



EUROPEAN COMMISSION
DG Competition

CASE M.3280 – Air France/KLM

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Waiver of the Commitments
Date: 06/02/2019



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Brussels, 6.2.2019
C(2019) 1025 final

PUBLIC VERSION

To the notifying parties:

Dear Sir or Madam,

Subject: Case M.3280 – Air France/KLM

Commission decision on Air France-KLM's request of 27 November 2018 for a waiver of the Commitments applying to Amsterdam-New York

1. On 27 November 2018 and pursuant to clause 14 of the commitments package annexed to the Commission decision of 11 February 2004, Société Air France (“Air France”) and Koninklijke Luchtvaart Maatschappij N.V. (“KLM”) requested, on behalf of Air France-KLM, a waiver of all the Commitments¹ applying to one Identified Long-Haul City Pair, i.e. Amsterdam-New York,² in the above-mentioned case. In this decision, the Commission assesses KLM’s request.

1. BACKGROUND

1.1. The Commitments

2. By decision of 11 February 2004 (the “Clearance Decision”) pursuant to Article 6(1)(b) and 6(2) of Council Regulation (EEC) No 4064/89,³ the Commission declared the operation by which Société Air France (“Air France”) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of KLM compatible with the internal market and with the EEA Agreement (the “Transaction”), subject to the full compliance with the Commitments submitted by Air France and attached to the Clearance Decision.⁴

¹ All abbreviations and capitalised terms used in this decision have the same meaning as in the Commission's decision of 11 February 2004 in Case M.3280 – *Air France/KLM*, including its annex, except for abbreviations and capitalised terms specifically defined in this decision.

² Unless specified otherwise in this Decision, Amsterdam-New York shall refer to the Identified Long-Haul City Pair defined as such in the Commitments, which encompasses the Amsterdam-New York JFK and Amsterdam-New York Newark airport pairs.

³ OJ L 395, 30.12.1989, p. 1 (the “Merger Regulation”), repealed and replaced with effect from 1 May 2004 by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p.1).

⁴ OJ C 60, 9.3.2004, p. 5.

3. The Commitments aimed at removing the serious doubts raised by the Transaction on the markets for scheduled air transport of passengers on the Identified Long-Haul and Identified European City Pairs.⁵ The Identified Long-Haul City Pairs include Amsterdam-New York, in relation to which the Commission had concluded that there were serious risks that the Transaction would create a dominant position,⁶ considering that KLM/Northwest and Delta Air Lines Inc. (“Delta”, Air France’s partner in the SkyTeam alliance) offered direct services on the city pair, and that KLM/Northwest and Delta collectively accounted for [55-65]% of all passenger traffic between Amsterdam and New York.⁷
4. The Commission concluded that the Commitments were sufficient to eliminate the serious doubts as to the compatibility of the Transaction with the internal market. In particular, the Commission considered that the Commitments were suitable to solve the competition concerns on the Identified Long-Haul and European City Pairs, by allowing and facilitating third parties’ entry.⁸
5. The Commitments applying to Amsterdam-New York consist of the following four Undertakings, which are unlimited in duration, unless they are waived:⁹
 - a. Under Clause 1.1 of the Commitments, Air France-KLM undertakes to make slots available at Amsterdam so as to enable a Prospective New Entrant to operate a new or additional Competitive Air Service (that is to say a non-stop scheduled passenger air service operated not less than six times a week) on Amsterdam-New York (the “Slot Commitment”);
 - b. Under Clause 4.2 of the Commitments, Air France-KLM undertakes not to add frequencies beyond a total of fourteen frequencies per week on Amsterdam-New York JFK airport, nor to add frequencies on Amsterdam-New York Newark Liberty airport, for a period of six full consecutive IATA seasons starting when a New Air Service Provider begins operating a non-stop service not less than six times a week on Amsterdam-New York (the “Frequency Freeze Commitment”);¹⁰
 - c. Under Clause 5 of the Commitments, Air France-KLM undertakes to enter into an interline agreement on Amsterdam-New York, at the request of a New Air Service Provider (the “Interlining Agreement Commitment”);
 - d. Under Clause 6 of the Commitments, Air France-KLM undertakes to host a New Air Service Provider on its frequent flyer programme for Amsterdam-New York, if the New Air Service Provider does not participate in Air France-KLM's frequent flyer programme or does not have its own comparable frequent flyer programme (the “Frequent Flyer Programme Commitment”).
6. There have been no applicants for slots under the Slot Commitment and no requests under the Interlining Agreement Commitment or the Frequent Flyer Programme Commitment

⁵ Clearance Decision, paragraph 154.

