

***Case No COMP/M.3770 -  
LUFTHANSA / SWISS***

Only the English text is available and authentic.

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

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Article 6(2) NON-OPPOSITION  
Date: 04/07/2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04.07.2005

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sir/Madam,

**Subject: Case No COMP/M.3770- Lufthansa/Swiss  
Notification of 20.05.2005 pursuant to Article 4 of Council Regulation  
No 139/2004<sup>1</sup>**

1. On 20 May 2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking Deutsche Lufthansa AG (“Lufthansa”, Germany), the holding company of the Lufthansa Group, acquires control of the whole of Swiss International Air Lines Ltd (“Swiss”, Switzerland), by way of purchase of shares.
2. Given the bilateral Agreement between the European Community and the Swiss Confederation on Air Transport (the “ATA”)<sup>2</sup>, the Commission has exceptionally full jurisdiction to assess potential competition concerns in Switzerland and, in particular, any concerns on routes between Switzerland and third countries under Article 11(1) of the ATA.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1.

<sup>2</sup> OJ L 11/73 of 30.4.2002. According to Article 11(1) ATA, “concentrations between undertakings shall be controlled by the Community institutions in accordance with Community legislation as set out in the annex of the agreement”. However, the annex still contains a reference to Merger Regulation (EC) No 4064/89. This means that the latter still applies in so far as the Commission’s competence is extended by the ATA (i.e. in so far as the Commission assesses the impact on the concentration on routes between Switzerland and third countries), while the current Merger Regulation (EC) No 139/2004 applies to the remaining assessment.

3. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and, following submission by the parties of undertakings designed to eliminate competition concerns identified by the Commission, in accordance with Article 6 (2) of the Merger Regulation, does not raise serious doubts as to its compatibility with the common market, with the EEA Agreement and the ATA.

## **I. THE PARTIES**

4. Lufthansa operates a scheduled flight network servicing 176 destinations in 74 countries with a fleet of about 230 aircraft. Its main hub is Frankfurt; other hubs are Munich and Düsseldorf. Lufthansa is member of the Star Alliance. Lufthansa is also active in air transport of cargo and mail, charter operations and other airline related services (aircraft maintenance, repair and overhaul, catering and ground-handling).
5. Swiss currently offers scheduled air services to 68 destinations with its principle hub at Zurich. It has also operations in air cargo and charter and to a minor extent in airline related services. Swiss intends to join the Star Alliance after the merger.

## **II. THE OPERATION**

6. In March 2005, Lufthansa, Swiss and a Swiss-law foundation signed an agreement which sets out the process pursuant to which Lufthansa will acquire 100% of the shares in Swiss. Due to the complex shareholder structure of Swiss and the need to preserve third-country traffic rights, the acquisition is structured in several steps. A holding company (called AirTrust) has been established to acquire all shares in Swiss. AirTrust is controlled by the Swiss-law foundation, and Lufthansa has taken an initial 11% minority stake in AirTrust. A combination of put and call options provides for Lufthansa to increase its share in AirTrust to 49%, after approval of the competent competition authorities (to take place in the third quarter of 2005).
7. As soon as Switzerland has secured certain third-country traffic rights, a further combination of put and call options ensures that Lufthansa will acquire 100% of Swiss [...].

## **III. CONCENTRATION**

8. Although the whole operation will be implemented in steps, all steps are conditional upon each other. Further, if Lufthansa does not increase its shareholding to 100%, the transaction will be unwound.
9. Therefore, the different steps of proposed transactions constitute a single concentration, through which Lufthansa will acquire sole control over Swiss in the sense of Article 3(1)(b) of the Merger Regulation.

#### **IV. COMMUNITY DIMENSION**

10. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion<sup>3</sup>. Each of Lufthansa and Swiss have a Community-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

#### **V. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS**

11. The proposed transaction leads to overlaps in four areas: scheduled passenger air transport services, cargo transport services, services and supply of airline seats to tour operators and repair and overhaul (“MRO”) of aircraft, aircraft engines and aircraft components. Only the first three markets will be affected by the proposed transaction.

##### **A. SCHEDULED PASSENGER AIR TRANSPORT SERVICES**

###### **(i) Point of origin / point of destination (O&D) pairs**

12. The Commission has previously found that the relevant market for scheduled passenger air transport services can be defined on a “point of origin / point of destination” (O&D) approach<sup>4</sup>. Following a small but significant and non-transitory price increase of air transport services on a O&D, passengers willing to travel on this route, will not switch to another destination. According to this approach, every combination of a point of origin and a point of destination is considered a separate market from a demand substitutability point of view. As a result, for each city pair two distinct markets may be delineated based on the “point of origin”. However, immediate supply-side substitution may provide sufficient disciplining effect when operating airlines do not incur significant additional cost to market their services on each end of the city-pair. Depending on the form and the extent of barriers to entry (see, Section VI B) supply-side substitution may be immediate and effective, but for some O&Ds this may not be the case. For each O&D pair, the Commission has calculated market shares as in previous cases based on total traffic, but in this case the Commission has also computed shares based on “the point of origin”. In the competitive assessment the Commission will also refer to “point of origin” market shares when it is appropriate.
13. Some respondents to the market investigation have questioned the O&D approach and have suggested that a network approach should be used. Although consumers tend to take into account the network aspects, such as Frequent Flyer Programs (FFPs) the Commission's investigation has confirmed that network characteristics do not determine the consumer's choice of supplier since this continue to be destination/route driven. Further, the market investigation has confirmed that the majority of customers

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<sup>3</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

<sup>4</sup> See further the Commission's decision in Case No. COMP/M.3280 – *Air France/KLM*, p. 2 ff., which extensively addresses the relevance of the O&D approach versus a market definition based on the network structure of this industry.

negotiate their contracts on an O&D city pair basis and obtain their rebates on individual routes.

