate Agreement shall have the following duration: (i) if the Special Prorate Agreement starts applying before IATA Winter Season 2013/14 (inclusive), the Special Prorate Agreement shall have an effective duration of up to ten (10) years at the choice of the Requesting Air Services Provider; or (ii) if the Special Prorate Agreement starts applying after IATA Winter Season 2013/14, the Special Prorate Agreement shall have an effective duration for a

period of up to the end of IATA Winter Season 2021/22 or (if later) up to five (5) years at the choice of the Requesting Air Services Provider. If the Requesting Air Services Provider elects to have a shorter initial duration than that to which it is entitled pursuant to this Clause 3.11, it shall have a right to renew the agreement on an evergreen basis for further periods of one (1) year (i.e. rolled over on the same terms) as long as these Commitments are in force, provided it exercises its right of extension by informing the Parties in writing no later than thirty (30) days before the expiry of the agreement. The Requesting Air Services Provider also has a right to terminate the agreement, at any time during the initial term or the extensions, upon thirty (30) days' written notice.

- 3.12 Within four (4) weeks of the date of the request for a Special Prorate Agreement by an Eligible Non-stop Air Service Provider, the Parties shall propose a draft Special Prorate Agreement to the Monitoring Trustee in compliance with Clause 3. At the same time, the Parties shall submit supporting evidence, as necessary, in particular with regard to Clauses 3.6, 3.8, 3.9 and 3.10.
- 3.13 Considering the comments of the Eligible Non-stop Air Service Provider and after having consulted the Commission, the Monitoring Trustee may request clarification and further evidence from the Parties. The Parties shall provide the requested clarification and evidence within two (2) weeks of the request from the Monitoring Trustee, unless the Parties present bona fide reasons for the Commission to extend this deadline.
- 3.14 If the Monitoring Trustee confirms that the provided clarification and evidence are sufficient, the Parties shall revise the draft Special Prorate Agreement, as necessary, within two (2) weeks of the confirmation from the Monitoring Trustee. If the Monitoring Trustee requests further clarification and evidence, the Parties shall proceed in accordance with Clause 3.12.
- 3.15 Upon the request of the Eligible Non-stop Air Service Provider, the draft Special Prorate Agreement proposed by the Parties under Clause 3.11 may be applied provisionally without prejudice to subsequent negotiations on the Special Prorate Agreement.
- 3.16 All Special Prorate Agreements entered into pursuant to this Clause 3:
  - (a) shall lapse automatically in the event that the Requesting Air Services Provider ceases to operate non-stop Competitive Air Service on the Identified City Pair, joins an existing Alliance with Hubs at both end of the City Pair referred to in Clause 3.1 or is controlled by a member of an Alliance with Hubs at both ends of the City Pair referred to in Clause 3.1; and
  - (b) may with the agreement of the Monitoring Trustee, be subject to annual re-negotiation. Clause 3.10 (in conjunction with the other Clauses referred to therein) shall be applicable to each annual re-negotiation.

- 3.17 Should the Requesting Air Services Provider believe that the terms proposed by the relevant Party do not comply with this Clause 3, it may ask the Monitoring Trustee to verify whether those terms comply with these Commitments.
- 3.18 The conclusion of the Special Prorate Agreement shall be subject to the approval of the Commission, as advised by the Monitoring Trustee, in particular as to whether its terms are reasonable.
- 3.19 For the avoidance of doubt, the Parties shall not deconcur the Requesting Air Services Provider from routes and fare classes covered by the Special Prorate Agreement. The Parties shall also not deconcur the Requesting Air Services Provider from particular fare classes or routes which it currently prorates under the IATA Multilateral Proration Agreement where the Requesting Air Services Provider's rates cover the relevant Party's marginal costs of carriage.