⁶ Clearance Decision, paragraph 112.

⁷ Clearance Decision, paragraph 109.

⁸ Clearance Decision, paragraph 168.

⁹ Clause 2 of the Commitments.

¹⁰ Although the two New York airports (JFK and Newark) were considered as substitutable (Clearance Decision, paragraph 34), the Frequency Freeze Commitment applies to each New York airport separately.

since the entry into force of the Commitments. The Frequency Freeze Commitment was triggered in May 2009, when OpenSkies, a subsidiary of British Airways, started operating a six-weekly non-stop service on Amsterdam-New York. However, OpenSkies cancelled its service on Amsterdam-New York in July 2009.

1.2. The Antitrust Commitments

7. By decision of 12 May 2015 (the “Antitrust Decision”) relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union, the Commission made legally binding the commitments offered by Air France, KLM, Alitalia Società Aerea Italiana SpA (“Alitalia”) and Delta under Article 9 of Council Regulation (EC) No 1/2003¹¹ (the “Antitrust Commitments”). The Antitrust Decision concerns the establishment between these four air carriers of a profit/loss-sharing joint venture called the Transatlantic Joint Venture Agreement (the “TAJV Agreement”), which covers, among other things, all passenger air transport services that they operate on routes between Europe and North America.
8. The Antitrust Commitments aimed at removing the Commission’s preliminary concerns that the TAJV Agreement may restrict competition for the provision of scheduled air transport of passengers on Paris-New York, Amsterdam-New York and Rome-New York, both by object and by effect.¹² The Commission had notably taken the preliminary view that the TAJV Agreement had the effect of appreciably restricting competition on Amsterdam-New York, considering that the combined market share of KLM and Delta was [65-75]% in the premium market and [55-65]% in the non-premium market¹³ and that the loss of competition between the two air carriers was unlikely to be replaced by competition from third parties due to substantial barriers to entry and expansion.¹⁴
9. The Commission concluded that the Antitrust Commitments were sufficient to address the concerns identified by the Commission in its preliminary assessment, without being disproportionate.¹⁵ In particular, the Commission considered that they facilitated entry or expansion on the routes of concern, by lowering barriers to entry or expansion and strengthening the services of competitors, by granting them access to connecting traffic and the possibility of concluding fare combinability agreements and cooperation agreements on frequent flyer programmes.¹⁶
10. The Antitrust Commitments applying to Amsterdam-New York consist of the following four commitments, which are due to expire in 2025:¹⁷
 - a. Under Clause 1.1 of the Antitrust Commitments, Air France, KLM, Alitalia and Delta undertake to make slots available at Amsterdam and/or New York (at the choice of the

¹¹ OJ L 1, 4.1.2003, p. 1.

¹² Antitrust Decision, paragraphs 65, 86 and 106.

¹³ Data for the year 2013, Antitrust Decision, paragraphs 74-75.

¹⁴ Antitrust Decision, paragraphs 79-85.

¹⁵ Antitrust Decision, paragraphs 170 and 176.

¹⁶ Antitrust Decision, paragraphs 151 and 152.

¹⁷ Antitrust Decision, Article 1.

prospective entrant¹⁸ at either JFK or Newark airport) so as to enable a prospective entrant to operate or increase up to seven new or additional frequencies per week on Amsterdam-New York. In contrast to the Commitments, a prospective entrant may, under the Antitrust Commitments, operate a service less than six times a week in order to be eligible to obtain the slots on Amsterdam-New York (the “Antitrust Slot Commitment”);

