

***Case No COMP/M.2041 -  
UNITED AIRLINES / US  
AIRWAYS***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(2) NON-OPPOSITION  
Date: 12/01/2001

*Also available in the CELEX database  
Document No 301M2041*



## COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.01.2001

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(2) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No COMP/M.2041-UNITED AIRLINES / US AIRWAYS**

Notification of 22.09.2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 22.09.2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89<sup>1</sup> ("The Merger Regulation) by which the undertaking UAL Corporation ("UAL", USA) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking US Airways Group Inc. The notification was declared incomplete on 13.10.2000. On 20.11.2000, the parties completed their notification.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

### **I. THE PARTIES**

3. UAL is a holding company. Its principal operating subsidiary (accounting for virtually all of UAL's operating revenues and expenses) is United Air Lines, Inc. ("United"), one of the world's leading airlines with a fleet of 600 aircraft and hubs at Chicago O'Hare, Denver, Los Angeles, San Francisco and Washington Dulles. United is also a member

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<sup>1</sup> OJ L 395, 30.12.1989 p.1; corrigendum OJ L 257 of 21.9.1990, p. 13, last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p.1, corrigendum OJ L 40, 13.2.1998, p.17).

of the Star Alliance<sup>2</sup> and has entered into additional transatlantic alliances with Lufthansa and SAS (two members of the Star Alliance).

4. US Airways Group has as its primary business the ownership of US Airways, Inc. (“US Air”) and a variety of other companies. US Air, its principal subsidiary, is an air carrier with a fleet of 400 aircraft and hubs in Charlotte, Pittsburgh and Philadelphia. It is predominantly a regional carrier operating within the Eastern region of the USA.

## **II. THE OPERATION**

5. The proposed transaction concerns the acquisition, by way of merger, of all the outstanding stock of US Airways Group by UAL. It will lead to the acquisition of sole control of US Airways Group by UAL, and therefore constitutes a concentration within the meaning of Article 3(1)b of the Merger Regulation.

## **III. COMMUNITY DIMENSION**

6. The aggregate world-wide turnover of UAL and US Airways Group (collectively referred to as “the parties”) for the fiscal year 1999 was in excess of EUR 2,500 million. In each of France, Germany and the UK, the combined aggregate turnover of the parties is more than EUR 100 million, and the aggregate turnover of each of the parties is also in excess of EUR 25 million in each of the above Member States. Finally, the aggregate Community-wide turnover of each of the parties is more than EUR 100 million, and the undertakings concerned do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The operation therefore has a Community dimension. It does not constitute a co-operation case under the EEA Agreement.

## **IV. RELEVANT MARKETS**

7. Both United and US are active in the provision of scheduled air transport of passengers between the EEA and the USA.

### *Distinction between sales to individuals and sales to tour operators*

8. The Commission has previously distinguished the supply of airline seats to tour operators for incorporation into package tours from sales to individuals. The provision of these services is not substitutable as prices and conditions are different. Individual passengers purchase tickets directly from the airline, whereas tour operators combine the air transport service with other services into a package holiday tour<sup>3</sup>. In this case, such a distinction is not necessary, because the vast majority of the seats on the scheduled flights in question are sold to individual customers.

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<sup>2</sup> The Star Alliance is an alliance of airlines comprising Air Canada, Air New Zealand, ANA - All Nippon Airways, Ansett Australia, Austrian Airlines, British Midland, Lauda, Lufthansa German Airlines, Mexicana, SAS - Scandinavian Airlines, Singapore Airlines, Thai Airways International, Tyrolean, United Airlines and Varig Brazilian Airlines.

<sup>3</sup> Case no. IV/M 1354, Sair Group/LTU, p.14.

### *Segmentation by route*

9. For scheduled flights, a further distinction has to be made according to routes. The definition of the relevant market in air transport is generally made on the basis of a route or a bundle of routes<sup>4</sup>. The service of the transport to a certain destination can not be substituted by a transport to a different destination. The substitutability between routes depends on a number of factors, such as the distance between the point of origin and the point of destination, the distance between the different airports situated on each side of the route and the number of frequencies available on each route<sup>5</sup>.
10. More specifically, in the *KLM/Alitalia*<sup>6</sup> decision, the Commission concluded that each point-of-origin/point-of-destination pair constitutes a relevant market, and that such market includes a route or a bundle of routes comprising:
  - The non-stop flights between the two airports concerned;
  - Non-stop flights between the airports whose respective catchment areas significantly overlap with the catchment area of the airports concerned;
  - Indirect flights between the airports concerned to the extent that these flights are substitutable for the non-stop flight. Substitutability of direct routes with indirect routes depends on a number of factors such as the flight time or the frequencies (and schedules of the routes).
11. United submits that such a market definition does not take sufficient account of the impact of the network competition. In particular, United emphasises (i) that almost all relevant USA-based carriers and European-based airlines serve multiple destinations from their respective hubs or gateways; (ii) that most transatlantic competitors support their EU/US services with codeshare relationships at each end; and (iii) that almost all transatlantic competitors other than US Air participate in alliances. United submits that, as a result, nearly every transatlantic city-pair is served by numerous carriers and alliances and that therefore, when viewed on a transatlantic basis, the envisaged integration of US Air's services in the United/Lufthansa/SAS alliance will not substantially affect competition between the USA and Europe.
12. The Commission does not deny this evolution that affects the supply side of the market, especially so for long haul services such as transatlantic flights. However, first, from the demand-side, the consumer continues to ask for a transport service between two points. And secondly, despite that evolution of the supply-side, there is no indication that

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<sup>4</sup> Court of Justice, judgement in Case 66/86-Ahmed Saeed Flugreisen and Other v/Zentrale zur Bekämpfung unlauteren Wettbewerbs (1989) ECR 803; Court of First Instance, judgement in Case 2/93-Air France v/Commission (TAT)(1994) ECR 323; Commission Decision of 5.10.1992, case IV/M. 157 Air France/Sabena, point 25; Commission Decision of 20.7.1995, case IV/M. 616 Swissair/Sabena, point 19; Commission Decision of 28.2.1997 case IV/M.857, British Airways/Air Liberté, point 15, Commission Decision of 21.12.1998 case IV/M. 1354 SAirGroup/LTU, Commission Decision of 3.08.1999 case IV/M.1494 Marine-Wendel/SAirGroup/AOM.

<sup>5</sup> See in particular Commission Decisions of 05.10.1992 (Air France/Sabena), point 25; of 27.11.1992 (British Airways/TAT), point 19; of 17.02.1993 (British Airways/Dan Air), point 10; of 20.07.1995 (Swissair/Sabena) point 19; Commission Decision of 28.2.1997 case IV/M.857, British Airways/Air Liberté, point 15; Commission Decision of 21.12.1998 case IV/M. 1354 SAirGroup/LTU.