14. To establish its market definition the Commission further considers different possibilities offered to consumers to travel between the relevant O&D pair. In this regard it is assessed whether these different ways of completing the trip are substitutable for the customer. The relevant market may include flights from other airports in an overlapping catchment area (airport substitutability) or other means of transport such as road, train or sea (inter-modal competition). Whether one or more of those alternatives exist is assessed on a route-by-route basis. The parties have not questioned the Commission's previous decisions.

(ii) Time-sensitive vs. non-time sensitive passengers

15. The Commission has found in previous decisions that passengers travelling on unrestricted tickets ("time-sensitive passengers") are in a different market from passengers purchasing restricted tickets ("non-time sensitive passengers"), which are more price sensitive, accept less flexibility and inconvenient connections. The investigation in the current case has also confirmed that although there is a trend among corporate customers to use less flexible tickets to decrease their costs for corporate travel, there is still a group of customers that can be defined as "time-sensitive". The parties are able to price discriminate between these two groups due to the different degrees of ticket flexibility.

(iii) Substitutability of direct and indirect flights

16. As regards the substitutability of direct and indirect flights, a certain distinction can be made between short-haul and long-haul routes.
17. The Commission has previously found that indirect services do not provide a constraint to direct services on short-haul routes absent exceptional circumstances (e.g. the direct flight does not allow for a typical one day return trip)<sup>5</sup>. For medium-haul routes, the indirect flights may in some cases provide a constraint on direct services and therefore belong to the same market. As regard long-haul flights, the Commission has found in the past<sup>6</sup> that indirect services will usually provide a competitive constraint on direct services. Thus, indirect flights may be considered as part of the same market as direct flights on long-haul routes. The parties agree in principle with this finding. The Commission's investigation has also confirmed this view.

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<sup>5</sup> In this particular case it seems that there exist some short-haul flights where indirect services indeed provide an alternative to direct ones (e.g. in cases where the direct flight does not enable the customer to complete the round trip in a day, as found in paragraph 20 of the decision of 11.02.2004 in Case No. COMP/M.3280 - Air France/KLM).

<sup>6</sup> Case No COMP/M.2041 - United/US Airways and Case No COMP/M.2672 - SAS/Spainair.

## **B. OTHER MARKETS**

18. The parties are also active in the supply of cargo air transport services, airline seats to tour operators, maintenance, repair and overhaul (“MRO”) of aircraft, aircraft engines and aircraft components, in-flight catering and ground-handling.

### **(i) Cargo transport services**

19. As regards cargo transportation services, the Commission has previously found that such markets can be defined as a European-wide market for intra-European cargo, which includes road and/or other modes of transport<sup>7</sup>. By the same token, for intercontinental routes, the corresponding catchment areas for North Atlantic routes correspond to the continent. As regards other continents a case-by-case analysis is required. However, for the purpose of the current decision the relevant market definition may be left open given that irrespective of market definition, no competition concerns arise (see further below).

### **(ii) Supply of airline seats to tour operators**

20. The parties argue that the supply of airlines seats to tour operators is not interchangeable with charter and scheduled air transport services. In addition, they submit that this market is national in scope. These conclusions are in line with previous decisions<sup>8</sup>, where the Commission regarded the supply of airlines seats to tour operators as a distinct market, indicating the possibility to distinguish between long haul and short haul. The markets have previously been considered national in scope. For the purpose of the current decision the relevant market definition may be left open given that irrespective of market definition, no competition concerns arise (see further below).

## **VI. COMPETITIVE ASSESSMENT**

### **A. SCOPE OF THE ASSESSMENT: THE PARTIES’ MAIN PARTNERS**

#### **(i) Lufthansa’s partners**

21. Lufthansa is member of the Star Alliance<sup>9</sup>. The framework of this alliance is set by the “Star Alliance Agreement”, which provides the legal framework for mutual contractual commitments among members. The purpose of the Star Alliance is to develop a global competitive passenger airline transportation system. [...*More detailed explanation of the purpose of the agreements...*] The “Star Alliance Agreement” lists a number of areas for potential co-operation within such bilateral

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<sup>7</sup> Case No. COMP/M.3280 – Air France/KLM; Case No COMP/JV19 – KLM/Alitalia, and Case No COMP/M.1328 – KLM/Martinair.

<sup>8</sup> Commission decision of 22.09.1999, in case No IV/M.1524 - *Airtours/First Choice*, paragraph 34 to 50 (this finding was not annulled by the court).