- b. Under Clause 2 of the Antitrust Commitments, Air France, KLM, Alitalia and Delta undertake to enter into an agreement that arranges for fare combinability on Amsterdam-New York at the request of an eligible non-stop air services provider that has started to operate a new or increased non-stop scheduled passenger air transport service on Amsterdam-New York (the “Antitrust Fare Combinability Commitment”);
 - c. Under Clause 3 of the Antitrust Commitments, Air France, KLM, Alitalia and Delta undertake to enter into a special prorate agreement with a new non-stop air services provider,¹⁹ at the latter's request, for traffic with a true origin/destination in Europe, Israel and Lebanon, and a true destination/origin in North America, the Caribbean, or Central America, provided that part of the journey involves Amsterdam-New York on which the competitive air service is offered (the “Antitrust Special Prorate Agreement Commitment”);
 - d. Under Clause 4 of the Antitrust Commitments, Air France, KLM, Alitalia and Delta undertake to host a new non-stop air services provider in their frequent flyer programmes for Amsterdam-New York, if the new non-stop air services provider does not have its own comparable frequent flyer programme and does not participate in any of these frequent flyer programmes (the “Antitrust Frequent Flyer Programme Commitment”).
11. On 14 August 2017, Norwegian Air Shuttle ASA (“Norwegian”) applied for slots at Amsterdam and New York JFK airport under the Antitrust Slot Commitment to operate four weekly frequencies on Amsterdam-New York from Summer 2018 IATA Season onwards. The Commission approved Norwegian’s application.²⁰ KLM and Delta subsequently released the slots to Norwegian.
12. On 23 March 2018, Norwegian applied for additional slots at Amsterdam and New York JFK airport under the Antitrust Slot Commitment to increase its operations on Amsterdam-New York to seven weekly frequencies from Winter 2018/2019 IATA Season onwards. The Commission approved Norwegian’s new application.²¹ KLM and Delta released the additional slots to Norwegian, which it can use to operate the additional weekly frequencies

¹⁸ Under the Antitrust Commitments, a prospective entrant is defined as any applicant able to offer a competitive air service (that is to say a non-stop scheduled passenger air transport service, without any requirement in terms of minimum frequency) on Amsterdam-New York, Rome-New York or Paris-New York, and needing a slot or slots to be made available by the parties to the TAJV Agreement in accordance with the Antitrust Commitments.

¹⁹ Under the Antitrust Commitments, a new non-stop air services provider is defined as an airline that commences a new non-stop service or increases the number of non-stop frequencies it operates on Amsterdam-New York, Rome-New York or Paris-New York in accordance with the Antitrust Commitments.

²⁰ Commission Decision of 30 October 2017 on evaluation and ranking of slot applicant for IATA Summer season 2018, C(2017)7372 final.

²¹ Commission Decision of 15 June 2018 on evaluation and ranking of slot applicant for IATA Winter season 2018/2019, C(2018)3901 final.

(seven in total) on Amsterdam-New York until the expiry of the Antitrust Commitments in 2025.

2. KLM'S REQUEST FOR A WAIVER OF THE COMMITMENTS ON AMSTERDAM-NEW YORK

13. On 27 November 2018, KLM requested, pursuant to Clause 14 of the Commitments, that the Commission waive all the Commitments applying to Amsterdam-New York. KLM did not submit any request in respect of the Commitments applying to any other Identified Long Haul or Identified European City Pairs, or of the Antitrust Commitments.
14. KLM submits that the existence of two separate sets of commitments (the Commitments and the Antitrust Commitments) for a single city pair (Amsterdam-New York) is unnecessarily duplicative in circumstances where the more recent package (the Antitrust Commitments) has triggered entry on the city pair and therefore has effectively fulfilled the objective of the Commitments. Furthermore, according to KLM, having two separate sets of commitments in force on one city pair, which pursue the same goals (reducing barriers to entry and facilitating new entry), is disproportionate. KLM thus concludes that this unnecessary, disproportionate duplication constitutes exceptional circumstances within the meaning of Clause 14 of the Commitments that justify the waiver of the Commitments on Amsterdam-New York.
15. In addition, KLM submits that, in the fourteen years since the Commitments came into force, there has been a marked change in market conditions. The conclusion of an Open Skies agreement between the European Union and the United States in 2007 has stimulated transatlantic air passenger transport. Consumer demand on transatlantic routes, including Amsterdam-New York, has grown, attracting new entry by carriers such as WOW air and Norwegian.

3. OPINION OF THE MONITORING TRUSTEE

16. On 22 November 2018, the Monitoring Trustee submitted a report, pursuant to Clause 11.2.1(v) of the Commitments, assessing Air France-KLM's waiver request. In this report, the Monitoring Trustee considers that the entry of Norwegian as a relatively new model low cost long-haul carrier, has been facilitated through the Antitrust Slot Commitment. Nevertheless, the Monitoring Trustee does not consider that to be extraordinary circumstances but rather the designed consequences of the Antitrust Commitments.
17. In addition, the Monitoring Trustee notes that the consequence of a waiver of the Commitments may be to put an end date to the access to slots guaranteed by the Commitments, considering that the Antitrust Commitments are set to expire in 2025 while the Commitments are not time limited. Therefore, the Commission may consider not waiving the Slot Commitment for Amsterdam-New York to possibly facilitate a continued service from Norwegian on Amsterdam-New York after the Antitrust Commitments have expired.
18. Furthermore, according to the Monitoring Trustee, it is not obvious that the market conditions on Amsterdam-New York have changed radically since the entry into force of the Commitments or that there was a long-term market evolution. The Monitoring Trustee notably considers that, even after the entry of Norwegian, KLM and Delta are "*still dominant in frequency and seat provision.*"