<sup>6</sup> See case M./JV-19-KLM/Alitalia

airlines are able to start services between all transatlantic city-pairs (between the EU and the USA) and market them in the short term without incurring significant additional costs and risks. In particular, the results of the Commission's investigation clearly indicate that possible regulatory constraints (such as the need to obtain slots at the relevant congested airports and the presence of bilateral traffic right agreements for services operated between Europe and the USA) on the one hand, and the need for routes to fit within an airline's network in order to generate sufficient demand on the other hand, may constitute significant barriers to entry between given city-pairs (both for the operation of non-stop or indirect flights). In that context, it is concluded that network competition is still not sufficient to modify the traditional approach followed by the Commission in this respect, i.e. that each city-pair as defined above constitutes a distinct market.

*Inclusion of non-stop and indirect flights*

13. As indicated above, the relevant market includes indirect flights between the airports concerned, to the extent that these flights are substitutable for the non-stop flights. Substitutability of direct routes with indirect routes depends on a number of factors such as the flight time or the frequencies (and schedules of the routes). In the present case, it appears that, on the transatlantic city-pairs considered, customers regard certain indirect flights as suitable alternatives to non-stop services.
14. Given that indirect flights imply the presence of a stop or even a change of aircraft, they are obviously longer and less convenient for passengers than non-stop operations. It follows that, other things being equal, indirect flights are considered less attractive than non-stop services. This is further reflected by the fact that non-stop services usually account for a much larger share of total O&D traffic than their share of frequencies.
15. However, the results of the Commission's investigation indicate that, on the transatlantic city-pairs considered, those drawbacks may be mitigated by a number of countervailing elements. In particular, it appears that, on long-haul flights such as transatlantic services, indirect flights are at a lower disadvantage than on short or medium-haul services, because intermediate stops have a lower relative impact on total elapsed time as the total trip duration increases. In that context, factors other than total flight duration may play a more important role on the passenger's decision to choose a given flight. In particular, a number of competitors referred to such criteria as (i) convenience of departure/arrival times, (ii) number of frequencies (and therefore flexibility), (iii) frequent flyer programmes or corporate schemes, and (iv) type of service (including airline reputation, presence of a flight bed, etc.). Price obviously also plays a role in the passenger's choice, but the results of the Commission's investigation suggest that airlines often price all services on a given city-pair at the same level (irrespective of whether they consist of non-stop or indirect operations), so that indirect service operators do not necessarily use discounts as an additional incentive for passengers to opt for their services.
16. It follows that indirect flight operators may take advantage of those other selection criteria to differentiate their services from those offered on the non-stop flights, and therefore to mitigate the inconvenience of additional elapsed time and possibly of a change of aircraft. Certain indirect flights therefore appear to effectively compete with the non-stop services. This is further confirmed by the fact that, on all transatlantic city-

pairs considered (with the exception of Frankfurt Philadelphia where 2 daily direct frequencies are operated), indirect services were chosen by at least 20% (and up to 50%) of the O&D<sup>7</sup> passengers concerned.

17. That obviously does not imply that all indirect routings constitute competitive alternatives to the non-stop services. Only those alternatives (hereafter referred to as “competitive indirect flights”) which (i) are marketed as connecting flights on the city-pair concerned (and therefore appear on the Computerised Reservation Systems used by travel agents), and (ii) only cause a limited extension of the trip duration, really appear to exert a sufficient competitive constraint on non-stop flights. In particular, certain third parties indicated that only services with an in-flight duration comparable with that of the non-stop service, and connection time no longer than 150 mn, constitute likely competitive alternatives to non-stop flights.
18. As concerns a possible distinction between (i) time-sensitive passengers (i.e. passengers whose main concern is to reach their destination in the shortest possible time, who are not flexible in terms of time of departure/arrival, and who require that the airline offers them the possibility to change their reservation at short notice), and (ii) non-time sensitive passengers (or price-sensitive passengers, who accept longer journey times), the results of the Commission’s investigation suggest that, for the transatlantic routes concerned, the line between these two categories becomes increasingly blurred. In particular, it has been indicated that an increasing number of time-sensitive business passengers travel in economy class and buy economy tickets, and that choices of airlines for business passengers are increasingly based on corporate discounts and not on travel times. Furthermore, the above discussion indicates that criteria other than flight duration play a more important role in the passenger’s decision as total elapsed time increases. Since this distinction is not decisive for the Commission’s assessment, the question of whether there is a distinct market for time-sensitive passengers can be left open.
19. In the light of the above, it is concluded that, on the transatlantic routes considered, competitive indirect flights can be seen as a suitable alternative to non-stop services. Those competitive indirect flights are therefore included in the markets for the provision of scheduled air services for passengers on the transatlantic city-pairs considered.

#### *Frankfurt and Munich airports*

20. As indicated above, the relevant market also includes flights originating at the airports whose respective catchment areas significantly overlap with the catchment area of the airports concerned. This is so because, those passengers living in the overlap between the catchment areas of two or more given airports may consider taking surface transport to these other airports, so that all of those airports can be viewed as substitutable alternatives to each other. If the proportion of passengers living in that overlap area is significant, airlines at each of the airports concerned will therefore compete for those passengers and will determine their offer accordingly. The competitive conditions for

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<sup>7</sup> Origin to destination or point to point

flights from each of those airports will therefore be competitively constrained by those at the other airports concerned, so that flights from all of the airports considered actually belong to the same markets. Obviously, the degree of competition exercised by a given airport in the relevant market may also depend on the nature of the services (in terms of frequencies, trip duration, price, etc.) offered from that airport, so that the inclusion of that airport in the relevant market may also vary depending on the destination concerned.

21. In the present case, a number of city-pair markets concern the Frankfurt airport or the Munich airport. It is therefore necessary to determine whether flights from those airports are subject to a significant competitive pressure from flights from other airports.
22. The parties contend that flights between Frankfurt and Munich and cities in the USA belong to the same market and/or are competitively constrained by flights between the same US cities and airports whose catchment area overlap with Frankfurt and Munich. More specifically, the parties have assumed that the catchment area of a given airport can be defined as a circle around that airport, with a radius of respectively 250 km in the case of a large airport (such as Frankfurt or non-German hubs) and 100 km in the case of a German regional airport. On that basis, the parties have indicated that the Frankfurt catchment area overlaps with those of other European hubs (namely Brussels, Amsterdam and Munich) and those of certain German regional airports (Cologne, Dusseldorf, Stuttgart and Nuremberg). Similarly, the parties submit that the catchment area of the Munich airport overlaps with those of Zurich and of two German regional airports (Nuremberg and Stuttgart).
23. However, for the reasons set out below, the results of the Commission's investigation do not confirm the parties' submission, and instead suggest that, on all almost all city-pairs concerned, flights from the Frankfurt airport (and flights from the Munich airport) are not competitively constrained by flights from the German regional airports or alternative European hubs identified by the parties.