#### **4. FREQUENT FLYER PROGRAMMES**

- 4.1 At the request of a New Non-stop Air Services Provider that does not have a comparable FFP of its own and does not participate in any of the Parties' FFPs, the Parties shall allow it to be hosted in their FFPs for the Identified City Pair on which the New Non-stop Air Services Provider has commenced or increased service. The FFP agreement with the New Non-stop Air Services Provider shall be on terms such that the New Non-stop Air Services Provider shall have equal treatment vis-a-vis the accrual and redemption of Miles on the Identified City Pair as compared with members of the Star Alliance other than the Parties.
- 4.2 Any agreement entered into pursuant to this Clause 4 shall:
- (a) lapse automatically in the event that the New Non-stop Air Services Provider ceases to operate non-stop service on the Identified City Pair; and
  - (b) have the following duration: (i) if the FFP agreement starts applying before IATA Winter Season 2013/14 (inclusive), the FFP agreement shall have an effective duration of up to ten (10) years at the choice of the New Non-stop Air Services Provider; or (ii) if the FFP agreement starts applying after IATA Winter Season 2013/14, the FFP agreement shall have an effective duration for a period of up to the end of IATA Winter Season 2021/22 or (if later) of up to five (5) years at the choice of the New Non-stop Air Services Provider. If the New Non-stop Air Services Provider elects to have a shorter initial duration than that to which it is entitled pursuant to this Clause 4.2, it shall have a right to renew the agreement on an evergreen basis for further periods of one (1) year (i.e. rolled over on the same terms) as long as these Commitments are in force, provided it exercises its right of extension by informing the Parties in writing no later than two (2) weeks after the slot conference preceding the requested extension. The New Non-stop Air Services Provider also has a right to terminate the agreement, at any time during the initial term or the extensions, upon thirty (30) days' written notice.

- 4.3 Subject to Clause 4.4, any term included in the frequent flyer agreement entered into pursuant to this Clause 4 can never be less favourable than the corresponding term in any FFP agreement which the relevant Party and the New Non-stop Air Services Provider have in place as at 10 October 2012.
- 4.4 The conclusion of the FFP agreement shall be subject to the approval of the Commission (advised by the Monitoring Trustee), in particular as to whether its terms are reasonable.

## **5. MONITORING TRUSTEE**

### **5.1 Appointment of Monitoring Trustee**

- 5.1.1 A Monitoring Trustee shall be appointed by the Parties on the terms and in accordance with the procedure described below and, once approved by the Commission, shall perform the functions of monitoring the Parties' fulfilment of the Commitments and further obligations that may be contained in the Commitment Decision. The Monitoring Trustee shall be independent of the Parties and the companies belonging to their respective groups, and must be familiar with the airline industry and have the experience and competence necessary for this appointment (e.g. investment bank, consultant specialised in the air transport sector, or auditor). In addition, it shall not be exposed to any conflict of interest and shall not have had any direct or indirect work, consulting or other relationship with any of the Parties in the last three (3) years and shall not have a similar relationship with the Parties for three (3) years after completing its mandate.
- 5.1.2 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, the Parties shall submit to the Commission for approval a list of one or more persons whom the Parties consider adequate to fulfil the duties of the Monitoring Trustee. The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out above and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments; and
  - (b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out the tasks assigned to it.

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, the Parties shall appoint the individual or institution concerned as Monitoring Trustee. If more than one name is approved by the Commission, the Parties shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The



Monitoring Trustee should be appointed within one (1) week of the Commission's approval, in accordance with the mandate approved by the Commission.

If all proposed Monitoring Trustees are rejected by the Commission, the Parties shall submit the names of at least two more individuals or institutions within one (1) week of being formally informed of the rejection by the Commission.

If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom the Parties shall appoint in accordance with the mandate approved by the Commission.

