



EUROPEAN COMMISSION

DG Competition

Case M.6607 – US AIRWAYS / AMERICAN AIRLINES

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Decision on the implementation of commitments

Date: 30.04.2018



Brussels, 30.04.2018
C(2018) 2788 final

PUBLIC VERSION

Dear Sir or Madam,

**Subject: Case M.6607 – US AIRWAYS / AMERICAN AIRLINES
Granting of Grandfathering rights**

I. FACTS AND PROCEDURE

I.1. The Commission decision of 5 August 2013

1. By decision of 5 August 2013 (the "Clearance Decision"), the Commission declared compatible with the internal market, subject to conditions and obligations (the "Commitments"),¹ the operation by which US Airways Group ("US Airways") entered into a full merger with AMR Corporation ("AMR") (together "the Parties" and "the Transaction"). The combined business is operated under the brand "American Airlines" and post-Transaction, the Parties are thus referred to as "American Airlines". The Clearance Decision was adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EEC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings² (the "Merger Regulation").

I.2. The competition concerns identified in the Clearance Decision

2. During the investigation leading to the Clearance Decision, the Commission considered that the Transaction would give rise to serious doubts as to its compatibility with the internal market as regards one non-stop/non-stop overlap on a long haul route, namely London-Philadelphia. The Airport Pair concerned by this

¹ The Commitments are annexed to the Clearance Decision and the relevant sections are further detailed below in section I.3.

² OJ L 24, 29.01.2004, p. 1-22.

route consists of London Heathrow (LHR) and Philadelphia International Airport (PHL).³

3. Prior to the Transaction, there were three daily non-stop flights between LHR and PHL. US Airways operated a daily service while British Airways, American Airlines' co-operation partner in a metal neutral joint venture, operated two daily services.
4. The Commission was concerned that the merged entity would have a dominant position on the London-Philadelphia route as the Transaction would reduce the number of non-stop carriers active on that route from 2 to 1. This would have given the merged entity a market share of between 80% and 100% on that route, depending on whether one-stop services are considered or not. In addition, the Parties were the only non-stop operators on that route, and were therefore each other's closest competitors.
5. Finally, the Commission considered that entry opportunities on the London-Philadelphia route would remain very limited due to the heavy congestion and the scarcity of slots prevailing at LHR.
6. Hence, the Commission was concerned that, as a result of the Transaction, the significant increase in market power of the merged entity would provide it with the ability to profitably increase prices on the London-Philadelphia route.

I.3. The Commitments

7. In order to remedy the serious doubts raised by the Commission in respect of the Transaction, and summarised above in paragraphs 2-6, the Parties committed to the following:
 - a) a slot release to allow a Prospective Entrant to operate one daily frequency (i.e. up to seven frequencies per week) on the LHR-PHL airport pair (the "Slot Commitment")⁴;
 - b) to enter into a fare combinability agreement across all classes of tickets with, and at the request of, any New Air Services Provider which operates on the Airport Pair;
 - c) to enter into a Special Prorate Agreement for traffic with, and at the request of, a New Air Services Provider when part of the journey involves the Airport Pair; and
 - d) to enter into a Frequent Flyer Programme ("FFP") agreement with, and at the request of, a New Air Services Provider who does not have a comparable FFP of its own.

³ Capitalized terms not explicitly defined in this decision are to be understood as defined in the Clearance Decision and the Commitments.

⁴ The LHR and PHL slots released under the Slot Commitment are referred to, together or separately, as the "Slots" or the "Slot Pair".

8. The Commission considered that the Commitments offered by the Parties would lead to sufficient, timely and likely entry on the London-Philadelphia route and were thus sufficient to eliminate the serious doubts identified by the Commission.⁵ The Commission approved the Transaction subject to full compliance with the conditions and obligations laid down in the Commitments.⁶
9. The detailed text of the Commitments is annexed to the Clearance Decision. In particular, Section 1 of the Commitments relates to the Slot Commitment. Pursuant to Clause 1.1 of the Commitments, the Parties "*undertake to make available Slots to allow a Prospective Entrant(s) to operate one (1) daily Frequency on the Airport Pair (i.e. up to seven (7) Frequencies per week on the Airport Pair)*".
10. Clause 1.9 specifies that the Slots have to be used to provide a Competitive Air Service on the London-Philadelphia route.⁷
11. Pursuant to Clause 1.10 of the Commitments, the Prospective Entrant will be eligible for Grandfathering rights, once it has made appropriate use of the Slots on the London-Philadelphia route for six full consecutive IATA Seasons.
12. Pursuant to Clause 1.11 of the Commitments, the granting of Grandfathering rights is subject to the Commission's approval.
13. Clause 1.13 of the Commitments provides for a definition of Misuse of the Slots, which will be described in more detail below in Section I.5 below. Clause 1.14 of the Commitments provides a description of the consequences of such Misuse.
14. In accordance with Clause 5 of the Commitments, a Monitoring Trustee was appointed by the Parties and approved by the Commission on 19 August 2013. The function of the Monitoring Trustee is to monitor the Parties' fulfilment of the Commitments and of any further obligations that may be contained in the Clearance Decision.

I.4. Chronology of the Divestiture Process

I.4.1. The Evaluation Decision of 6 November 2014

15. On 9 October 2014, Delta Air Lines, Inc. ("Delta") submitted a formal bid for Slots pursuant to Clause 1.24 of the Commitments. According to its application, Delta intended to operate on the Airport Pair with one daily frequency (namely 7 weekly frequencies) for the next six consecutive IATA Seasons as of Summer 2015.

⁵ Clearance Decision, paragraphs 195 and 196.

⁶ Clearance Decision, paragraph 201.

⁷ As set out in the Definitions of the Commitments, a "Competitive Air Service" is a non-stop scheduled passenger air transport services operated on the Airport Pair (LHR-PHL).