<sup>9</sup> The 16 Star Alliance members are: Lufthansa, Air Canada, Air New Zealand, ANA, Asiana Airlines, Austrian, British Midland (bmi), LOT, SAS, Singapore Airlines, Spanair, TAP, Thai Airways, United Airlines, US Airways and Varig. South African Airlines intends to join in the next 12 months. Star Alliance also includes three Regional Member Airlines: Blue1, Adria Airways and Croatia Airlines.

agreements. These bilateral agreements may range from plain code-share agreements on a single route to world-wide network and fare co-ordination. [...*Partners with which Lufthansa has concluded bilateral agreements...*]

22. The Commission has analysed the scope of the bilateral agreements signed by Lufthansa. In the light of the extensive nature of the co-operation stemming from such agreements, the Commission has concluded that Austrian, bmi, SAS, and United Airlines cannot be considered as competitors of Lufthansa. [...*Outline of the content of these agreements as regards pricing policy, network and flight planning, etc...*] Thus, these carriers have little or no incentive to compete post-merger with Swiss. Not only will Swiss become a subsidiary of Lufthansa it will also become a member of the Star Alliance<sup>10</sup>. The market investigation, in particular replies from travel agents and corporate customers, confirms this conclusion. The same reasoning applies to LOT and Air Canada, [...*Outline of the content of these agreements...*]<sup>11</sup>.
  23. For the above reasons, these carriers' market shares have been added to those of Lufthansa where relevant. In practice, this mainly affects the routes between Switzerland and Austria, Sweden, Denmark, Poland, Canada and the USA. Even if the market shares of the remaining Star Alliance partners are included, this would not change the Commission's findings since even if the market shares of these carriers were included no additional concerns would arise. Therefore, for the purpose of the current decision it can be left open whether the same conclusions can be drawn for other Star Alliance partners.
- (ii) Swiss's partners
24. Swiss has signed Alliance Agreements with Oneworld members American Airlines and Finnair.
  25. The overall aim of the Alliance Agreement between Swiss and American is to establish marketing and operational synergies world-wide. [...*Outline of the content of this agreement...*] On a number of other US-Swiss routes the parties are code-sharing. Swiss and American Airlines can therefore not be considered competitors on the US-Switzerland bundle of routes.
  26. According to the parties, the Alliance Agreement between Swiss and Finnair is not fully implemented. Currently the co-operation is limited to code-sharing on specific intra-European routes. [...*Outline of the content of this agreement...*] Hence, Finnair and Swiss cannot be considered competitors on the Switzerland-Finland routes. This agreement will be taken into consideration for the assessment of the Helsinki-Zurich route.

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<sup>10</sup> Swiss announced its intention to join the Star Alliance on 02.06.2005.

<sup>11</sup> This line of reasoning was also applied to Alitalia in the Case No COMP/3280 - *Air France/KLM*.

## **B. MAIN BARRIERS TO ENTRY ON AN O&D**

### **(i) Access to airports**

27. Landing and take off slots are critical inputs for any entrant wishing to operate a new service or expanding an existing service. Without access to a sufficient number of slots at critical time, a new entrant will be unable to operate a regular service, and as a result, will not provide an effective competitive constraint on the incumbent carriers. The extent of slot scarcity depends on the congestion level of an airport. Availability of slots is therefore an essential condition for the creation of a stable regular service and thus effective new entry into the routes concerned<sup>12</sup>.

#### *a) Swiss Airports*

28. As regards Swiss airports, slot scarcity is a barrier to entry only in Zurich.

29. The parties argue that it is still possible to obtain slots for new entrants even though the airport is slot co-ordinated. There are few periods during the day in which slot capacity is almost full (i.e. 8am, 11am, 4pm, 7pm and 9pm for arrival slots and 7am, 12pm, 5pm for departure slots), to accommodate Swiss' arrival and departure banks. However, the parties maintain that there is plenty of availability in all neighbouring slot periods. Accordingly, all slot requests at Zurich have been, and can be, accommodated in most cases, within 5-30 minutes of the requested time.

30. The market investigation has confirmed that demand for slots exceeds the available capacity at Zurich airport during peak hours<sup>13</sup> and that the maximum difference between cleared and requested slots is 5-60 minutes. According to the slot co-ordinator the hourly congestion restricts competitors in particular between 12:00-13:00 and 17:00-18:00 for departures and between 11:00-12:00 and 21:00-22:00 for arrivals. It can be concluded from the above that slot constraints at Zurich airport constitute a market entry barrier to new entrants entering routes out of Zurich.

#### *b) German airports*

31. In Germany, the airports of Frankfurt, Munich, Düsseldorf and Berlin (Tegel, Tempelhof and Schönefeld) are slot co-ordinated. The airports of Hamburg, Hannover and Nuremberg are not co-ordinated under Council Regulation 93/95, which indicates that there are no slot-constraints at these airports.

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<sup>12</sup> Congestion levels stem not only from increased traffic at peak hours but also as a result of the hub-and-spoke system. Hub carriers organise their flight schedule in waves to facilitate the transfer of passengers. Most of the spoke-to-hub flights land during a specific time windows, also termed arrival banks,. Next, allowing for passenger transfer most of the hub-to-spoke flights take off in a specific time windows. As a result, the hub carrier accumulates most of the landing slots during the arrival banks, and most of the take off slots during the departure banks. Unsurprisingly the airport becomes congested during these two periods, leaving few to no slots available to other carriers. The hub carrier's organisation is efficient, and customer benefits from it through better connecting times. However, non-hub carriers may be prevented from obtaining slots at their preferred time window for new or additional frequencies. In turn, they may fail to provide a regular and attractive service.

<sup>13</sup> Arrival times: 6:00-7:00, 8:00-9:00, 11:00-12:00, 16:00-17:00 and 21:00-22:00 and departure times 7:00-8:00, 12:00-13:00 and 17:00-18:00.