## 5.2 **Monitoring Trustee's Mandate**

5.2.1 The Monitoring Trustee's mandate shall include, in particular, the following obligations and responsibilities:

- (a) 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;
- (b) 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 Commitment Decision;
- (c) to advise and make a written recommendation to the Commission as to the suitability of any Slot Release Agreement and Prospective Entrant, fare combinability agreement, Special Prorate Agreement and FFP agreement submitted for approval to the Commission under Clauses 1 to 4;
- (d) to provide written reports to the Commission on the Parties' compliance with these Commitments and the progress of the discharge of its mandate, identifying any respects in which the Parties have failed to comply with these Commitments or the Monitoring Trustee has been unable to discharge its mandate;
- (e) to mediate in any disagreements relating to any Slot Release Agreement, if mediation is agreed to by the other Party or Parties to the agreement in question, and submit a report upon the outcome of the mediation to the Commission; and
- (f) at any time, to provide to the Commission, at their request, a written or oral report on matters falling within the scope of these Commitments.

5.2.2 For the avoidance of doubt, subject to Clause 5.2.1, there is no requirement for the Monitoring Trustee to be involved in the commercial negotiations between one or more of the Parties and a third party carrier entering into any of the agreements under the Commitments. Any such agreements however remain subject to the Commission's approval.

- 5.2.3 Any request made by a third party carrier for the Monitoring Trustee to verify the Parties' compliance with these Commitments (including as described at Clause 3.5(d) and Clause 3.13) must be reasonable. In particular, the Monitoring Trustee may refuse to conduct such a verification where the third party carrier fails to produce any evidence of a suspected breach of the Commitments and/or appears to be making a vexatious request.
- 5.2.4 The Parties shall receive simultaneously a non-confidential version of any recommendation made by the Monitoring Trustee to the Commission (as provided for in Clause 5.2.1(c)).
- 5.2.5 The reports provided for in Clauses 5.2.1(c) to 5.2.1(f) shall be prepared in English. The reports provided for in Clause 5.2.1(d) shall be sent by the Monitoring Trustee to the Commission within ten (10) working days from the end of every IATA Season following the Monitoring Trustee's appointment or at such other time(s) as the Commission may specify and shall cover developments in the immediately preceding IATA Season. The Parties shall receive simultaneously a non-confidential copy of each Monitoring Trustee report.
- 5.2.6 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. The Parties shall pay reasonable remuneration for the services of the Monitoring Trustee as agreed in the mandate.
- 5.2.7 The Monitoring Trustee shall have full and complete access to any of the Parties' books, records, documents, management or other personnel facilities, sites and technical information necessary to fulfil its duties under these Commitments.
- 5.2.8 The Parties shall indemnify the Monitoring Trustee (and, where appropriate, its employees, agents and advisors) (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, agents and advisors).
- 5.2.9 At the expense of the Parties, the Monitoring Trustee may appoint advisors, subject to the Commission's prior approval, if the Monitoring Trustee reasonably considers the appointment of such advisors necessary for the performance of its duties under the mandate, provided that any fees incurred are reasonable and upon which the Parties have been consulted.

### 5.3 **Termination of Mandate**

- 5.3.1 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:
- (a) the Commission may, after hearing the Monitoring Trustee, require the Parties to replace the Monitoring Trustee; or
  - (b) with the prior approval of the Commission, the Parties may replace the Monitoring Trustee.
- 5.3.2 If the Monitoring Trustee is removed, it may be required to continue its functions until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand-over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in 5.1.1.
- 5.3.3 Aside from being removed in accordance with Clause 5.3.1, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the Commitments have not been fully and properly implemented.

## **6. FAST-TRACK DISPUTE RESOLUTION PROCEDURE**

- 6.1 The agreements concluded to implement the Commitments in accordance with Clauses 1 to 4 shall provide for a Fast-Track Dispute Resolution procedure (*Fast-Track Dispute Resolution Procedure*) described in this Clause 6. In the event that a Prospective Entrant, Eligible Air Services Provider, Requesting Air Services Provider, or New Non-stop Air Services Provider has reason to believe that the Parties are failing to comply with the requirements of the Commitments vis-a-vis that party, this Fast-Track Dispute Resolution Procedure will apply.
- 6.2 Any Party, Prospective Entrant, Eligible Air Services Provider, Requesting Air Services Provider, or New Non-stop Air Service Provider which wishes to avail itself of the Fast-Track Dispute Resolution Procedure (*Requesting Party*) shall send a written request to the counterparty (with a copy to the Monitoring Trustee) setting out in detail the reasons leading that party to believe that the counterparty is failing to comply with the requirements of the Commitments (the *Request*). The Requesting Party and the counterparty will use their best efforts to resolve all differences of opinion and settle all disputes that may arise through cooperation and consultation within a reasonable period of time not to exceed fifteen (15) working days after receipt of the Request.