#### Non-German hubs

24. First, while the parties' submission primarily relies on the existence of large overlaps between the catchment areas of the Frankfurt or Munich airport on the one hand, and the catchment areas of German regional airports or non-German hubs on the other hand, there are indications that the catchment areas around the larger international hubs concerned are significantly smaller than the parties' estimates. In particular, it appears that the parties' choice of a 250 km radius for large international airports is mainly arbitrary, and is not supported by any detailed analysis of the geographic distribution of passengers for the airports concerned. By contrast, a more detailed assessment made by the parties for the Philadelphia and Newark airports indicates that, although these two large international airports are distant of only 200 km, they do not appear to compete with each other for the European destinations concerned. The value of one single example is obviously limited, not least because the actual catchment area of a given airport is largely determined by factors specific to that airport (such as the geographic distribution of population around that airport, the quality of the land transport infrastructure, etc.). However, even taking account of those elements, it would seem reasonable to argue that Amsterdam, Brussels and Zurich, which are all distant by more

than 300 km from Frankfurt, do not exercise any significant competitive constraint on Frankfurt for the transatlantic routes considered.

25. The absence of any significant competition between Frankfurt, Amsterdam, Brussels and Zurich is further suggested by the fact that, [...] few passengers in the Frankfurt catchment area currently consider flights from non-German hubs as suitable and competitive alternatives to those provided at Frankfurt. These proportions are likely to be even lower if the catchment areas of the airports concerned are smaller than what the parties submit.
26. The limited degree of competition exercised by non-German hubs on Frankfurt is also made more likely by the fact that, for most of the transatlantic destinations in question, the services offered at Amsterdam, Brussels or Zurich only constitute inferior alternatives to those provided at Frankfurt. For instance, for all transatlantic destinations concerned, it appears that flights from Zurich are longer, not more frequent, and on average have published fares 5-10% more expensive, than flights from Frankfurt. Similarly, it appears that, for almost all transatlantic destinations considered, the shortest flights from Brussels are more than 1 hour longer than the shortest service from Frankfurt. This further lowers the incentives for passengers living in the Frankfurt catchment areas to fly from Zurich, Amsterdam or Brussels, and therefore reduces the competitive constraint exercised by those non-German hubs on Frankfurt. The only possible exceptions are Orlando and Seattle, where a non-stop service from Amsterdam is more than 3 hours shorter than the shortest (indirect) service from Frankfurt.
27. The parties have not been able to provide detailed information with respect to the Munich airport. However, the only non-German hub which could compete with Munich is Zurich, and the data provided by the parties indicate that, except for Boston and Los Angeles, where a non-stop service from Zurich is almost 2 hours shorter than the shortest (indirect) service from Munich, flights from Zurich are on average 5-10% more expensive, longer and not more frequent than the corresponding flight from Munich. This implies (i) that, with the exception of Boston, Zurich seems to constitute an inferior alternative to Munich for the transatlantic destinations considered; and (ii) that, despite that apparent inferior service, flights from Zurich can be 5-10% more expensive than those at Munich. This in turn indicates that Munich and Zurich do not exert any significant constraint on each other for the transatlantic destinations considered.
28. In the light of the above, it is concluded that the flights from Frankfurt or Munich to the transatlantic destinations concerned do not face a significant competitive constraint from the corresponding flights from Zurich or (in the case of Frankfurt) Amsterdam and Brussels. The only possible exception are (i) Munich/Boston and Munich/Los Angeles, where the non-stop service from Zurich would appear to be sufficiently shorter than the corresponding flights from Munich in order to compensate for a higher price, and therefore where Zurich would appear to constitute a valid alternative to Munich; and (ii) Frankfurt/Orlando and Frankfurt/Seattle, where the non-stop service from Amsterdam would appear to be sufficiently shorter than the corresponding flights from Frankfurt in order to make passengers take accept to take a land transport to Amsterdam.

#### German regional airports



29. The situation of the German regional airports is more complex: being close to Frankfurt or Munich, and offering prices usually identical to those at Frankfurt or Munich, they might in theory exercise a significant competitive pressure on these two airports. However, the results of the Commission investigation indicate that, at least for the transatlantic destinations where non-stop services from Munich or Frankfurt exist, they do not seem to offer suitable alternatives to Munich or Frankfurt.
30. First, it appears that those airports are much smaller than Frankfurt or Munich, and that they can only offer a much more limited number of frequencies, connections and destinations than Frankfurt or Munich. They would therefore appear to be, in principle, less attractive than Frankfurt or Munich. That limited attractiveness is further indicated by the fact that, according to the parties, the catchment area of those German regional airports is much smaller (proposed radius of 100 km) than that of the large international airports (proposed radius of 250 km).
31. Furthermore, the data submitted by the parties indicate that flights from those airports are longer and less frequent than those from Frankfurt or Munich, especially so in the case of destinations where non-stop services are available at Frankfurt or Munich. In particular, the German regional airports do not offer any non-stop service to the transatlantic destinations concerned, so that, for all destinations where non-stop services are offered from Frankfurt or Munich, flights from German regional airports are more 1h40 longer than those from Frankfurt or Munich. Even for those destinations which are only served through indirect flights from Frankfurt or Munich, it appears that flights from the German regional airports concerned are almost invariably longer than those from Frankfurt or Munich. This further adds to the already limited attractiveness of the German regional airports, and therefore further reduces the incentives for passengers living in the catchment areas of Frankfurt or Munich to travel to and fly from those regional airports.
32. It therefore appears (i) that the German regional airports in principle, are less attractive than Frankfurt or Munich because of their smaller size and of the lower number of destinations and frequencies offered; and (ii) that, especially for those destinations served by non-stop flights from Frankfurt or Munich, the flights offered at the German regional airports to the transatlantic destinations concerned are usually longer and less frequent and more expensive than those provided at Frankfurt or Munich.
33. In the light of the above, it is concluded that, at least for those transatlantic destinations where non-stop services are offered at Frankfurt or Munich, the German regional airports would not seem to exercise a significant competitive constraint on Munich or Frankfurt for the transatlantic destinations concerned.
34. The situation might be different for those destinations only served by indirect flights from Frankfurt or Munich, since the duration of flights from German regional airports may be comparable to that of the corresponding services from Frankfurt or Munich. However, for those destinations, the question of whether the German regional airports should be included in the relevant markets for those destination is not decisive for the Commission's assessment, and it can therefore be left open.

## V. ASSESSMENT

### A. Alliance between United and Lufthansa

35. As indicated above, United is part of the Star Alliance, which includes a number of other airlines such as Lufthansa, SAS, Air Canada, British Midlands, Singapore Airlines, etc. This alliance provides for a number of arrangements, such as codesharing, co-operation in the provision of airport lounges and frequent flyer programmes (FFPs), co-operation in ground-handling services, etc.
36. In parallel, and in addition to those arrangements, United has concluded a more extensive transatlantic alliance<sup>8</sup> with Lufthansa and SAS. In particular, under the terms of this transatlantic alliance, United may co-ordinate with Lufthansa and SAS on pricing and revenue sharing, on routes and schedules, and on marketing, advertising, distribution and product development. The transatlantic alliance also provides for extensive codesharing, giving United and either of Lufthansa or SAS the opportunity to engage in codesharing on any or all non-stop transatlantic passenger services for which it is the operating carrier and such other services as the parties may jointly select from time to time.
37. In the light of the extensive co-ordination deriving from this transatlantic alliance, it appears that competition between United and Lufthansa (or SAS) on transatlantic flights is substantially reduced.
38. It follows that the competitive effects of the proposed transaction will not only consist in the elimination of competition between US Air and United. In view of the extensive co-operation between United and Lufthansa (or SAS) on transatlantic routes, the notified concentration is also analysed as substantially reducing the competition previously existing between US Air and Lufthansa on transatlantic services.