4. COMMISSION'S ASSESSMENT OF THE REQUEST FOR A WAIVER OF THE COMMITMENTS ON AMSTERDAM-NEW YORK

19. For the reasons explained below, the Commission considers that, on the basis of the arguments provided by KLM, and taking account of the Monitoring Trustee's report and of comments from third parties, KLM's request to waive the Commitments on Amsterdam-New York is justified by exceptional circumstances²² and that the latter Commitments may be waived pursuant to paragraph 14 of the Commitments.

4.1. Assessment framework

20. As regards the conditions under which a waiver may be granted, Clause 14 of the Commitments (the "review clause") states, "[t]he Commission may, in response to a request from the Merger Entity justified by exceptional circumstances or a radical change in market conditions, such as the operation of a Competitive Air Service on a particular Identified European or Long-Haul City Pair, waive, modify or substitute any one or more of the undertakings in [the] Commitments."
21. In this respect, paragraph 74 of the Commission Notice on remedies²³ states the following as regards non-divestiture commitments: "*A waiver, modification or substitution of commitments may be more relevant for non-divestiture commitments, such as access commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision. (...) Second, exceptional circumstances [justifying a waiver, modification or substitution] may also be present if the parties can show that the experience gained in the application of the remedy demonstrates that the objective pursued with the remedy will be better achieved if modalities of the commitment are changed. For any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy. In this regard, the Commission will also consider whether modifications affect the right already acquired by third parties after implementation of the remedy.*"
22. Within this framework, the Commission will assess whether (i) KLM demonstrates the existence of exceptional circumstances such that the objective pursued with the Commitments on Amsterdam-New York will be better achieved if modalities of the Commitments are changed; and (ii) the waiver of the Commitments on Amsterdam-New York does not adversely affect the position of third parties.

²² As the conditions for "exceptional circumstances" are fulfilled, the Commission considers that it is not necessary to examine in this Decision whether the conditions for the two other grounds for a waiver, as defined in Clause 14 of the Commitments ("radical change in market conditions" and "long-term market evolution") are fulfilled, since it follows from the wording of Clause 14 of the Commitments that those different grounds are alternative and not cumulative.

²³ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1. Although the Commission Notice on remedies does not formally apply to remedies accepted under Council Regulation (EEC) No 4064/89, the Commission considers that it provides useful guidance for application of Clause 14 of the Commitments, since it "*reflects the Commission's evolving experience with the assessment, acceptance and implementation of remedies under the Merger Regulation since its entry into force on 21 September 1990*" (paragraph 2 of the Commission Notice on remedies). The previous Commission Notice on remedies (Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001, p. 3) did not contain any guidance as to the review of commitments.