16. By decision of 6 November 2014, assessing the viability of Delta and evaluating its formal bid pursuant to Clause 1.21 and 1.26 of the Commitments (the "Evaluation Decision"), the Commission declared that Delta is:
 - a) independent of and unconnected with the Parties and has exhausted its own slot portfolio at LHR within the meaning of Clause 1.21 of the Commitments; and
 - b) a viable potential competitor of the Parties on the Airport Pair for which it has requested slots under the Commitments, with the ability, resources and commitment to operate services on the LHR-PHL route in the long term as a viable and active competitive force.
17. In reaching its conclusion on the independence of Delta from the Parties pursuant to Clause 1.21 of the Commitments, the Commission, in line with the Monitoring Trustee reports of 4 September 2014 and 23 October 2014, considered a number of criteria. For instance, the Commission noted that Delta is not an associated carrier belonging to the same group as the Parties, has no common ownership with the Parties, and does not belong to the same alliance as the Parties. In addition, Delta and the Parties do not cooperate on the Airport Pair in the provision of passenger air transport services (e.g. with a codeshare agreement).
18. With regard to the viability of Delta as a competitor, pursuant to Clause 1.26 (a) of the Commitments, the Commission assessed whether Delta *"is a viable existing or potential competitor, with the ability, resources and commitment to operate services on the Airport Pair in the long term as a viable and active competitive force"*.
19. Accordingly, the Commission, in line with the Monitoring Trustee reports of 4 September 2014 and 23 October 2014, considered a number of criteria. Those criteria include Delta's strong position at PHL, Delta's overall financial performance, the availability of aircraft to operate on the London-Philadelphia route and the possibility to access ground handling services and check-in facilities. The Commission also considered how the fare structure of Delta would compete with the fare structure of the Parties.
20. Pursuant to Clause 1.27 of the Commitments, where there are several viable applicants, the Commission was required to give preference to the applicant (or combination of applicants) which would provide the most effective competitive constraint on the routes of concern.
21. Delta was the only applicant for slots under the Commitments. There was therefore no need for the Commission to make a comparison of bids.
22. Nonetheless, the Commission carried out an assessment of the merits of Delta's bid, including its business plan, with regard to capacity, frequencies, the existence of a year-round service, the pricing structure and the service offering on the Airport Pair. That assessment confirmed that Delta would overall be a viable competitor on the London-Philadelphia route.

I.4.2. The Slot Release Agreement Decision of 19 December 2014

23. On 17 December 2014, American Airlines and Delta submitted to the Commission the Slot Release Agreement to be concluded between the two companies for the purpose of implementing the Commitments with respect to slots requested by Delta on the LHR-PHL Airport Pair. By decision of 19 December 2014 (the "Slot Release Agreement Decision"), the Commission, in line with the Monitoring Trustee report of 17 December 2014, approved the Slot Release Agreement.
24. In reaching its conclusion, the Commission considered that the Slot Release Agreement was in line with the relevant clauses of the Commitments (including Clauses 1.7, 1.9, 1.10, 1.11, 1.12 and 1.13). Moreover, the Commission considered that the provisions regarding the termination and the consequences of termination of the Slot Release Agreement were proportionate and did not go beyond what was provided for in the Commitments. Lastly, the Commission also considered that the Slot Release Agreement contained a Fast Track Dispute Resolution Procedure in accordance with Clause 6 of the Commitments.
25. The Slot Release Agreement Decision provides that *"Delta is under an obligation to use the American Airline Slots to operate a non-stop scheduled air service on LHR-PHL. Once appropriate use of those slots has been made for the Utilization Period, Delta will be deemed to have Grandfathering rights (as defined in the Commitments) subject to the approval of the Commission (advised by the Monitoring Trustee). Once the Commission approves of Grandfathering rights, Delta will retain the American Airlines slots and will be entitled to use them on any city pair"*.⁸
26. Delta was, therefore, granted Slots to operate one daily Frequency⁹ on the London - Philadelphia route (i.e., 7 weekly Frequencies).

I.5. The Grandfathering rights

27. Clause 1.9 of the Commitments provides that *"As a general rule, the Slots obtained by the Prospective Entrant as a result of the Slot Release Procedure shall be used only to provide a Competitive Air Service on the Airport Pair. The Slots cannot be used on another city pair unless the Prospective Entrant has operated a non-stop service on the Airport Pair in accordance with the bid submitted pursuant to Clause 1.24 for a number of full consecutive IATA Seasons ('Utilization Period')"*.
28. Accordingly, Delta shall only use the Slots to operate a non-stop service on the route between London and Philadelphia.
29. Clause 1.10 of the Commitments provides that *"The Prospective Entrant will be deemed to have grandfathering rights for the Slots once appropriate use of the Slots has been made on the Airport Pair for the Utilization period. In this regard, once the*

⁸ Slot Release Agreement Decision, paragraph 16.

⁹ In the Definitions section of the Commitments, Frequency is defined as a round-trip on the Airport Pair.

Utilization period has elapsed, the Prospective Entrant will be entitled to use the Slots obtained on the basis of these Commitments on any city pair ('Grandfathering')."

30. Therefore, Grandfathering rights would entitle Delta to use the Slots obtained on the basis of the Commitments, to operate any route, and not necessarily the London-Philadelphia route. Such granting of Grandfathering rights is subject to appropriate use of the Slots during the Utilization Period, i.e. during six consecutive IATA Seasons.