### B. Overlap routes with non-stop operations

39. There is no overlap between the city pairs operated on a non-stop basis by United and US Air. However, first, on the Frankfurt/Philadelphia route, there is a direct overlap between the non-stop service operated by US Air, and the non-stop service operated by Lufthansa under a codeshare agreement with United. Furthermore, there are a number of routes where either US Air operates a non-stop flight while United or Lufthansa offer indirect services, or United or Lufthansa operates a non-stop flight while US Air offers indirect services.

#### *Frankfurt/Philadelphia<sup>9</sup>*

40. This route connects US Air's hub at Philadelphia with Lufthansa's hub at Frankfurt. There are only two non-stop services on that route: the daily flight of US Air, and the daily non-stop service operated by Lufthansa under a codeshare agreement with United

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<sup>8</sup> This cooperation is currently being examined by DG COMP under Article 85 of the Treaty (Case COMP/D-2/36.201 – Lufthansa/United/SAS)

<sup>9</sup> Approximately 100 000 O&D passengers per year

(and therefore, where United sells seats). The proposed transaction will therefore lead to the combination of the two only non-stop service providers, and therefore of the two operators with the best competitive flights and the highest market shares (respectively [40%-50%] for Lufthansa and United, and [35%-45%] for US Air). After the proposed transaction, the merged entity and its alliance partner Lufthansa will therefore be the only operators of non-stop services between Frankfurt and Philadelphia, and will collectively account for [80%-90%] of all O&D traffic between these two cities.

41. Furthermore, there is no indication that existing or potential competitors could successfully challenge the market position of the merged entity and Lufthansa. This is so because (i) the other operators on that route (who offer indirect flights only) are currently chosen by a very limited number of O&D passengers (the next largest competitor, British Airways, only representing [0-5%] of O&D bookings); and (ii) competitive advantages of the parties and other barriers will contribute to making entry or expansion difficult on this route.
42. First, Frankfurt and Philadelphia are hubs of respectively Lufthansa and US Air. This will contribute to making entry or expansion more difficult for competitors, and in particular could preclude the entry of alternative non-stop operators. This is so because (i) given the limited number of O&D passengers between Frankfurt and Philadelphia, any operator of non-stop flights would have to carry a substantial number of connecting passengers; and (ii) it appears that no other airline but Lufthansa and US Air has a hub or a substantial gateway at Frankfurt or Philadelphia, and thus cannot offer any significant connections at those airports. Without the ability to obtain connecting traffic at an intermediate hub (and therefore, without offering an indirect service), it seems unlikely that any operator but the parties and Lufthansa could provide a service between Frankfurt and Philadelphia.
43. The fact that Philadelphia and Frankfurt are hubs of US Air and Lufthansa also means that those airlines are the operators with the highest presence at those airports, and in particular offer the widest range of services there. This in turn implies that passengers at those airports are more likely to enter into corporate or frequent flyer programmes with US Air and Lufthansa than with other operators, and therefore suggests that US Air and Lufthansa could benefit from a significant proportion of loyal passengers on this city-pair. For instance, more than [...] of United or US Air passengers on that route already fly on the basis of corporate travel schemes or frequent flyer programmes. This would obviously also contribute to making entry or expansion more difficult.
44. Finally, by combining the flights of US Air, United and Lufthansa, the operation will enable the merged entity and Lufthansa to offer a higher number of frequencies than before. After the proposed transaction, the highest number of competitive flights offered by a competitor will thus represent only one third of that offered by the merged entity and Lufthansa. This will further increase the attractiveness of the parties' and Lufthansa's services (by raising the number of alternatives and therefore the flexibility offered to passengers), and, by contrast, further weaken the position of existing or potential competitors.
45. It follows that, in order to effectively compete with the merged entity and Lufthansa on Frankfurt/Philadelphia, operators would have to commence new competitive indirect services with a significant number of frequencies. However, in order to offer such

services, they would have to obtain the necessary assets and rights, and in particular the relevant take-off and landing slots at the airports concerned. The results of the Commission's investigation suggest that, although this should not be a problem at the Philadelphia airport, this would prove very difficult at Frankfurt, which appears to be highly congested (especially at peak hours) and where relevant slots are scarce.

46. In the light of the above, and given that the highly fragmented nature of demand excludes any significant countervailing buying power on the part of customers, there are serious risks that the operation would create a dominant position on the Philadelphia/Frankfurt route.

*Overlap routes where only one party has non-stop activities*

47. The operation will also create overlaps on other routes where one of the parties is active on non-stop services, while the other party provides competitive indirect services. On most of those routes, it appears that the operation will only have *de minimis* effects. However, there are also ten routes where the increment of traffic shares is significant: those are Frankfurt/Charlotte, Philadelphia/Munich, Pittsburgh/Frankfurt, Pittsburgh/London, Chicago/Munich, San Francisco/Munich, San Francisco/Frankfurt, Houston/Frankfurt, Los Angeles/Frankfurt, and Miami/Frankfurt.
48. On each of those routes, the party operating non-stop services (together with Lufthansa in the case of United) accounts for more than [50%] of total O&D traffic, the other party representing more than 3%. It is therefore necessary to examine to what extent the proposed transaction will strengthen the position of the non-stop carrier, and more generally to what extent the proposed transaction will affect the conditions of competition on those routes.
49. The parties submit that, on each of those routes, several carriers offer an indirect service comparable to that offered by United, so that, after the proposed transaction, there will remain sufficient indirect service providers so that competition is not diminished in any meaningful way. The parties also submit that it is easy for an airline, together with alliance partners, to introduce new services on each relevant city-pair.
50. It is generally true that, on a given transatlantic city-pair, there is usually an ample number of possible indirect alternatives connecting at a variety of intermediate hubs. For instance, on the Chicago/Munich route, the parties identify 32 indirect flights (connecting at 13 different hubs) chosen by more than one passenger per day in 1999. Furthermore, some third parties indicated that they had a certain degree of excess capacity on the transatlantic flights concerned. It follows that the elimination of one or two of those indirect flights as a competitive alternative would not automatically affect the conditions of competition on the city-pair concerned, because there might remain in some cases a sufficient number of valid alternatives able to take up the passengers of the one or two indirect flights concerned, and therefore to offset the loss of those previous alternatives.
51. However, as indicated above, only those alternatives (hereafter referred to as "competitive indirect flights") which (i) are marketed as connecting flights on the city-pair concerned, and (ii) only cause a limited extension of the trip duration, really appear to exert a sufficient competitive constraint on non-stop flights. Given the substantial

variations from one indirect service to another in terms of elapsed time, frequency and departure or arrival time, it follows that not all indirect flights constitute equal or even real competitive alternatives. For instance, the 32 possible indirect alternatives identified on the Chicago/Munich route have a duration ranging between 10h05 and 13h43, and they carry between [0%-5%] and [0%-5%] of O&D passengers each. It is therefore necessary to conduct a detailed assessment of the real competitive position of the indirect flights concerned by the transaction.