32. With respect to Frankfurt the parties indicate that the airport is congested throughout the day except for certain time intervals in the afternoon and thus slot constraints constitute barrier to entry. The parties' view has been confirmed by the market investigation.
33. According to the parties some capacity problems during peak times exist at the airports of Düsseldorf and Munich, which however do not deter new entry into the two airports. The market investigation has shown that both airports are congested during a number of peak-times during the whole week. Hence, potential entrants in particular those who target time-sensitive customers face a significant entry barrier.
34. The parties are of the view that no slot capacity problems exist in Berlin, either when taking all three airports or at each of the airports individually. During the market investigation it has been confirmed that no slot scarcity exists in the Berlin airport system. However, Berlin Tegel faces some constraints in terms of slot and terminal capacity. The limited terminal capacity at Tegel may also limit the size of aircraft that can be operated. As a result, a potential entrant operating out of Tegel may face substantial market entry barriers.

c) *Austrian and Scandinavian Airports*

35. In Austria only Vienna airport is slot co-ordinated. Information received from the Austrian slot co-ordinator indicates that the airport faces slot constraints during peak time hours. Consequently, new entrants are confronted with a barrier to enter the market.
36. The Danish slot co-ordinator informed that Copenhagen airport faces a number of congested time periods during the day. Potential entrants are not able to choose freely their departure and arrivals times at this airport and thus face a barrier to enter onto the market.
37. Of the Stockholm airports Skavsta, Bromma and Arlanda only Arlanda faces slot constraints. These constraints are limited to three peak hours in the morning and one hour in the late afternoon according to information received by the Swedish slot co-ordinator. These slot constraints even though limited constitute a barrier to entry for potential entrants.

(ii) Regulatory barriers

38. While intra-EU air transport today is fully liberalized (at least as far as Community carriers are concerned), international aviation is regulated by a web of international agreements concluded between sovereign states under the umbrella of the Chicago Convention.<sup>14</sup> Bilateral air services agreements (ASAs) regulate market conditions under which airline carriers operate transport services between two countries<sup>15</sup>. The resulting regulatory framework is diverse. It ranges from restrictive agreements whereby only one carrier from each country is allowed to operate the route (single

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<sup>14</sup> Convention of International Civil Aviation signed at Chicago of 7 December 1944.

<sup>15</sup> ASAs may specify the routes that may be served, the number of carriers as well as their nationality that are authorised to operate the routes, the capacity in terms of weekly/monthly seats, the number of frequencies, the size of aircrafts as well as prices.

designation) with all other operational parameters determined by the ASA to “Open skies agreements”, which reduce many of the regulatory barriers. Open skies agreements provide for unlimited designation and market access, unlimited frequencies etc. These types of agreements are commonly negotiated with the US.

39. One common aspect of all these agreements is that irrespective of providing for single/multiple or unlimited designation, the authorisation to operate is reserved to carriers owned and controlled by nationals of the signatory countries - commonly known as the ‘nationality clause’ or ‘ownership and control clause’. The traffic rights to operate a direct service are consequently reserved to national carriers.
40. When assessing the market structure on O&D where the point of destination is outside the EEA and Switzerland, the Commission takes into consideration the existence of specific regulatory barriers flowing from this web of ASAs in order to determine to what extent other carriers, be it European or third country carriers, may benefit from the necessary traffic rights and operation flexibility to compete effectively and, therefore, exert sufficient competitive constraints on merging parties. These relate in particular to 6<sup>th</sup> freedom price leadership restrictions and 5<sup>th</sup> freedom traffic rights for third country carriers.
41. Under the Chicago convention sixth freedom is defined as a carriage between two other countries via the carrier's home country (e.g. Air France flying from Zurich to Chicago via Paris). Price leadership restrictions are normally applied to prevent competitors from providing indirect services on long haul destinations to third countries, via their European or third country hubs, undercutting the price on the direct services provided by the national designated carriers. Fifth freedom is carriage between two foreign countries on a route with origin/destination in its home country (e.g. Nippon Airlines operating Zurich-Chicago with origin in Tokyo). This freedom is granted either through the ASAs or on an *ad hoc* basis<sup>16</sup>.
42. In the past the Commission has, in case of serious doubts on an intercontinental O&D market, required that the relevant governmental authorities agreed by way of declarations not to hinder 6<sup>th</sup> and/or 5<sup>th</sup> freedoms. The Commission has required the same declarations from the German and Swiss government in the current case (see paragraph 189)

(iii) Economies of scope

43. Most traditional airline carriers operate a hub-and-spoke system. This is the case for the two merging parties. At its hub airport an incumbent carrier benefits from economies of scope in terms of overhead and operational costs. Such economies of scope stems from the flexibility of assets used by airlines. Indeed, many aircrafts and crew can be used for many destinations. Ground handling and aircraft maintenance are also activities that require a certain amount of fixed costs that can be spread over many markets. In sum, a carrier with an established base of operations at a particular airport will benefit from clear cost advantages.

(iv) Branding, promotions and customer loyalty

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<sup>16</sup> For further explanations see e.g. Case No COMP/M.3280 - Air France / KLM, paragraph 98 ff.