31. Clauses 1.12 and 1.13 of the Commitments set out conditions pertaining to the usage of the Slots by the Prospective Entrant. Pursuant to Clause 1.12, *"During the Utilization Period, the Prospective Entrant shall not be entitled to transfer, assign, sell, swap or charge in breach of these Commitments any Slots obtained from the Parties under the Slot Release Procedure, except for changes to any such Slots which are within the Time Window and which have been agreed with the slot coordinator."*

32. Clause 1.13 of the Commitments contains the definition of "Misuse" of the Slots:¹⁰

"During the Utilization Period, 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 Airport Pair

(b) to operate fewer weekly Frequencies than those to which it committed in the bid in accordance with Clause 1.24 or to cease to operate on the Airport Pair unless such a decision is consistent with the "use it or lose it" principle in Article 10(2) of the EU Slot Regulation¹¹ (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 the Time Window and which have been agreed with the slot coordinator;

(d) not to use the Slots on the Airport Pair, as proposed in the bid pursuant to Clause 1.24;

(e) not to use the Slots properly: this situation shall be deemed to exist where the Prospective Entrant (i) loses the series of Slots 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 Slots as described and interpreted in Article 14(4) of the EU Slot Regulation."¹²

¹⁰ The same definition of Misuse is included in the Slot Release Agreement between American Airlines and Delta in the version submitted to the Commission on 17 December 2014.

¹¹ 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.

¹² The notion of Misuse under the Commitments is therefore wider than the "use it or lose it" principle and the notion of misuse under the EU Slot Regulation.

33. Clause 1.14 of the Commitments describes the consequences of such Misuse during the Utilization Period and the course of action that the Parties can take in case of Misuse.
34. Finally, Clause 1.11 of the Commitments provides that "*Grandfathering is subject to the approval of the Commission, advised by the Monitoring Trustee at the end of the Utilization Period. Once the Commission approves the granting of Grandfathering rights pursuant to Clause 1.10, the Parties will be released from the slot Commitment provided for in Clause 1.1*".
35. Pursuant to Clause 1.11 of the Commitments, the Commission is thus competent to approve the granting of Grandfathering rights for the Slots to Delta.¹³
36. The purpose of this decision is, therefore, to assess whether Delta is eligible for Grandfathering rights and, if this is the case, to approve the granting of such Grandfathering rights to Delta.

II. ARGUMENTS OF AMERICAN AIRLINES AND DELTA

37. American Airlines and Delta have different views as to the relevant criteria for the granting of Grandfathering rights. As a consequence of those diverging views, American Airlines considers that Delta is not eligible for Grandfathering rights, whereas Delta concludes that it is eligible.
38. American Airlines considers¹⁴ that in the Commitments, Grandfathering has a meaning which makes no reference to the EU Slot Regulation. Grandfathering is defined in Clause 1.10 of the Commitments, which states that Grandfathering rights are given to the remedy taker only once appropriate use of the Slots has been made. According to American Airlines, the level of service required for acquiring Grandfathering rights pursuant to the Commitments is "appropriate use" and not Misuse. According to American Airlines, "Misuse" is a different concept with an independent purpose, i.e. the protection of the historic ownership rights of the airline providing the slots. American Airlines also claims that there is no link in the text of the Commitments between "Misuse" and "appropriate use".
39. According to American Airlines, to satisfy the threshold of "appropriate use", Delta should have operated the Slots "in accordance with its bid". To support its interpretation, American Airlines claims that "*operating the remedy slots in accordance with the bid made to obtain the slots and the consequent competitive constraint on the airport pair of concern for the Utilization Period that comes with operating the slots is the 'price' a Prospective Entrant pays for effectively assuming 'ownership' of the slots*".¹⁵ Thus, American Airlines alleges that "appropriate use"

¹³ In this regard, Delta initiated contacts with the Commission and the Monitoring Trustee in June 2017; see for instance minutes of a meeting with Delta, the Monitoring Trustee and the Commission of 13 June 2017, but also e-mails sent by Delta on 8 August 2017, 4 September 2017 and 19 September 2017.

¹⁴ Letters of 28 September 2015, 4 November 2015, 8 April 2016, 26 September 2016, 5 March 2018; non-confirmed minutes of the meetings of 12 September 2017 and of 22 March 2018.

¹⁵ Letter of 28 September 2015, p.2.

cannot be merely reduced to the "use it or lose it" rule from the EU Slot Regulation.¹⁶ To the contrary, the "appropriate use" required "is clearly a higher usage standard than the minimum to protect historic rights".¹⁷ While this requires the exercise by Delta of "maximum competitive constraint", American Airlines acknowledges that "true operational or mechanical issues" leading to cancellations of flights do not put an "appropriate use" of the Slots into doubt.¹⁸ American Airlines further states that cancellations should not be tolerated "other than for extraordinary operational reasons".¹⁹ American Airlines considers that "the deliberate and systematic cancellations" made by Delta cannot be considered "appropriate use".²⁰

40. Moreover, American Airlines claims that granting Grandfathering rights to Delta would highlight "one of the fundamental flaws and risks of the use of the grandfathering concept as an incentive in EU merger control remedy decisions"²¹. American Airlines takes the view that the presence of grandfathering rights in mergers decisions with commitments in the aviation sector runs counter to what it considers the policy of the Commission Services in charge of Competition. American Airlines argues that the "grandfathering concept used in merger context provides no guarantee competitive harm will be addressed in the long term and as such it lacks coherence from a competition policy perspective".²²
41. In this regard, American Airlines argues that by failing to operate daily services in accordance with its bid for the Slots, Delta did not reach the level of an "appropriate use" of the Slots for the past six IATA Seasons. Therefore, those seasons should not be counted for the purpose of granting Grandfathering rights under the Commitments. As a result, American Airlines considers that Delta should not obtain Grandfathering rights.
42. In contrast, Delta considers²³ that there is no basis in the Commitments for taking the view that "appropriate use" involves a threshold that is higher than the "use it or lose it" rule. In Delta's view, "it follows from the text of the Commitments that 'appropriate use' of the Slots will have been made by the entrant if it complies with the other provisions of the Commitments. In this respect, the Commitments define various behaviours which might amount to 'Misuse' and the only reasonable interpretation of the Commitments is that by avoiding these behaviours, the entrant will have made 'appropriate use' of the Slots".²⁴

¹⁶ Article 10(2) of the EU Slot Regulation defines the "use it or lose it" principle, according to which an air carrier having operated its particular series of slots for at least 80% of the relevant scheduling period is entitled to the same series of slots in the equivalent scheduling period of the following year.