Routes connecting a US Air hub with a Lufthansa hub

52. For three of the above ten routes, it appears that the operation will substantially affect the conditions and significantly reduce the competitive pressure exercised by the remaining competitive alternatives.
53. Those three routes are Frankfurt / Charlotte<sup>10</sup>, Philadelphia / Munich<sup>11</sup> and Pittsburgh / Frankfurt<sup>12</sup>. Each of these routes connects a US Air hub (at Charlotte, Philadelphia and Pittsburgh) with a Lufthansa hub or gateway (at Frankfurt and Munich). On each of those routes, US Air offers a daily non-stop service and carries more than 70% of total O&D traffic. Lufthansa and United are also active on those routes, where they offer indirect alternatives via airports in the USA (primarily United's hubs at Washington Dulles and Chicago O'Hare), and where they collectively represent the second or third-largest competitor with a market share between [5%-10%] and [10%-20%].
54. On those routes, United and Lufthansa collectively account for [20-60%] of those passengers currently not carried by US Air. It is therefore clear that the flights operated by United and Lufthansa previously represented one of the main indirect alternatives to the services offered by US Air, and that the loss of that competition would significantly strengthen the competitive position of the non-stop service provider.
55. There are also indications that, after the proposed transaction, the merged entity could not be successfully challenged by its existing competitors' activities. This is indicated by the market shares of the merged entity (more than [ $\pm$ 75%] on each route) and of its competitors traffic (the next largest operator carrying less than [ $\pm$ 10%] of O&D passengers). This is also further reflected by the fact that, after the proposed transaction, the merged entity and Lufthansa would not only be the sole non-stop operator, but would also carry more than 40% of indirect traffic.
56. Furthermore, the fact that those routes connect a US Air hub with a Lufthansa hub means that the merged entity will benefit from the same network advantages, and that those routes will be subject to the same barriers to entry, as those described on the Philadelphia/Frankfurt. This is especially so as no other operator but US Air or Lufthansa has a substantial presence at the airports concerned, and as the limited O&D traffic on the routes concerned will further deter entry of non-stop service operators.

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<sup>10</sup> Approximately 60 000 O&D passengers per year

<sup>11</sup> Approximately [45000] O&D passengers per year

<sup>12</sup> Approximately 55000 O&D passengers per year

57. It follows that, for the same reasons as in the Frankfurt/Philadelphia route, it is unlikely that any new operator could commence non-stop services on those routes, and that any operator seeking to effectively compete with the merged entity and Lufthansa on the routes concerned would have to commence new competitive indirect services with a significant number of frequencies. However, in order to offer such services, they would have to obtain the necessary assets and rights, and in particular the relevant take-off and landing slots at the airports concerned. The results of the Commission's investigation indicate that this would prove very difficult at Frankfurt and Munich, both of which appear to be congested (especially at peak hours).
58. In the light of the above, and given that the highly fragmented nature of demand excludes any significant countervailing buying power on the part of customers, there are serious risks that the operation would create or strengthen a dominant position on each of the Frankfurt/Charlotte, Philadelphia/Munich and Pittsburgh/Frankfurt routes.

Routes not connecting a US Air hub with a Lufthansa hub

59. By contrast, it appears that the operation will not materially affect the conditions of competition on the 7 remaining routes, which do not connect a US Air hub with a Lufthansa hub. Those routes are: London/Pittsburgh, Chicago/Munich, San Francisco/Munich, San Francisco/Frankfurt, Houston/Frankfurt, Los Angeles/Frankfurt and Miami/Frankfurt. On the London/Pittsburgh route, US Air operates non-stop flights while Unktd and Lufthansa provide indirect services. On all other routes, United and Lufthansa offer non-stop services while US Air has indirect operations.
60. First, the party (in the case of United, together with Lufthansa) operating indirect services only is a marginal player on those routes, carrying less than 5% of total O&D traffic (or  $[\pm 15\%]$  of indirect O&D traffic), and holding only a limited share of competitive indirect capacity offering. In view of those moderate traffic volumes, and given the presence of a significant number of alternatives with similar or even higher competitiveness and the existence of some excess capacity at other indirect service operators, it therefore appears that the proposed combination of that party's flights with those currently operated by the non-stop service carrier would not materially affect the non-stop service carrier's market position.
61. The Commission also investigated whether, despite those apparent operations, the acquisition of the party operating indirect services only could increase demand for the non-stop carrier's existing flights, especially through the possibility of enhanced connection opportunities at the airports concerned. However, it appears that the party operating indirect services only has minor operations (representing less than 5% of departures and arrivals) in each airport concerned. It follows that this party will not add any significant connections or other network advantages to the services already provided by the non-stop operator, and therefore that the operation will not materially affect the attractiveness or competitiveness of the non-stop service carrier's flights on those routes.
62. In the light of the above, it appears that the operation will not substantially alter the structure of the indirect service offering, and therefore that competition will not be affected in any meaningful way on those routes. It therefore appears that the proposed concentration does not create or strengthen a dominant position on those routes as a

result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

**C. Overlap routes without non-stop operations**

63. The operation will also create a number of overlaps on routes where both US Air on the one hand, and United and/or Lufthansa on the other hand, offer indirect services (but no non-stop service). There is no indication that, on most of those markets, the operation could create or strengthen a dominant position, because of the presence of other competitors with sizeable activities or because one of the parties (and/or Lufthansa) only have marginal operations.
64. By contrast, there are 9 city pairs where (i) total O&D traffic is significant (more than 30,000 passengers per year); (ii) no airline offers a non-stop service; (iii) the indirect flights offered by US Air, United and Lufthansa collectively account for [35-65%] of O&D traffic; and (iv) the operation will result in a significant addition of market shares (of more than [5-10%] in all cases). Those are: Frankfurt / New Orleans, Denver / Frankfurt, Frankfurt / San Diego, Boston / Munich, Frankfurt / Orlando, Los Angeles / Munich, Denver / Paris, Frankfurt / Phoenix and Frankfurt / Seattle.
65. However, it appears that, despite these high market shares, the merged entity and Lufthansa will remain subject to sufficient competitive constraint on those routes. First, it should be noted that all services provided on those routes are indirect flights through an intermediate. As is indicated by the presence of some competitors with market shares above 10% (and up to 20% in most cases), this tends to level the competitive position of all alternatives, and in particular to enable a larger number of flights to offer a duration and a frequency comparable to those of the parties. In particular, it appears that, for all routes concerned, several competitors offer alternative routings with a duration either lower than or at least close to that of the parties. This implies that, should the parties and Lufthansa raise their prices, a significant proportion of customers would decide to opt for other alternatives.
66. It is therefore necessary to examine whether existing or potential competitors would be able to carry those passengers. The routes concerned are thin routes, with total annual O&D traffic below 125000 passengers on each of them. Given that limited number of O&D passengers, and the presence of some excess capacity on certain third parties' aircraft used for the routes concerned, it appears that existing competitors on those routes would have sufficient capacity to accommodate even a significant additional proportion of customers currently carried by the parties. This is further suggested by the presence of significant fluctuations of market shares from one year to another observed on those routes. In that context, it appears that the presence of actual competitors will act as a significant constraint on the merged entity's competitive behaviour on those routes.
67. Finally, as indicated above, the absence of non-stop flights from Frankfurt, combined with the duration of those indirect flights, may make passengers in the Frankfurt or Munich catchment areas opt for services from German regional airports. It might even make passengers consider flights from alternative European hubs in those cases where shorter non-stop services are available from those hubs: this is the case of the

Boston/Munich, Los Angeles/Munich, Frankfurt/Seattle and Denver/Frankfurt routes, where shorter non-stop services are available from Zurich or Amsterdam.