The Monitoring Trustee shall present its own proposal (*Trustee Proposal*) for resolving the dispute within eight (8) working days, specifying in writing the action, if any, to be taken by the counterparty in order to ensure compliance with the Commitments vis-a-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.

- 6.3 Should the Requesting Party and the counterparty fail to resolve their differences of opinion through cooperation and consultation as provided for in Clause 6.2, the Requesting Party shall serve a notice (the *Notice*), in the sense of a request for arbitration, to the International Chamber of Commerce (*ICC*) (hereinafter the *Arbitral Institution*), with a copy of such Notice and request for arbitration to the Parties.
- 6.4 The Notice shall set out in detail the dispute, difference or claim (the *Dispute*) and shall contain, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by the counterparty (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal, including a comment as to its appropriateness.
- 6.5 The counterparty shall, within ten (10) working days from receipt of the Notice, submit its answer (the *Answer*), which shall provide detailed reasons for its conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which the counterparty proposes to undertake vis-a-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

#### *Appointment of the Arbitrators*

- 6.6 The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; the counterparty shall nominate its arbitrator in the Answer.
- 6.7 The arbitrators nominated by the Requesting Party and the counterparty shall, within five (5) working days of the nomination of the latter, nominate the chairman, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators. Should the Requesting Party wish to have the Dispute decided by a sole arbitrator, it shall indicate this in the Notice. In this case, the Requesting Party and the counterparty shall agree on the nomination of a sole arbitrator within five (5) working days from the communication of the Answer, communicating this to the Arbitral Institution. Should the Requesting Party and counterparty fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, or should the Requesting Party and counterparty fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the "Arbitral Tribunal".

#### *Arbitration Procedure*

- 6.8 The Dispute shall be finally resolved by arbitration under the ICC rules, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the **Rules**). The arbitration shall be conducted in Zurich, Switzerland in the English language.
- 6.9 The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Requesting Party and counterparty shall consent to the use of e-mail for the exchange of documents.
- 6.10 The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Requesting Party and counterparty. Terms of Reference shall be drawn up and signed by the Requesting Party and counterparty and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two (2) months of the confirmation of the Arbitral Tribunal.
- 6.11 In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Requesting Party and counterparty, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Requesting Party and counterparty agree.
- 6.12 The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under Regulation 1/2003. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, the Commission, and outside counsel and experts of the opposing party.
- 6.13 The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless the Parties can produce evidence to the contrary.

#### ***Involvement of the Commission***

- 6.14 The Commission shall be allowed and enabled to participate in all stages of the procedure by:
- (a) receiving all written submissions (including documents and reports, etc.) made by the Requesting Party and counterparty;

- (b) receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Requesting Party and counterparty (including Terms of Reference and procedural time-table);
- (c) giving the Commission the opportunity to file amicus curiae briefs; and
- (d) being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.

The Arbitral Tribunal shall forward, or shall order the Requesting Party and counterparty to forward, the documents mentioned to the Commission without delay.

In the event of disagreement between the Requesting Party and counterparty regarding the interpretation of the Commitment, the Arbitral Tribunal may seek the Commission's interpretation of the Commitment before finding in favour of either Requesting Party and counterparty and shall be bound by the interpretation.