¹⁷ Letter of 28 September 2015, p.4.

¹⁸ *Ibid.*

¹⁹ Letter of 4 November 2015, p.8.

²⁰ Letter of 28 September 2015, p.4.

²¹ Letter of 5 March 2018, p.3.

²² Presentation sent on 7 March 2018 ahead of the meeting of 22 March 2018, slide 15.

²³ Letters of 16 October 2015, 15 February 2016 and 12 October 2016; non-confirmed minutes of the meeting of 13 June 2017.

²⁴ Letter of 16 October 2015, p.2-3.

43. In addition, Delta claims that its use of the Slots is "*consistent with the industry practice with widespread operations of slots at below the 100% utilisation*"²⁵ level which would be the level included in its bid. Delta claims also that the occasional cancellations are normal industry practice and were done "*with a view to maximising profitability*" on the route "*so as to ensure it competed effectively with American Airlines*".²⁶
44. As a result, Delta argues that it has made appropriate use of the Slots and should therefore obtain Grandfathering rights. Moreover, "*Delta has corresponded with ACL (the slot coordinator at LHR) specifically on this point to ensure that its proposed schedule was in compliance with the rules for retaining grandfather rights (i.e. that it was making "appropriate use" of the Slots)*".²⁷

III. THE COMMISSION'S ASSESSMENT

III.1. Analytical Framework

III.1.1. Context

45. The purpose of the Commitments is to eliminate the serious doubts as to its compatibility with the internal market to which the Transaction would have otherwise given rise. Specifically, the merged entity would have been the only air carrier operating a direct service on the London-Philadelphia route while there were two competing carriers offering direct services on that route pre-Transaction. Therefore, the Commitments aimed at enticing entry on that route.
46. As set out in Clause 1.9 of the Commitments, Slots made available under the Commitments shall be used only on the route where the Commission identified competition concerns, unless the Prospective Entrant acquired Grandfathering rights for those Slots. This ensures that the Slots obtained under the Commitments contribute to restoring a Competitive Air Service on the London-Philadelphia route at least for the duration of the Utilization Period by enabling a Prospective Entrant to operate on that route.
47. The purpose of the inclusion of Grandfathering rights in the Commitments is to make the entry on the London-Philadelphia route more attractive, as underlined by the Parties themselves.²⁸ Once Grandfathering rights are granted to the Prospective Entrant, the limitations on the use of the Slots (i.e., the obligation to operate on the Airport Pair) as well as on the ability to transfer and trade the Slots are removed. Therefore, Grandfathering rights constitute an incentive for airlines to request slots under the Commitments. This increases the likelihood that a Prospective Entrant can be found who will operate a Competitive Air Service at least during the Utilization Period.

²⁵ *Ibid*, p.2.

²⁶ *Ibid*, p.5.

²⁷ *Ibid*, p.3.

²⁸ Form RM section 1.1: "*In particular, to increase the attractiveness of the remedy, the Proposed Commitments include provisions on "grandfathering" of the slots released by the Parties once the new entrant has operated a non-stop service on the Airport Pair for six consecutive seasons*".

48. As mentioned in paragraph 36 above, the purpose of this decision is to assess whether or not Grandfathering rights can be granted to Delta pursuant to the Commitments. This decision will not make any finding as to the merits of including Grandfathering rights in the Commitments since the Clearance Decision (which made the Commitments binding on the Parties) has become final. Accordingly, American Airlines' argument set out above in paragraph 40 above and questioning the appropriateness of including grandfathering rights in commitments, and the incentive they pursue from a wider merger policy perspective, must be rejected at the outset as irrelevant to this decision.

III.1.2. Criteria for the assessment of whether the granting of Grandfathering rights can be approved

49. As explained in Section I.5, Grandfathering is defined in Clause 1.10 of the Commitments. Pursuant to Clause 1.10 of the Commitments, the Prospective Entrant will be deemed to have Grandfathering rights for the Slots once "*appropriate use of the Slots has been made on the Airport Pair for the Utilization Period*". The Utilization Period is defined in Clause 1.9 of the Commitments as "*a number of full consecutive IATA Seasons*", which, as specified in the Definitions section of the Commitments, is six consecutive IATA Seasons.²⁹

50. Pursuant to Clause 1.10 of the Commitments, the only criterion for obtaining Grandfathering rights is therefore the "*appropriate use*" of the Slots during the Utilization Period.

III.1.3. Definition of "appropriate use" of the Slots

51. The notion of "appropriate use" is not defined in the Commitments and, as mentioned in Section II of this decision, American Airlines and Delta disagree on its definition. Therefore, the Commission shall determine the meaning of "*appropriate use*" under Clause 1.10 of the Commitments before proceeding with the assessment of whether the Commission can approve the granting of Grandfathering rights to Delta.

52. In the absence of an explicit definition, the Commission has considered the wording, the object and the context of the Commitments. On that basis, the Commission concludes that the relevant interpretation of "*appropriate use*" is "*absence of Misuse*". The reasons for the Commission's conclusion are set out in this section below.

III.1.3.1. "Appropriate use" as "absence of Misuse"

53. Clause 1.10 of the Commitments, which is the one defining Grandfathering, does not define "appropriate use" and does not set a specific standard for such appropriate use. The Commission therefore considers the object and the context of the Commitments as relevant to interpret "appropriate use".

54. As regards the object of the Commitments, the Commission considers that the Commitments aim to remedy serious doubts as to the compatibility of the Transaction with the internal market in relation to the London-Philadelphia route, as explained in paragraph 8 above. Clause 1.9 of the Commitments refers to the purpose of the Slot

²⁹ According to the Definitions section of the Commitments: the term *Utilization Period* has the meaning given in Clause 1.9 of the Commitments and shall be six consecutive IATA Seasons.