4.2. Exceptional circumstances

23. As recalled in paragraphs 4 and 9 above, both the Commitments and the Antitrust Commitments in relation to Amsterdam-New York have the same objective: to facilitate the entry or expansion of an actual or potential competitor effectively competing with KLM and Delta on the city pair through the commencement of a new or additional air service on Amsterdam-New York.²⁴ For that purpose, under the Slot Commitment, Air France-KLM undertakes to make slots available at Amsterdam to allow a new entrant to operate one new or additional non-stop scheduled passenger air service on a daily basis (or at least six times a week) on Amsterdam-New York. Under the Antitrust Slot Commitment, Air France, KLM and Delta undertake to make slots available at Amsterdam and/or New York to allow one or more new entrants to operate up to seven new or additional frequencies a week on Amsterdam-New York. The other Commitments (the Frequency Freeze, Interlining Agreement and Frequent Flyer Programme Commitments) and the other Antitrust Commitments (the Antitrust Fare Combinability, Special Prorate Agreement and Frequent Flyer Programme Commitments) aim at reinforcing the attractiveness of the Slot Commitment and Antitrust Slot Commitment respectively and further facilitate entry on Amsterdam-New York.
24. The Commitments have not triggered any entry on Amsterdam-New York since the adoption of the Clearance Decision on 11 February 2004. By contrast, the Antitrust Commitments have been effectively implemented and Norwegian operates a non-stop scheduled passenger air service on a daily basis as from Winter 2018/2019 IATA Season based on the slots released by KLM and Delta under the Antitrust Commitments. The Commission notes that, while this service did not qualify as a Competitive Air Service within the meaning of the Commitments prior to Winter 2018/2019 IATA Season,²⁵ Norwegian was able to enter Amsterdam-New York based on the slots released by KLM and Delta under the Antitrust Commitments prior to the Winter 2018/2019 IATA Season. Norwegian thus started with a four-weekly non-stop scheduled passenger air service on Amsterdam-New York during Summer 2018 IATA Season and subsequently decided to increase frequencies as from Winter 2018/2019 IATA Season, resulting in a Competitive Air Service within the meaning of the Commitments.
25. Therefore, the Antitrust Commitments have proven effective as they have triggered the entry (in two stages) of a new Competitive Air Service Provider, thus achieving the objective of the Commitments on Amsterdam-New York.²⁶
26. In addition, in view of the new Competitive Air Service on Amsterdam-New York triggered by the Antitrust Commitments, the Commission considers that maintaining both the Commitments and the Antitrust Commitments on the city pair would risk undermining the proportionality principle.²⁷ Indeed, the Antitrust Commitments and the Commitments have

²⁴ The new or additional service should be operated on a daily basis (or not less than six times a week) under the Commitments. There is no such minimum frequency under the Antitrust Commitments.

²⁵ For failure to reach at least six frequencies per week.

²⁶ In that respect, the Monitoring Trustee notes in its report that *“the entry of Norwegian is taking the competitive landscape back to what it was in 2004 (when there was competition from both Continental (United) and Singapore.”*

²⁷ As recalled in paragraph 168 of the Antitrust Decision, *“[t]he principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.”* In relation to merger control, see the judgment of 18 December 2007 in Case C-202/06 P *Cementbouw v Commission*, paragraph 54.

the same objective as regards Amsterdam-New York and the Antitrust Commitments have proven to be effective and thus sufficient by themselves to remove the competition problem identified in the Clearance Decision.

27. In particular, in terms of new or additional frequencies made possible under the Commitments, the Slot Commitment was designed to enable a new entrant to operate a daily (or seven-weekly) service, which was qualified as a service “*with a significant number of frequencies*”.²⁸ A seven-weekly service also corresponds to the increment brought about by Delta (Air France’s SkyTeam partner) to KLM/Northwest’s operations on Amsterdam-New York at the time of the Transaction.²⁹ The Antitrust Slot Commitment also provides for the possibility to operate up to seven new or additional frequencies per week on Amsterdam-New York, which Norwegian has exhausted since Winter 2018/2019 IATA Season. The Commission concluded in the Antitrust Decision that this number of slots “*is appropriate to address the concerns identified in the Preliminary Assessment, given the characteristics and competitive situation of each of the Routes of Concern.*”³⁰
28. A seven-weekly service on Amsterdam-New York also appeared to constitute a viable competitive constraint at the time of the Clearance Decision, since not only Delta but also Continental was operating a non-stop seven-weekly service on the city pair.³¹ At the time of the Antitrust Decision, United (which merged with Continental in 2010) was still operating a non-stop seven-weekly service on the city pair.³² United still operates today a non-stop seven-weekly, year-round service on Amsterdam-New York and does not plan to stop offering this service within the next three years.³³
29. As a consequence, by enabling Norwegian to operate a new non-stop seven-weekly service on Amsterdam-New York, the Antitrust Commitments restore the competitive situation that existed prior to Air France’s acquisition of control over KLM. By contrast, enforcing both the Commitments and Antitrust Commitments (notably requiring Air France-KLM to release slots for the operation of up to 14 flights per week) would be disproportionate in view of the competition concerns identified on Amsterdam-New York both in the Clearance Decision and in the Antitrust Decision.
30. The Commission notes the concern expressed by the Monitoring Trustee as to the risk for Norwegian’s access to slots after the expiry of the Antitrust Commitments in 2025, if the Slot Commitment, which is of an indefinite duration, were to be waived.
31. Nevertheless, the Commission notes that, despite the indefinite duration of the Commitments, Norwegian decided to start operations on Amsterdam-New York not under the Commitments, but under the Antitrust Commitments, which appear broader in scope. In particular, under the Antitrust Commitments, Norwegian requested and obtained slots at

²⁸ Clearance Decision, paragraph 111.