68. The competitive constraint exercised by those airports will be twofold: first, the existing flights operated by third parties at these airports will add new alternatives to those offered by the parties. This is indicated by the fact that, (i) if the flights from those airports are part of the same market as flights from Frankfurt or Munich, the combined market shares of the parties and Lufthansa are reduced to [25-50%] of total traffic; and (ii) the shares of other competitors (especially Delta Air Lines) rise to [15-25%]. In particular, this competitive pressure could be sufficient to constrain the competitive behaviour of the merged entity on the Frankfurt / Seattle, Frankfurt / Phoenix, Munich / Los Angeles and Frankfurt / Orlando routes, where the merged entity and Lufthansa would not carry more than 40% of total O&D traffic, and where they would remain subject to the competition of other airlines (such as Delta, Northwest, or Swissair) with market shares in excess of 20%.
69. And secondly, the presence of those airports (especially the German regional airports, which, with the exception of Dusseldorf, are often less congested than Frankfurt or Munich) will provide additional possibilities of entry for operators wishing to commence or expand services on the routes concerned. The effect (and thus the significance of the threat) of such an entry could be all the more important as, in view of the limited number of flights offered on the routes concerned, one daily flight may represent a market share close to [5-10%] (even including the German regional airports).
70. In the light of the above, it is concluded that the competitive position of the parties will remain substantially constrained by their existing competitors at Frankfurt and Munich (which have competitive flights and could carry an additional number of passengers), and by the presence of competitive alternative flights and opportunities for entry at the German regional airports and, in some cases, possibly at certain non-German hubs as well. It therefore appears that the proposed concentration does not create or strengthen a dominant position on those routes as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

**D. Conglomerate aspects**

71. United is a large network alliance with large long-haul activities, while US Air is primarily a regional operator on the East coast of the USA, where it offers short and medium-haul operations. In that context, US Air may offer interlining services to third-party operators, so as to provide those operators with sufficient feeder/de-feeder traffic for their long-haul (including transatlantic) operations. For example, this is so for Virgin Atlantic and Air France at Philadelphia.
72. It is therefore necessary to examine whether, after the proposed transaction, US Air could stop providing those services competitively to those third parties, and whether the resulting weakening of those competitors could create or strengthen a dominant position by United or Lufthansa on certain routes. However, there is no indication that this could be the case, primarily because of the significant number of other competitors not resorting to services from US Air.



73. It therefore appears that those conglomerate aspects arising from the proposed concentration do not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

## **VI. UNDERTAKINGS SUBMITTED BY THE PARTIES**

74. The notifying party has provided undertakings in response to the competition issues raised above. These commitments are annexed to this decision and form an integral part thereof.

75. The undertakings can be summarised as follows :

The notifying party undertakes to make available slots at Frankfurt and/or Munich to a new air service provider or providers (the new entrant(s)) for the purpose of enabling the new entrant(s) to commence new or additional competitive<sup>13</sup> air service in the routes between Frankfurt and Philadelphia, Charlotte and Pittsburgh and between Munich and Philadelphia (the identified city pairs) if the new entrant(s) are unable to obtain the slots needed through normal procedures. Nevertheless, subject to approval by the Commission United will not be required to make available slots with respect to an identified city pair(s) once a carrier has commenced a new or additional competitive air service on that identified city pair(s) or when on any of the identified city pairs neither United nor one of its alliance partners offers a non-stop service.

76. These undertakings allow to overcome the slot restrictions at Frankfurt and Munich, which have been described by third parties as constituting the main barriers to entry (at least for indirect services) on the routes concerned. In particular, third parties have indicated to the Commission that they would be willing to enter the routes where competition concerns have been identified, provided that sufficient slots were available to them for such operations.

77. In particular, the slots made available by the parties will be sufficient to allow one new daily frequency (or in any case not less than 6 times a week) in each of the relevant city pairs. This level of frequency addition appears adequate for long haul routes with a limited amount of O&D traffic, and would effectively allow travellers to use an additional, competitive alternative service.

78. It is therefore concluded that these undertakings will prevent United from behaving independently from its competitors and customers because of the competitive constraint imposed by the new entrant(s), and therefore that these undertakings are sufficient to remove the dominant position created by the notified operation in the relevant city pairs.

79. It follows from the above that, subject to full compliance with the commitments made by the notifying party and annexed to this Decision, the proposed concentration will not

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<sup>13</sup> A non-stop or indirect scheduled passenger air service which is operated on a daily basis (or in any case, not less than 6 times a week) on one or more of the identified city pairs, and, in the case of an indirect service with a connecting time of not more than 150 minutes.

create or strengthen a dominant position as a result of which competition will be significantly impeded in the common market or in the EEA or in a substantial part of it.

## **VII. CONCLUSION**

80. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and the EEA Agreement. This decision is adopted in application of Article 6(2) of Council Regulation (EEC) No 4064/89, subject to the condition of full compliance with the undertakings set out in the Annex to this decision.

For the Commission,

# COMMITMENT PACKAGE

## CASE NO. COMP/M.2041

### UAL CORPORATION / US AIRWAYS GROUP, INC.

#### PROPOSED AMENDMENTS TO THE NOTIFIED TRANSACTION

UAL Corporation ("United") submits the commitments specified below (the "Commitments"). The Commitments are offered by United in accordance with Article 6(2) of Council Regulation EEC N° 4064/89 as amended (the "Merger Regulation") in order to remove serious doubts as to the compatibility of the merger with the common market. The Commitments are subject to the adoption of a final decision pursuant to Article 6(1)(b) declaring the notified concentration (the "Concentration") compatible with the common market (the "Decision") and shall take effect upon the date of the Decision. These Commitments will be binding on United, its subsidiaries, successors and assigns including, United Air Lines, Inc, a wholly owned subsidiary of United. These Commitments are offered exclusively in the context of the notified concentration between United and US Airways Group ("US Airways"), and are without prejudice to the position of United and its alliance partners (British Midland, Lufthansa, Austrian and SAS) in other cases currently being examined by the European Commission (or competent national authorities) under any of Regulation 3975/87, Regulation 17/62, Articles 84 and 85 EC Treaty .