Commitment, which is restoring competition on that route by establishing a Competitive Air Service. Clause 1.9 of the Commitments does not contain any reference to a specific number of frequencies on the route. In addition, Competitive Air Service is defined as "*a non-stop scheduled passenger air transport service operated on the Airport Pair*"³⁰, therefore not requiring the take-up or servicing of any particular minimum number of frequencies by a Prospective Entrant.

55. As regards the context of the Commitments, the Commission considers that, as explained in paragraph 47 above, Grandfathering rights constitute an incentive for the Prospective Entrant to operate the London-Philadelphia route. To entice entry by a competitor, the Prospective Entrant needs clear and verifiable principles, as well as legal certainty, notably concerning the award of Grandfathering rights, in order to decide whether or not to apply for the Slots. This requires that the Prospective Entrant can trust that the criterion for obtaining Grandfathering rights (i.e. appropriate use as explained in paragraph 50 above) is clearly circumscribed and not subject to arbitrary considerations.
56. Considering that in the ordinary language "misuse" can be defined as "*an occasion when something is used in an unsuitable way or in a way that was not intended*"³¹ and that "appropriate" can be defined as "*suitable or right for a particular situation or occasion*"³², the most evident conclusion is that "appropriate use" is the opposite of "misuse". Consequently, when applying a literal interpretation of the concepts used in the Commitments, the appropriate use of the Slots should be understood as the absence of Misuse of these Slots.
57. Misuse is defined in Clause 1.13 of the Commitments, while "appropriate use" is not defined. The existence of a definition of "Misuse" and the absence of a definition of "appropriate use" in the Commitments points towards an equation between "appropriate use" and "absence of Misuse". Therefore, Misuse of the Slots arises under a number of circumstances listed under Clause 1.13;³³ *a contrario*, the situation which does not give rise to Misuse can be considered as "appropriate use" of the Slots. By referring back to a defined concept in the Commitments, this is the only interpretation (as opposed to the interpretation provided by American Airlines, see below in Section III.1.3.2) that would give sufficiently clear and verifiable guidance to the Prospective Entrant and would fulfil the requirements of legal certainty.

III.1.3.2. "Appropriate use" is not "use in accordance with the bid"

58. For the reasons set out below, the Commission rejects American Airlines' interpretation of "appropriate use of the Slots" as meaning the "use in accordance with the bid".

³⁰ Commitments, Definitions section

³¹ Misuse (noun) in *Cambridge Dictionary*. Retrieved on 11 April 2018 from <https://dictionary.cambridge.org/fr/dictionnaire/anglais/misuse> .

³² Appropriate (adjective) in *Cambridge Dictionary*. Retrieved on 11 April 2018 from <https://dictionary.cambridge.org/fr/dictionnaire/anglais/appropriate> .

³³ It is noteworthy that Misuse arises not only in case of breach of the "*use it or lose it*" principle or in case of misuse as defined under the Slot Regulation, but also under certain circumstances specific to the Commitments as defined in Clause 1.13 of the Commitments.

59. First, the Commission considers that equating "appropriate use" to "use in accordance with the bid" would lead to an almost impossible requirement for any airline. A requirement to be strictly bound by a business plan for the following six IATA Seasons would deprive the Prospective Entrant of any flexibility to operate the Slots in a commercially viable manner. In such scenario, cancelling even one flight (resulting in deviating from the business plan) would prevent the Prospective Entrant from counting the whole relevant IATA Season as part of the Utilization Period and would reset the count for the six consecutive IATA Seasons to acquire Grandfathering rights to zero. In practice, virtually no airline operates 100% of its initially scheduled frequencies in accordance with a pre-defined business plan, which can be up to 2-3 years old, especially on routes where operations are starting anew. In addition, the "*use it or lose it*" rule does not require an air carrier to demonstrate 100% usage of the slots during the relevant scheduling period in order to be entitled to the same slots in the next equivalent scheduling period. This demonstrates that the EU legislator considered that a 100% utilisation rate is not an attainable or desirable threshold.
60. Second, American Airlines' argument that only cancellations for "extraordinary operational reasons" would be in compliance with "use in accordance with the bid" is not convincing either. In addition to the reasons set out in the previous paragraph, such interpretation would introduce a concept that cannot be objectively defined in the notion of "appropriate use" of the Slots. This could lead to arbitrary decisions and cast legal uncertainty on how the Commitments should be applied. There is no specific indication anywhere in the Commitments that would lend support to such an interpretation or would indicate such a threshold. The Commission considers that the only clear, verifiable, predictable and reasonable rule to assess "appropriate use" is the absence of "Misuse". In terms of the number of Frequencies that should accordingly be flown, Clause 1.13 of the Commitments, defining "Misuse", refers to the "*use it or lose it*" rule included in the EU Slot Regulation (Clause 1.13 (b)). This is *de facto* the standard in the aviation sector defining the minimum use of slots that entitles an air carrier to the same series of slots in the next equivalent scheduling period. Only this interpretation gives legal certainty to the Prospective Entrant. Any other threshold would create legal uncertainty.
61. Third, the interpretation of "appropriate use" as "in accordance with the bid" described in paragraphs 59 and 60 above would have a detrimental effect on the attractiveness of the Commitments. They would undermine the purpose of the Grandfathering rights and would ultimately render it very difficult, if not impossible, to find a Prospective Entrant. Therefore, such interpretations would reduce the likelihood of success of the Commitments and would run counter to the object and context of the Commitments as explained above (paragraphs 54-57).
62. Fourth, requiring the Prospective Entrant to demonstrate a level of slot utilisation superior to the *de facto* standard in the aviation sector of 80% (as described in paragraph 61 above) would not be justifiable. The purpose of the Commitments is to contribute to restoring a Competitive Air Service on the London-Philadelphia route by enabling a competitor to enter the route and exert an effective competitive constraint. Given that the merged entity's operation on this route is subject to the "*use it or lose it*" rule, it would be unreasonable to require from Delta, as a remedy taker, to operate according to a utilisation rate which would be more burdensome. A higher utilisation rate is in any event not required to operate a Competitive Air Service (as defined in the Commitments) and thus to exert an effective competitive constraint.