44. In addition, any new entrant would face significant sunk costs in terms of marketing expenditures which will not be recovered upon exit. Like in many other industries customer information (or lack thereof) and promotional campaigns remain critical to the individual success of suppliers. Therefore, any new entrant would have to consider incurring expenditures to market its service in the relevant catchment area.
45. Related to marketing expenditure is the brand name that each airline has developed over many years. The parties are former national flag carriers whose name bears significant brand recognition in their respective country of origin, which happens to be the catchment area of the hub airport from which they operate, and the assurance of a service adapted to national culture. In addition to the own carrier's brand, the development of strategic partnerships among carriers are also introducing the "Alliance" brand. Such brand is a guarantee for customers of, *inter alia* higher possibility of interconnection, a more extensive Frequent flyer programs (FFP)<sup>17</sup> and access to VIP lounges at a higher number of airports.
46. In addition to the FFPs (which follow suit at a lower level within the company, i.e. at the employee level) corporate contracts may provide a barrier to entry into the lucrative corporate customers segment. Travel managers at the large corporations are the ones initially selecting the preferred airlines for its employees. Figures from the market investigation show that as much as 80-90% of corporate travel (if more than one supplier) are through the preferred supplier. The investigation has also shown that Lufthansa and Swiss' corporate customers are particularly loyal.
47. Further, some respondents indicate that the Star alliance is also very advanced in its integration (in terms of brand and commercial conditions) and often negotiate with one representative only responsible for a corporate customer.

(v) Network economies and frequency advantages

48. The hub-and-spoke network allows airlines to fill planes with local but also connecting passengers. This augments the planes load factor, and thus leads to a reduction in costs per seat. Such a system of operation allows airlines to exploit economies of 'densities' or economies of network. The economies of network arise because of the reduction in the number of segments operated and the densification of traffic on these segments. As a result, these network economies confer hub carriers significant cost advantages over possible competitors.
49. The concentration of traffic via the hub airport also allows the hub carrier to increase significantly the number of frequencies it operates between the hub and its numerous spokes. This advantage is particularly salient for high yield business customers who tend to value flexibility far more than economy passengers. As a result, the hub carrier not only offers a wide range of routes to its corporate customers but also an unmatched schedule that provides greater flexibility to time-sensitive passengers.

**C. SCHEDULED PASSENGER AIR TRANSPORT: EUROPEAN ROUTES**

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<sup>17</sup> FFP's are particularly effective with repeat customers, who are mostly business travellers (i.e. time sensitive passengers). Often these passengers take advantage of the reward of these programs, such as free tickets for private use.

50. The parties (directly or through their partners) are both present, with direct and/or indirect flights, on 64 European routes, namely: fourteen O&D city pairs between Switzerland and Germany, twelve between Switzerland and each of the home countries of Lufthansa's main partners (Austria, Denmark, Sweden and Poland<sup>18</sup>), and 37 European city pairs between Switzerland and other European countries.

(i) Routes between Switzerland and Germany

51. Between Germany and Switzerland there exist seven routes, which are currently operated both by Swiss and Lufthansa with direct flights: Zurich-Frankfurt, Zurich-Munich, Basel-Munich, Zurich-Berlin (Tegel), Zurich-Düsseldorf, Zurich-Hamburg, and Zurich-Hannover.

52. On other seven routes between Germany and Switzerland only one of the parties has direct flights, while the other operates through indirect flights. These routes are: Basel-Berlin, Basel-Hamburg, Basel-Düsseldorf, Geneva-Düsseldorf, Geneva-Düsseldorf, Geneva-Munich and Zurich-Nürnberg. Although the market investigation has confirmed that on short-haul routes direct and indirect flights do not generally belong to the same market, on these routes the proposed concentration will however remove the main potential competitor in the market for direct flights.

53. Therefore, a competitive assessment for each of the above routes will be carried out below.

a) *Zurich-Frankfurt*

54. Almost [400,000 – 500,000] annual passengers are travelling on this hub-to-hub route every year. [100,000 – 200,000] of them are passengers flying from point to point (“O&D passengers”), while the remaining are transfer passengers. Lufthansa and Swiss are the only two airlines flying direct on the route with 7 and 5 daily frequencies (return flights) respectively. The proposed merger will therefore combine the only two operators of direct services on this route.

55. Apart from the air transport services offered by the merging parties, Deutsche Bahn operates 5 daily non-stop train services between Frankfurt and Zurich and a number of additional one and two stop services. The shortest train travel time of 3 hour 51 minutes (one direction) compares to a flight travel time of 2 hours 45 minutes to 2 hours 55minutes<sup>19</sup> (city centre to city centre). The parties estimate that around 160,000 annual rail passengers are travelling on the Zurich-Frankfurt route.

56. The parties have argued that the train service provides a competitive constrain for both time and non-time sensitive passengers on the route. The investigation has shown that Deutsche Bahn may only be considered an effective competitor for non-time sensitive passengers. The Commission's investigation has also shown that Deutsche Bahn will continue to exert a competitive pressure on the parties post-merger for these

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<sup>18</sup> Neither Spanair nor British Midland fly either direct or indirect to Switzerland; therefore the bundle of routes between Switzerland, Spain and the United Kingdom are not considered.

<sup>19</sup> Assuming travelling time from Frankfurt city centre to Frankfurt airport of 25 minutes, 45 minute check-in time, flight time 55-65 minutes, clearing passport control and other terminal related procedures of 15 minutes and travelling of 25 minutes to Zurich city centre.

passengers. The longer travel time by train may in such cases be outweighed by lower ticket prices.