#### *Decisions of the Arbitral Tribunal*

- 6.15 The Arbitral Tribunal shall decide the dispute on the basis of the Commitment and the Commitment Decision. Issues not covered by the Commitment and the Commitment Decision shall be decided (in the order as stated) by reference to Regulation 1/2003, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
- 6.16 Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one (1) month of the confirmation of the Arbitral Tribunal. The preliminary ruling shall be applicable immediately and, as a rule, remain in force until the final decision is issued.
- 6.17 The final award shall, as a rule, be rendered by the arbitrators within six (6) months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitment if asked by the Arbitral Tribunal.
- 6.18 The Arbitral Tribunal shall, in their preliminary ruling as well as the final award, specify the action, if any, to be taken by the Parties in order to comply with the Commitments vis-a-vis the Requesting Party (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal.
- 6.19 The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall

specify that terms and conditions determined in the final award apply retroactively.

- 6.20 The Requesting Party and counterparty shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.
- 6.21 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 Regulation 1/2003 and the TFEU.

## **7. REPORTING OBLIGATIONS**

- 7.1 The Parties shall promptly provide to the Commission copies of any material variations, amendments or additions to the Agreements.
- 7.2 The Parties shall permit the DOT to transmit to the Commission data based on information supplied to it by the Parties in accordance with the reporting obligations provided for in its Final Order in Case DOT-OST-2008-0234 (or any future amendment thereof). UA and LH shall additionally permit the DOT to transmit to the Commission relevant data based on information previously supplied to it by UA and/or LH as the case may be in accordance with applicable legislation.

## **8. TERMINATION AND REVIEW**

- 8.1 If the A++ Joint Venture is abandoned, abrogated, unwound, not approved or disapproved by a relevant government authority, or otherwise terminated including as a result of any regulatory approvals having been withdrawn or expired, then these Commitments shall automatically cease to apply.
- 8.2 Pursuant to Article 9(2)(a) of Regulation 1/2003, any of the Parties may request the Commission to re-open the proceedings with a view to modifying these Commitments where there has been a material change in any of the facts on which the Commitment Decision was based. Without prejudice to the generality of this Clause 8, if the approval of the A++ Joint Venture by another governmental authority is made subject to requirements that are potentially incompatible with these Commitments, the Parties may request such a re-opening of the proceedings and modification of these Commitments in order to avoid such incompatibilities.
- 8.3 In addition and without prejudice to the provisions of Article 9(2) of Regulation 1/2003, the Commission may, on its own initiative, review these Commitments five (5) years after the Effective Date. Such a mid-term review shall in any event not affect the validity of the Slot Release Agreements, Special Prorate Agreements, fare combinability agreements and FFP agreements already concluded.
- 8.4 On becoming aware of any new legislation which would prohibit any of the terms of the Proposed Alliance or the Parties' compliance with these

Commitments (*Adverse New Legislation*), the Parties shall consult in good faith with the Prospective Entrant and the Monitoring Trustee about its effect on:

- (a) the agreements entered into pursuant to these Commitments; and
- (b) the practicability of making alternative arrangements which would have the same effect as carrying out such agreements,

and as agreed may then, prior to such Adverse New Legislation coming into force:

- (c) enter into supplemental agreements varying the relevant agreements to implement the alternative arrangements; or
- (d) elect to terminate the agreements.

Any changes in accordance with (c) and (d) above shall be subject to prior confirmation of the Monitoring Trustee that they are not material or approval of the Commission (advised by the Monitoring Trustee).

8.5 For the avoidance of doubt, the expiry of these Commitments (e.g. as a result of the expiry or review of the Commitment Decision or as a result of Clauses 8.1 or 8.2 above) shall not affect the validity of the Slot Release Agreements, Special Prorate Agreements, fare combinability agreements and FFP agreements already concluded, unless the Commission's review results in a decision explicitly ending such agreements. As long as such agreements continue to apply beyond the expiry of the Commitments, the provisions in these Commitments that concern these agreements also continue to apply. However, the expiry of these Commitments shall end the Parties' obligation to renew those agreements.

**Date: [...] December 2012**

Signed:

Signed:

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duly authorised for and on  
behalf of Air Canada

duly authorised for and on  
behalf of Continental Airlines  
Inc.

Signed:

Signed:

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duly authorised for and on behalf of  
Lufthansa

duly authorised for and on behalf of  
United Air Lines