²⁹ Clearance Decision, footnote 30.

³⁰ Antitrust Decision, paragraph 172.

³¹ Clearance Decision, paragraph 110.

³² Antitrust Decision, paragraph 68.

³³ Reply to the Questionnaire Implementation of commitments – Market test of the waiver request, questions 2.1 and 2.2.

New York JFK airport to operate on Amsterdam-New York, while slots at New York JFK airport are not available under the Commitments.³⁴

32. Furthermore, the Antitrust Commitments include a clause³⁵ enabling the Commission, on its own initiative, to review the Antitrust Commitments after five years, i.e. in 2020. This clause enables the Commission to assess the effectiveness of the Antitrust Slot Commitment prior to its expiry in 2025.
33. Finally, at the time of the expiry of the Antitrust Commitments, the parties to the TAJV Agreement would in any event have to conduct a compliance self-assessment of their co-operation under Article 101 TFEU ³⁶ and, if necessary, would have to take measures to ensure compliance of the TAJV Agreement with Article 101 TFEU in respect of Amsterdam-New York. Alternatively, if competition concerns remain on Amsterdam-New York, the Commission may open new proceedings potentially resulting in the parties offering new commitments.
34. In light of the above considerations, the Commission concludes that (i) the Antitrust Commitments are sufficient and appropriate to achieve the objective of the Commitments on Amsterdam-New York, and, therefore, (ii) the condition for considering that exceptional circumstances are present, as provided for in Clause 14 of the Commitments and paragraph 74 of the Commission Notice on remedies, is fulfilled.

4.3. No adverse effect on the position of third parties

35. The Commission considers that the waiver of the Commitments on Amsterdam-New York would not adversely affect the position of (i) Norwegian, as the slot remedy-taker under the Antitrust Commitments, (ii) KLM's and Delta's other actual competitors or potential competitors on the city pair, or (iii) other interested third parties.
36. KLM's and Delta's other actual competitors on Amsterdam-New York include United, the sole other air carrier operating a non-stop scheduled service, and air carriers offering indirect services, notably air carriers forming the Atlantic Joint Business (American Airlines, British Airways, Iberia and Finnair), which currently offer a one-stop connecting service between Amsterdam and New York primarily via London.³⁷ In view of the attractive market conditions on the city pair in terms of demand and fares, the Commission does not exclude that other air carriers might be interested in entering the city pair over the next three years.

4.3.1. The waiver of the Slot Commitment on Amsterdam-New York would not adversely affect the position of third parties

37. In the Clearance Decision, the Commission identified the main barriers to entry or expansion on Amsterdam-New York as *“the necessary assets and traffic rights, and in*

³⁴ Under the Commitments, the Prospective New Entrant can only request slots at Amsterdam (or Paris, but that is not relevant here) – see Clause 1.1.1 of the Commitments.

³⁵ Clause 8.3 of the Antitrust Commitments.

³⁶ Unless the parties to the TAJV Agreement would create a full-function joint venture reviewable under EU merger control rules.

³⁷ Replies to the Questionnaire Implementation of commitments – Market test of the waiver request, questions 2.2 and 3.1.2.

*particular the relevant take-off and landing slots at [Amsterdam airport].*³⁸ The Commission also mentioned capacity constraints at Amsterdam and New York airports as one of the main barriers to entry and expansion in the Antitrust Decision.³⁹ The Dutch competition authority (the *Autoriteit Consument & Markt*) has confirmed that “[c]apacity at Schiphol is becoming increasingly scarce.”⁴⁰

38. The Commission notes that all the slots, which had to be made available under the Antitrust Slot Commitments, have been taken up by Norwegian. It follows that there is no slot available for expansion by Norwegian or for entry or expansion by other competitors on Amsterdam-New York under the Antitrust Commitments. Given that, as indicated in section 4.2 above, the number of slots made available under the Antitrust Slot Commitments is sufficient and appropriate to solve the competition concerns raised in the Clearance Decision, the principle of proportionality entails that there are equally no further slots available for entry or expansion on Amsterdam-New York under the Commitments. Therefore, the waiver of the Slot Commitment may not be considered as adversely affecting the position of Norwegian or Air France-KLM’s other actual or potential competitors on Amsterdam-New York.
39. More generally, the waiver of the Slot Commitment may not be considered as adversely affecting the position of Norwegian or other air carriers actually or potentially competing with Air France-KLM at any of the concerned airports (Amsterdam Schiphol, New York JFK or Newark). Therefore, the waiver of the Slot Commitment also does not deteriorate access for Norwegian or other air carriers to infrastructure services provided by the concerned airports or undermining the creation of a level playing field for those air carriers at the concerned airports.