57. The situation for time sensitive O&D passengers appears to be different. With regard to this passenger group, Deutsche Bahn's competitive position is burdened by a travelling time which is one hour longer in each direction and due to a smaller number of daily non-stop frequencies (5 daily non-stop connections against 12 hypothetical direct flights by the parties).
58. Moreover, Deutsche Bahn's service does not allow for a typical business return trip within the same day. If a time-sensitive passenger for instance has to attend a morning meeting in one of the two cities the earliest arrival time of a non-stop train in Zurich is 10:58 (at train station) compared to 7:45 at Zurich airport. The respective arrival times in Frankfurt are 9:53 (train station) and 8:05 (airport). The parties argue that even if a certain number of time-sensitive passengers would have a clear preference for early arrival times or certain peak hours, they would not be in a position to identify these customers<sup>20</sup> and hence could not price-discriminate against these passengers. This argument might be cogent, if at least a small but significant number of time-sensitive passengers would consider train services to be a competitive alternative on this route.
59. A price comparison shows that whilst restricted economy class fares of the airlines are comparable to Deutsche Bahn's second class fares, fully flexible tickets of Lufthansa and Swiss are more than twice as expensive as Deutsche Bahn's first class tickets. Despite this fact, the market investigation has shown that almost all corporate customers and travel agents do not consider Deutsche Bahn's services to be a competitive alternative to air travel on this city pair for time-sensitive passengers.
60. The market investigation has further shown that other network carriers are not interested in operating any direct flights on this city pair in the short to medium term. There exist a number of entry barriers that prevent the emergence of competition from low-cost and regional carriers. The airports in Zurich and Frankfurt are slot constrained, in particular in Frankfurt (all-day congestion), which makes it virtually impossible for competitors to obtain a sufficient number of attractive slots to operate at a minimum efficient scale. To enter and cater for time-sensitive passengers (which require more frequencies per day) is even more difficult. Given the parties' large range of operations at their respective hubs, they benefit from economies of scale and scope at both airports.
61. It is therefore concluded that due to the elimination of the only direct competitor (Swiss) and a number of entry barriers linked with the parties' strong position on the this route, there is a risk that without appropriate remedies allowing for effective entry, the proposed transaction would raise serious doubts that effective competition would be significantly impeded.

*b) Zurich-Munich*

62. On the city pair Zurich-Munich, the parties' second hub-to-hub route, the total air passengers volume amounts to [200,000 – 300,000]. [80,000 – 120,000] passengers are

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<sup>20</sup> The parties would not be able to identify these passengers since unrestricted tickets can be used at any time.

direct O&D passengers. Pre-merger Lufthansa and Swiss offer 6 and 5 daily frequencies respectively. Deutsche Bahn offers 4 daily high speed non-stop rail connections (ICE/IC) and a number of one stop connections. In April 2005 Denim Airways started 5 weekly services between Zurich and Augsburg Airport, which the parties consider substitutable to Munich. However, these services are no longer offered since June 2005.

63. The parties consider their services to be under significant competitive pressure from the rail service offered by Deutsche Bahn. The market investigation has however clearly shown that the train is not an alternative to time-sensitive passengers. The fastest non-stop rail connection takes 4 hours 14 minutes compared to 55-65 minutes for a direct flight. In terms of total travel time rail services take 4 hours 20 minutes compared to 3 hours 20 minutes<sup>21</sup> if flying (city-centre to city-centre). Train services on this route also do not appear to cater for typical one day business return trips. In case a time-sensitive passenger has to attend a morning meeting in one of the two cities, the earliest arrival time of a non-stop train in Zurich is 12:28 compared to 8:40 (at airport) for air travel. The respective arrival times in Munich are 8:05 (airport) and 11:58 (train station).
64. The market investigation has shown that as the case of Frankfurt-Zurich, time-sensitive passengers do not consider the train service offered by Deutsche Bahn on this route to be a competitive alternative to the services offered by the parties. This despite significant differences in price. Again the train service can be considered to provide a competitive constraint on the parties' services for non-time sensitive passengers. Corporate customers and travel agents indeed assert that non-time sensitive business and leisure travellers are using Deutsche Bahn as well as air services on this city pair.
65. Airport substitutability between Munich and Augsburg has also been argued by the parties. The distance between Munich airport and Munich city centre is approximately 30km, while Augsburg is 67 km from Munich. Therefore the parties maintain that Augsburg airport offers an attractive and competitive alternative for all non-time sensitive passengers and even for time-sensitive passengers. However, Augsburg airport only suits relatively small aircraft due to runway limitations. The market investigation has also shown that time-sensitive passengers do not consider Munich as substitutable by Augsburg. For non-time sensitive passengers the question can be left open since the train provides competitive services on this route. Therefore, no conclusion is necessary as regards airport substitutability between Munich and Augsburg for these passengers.
66. Since time-sensitive passengers are not considering rail services to be a competitive alternative to air travel on the Munich-Zurich city pair and the airport of Augsburg is not an alternative to Munich for this type of passengers, the transaction leads to a merger to monopoly on the Munich-Zurich route.
67. The airports of Munich and Zurich airport are slot-constrained at least during peak hours, which render market entry difficult. Moreover, potential entrants are confronted with a number of additional market entry barriers at both ends (see Section VI.B (iii) to (v) above).