The Commitments to be provided by United must be proportionate to the need to ensure that the concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded on any city-pair identified by the Commission's Decision. The Commitments proposed by United below are designed to remove serious doubts as to the compatibility of the Concentration with the common market without placing a more than absolutely necessary burden on United's commercial activities. In particular, the solution set out below with regard to making slot(s) available at either Frankfurt and/or Munich (as the case may be) is designed to ensure the provision of adequate new or additional scheduled passenger Competitive Air Service between Frankfurt and/or Munich (as the case may be) and the US destinations identified by the Commission without United being required to make available more slots at either Frankfurt and/or Munich (as the case may be) than absolutely necessary to the need to avoid the creation or strengthening of a dominant position on the city-pair(s) identified in the Commission's Decision under Article 6(1)(b) of the Merger Regulation.

#### DEFINITIONS

- 1 **Competitive Air Service** - a non-stop or indirect scheduled passenger air service which is operated on a daily basis, 7 (or in any case not less than 6) times a week on one or more of the Identified City-Pairs, and, in the case of an indirect service with a connecting time of not more than 150 minutes.
- 2 **Identified City-Pairs** - Frankfurt-Philadelphia, Frankfurt-Charlotte, Frankfurt-Pittsburgh and Munich-Philadelphia.
- 3 **New Air Service Provider** - any carrier (or carriers that are members of the same alliance) that individually or collectively by codeshare provide(s) new or additional Competitive Air Service.
- 4 **Notified Concentration** - the proposed acquisition by UAL Corporation of US Airways Group, Inc.
- 5 **Prospective New Entrant** - a carrier or carriers members of the same alliance able to offer a Competitive Air Service singly or by codeshare and needing a slot or slots to be made available by United in accordance with the Commitment(s) to operate a Competitive Air Service.

## **SLOTS**

### **1. Slots for a new non-stop or indirect service between Frankfurt and Philadelphia, Charlotte and Pittsburgh and between Munich and Philadelphia**

- 1.1. The Commission considers that the proposed concentration raises serious doubts as to its compatibility with the common market on the Identified City-Pairs. United undertakes to make slot(s) available at Frankfurt and/or Munich to allow one or more New Air Service Providers to provide a new or additional Competitive Air Service.
- 1.2. Slots shall only be made available at Frankfurt or Munich to the New Air Service Provider for the purpose of enabling the latter to commence a new or additional Competitive Air Service, provided the relevant New Air Service Provider can demonstrate that all reasonable efforts to obtain the necessary slots for the provision of such Competitive Air Service through the normal workings of the slot allocation procedures have failed. The slots made available are therefore to be used at a minimum for the provision of the Competitive Air Service.
- 1.3. United will make the necessary slots available to the relevant New Air Service Provider(s) selected in accordance with Clauses 3 and 4.
- 1.4. Where one or more slots have been made available by United, the New Air Service Provider(s) shall remain under a continuing obligation to make all reasonable efforts to obtain the necessary slots at Frankfurt (or Munich) through the normal workings of the slot allocation procedures enabling it to provide a Competitive Air Service. Should a slot ("the New Slot") be obtained by the New Air Service Provider through such procedures, the slot made available to the New Air Service Provider by United pursuant to these Commitments shall be returned to United as soon as the New Slot can be operated by the New Air Service Provider if:
  - the New Slot is used at any time to operate a *non-stop* scheduled air passenger service on any of the Identified City-Pairs and the New Slot falls within a period of 120 minutes before or after the time of any slot made available to it by United pursuant to these Commitments; or
  - the New Slot is used at any time to operate a scheduled air passenger service between Frankfurt or Munich, as the case may be, and the New Air Service Provider's connecting hub, provided that the connection time for a connecting flight to Philadelphia, Charlotte or Pittsburgh, as the case may be, is not more than 150 minutes.
- 1.5. Subject to the provisions of Clause 2.1 and subject to approval by the Commission in accordance with Clause 1.6 or Clause 4, United will not be required to make available slots at Frankfurt or Munich under these Commitments with respect to an Identified City-Pair once a carrier has commenced a new or additional Competitive Air Service on that Identified City-Pair.
- 1.6. United will inform both the Commission and the Trustee of the announced commencement by a carrier of a new or additional Competitive Air Service on an Identified City-Pair as soon as possible following the announcement of that service that does not use slots made available by United. The Commission will confirm to United, in accordance with Clause 4, whether or not such new or additional Competitive Air Service is sufficient for the relevant carrier to qualify as New Air Service Provider with respect to that Identified City-Pair once such service is commenced.

### **2. DURATION OF THE COMMITMENTS**

- 2.1. The Commitments contained in Clause 1 are subject to being revived (as further explained in Clause 2.2) until the New Air Service Provider has operated a new or additional Competitive Air Service for four consecutive IATA seasons.

- 2.2. A carrier which does not use the slots made available to it by United under the present Commitments to operate a new or additional Competitive Air Service for four consecutive IATA seasons on a relevant Identified City Pair(s), will return to United all slots which were made available for the operation of the Competitive Air Service as soon as it fails to operate a Competitive Air Service. The slots thus returned to United, will, in accordance with Clause 1 , be made available by United to another New Air Service Provider for the purposes of operating a new or additional Competitive Air Service on the relevant Identified City Pair(s).

### **3. SELECTION PROCEDURE**

- 3.1. United can select whichever Prospective New Entrant(s) it deems appropriate to satisfy its obligations hereunder, subject to approval by the Commission in accordance with Clause 4 .
- 3.2. A Prospective New Entrant wishing to obtain slots from United for the operation of a new or additional Competitive Air Service shall send its application, during the time period specified in Clause 3.3, to United by fax or e-mail with acknowledgement of receipt to:

Francesca Maher  
Senior Vice President  
General Counsel and Corporate Secretary  
United Airlines  
Chicago, Illinois 60666  
United States

Fax: 001 847 700 46 83

e-mail: Fran.Maher@ual.com

and

Kevin Knight  
Vice President-Resource Planning  
United Airlines  
Chicago, Illinois 60666  
United States

Fax: 001 847 700 2534

E-mail: Kevin.Knight@ual.com

A copy of each of the applications will be sent by United to the Commission and the Trustee as soon as possible after receipt.

- 3.3. Any application by a Prospective New Entrant shall be sent to United during the 14 day period following the close of the then immediately preceding IATA Schedule Coordination Conference.
- 3.4. In addition to the applications received in accordance with Clause 3.2, United shall be entitled to find other carrier(s) to be a Prospective New Entrant. If the other carrier(s) agree(s) or plan(s) to operate a new or additional Competitive Air Service, United shall provide the Commission and the Trustee with the identity of such an additional Prospective New Entrant and a copy of its plan or agreement as soon as possible.
- 3.5. United will inform the Prospective New Entrant within 30 days after the end of the 14 day period, specified in Clause 3.3., whether it has been selected to be a New Air Service Provider. At this time, United shall also inform the Commission, in accordance with Clause 4.2, of the Prospective New Entrant(s) who have been selected. Within 20 days following receipt of United's selection decision, the Commission shall decide, in accordance with the principles specified in Clause 4, whether or not to approve the Prospective New Entrant selected by United.