63. Fifth, the Form RM submitted by American Airlines in the procedure leading up to the Clearance Decision states that the Commitments are largely similar to the commitments offered by IAG in the IAG/bmi merger case.³⁴ With the exception of an exhaustive list of points diverging from the IAG/bmi case as set out in the Form RM and which do not include the issue of Grandfathering, the Form RM clarifies that any formulation used in the Commitments which differs from the commitments in the IAG/bmi case are only "*minor linguistic changes and clarifications*".³⁵ While the commitments in the IAG/bmi case refer to "appropriate use", they do not require using the slots during the Utilization Period "in accordance with the bid". It follows that the formulation "in accordance with the bid" in the Commitments does not amount to a change of the requirements for Grandfathering in the present case and only constitutes a "minor linguistic change" as compared to the commitments in the IAG/bmi case.
64. Sixth, according to American Airlines, Clause 1.9 clarifies that the Prospective Entrant should use the Slots in accordance with the bid. However, as mentioned in paragraph 55 above, Clause 1.9 of the Commitments refers to the purpose of the Slot Commitment, (i.e. to provide a Competitive Air Service on the Airport Pair). It does not refer to Grandfathering rights. Accordingly, Clause 1.9 of the Commitments does not contain any reference to "appropriate use", the latter being the condition to the granting of Grandfathering rights. Clause 1.10 of the Commitments, on the other hand, introduces the concept of "appropriate use" in the context of granting Grandfathering rights. Therefore, operating the Slots "in accordance with the bid" is not a condition for the granting of Grandfathering rights.
65. Therefore, it stems from the wording, the object and the context of the Commitments that "*appropriate use*" cannot be understood as "*use in accordance with the bid*".

III.1.3.3. Conclusion

66. In the light of the foregoing, the Commission considers that "*appropriate use*" of the Slots must be interpreted as the "*absence of Misuse*" of the Slots, as defined in Clause 1.13 of the Commitments.
67. Therefore, the Commission will assess whether Delta should obtain Grandfathering rights based on the absence of Misuse of the Slots during the Utilization Period.

III.2. Assessment of whether Delta should obtain Grandfathering rights

68. Pursuant to Clause 1.10 of the Commitments and as explained in paragraphs 49 to 50 above, the "appropriate use" of the Slots during the Utilization Period is the only criterion for assessing whether the Commission can approve the granting of Grandfathering rights to a Prospective Entrant.
69. In addition, as explained above in paragraphs 53 to 67, "appropriate use" of the Slots is to be understood as the absence of Misuse of the Slots.

³⁴ Case M.6447 IAG/bmi, the "IAG/bmi" case.

³⁵ Form RM, Section 3.

70. Therefore, in order to determine whether Delta is entitled to Grandfathering rights, the Commission must assess whether Misuse has occurred during the Utilization Period.
71. Clauses 1.10 and 1.11 of the Commitments and paragraph 6(a)(iv) of the Trustee Mandate require the Monitoring Trustee to advise and make a written recommendation to the Commission on whether Grandfathering rights should be granted to the Prospective Entrant in accordance with the Commitments. In that respect, Delta initiated contacts with the Monitoring Trustee and the Commission before the end of the Utilization Period³⁶ and the Monitoring Trustee has reviewed the slot usage on the Airport Pair based on data provided by Delta and ACL for each season of the Utilization Period (starting in Summer 2015 and ending in Winter 2017/18 for a total of 6 consecutive IATA Seasons).³⁷ In addition, the Monitoring Trustee has submitted to the Commission a Trustee Report on Grandfathering rights on 13 April 2018.
72. Pursuant to Clause 1.13 of the Commitments, Misuse is deemed to arise under the circumstances listed in sub-Clauses 1.13(a) to 1.13(e) of the Commitments. The Commission will therefore assess, notably on the basis of the data and analysis included in the Monitoring Trustee's reports, whether Delta's use of the Slots during the Utilization Period has given rise to Misuse within the meaning of the Commitments.

III.2.1. *Assessment of the occurrence of Misuse within the meaning of Clause 1.13 (a) and 1.13 (d) of the Commitments*

73. Pursuant to Clause 1.13 (a) of the Commitments, Misuse shall be deemed to arise where the Prospective Entrant decides not to commence services on the Airport Pair. Pursuant to Clause 1.13 (d) of the Commitments, Misuse occurs when the Prospective Entrant does not use the Slots on the Airport Pair.
74. As noted by the Monitoring Trustee, Delta started operating non-stop services between LHR and PHL on 26 April 2015.³⁸ Delta has continued providing those services on the Airport Pair throughout the remainder of the Summer 2015 IATA Season and the subsequent IATA Seasons of the Utilization Period (i.e. from Summer 2015 to Winter 2017/2018 included). In that regard, the Monitoring Trustee indicated

³⁶ See for instance minutes of a meeting with Delta, the Monitoring Trustee and the Commission of 13 June 2017 and e-mails sent by Delta on 8 August 2017, 4 September 2017 and 19 September 2017.

³⁷ *Trustee Report to the European Commission on the compliance of the Parties with the Commitments for Summer 2015 season*, dated 16 November 2015; *Trustee Report to the European Commission on the compliance of the Parties with the Commitments for Winter 2015/16 season*, dated 1 June 2016; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Summer 2016*, dated 9 December 2016; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Winter 2016/17*, dated 7 April 2017; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Summer 2017*, dated 14 November 2017; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Winter 2017/18*, dated 6 April 2018.