4.3.2. *The waiver of the other Commitments on Amsterdam-New York would not adversely affect the position of third parties*

40. With regard to Norwegian, the question is whether the waiver of the Commitments related to measures that have no equivalent in the Antitrust Commitments (that is to say the Frequency Freeze and the Interlining Agreement Commitments) may lead to a deterioration of its market position and diminish the competitive pressure that it exerts or will exert on Air France-KLM and their partner Delta, thanks to the slots made available under the Antitrust Slot Commitment to operate on Amsterdam-New York.
41. Based on information contained in the Monitoring Trustee’s report, “[CONFIDENTIAL].” The Commission draws from Norwegian’s statement, as reported by the Monitoring Trustee, that Norwegian [CONFIDENTIAL]. Furthermore, during the Summer 2018 IATA Season, KLM and Delta transferred operations from Newark to JFK airport, which resulted in the offering of a 20-weekly service on the Amsterdam-New York JFK airport pair.⁴¹ The

³⁸ Clearance Decision, paragraph 111.

³⁹ Clearance Decision, paragraphs 80 and 147.

⁴⁰ See press release from the *Autoriteit Consument & Markt* dated 12 October 2017 on commitments of KLM and Schiphol: <https://www.acm.nl/en/publications/commitments-klm-and-schiphol-acm-level-playing-field-schiphol-airport>

⁴¹ The number of frequencies operated during Summer 2018 IATA Season by KLM on the Amsterdam-New York JFK airport pair exceeded the 14-weekly ceiling set out in Clause 4.2 of the Commitments. However, this transfer was allowed under the Commitments, since Norwegian, with a four-weekly service, did not qualify as a New Air Service Provider. During Winter 2018/2019 IATA Season, the Frequency Freeze Commitment applies, since Norwegian qualifies as a New Air Service Provider, and is complied with, since KLM maintains for the winter season a reduced 14-weekly service on the Amsterdam-New York JFK airport pair. In addition, the

reinforced presence during Summer 2018 IATA Season of KLM and Delta on the Amsterdam-New York JFK airport pair, on which Norwegian also operates, has not prevented Norwegian's entry and even expansion plans on the airport pair as from Winter 2018/2019 IATA Season.

42. Similarly, the Commission has not received any signal from Norwegian that the latter intends to request Air France-KLM to enter into an interlining agreement under the Interlining Agreement Commitment. Therefore, the Commission does not have any strong indication that the waiver of the Interlining Agreement Commitment is detrimental to Norwegian's position on Amsterdam-New York.
43. In addition, it appears that the waiver of the Commitments applicable to Amsterdam-New York other than the Slot Commitment, in particular the Frequency Freeze Commitment, would not adversely affect (i) the position of Air France-KLM's other actual competitors on the city pair, by undermining the viability and competitiveness of their current service, or (ii) the position of Air France KLM's potential competitors on the city pair, by deterring their entry.
44. Indeed, with regard to the Frequency Freeze Commitment, Air France-KLM and Delta already increased the number of frequencies offered on the Amsterdam-New York JFK airport pair in Summer 2018 IATA Season beyond the absolute limit of 14 frequencies referred to in the Frequency Freeze Commitment (without increasing the overall number of frequencies on the city pair).⁴² The market investigation has not brought evidence that the increase in frequencies led to a lessening of actual or potential competition on the city pair.⁴³
45. The waiver of the Frequency Freeze Commitment may contribute to Air France-KLM's ability to increase frequencies on Amsterdam-New York, to the extent made possible by Air France-KLM's ability to redeploy its slot portfolio at the concerned airports for that purpose. However, the waiver of the Frequency Freeze Commitment is not likely to change its incentive to increase frequencies on Amsterdam-New York, as compared to its incentive before Winter 2018/2019 IATA Season.⁴⁴
46. In that respect, the Commission notes that the number of frequencies operated by KLM and Delta on the Amsterdam-New York city pair has remained the same during the period between the Clearance Decision and Winter 2018/2019 IATA Season (27 weekly flights from Amsterdam to New York JFK and Newark),⁴⁵ even though, during the whole period (i) Air France-KLM was not subject to the Frequency Freeze Commitment, and (ii) United

increase in frequencies by KLM on the Amsterdam-New York JFK airport pair results from a transfer of capacity from one New York airport (Newark) to another New York airport (JFK), which were considered as substitutable (Clearance Decision, paragraph 34). Overall, on Amsterdam-New York (JFK and Newark together), there was no increase in frequencies by KLM.