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<sup>21</sup> Assuming travelling time from Munich city centre to Munich airport of 50 minutes, 45 minute check-in time, flight time 55-65 minutes, clearing passport control and other terminal related procedures of 15 minutes and travelling of 25 minutes to Zurich city centre.

68. The market investigation revealed that no international network carrier is interested in entering the route. Low-cost and regional carriers which showed an interest in starting operations on this route highlight a number of market entry barriers, particularly slot scarcity at both airports, the parties' high number of combined frequencies on the route, the joint FFP program and reduced possibilities to enter into corporate deals constitute significant impediments.
69. Concluding from the above due to the elimination of a direct competitor (Swiss) and numerous market entry barriers there are serious doubts that the proposed transaction would significantly impede effective competition for time-sensitive passengers on this city pair.

c) *Basel-Munich*

70. The city pair Basel-Munich is a relatively thin route (about [50,000 – 100,000] passengers of which [30,000 – 40,000] are direct O&D passengers). Nevertheless Lufthansa (4 daily frequencies) and Swiss (2 daily frequencies) are operating on this route. No other airline is active on this route. Consequently the parties' combined market share for time-sensitive passengers and non-time sensitive passengers is 100%.
71. Swiss asserts that this route has been consistently loss-making and Swiss submitted data confirming that the route is among the worst performing routes out of Basel in terms of financial performance. [...*Reference to Swiss' plans to transfer a large number of the routes currently operated from Basel to partners airlines' operation in the course of 2006 ...*]
72. [...]<sup>22</sup>
73. It follows from the above that the proposed transaction would not significantly impede effective competition on the Basel-Munich city route.

d) *Zurich-Berlin (Tegel), Zurich- Düsseldorf, Zurich–Hamburg and Zurich-Hannover*

74. The passenger volume of the four city pairs Zurich - Berlin (Tegel), Zurich - Düsseldorf, Zurich – Hamburg and Zurich - Hannover ranges from 150,000 to 380,000 of which 110,000-320,000 are direct O&D passengers. Lufthansa, Swiss and Air Berlin offer the following daily frequencies on the routes:

Number of daily frequencies	Lufthansa	Swiss	Air Berlin
Zurich-Berlin	3	3	3
Zurich-Düsseldorf	5	5	3
Zurich-Hamburg	4	4	2
Zurich-Hannover	2	3	2

75. The parties have estimated their market shares on the four city pairs to between 15-50% for time-sensitive passengers and between 31% and 51% for non-time sensitive

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<sup>22</sup> [...]

passengers<sup>23</sup>. Market share data as well as the market investigation shows that Air Berlin is a competitive alternative to Lufthansa on all four routes for non-time sensitive passengers. However, the investigation has revealed that Air Berlin's market share for time-sensitive passengers is in fact well below [ $<15$ ]%.

76. For time-sensitive passengers however, Air Berlin is not a competitive alternative, although it cannot be considered a typical low-cost carrier. It offers its own FFP program, corporate deals, fully flexible tickets and sells its tickets via travel agencies and the internet. On the other hand, Lufthansa and Swiss are closer competitors than Air Berlin, in terms of their business models<sup>24</sup>, brand reputation, airport lounges, in-flight service, pricing policy, price levels and margins. The market investigation has shown that time-sensitive passengers do not perceive any differences between the services of Lufthansa and Swiss, while a majority of time-sensitive passenger consider Air Berlin's services to be inferior to those of the parties. Since the parties are the closest substitutes on the market, there is a risk of significant price increases post-merger.
77. Moreover, in terms of number of frequencies Air Berlin offers less than the parties combined on each of the four routes. Only on the route Zurich-Berlin Air Berlin offers the same number of frequencies that each of Lufthansa and Swiss offers. However, Air Berlin will in the future have difficulty in further expanding its frequencies on the market to cater for time-sensitive passengers on each of the above mentioned city pairs and increase its market shares. Other potential entrants and Air Berlin are not able to increase frequencies in order to match the parties' combined frequencies that are particularly attractive to time-sensitive passengers. The airports of Zurich, Düsseldorf and Berlin Tegel are congested during peak-hours. With respect to the latter airport the parties argue that Tempelhof and Schönefeld are substitutable to Tegel. While this might be true from the demand-side perspective, it should be noted that no carrier is presently offering services from Zurich to Tempelhof and Schönefeld. Thus, currently there is no supply-side substitutability. Furthermore, for carriers operating out of Tegel there is no commercial justification in opening a second base in Berlin only to serve the Zurich route, due to the duplication of costs. In any event, Zurich airport is slot congested during certain peak-hours.
78. It can be concluded from the above that in the absence of effective remedies there are serious doubts that the proposed transaction would significantly impede effective competition for time-sensitive passengers on the city routes Zurich-Berlin, Zurich-Düsseldorf, Zurich-Hamburg and Zurich-Hannover.

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<sup>23</sup> The parties assumed for all low-cost and regional carrier (inter alia Maersk Air, Air Berlin, Nikki and EasyJet) that sell a large amount of their tickets via the internet a seat load factor of 70% and that 20% of their passengers are time-sensitive passengers. In doing so the parties assume on a number of routes concerned a significantly higher share of time-sensitive passengers for these carriers than the parties themselves have.