³⁸ See for instance *Trustee Report on the compliance of Parties for S15*, dated 16 November 2015, section 3.2.5 "Trustee review of DL and ACL slot utilisation data".

that Delta offered the following seat capacity between LHR and PHL during the Utilization Period:

Table 1 - Capacity offered by Delta on the London -Philadelphia route during the Utilization Period

	Summer 2015	Winter 2015/2016	Summer 2016	Winter 2016/2017	Summer 2017	Winter 2017/2018
Capacity (number of seats)	53 170	40 824	54 371	39 584	54 268	38 440

Source: Monitoring Trustee report of 13 April 2018

75. As confirmed by the LHR slot coordinator and as reported by the Monitoring Trustee, Delta used the Slots exclusively on the London-Philadelphia route throughout the Utilization Period.³⁹
76. Therefore, Delta commenced providing non-stop passenger air transport services between LHR and PHL in Summer 2015 and used the Slots exclusively on the Airport Pair throughout the Utilization Period.⁴⁰
77. The Commission thus considers that no Misuse as defined in Clause 1.13 (a) and 1.13 (d) of the Commitments occurred during the Utilization Period.

III.2.2. Assessment of the occurrence of Misuse within the meaning of Clause 1.13 (b) of the Commitments

78. Pursuant to Clause 1.13 (b) of the Commitments, Misuse shall be deemed to arise where the Prospective Entrant *"decides to operate fewer weekly Frequencies than those to which it committed in the bid in accordance with Clause 1.24 or to cease operating on the Airport Pair unless such a decision is consistent with the "use it or lose it" principle in Article 10(2) of the EU Slot Regulation (or any suspension thereof)"*.
79. The *"use it or lose it"* principle in Article 10(2) of the EU Slot Regulation is the general principle according to which an air carrier having operated its particular series of slots for at least 80% of the relevant scheduling period is entitled to the same series of slots in the equivalent scheduling period of the following year. The entitlement to the same series of slots as the one operated during the previous year is sometimes referred to as *"grandfather(ing) rights"* or *"historical precedence"*.⁴¹
80. In addition, pursuant to Article 10(3) of the EU Slot Regulation, *"slots allocated to an air carrier before 31 January for the following summer season, or before 31 August for the following winter season, but which are returned to the coordinator for reallocation before those dates shall not be taken into account for the purposes of the usage calculation."* Therefore, under the slot allocation procedure, which is

³⁹ Trustee Report on Grandfathering rights, dated 13 April 2018, paragraphs 103 (ii), 111 (i), 119 (i), 127 (i), 135 (i) and 143 (i).

⁴⁰ *Ibid.*, paragraphs 103 (v), 111 (iv), 119 (iv), 127 (iv), 135 (iv) and 143 (iv).

⁴¹ See for instance IATA *Worldwide Slot Guidelines*, 8.1 Edition, effective 1 January 2018, part 8.1.

applicable to LHR, it is possible to return slots while such hand-backs do not affect the compliance with the "use it or lose it" principle.

81. In accordance with Articles 10(2) and 10(3) of the EU Slot Regulation, an airline can return some slots of a given series to the slot coordinator ahead of the Slot Handback Deadline,⁴² without compromising its eligibility for historical precedence over this given series.
82. Delta committed in its bid, submitted in accordance with Clause 1.24 of the Commitments, to operate 7 weekly Frequencies (i.e. 1 daily Frequency). According to the Monitoring Trustee's reports,⁴³ Delta (i) returned some slots ahead of the Slot Handback Deadline and (ii) cancelled some flights after the Slot Handback Deadline.
83. Throughout the Utilization Period, Delta returned between 32 and 42 Slot Pairs to the LHR slot coordinator in the Summer IATA Season and 28 in the Winter IATA Season before the Slot Handback Deadline. Those Slots Pairs are thus not taken into account for the application of the "use it or lose it" principle.

Table 2 - Number of Slot Pairs returned before the Slot Handback Deadline

	Summer 2015	Winter 2015/2016	Summer 2016	Winter 2016/2017	Summer 2017	Winter 2017/2018
Arrival	37	28	42	28	32	28
Departure	36	28	42	28	32	28

Source: Monitoring Trustee report of 13 April 2018

84. In addition, Delta cancelled some flights after the Slot Handback Deadline. As a result of the flight cancellations, the slot usage, which is the ratio between the number of slot actually used and the number of slots allocated (net of the returns occurring before the Slot Handback Deadline), has been between 82% and 100%.

⁴² Pursuant to the Definitions section of the Commitments the Slot Handback Deadline is "15 January for the IATA Summer Season and 15 August for the IATA Winter Season".

⁴³ *Trustee Report to the European Commission on the compliance of the Parties with the Commitments for Summer 2015 season*, dated 16 November 2015, section 3.2.5; *Trustee Report to the European Commission on the compliance of the Parties with the Commitments for Winter 2015/16 season*, dated 1 June 2016, section 3.2.2; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Summer 2016*, dated 9 December 2016, section 3.2.2; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Winter 2016/17*, dated 7 April 2017 section 3.2; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Summer 2017*, dated 14 November 2017 section 3.3; *Trustee Report to the European Commission on the compliance of American Airlines with the Commitments for Winter 2017/18*, dated 6 April 2018 section 3.3 and *Trustee Report to the European Commission on the award of Grandfathering rights to Delta*, dated 13 April 2018, section 4.