- 42 As allowed under the Frequency Freeze Commitment in the absence of a New Air Service Provider having begun to operate a non-stop service on that city pair.
- 43 Replies to the Questionnaire Implementation of commitments – Market test of the waiver request, questions 2.1-2.5 and 3.1-3.2.
- 44 Before Winter 2018/2019 IATA Season, that is to say before Norwegian qualified as a New Air Service Provider, Air France-KLM was not bound by the maximum number of frequencies set out in the Frequency Freeze Commitment (with the exception of the period between May and July 2009, during which Open Skies operated as a New Air Service Provider on Amsterdam-New York).
- 45 Clearance Decision, paragraph 109 and Monitoring Trustee's report.

operated a seven-weekly service directly competing with KLM's and Delta's services, thus exerting a competitive pressure in terms of frequencies comparable to the level of competition exerted by Norwegian's new Competitive Air Service as from Winter 2018/2019 IATA Season.

47. Finally, the metal-neutral TAJV Agreement has questioned the effectiveness of the Frequency Freeze Commitment,⁴⁶ which only binds Air France and KLM, while their partner Delta is not subject to it. Therefore, Air France-KLM could relatively easily circumvent the Frequency Freeze Commitment by reshuffling operations from KLM to Delta. Conversely, the transfer of operations from Delta to KLM could be prevented by the Frequency Freeze Commitment, while this transfer would have no impact from a competition point of view on Amsterdam-New York or on the overall position of the TAJV partners at Amsterdam Schiphol airport.⁴⁷
48. On the other hand, applying the Frequency Freeze Commitment would reduce the capacity intended to be offered on the Amsterdam-New York JFK airport pair during Summer 2019 IATA Season (from 20 to 14 weekly frequencies for KLM, while Norwegian's frequencies would only increase by three weekly frequencies), the effects of which on consumers would likely not be positive. Indeed, in view of the very high load factors of KLM and Norwegian on this airport pair,⁴⁸ some demand may not be met if KLM were required to reduce its frequency to 14 flights per week during the Summer 2019 IATA Season.
49. With regard to the Interlining Agreement Commitment, no consulted third party has expressed any reservation as to its waiver.
50. In light of the above considerations, the Commission concludes that the waiver of the Commitments on Amsterdam-New York would not adversely affect the position of third parties on Amsterdam-New York or at the concerned airports.

4.4. Conclusion

51. It follows from the above considerations that (i) the Antitrust Commitments are at least as effective as the Commitments in remedying the Commission's concerns on Amsterdam-New York expressed in the Clearance Decision; therefore, in line with paragraph 74 of the Commission Notice on remedies, exceptional circumstances are present; and (ii) on balance, the waiver of the Commitments would not adversely affect the position of third parties.

5. CONCLUSION

52. In the light of the above considerations, the Commission concludes that KLM has justified the existence of exceptional circumstances as required by Clause 14 of the Commitments.

⁴⁶ As indicated in paragraph 38 of the Antitrust Decision, the parties to the TAJV Agreement "*agree that the guiding principle on sales is that each Party will implement sales and distribution programs and policies without preference for its own operated flights on the Transatlantic Routes, which is defined as metal neutrality.*"

⁴⁷ According to the press release from the *Autoriteit Consument & Markt* dated 12 October 2017 on commitments of KLM and Schiphol (<https://www.acm.nl/en/publications/commitments-klm-and-schiphol-acm-level-playing-field-schiphol-airport>), "*KLM and its partners operate approximately 70 percent of all flights [at Schiphol]*". The term "partners" refers to the 18 other members of the SkyTeam alliance, including KLM's TAJV partners (Air France, Alitalia and Delta).

⁴⁸ In the range of 90%.

53. The Commission therefore accepts KLM's request for a waiver of all the Commitments applying to Amsterdam-New York. The Commitments applying to other Identified Long-Haul and Identified European City Pairs and the Antitrust Commitments remain unchanged.

For the Commission

(Signed)

Margrethe VESTAGER

Member of the Commission