- 3.6. If United has not submitted a Prospective New Entrant to the Commission for its approval within the required 30-day period, the Trustee shall have an irrevocable mandate to select, in consultation with United, a Prospective New Entrant able to provide, under the best possible terms and in accordance with the principle of proportionality, a Competitive Air Service on the relevant Identified City Pair(s). The Trustee shall submit the Prospective New Entrant selected by it to the Commission for approval within seven days. The Commission shall decide, in accordance with the principles specified in Clause 4, whether or not to approve the Prospective New Entrant within 20 days following receipt of the Trustee's decision.
- 3.7. If United has submitted a Prospective New Entrant to the Commission for its approval, but the Commission has not approved, within the 20 day period provided for in Clause 3.5, the Prospective New Entrant selected by United, then the Trustee shall be granted an irrevocable mandate to select another Prospective New Entrant within seven days. The Trustee shall select, in consultation with United, a Prospective New Entrant able to provide, under the best possible terms and in accordance with the principle of proportionality, a Competitive Air Service on the relevant Identified City Pair(s). The Commission shall decide, in accordance with the principles specified in Clause 4, whether or not to approve the Prospective New Entrant within 20 days following receipt of the Trustee's decision.

#### **4. APPROVAL BY THE COMMISSION**

- 4.1. United shall make available the slots only to the Prospective New Entrant(s) that receive(s) the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In considering its approval, the Commission shall take into account the following criteria:
  - (a) the Prospective New Entrant is unconnected to and independent of the merged entity (and, in particular, will not be part of an alliance with United or US Airways); and
  - (b) the Prospective New Entrant is a viable existing or potential competitor with the ability, resources and commitment to operate Competitive Air Service in the long term as a viable and active competitive force.
- 4.2. To assist the Commission in determining whether the Prospective New Entrant is suitable, United (or, where either Clause 3.6 or Clause 3.7 applies, the Trustee) shall submit a fully documented and reasoned selection decision to enable the Commission to verify that the above criteria are met. The Commission's failure to decide within 20 days from receipt of United's (or, where either Clause 3.6 or Clause 3.7 applies, the Trustee's) fully documented and reasoned selection decision shall constitute an exceptional circumstance pursuant to Clause 6.2.

#### **5. TRUSTEE**

- 5.1. Within two weeks of the date of the Commission's decision, United shall propose the name of an independent and experienced person or institution that it considers appropriate to be appointed as Trustee. The Trustee will have the experience, competence and independence necessary for this appointment. The Trustee will have had no direct or indirect employment, consultancy or other relationship with United, US Airways or Lufthansa during the past 2 years, and will have no such relationship with United or Lufthansa for the 3 years following the completion of its mandate. The Commission shall have the discretion to approve or reject the proposed Trustee. If the proposed Trustee is rejected, United shall submit the names of at least two further proposed Trustees, within five working days of being informed of the rejection. If more than one name is approved by the Commission, United shall be free to choose the Trustee to be appointed from among the names approved. If all further names are rejected by the Commission, the Commission shall nominate the Trustee to be appointed by United.
- 5.2. United shall appoint the Trustee within five working days after being informed of the Commission's approval or selection as appropriate.

- 5.3. Along with its request for approval of a proposed Trustee, United shall submit a proposed draft mandate setting forth in detail the scope of the mandate and the responsibilities to be performed under the mandate. At the Commission's reasonable request, United shall modify the proposed mandate, if necessary to ensure that it is in accordance with the provisions of these Commitments. Once the mandate has been executed, United shall not make any changes to such mandate without the Commission's approval.
- 5.4. The Trustee's mandate shall include, in particular, the following responsibilities:
- (a) to monitor the satisfactory discharge by United of the obligations entered into in these Commitments (in so far as they fall within the scope of the Trustee's mandate);
  - (b) to advise the Commission as to the suitability of the Prospective New Entrant submitted for approval to the Commission under Article 4;
  - (c) to provide written reports to the Commission on the progress of the discharge of its mandate, identifying any respects in which the Trustee has been unable to discharge its mandate. Such reports shall be provided in English within ten (10) working days from the end of every IATA season period following the Trustee's appointment or at such other time(s) as the Commission may specify, and which shall cover the developments of the immediately preceding IATA season period. United shall receive simultaneously a non-confidential copy of such Trustee report;
  - (d) at any time, to provide to the Commission, at its request, a written or oral report on matters falling within the Trustee's mandate;
  - (e) to select a Prospective New Entrant in accordance with either Clause 3.6 or Clause 3.7.
- 5.5. In circumstances where either Clause 3.6 or Clause 3.7 applies, the Trustee shall:
- (a) notify the Commission and United as soon as practically possible of the identity of the Prospective New Entrant(s) with whom it has initiated negotiations and advise why it believes such Prospective New Entrant(s) are suitable, in view of the criteria specified in Clause 4.1;
  - (b) end negotiations with any Prospective New Entrant, if the Commission determines that the negotiations are being conducted with an unsuitable Prospective New Entrant;
  - (c) carry out the negotiations with the view to concluding a binding agreement (subject to the consummation of the Notified Concentration) that takes into account the interest of United (i.e., to obtain the best terms possible within the context of the Trustee's mandate) and in accordance with the principle of proportionality.
- 5.6. United shall provide the Trustee with all such assistance and information, including copies of all relevant documents, as the Trustee may reasonably require in carrying out its mandate, and shall pay reasonable remuneration for its services.

## **6. GENERAL PROVISIONS**

- 6.1. The present Commitments shall enter into force on the date of the adoption of the Commission Article 6(1)(b) decision; provided, however, that United shall not be required to provide, by surrender or exchange, any slots until one (1) month after the consummation by United of the Notified Concentration. If the Notified Concentration is abandoned, abrogated, not approved or disapproved by a relevant Government Authority, or otherwise terminated, then these Commitments cease to apply.
- 6.2. Upon request of the Trustee or United, any deadline provided for in the present Commitments can be extended by the Commission if there are exceptional circumstances justifying such an

extension. Such request shall specify the exceptional circumstances that in United's or the Trustee's opinion justify an extension.

- 6.3. If the approval of the Notified Concentration by another antitrust authority is made subject to requirements that are potentially inconsistent with these Commitments, United may request a review and adjustment of these Commitments in order to avoid such inconsistencies or any obligations beyond the obligation to remove such serious doubts.
- 6.4. If at any given time, on any one of the Identified City-Pairs, neither United nor one of its alliance partners offers a non-stop service, United shall be entitled to request the Commission to release it from its Commitments with respect to the relevant Identified City-Pair(s). The present Commitments shall automatically re-apply to the relevant Identified City-Pair(s) should United or one of its alliance partners recommence non-stop services.
- 6.5. United shall provide the Commission with such information as the Commission may require in connection with these Commitments within ten working days from receipt of the Commission's reasoned request.