Table 3- Usage of arrival Slots by Delta at LHR during the Utilization Period

	Slot usage					
	Summer 2015	Winter 2015/2016	Summer 2016	Winter 2016/2017	Summer 2017	Winter 2017/2018
Monday	92%	100%	92%	100%	96.2%	100%
Tuesday	92%	94%	96%	100%	82.2%	100%
Wednesday	96%	100%	92%	100%	84.6%	100%
Thursday	96%	100%	96%	100%	88.9%	100%
Friday	92%	100%	96%	100%	96.2%	100%
Saturday	92%	100%	96%	100%	96.2%	94%
Sunday	92%	100%	96%	100%	96.2%	100%
Average	92%	99.2%	94.9%	100%	91.4%	99.1%

Source: Monitoring Trustee report of 13 April 2018

Table 4- Usage of departure Slots by Delta at LHR during the Utilization Period

	Slot usage					
	Summer 2015	Winter 2015/2016	Summer 2016	Winter 2016/2017	Summer 2017	Winter 2017/2018
Monday	96%	100%	92%	100%	96.2%	100%
Tuesday	88%	94%	96%	100%	82.2%	100%
Wednesday	96%	100%	92%	100%	84.6%	100%
Thursday	96%	100%	96%	100%	88.9%	100%
Friday	92%	100%	96%	100%	96.2%	100%
Saturday	92%	100%	96%	100%	96.2%	94%
Sunday	88%	100%	96%	100%	96.2%	94%
Average	93%	99.2%	94.9%	100%	91.4%	98.2%

Source: Monitoring Trustee report of 13 April 2018

85. Delta, therefore, operated fewer Frequencies than set out in its bid during each IATA Season of the Utilization Period. However, the Slot usage data shows that Delta's decision to operate fewer Frequencies was consistent with the "use it or lose it" principle, since the Slot usage was above 80% during each of the relevant IATA Seasons.

86. Therefore, the Commission considers that no Misuse as defined in Clause 1.13 (b) of the Commitments occurred during the Utilization Period.

III.2.3. *Assessment of the occurrence of Misuse within the meaning of Clause 1.13 (e) of the Commitments*

87. Pursuant to Clause 1.13 (e) of the Commitments, Misuse is deemed to arise where the Prospective Entrant decides *"not to use the Slots properly: this situation shall be deemed to exist where the Prospective Entrant (i) loses the series of Slots 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 Slots as described and interpreted in Article 14(4) of the EU Slot Regulation."*⁴⁴

88. First, as confirmed by the LHR slot coordinator and reported by the Monitoring Trustee in its report of 13 April 2018 and as demonstrated above, Delta has respected the *"use it or lose it"* principle pursuant to Article 10(2) of the EU Slot Regulation with regard to the Slots.⁴⁵

89. Second, the Monitoring Trustee report of 13 April 2018 also confirms that the circumstances described in Article 14(4) of the EU Slot Regulation did not occur throughout the Utilization Period.⁴⁶

90. Therefore, the Commission considers that no Misuse as defined in Clause 1.13 (e) of the Commitments occurred during the Utilization Period.

III.2.4. *Assessment of the occurrence of Misuse within the meaning of Clause 1.13 (c) of the Commitments*

91. Pursuant to Clause 1.12 of the Commitments, *"the Prospective Entrant shall not be entitled to transfer, assign, sell, swap, or charge in breach of these Commitments any Slots obtained from the Parties under the Slot Release Procedure, except for changes to any such Slots which are within the Time Window and which have been agreed with the slot coordinator."*

92. Pursuant to Clause 1.13 (c) of the Commitments, Misuse is deemed to arise where the Prospective Entrant decides *"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 the Time Window and which have been agreed with the slot coordinator"*.

⁴⁴ Article 14(4) of the EU Slot Regulation provides that *"Air carriers that repeatedly and intentionally operate air services at a time significantly different from the allocated slot as part of a series of slots or uses slots in a significantly different way from that indicated at the time of allocation and thereby cause prejudice to airport or air traffic operations shall lose their status as referred to in Article 8(2). The coordinator may decide to withdraw from that air carrier the series of slots in question for the remainder of the scheduling period and place them in the pool after having heard the air carrier concerned and after issuing a single warning."*

⁴⁵ *Trustee Report on Grandfathering rights*, dated 13 April 2018, paragraphs 103 (v), 111 (v), 119 (v), 127 (v), 135 (v) and 143 (v).

⁴⁶ *Ibid.*

93. It stems from Clause 1.13 (c) of the Commitments that Misuse arises from the breach of Clause 1.12 of the Commitments as well as from the sublease of the Slots, unless such sublease has been agreed with the slot coordinator.
94. The Monitoring Trustee has found, based on information obtained from the LHR slot coordinator that no Misuse as defined in Clause 1.13 (c) of the Commitments occurred during the Utilization Period.
95. Indeed, during the Utilization Period, Delta did not transfer, assign, sell, swap, sublease or charge any Slot, except for the swaps of Slots that occurred in the Summer 2015 IATA Season and the Winter 2015/2016 IATA Season within the Time Window⁴⁷ and as agreed with the LHR slot coordinator.⁴⁸
96. Therefore, the Commission considers that no Misuse as defined in Clause 1.13 (c) of the Commitments occurred during the Utilization Period.

III.2.5. Conclusion on Misuse

97. On the basis of the above, Delta did not commit any Misuse, as defined in Clause 1.13 of the Commitments, during the Utilization Period.
98. Accordingly, in line with the written recommendation of the Monitoring Trustee, the Commission concludes that Delta has made appropriate use of the Slots during the Utilization Period and that the Commission can, therefore, approve the granting of Grandfathering rights to Delta pursuant to Clause 1.10 of the Commitments.

IV. CONCLUSION

99. Given that (i) the Utilization Period has elapsed and (ii) Delta has made appropriate use of the Slots during the Utilization Period, the Commission approves the granting of Grandfathering rights to Delta pursuant to Clause 1.10 of the Commitments. As a consequence of the granting of Grandfathering rights to Delta and in accordance with Clause 1.11 of the Commitments, American Airlines is released from Clause 1.1 of the Commitments.
100. This Decision is adopted in application of Clause 1.11 of the Commitments.

For the Commission

(Signed)
Johannes LAITENBERGER
Director-General

⁴⁷ The Time Window is defined in the Definitions section of the Commitments as "The period of sixty (60) minutes either side of the Slot time requested by the Prospective Entrant".

⁴⁸ *Trustee Report on Grandfathering rights*, dated 13 April 2018, paragraphs 103 (iii), 111 (iii), 119 (iii), 127 (iii), 135 (iii) and 143 (iii).