<sup>24</sup> Lufthansa and Swiss operate relatively small aircraft with a high number of frequencies in order to feed their networks while Air Berlin as a point-to-point carrier uses large aircraft and less frequencies.



e) *Basel-Berlin*

79. About 130,000 passengers are travelling annually between Basel and Berlin. This is not a hub-to-hub route. EasyJet and Swiss are offering 2 and 3 daily direct frequencies respectively. EasyJet provides one morning and one evening frequency out of Schönefeld while Swiss flies out of Tegel. Swiss overall passenger volume accounts for only [5,000 – 10,000] passengers. [...*Reference to Swiss' plans to transfer a large number of the routes currently operated from Basel to partners airlines' operation in the course of 2006 ...*]. Lufthansa cannot be considered a potential entrant on this route given the business models of Lufthansa and Swiss are similar and the low passenger volume of Swiss. Furthermore, the city pair is not a hub route to Lufthansa and EasyJet is already operating on the city pair. Therefore, the proposed transaction will not significantly impede effective competition on the city pair Basel-Berlin.

f) *Basel-Hamburg*

80. Overall traffic on the Basel-Hamburg route accounts for [20,000 – 30,000] passengers ([15,000 – 25,000] direct O&D passengers). Currently, Swiss is the only operator offering two daily direct services. [...*Reference to Swiss' plans to transfer a large number of the routes currently operated from Basel to partners airlines' operation in the course of 2006 ...*]. Easyjet has announced that it will start servicing the route as of 11 August 2005 with one daily mid-day frequency. This route is not a hub-to-hub route for the parties and neither Basel nor Hamburg face slot constraints. Therefore, it can be concluded that the proposed transaction will not significantly impede effective competition on the city pair Basel-Hamburg.

g) *Basel-Düsseldorf*

81. The route Basel-Düsseldorf has [20,000 – 30,000] overall passengers of which [20,000 – 30,000] are direct O&D passengers. Swiss is the only operator that provides a daily direct service. [...*Reference to Swiss' plans to transfer a large number of the routes currently operated from Basel to partners airlines' operation in the course of 2006 ...*]. The airport of Basel is not slot-constrained, while Düsseldorf airport faces some congestion during peak hours. Lufthansa is currently only operating indirect services on the city pair and is only one of a number of potential suppliers of direct services. There are a number of regional and low-cost carriers operating out of the respective airports. Because it is not a hub route, other potential competitors would not face insuperable entry barriers, with the exception of slot constraints in Düsseldorf. Given that congestion in Düsseldorf is limited to peak hours and Swiss only operates one daily frequency and is not likely to increase due to the size of the route, a potential entrant might already be able to effectively compete with Swiss with one daily frequency outside peak hours. Therefore the proposed transaction will not significantly impede effective competition on the Düsseldorf-Basel city pair.

h) *Geneva-Düsseldorf*

82. Overall traffic on the route Geneva-Düsseldorf accounts for [20,000 – 30,000] direct O&D passengers. Lufthansa as the only direct operator offers 2.5 daily direct services. Swiss provides 49 weekly indirect services via Zurich. In view of the fact that Swiss following their financial difficulties has drastically scaled down its hub operations in

Geneva<sup>25</sup>, Swiss cannot be considered a potential direct entrant on this city pair anymore. Hence, the proposed transaction does not significantly impede effective competition on the Düsseldorf-Geneva city pair

i) *Geneva-Frankfurt*

83. The city pair Geneva-Frankfurt is a hub route for Lufthansa. With seven daily frequencies Lufthansa is the only direct operator and it carries almost [80,000 – 100,000] direct O&D passengers and over [150,000 – 250,000] transfer passengers. Swiss has reduced its hub operations at Geneva and only offers 9 daily indirect services via Zurich on the city pair. Therefore, it is not likely that Swiss would have entered this route against a strong hub operator. Thus the proposed transaction does not significantly impede effective competition on the Frankfurt-Zurich city pair.

l) *Geneva-Munich*

84. The route Geneva-Munich is served directly by Lufthansa. From the [100,000 – 150,000] passengers that are flying between the two cities only [40,000 – 60,000] are direct O&D passengers. Lufthansa, as a hub carrier, is the sole carrier on the route with 7 daily services. Swiss provides 35 weekly indirect services via Zurich. Geneva cannot be considered a hub to Swiss anymore and therefore Swiss would not be a prospective entrant into this route. It can be concluded that the proposed transaction will not significantly impeded effective competition on the Geneva-Munich city pair.

m) *Zurich - Nürnberg*

85. The route Zurich - Nürnberg is a hub route for Swiss. Swiss operates the only direct service (4 daily) and Lufthansa is the only carrier providing indirect services via Frankfurt and Munich. In terms of passenger volume the route is not sizeable, i.e. [50,000 – 70,000] passengers of which [20,000 – 30,000] are direct O&D passengers. It is therefore unlikely that Lufthansa would have entered with a direct flight on the route against a hub operator. Thus, the proposed transaction will not significantly impede effective competition on the city pair Zurich-Nürnberg.

(ii) Routes from Switzerland to Austria, Denmark, Sweden and Poland

*Switzerland-Austria bundle of routes*

a) *Vienna-Zurich*

86. The size of the route Vienna-Zurich is considerable, about [300,000 – 400,000] direct O&D passengers and an additional [100,000 – 150,000] transfer passengers are using the services of four different operators. The route is a hub route for Austrian and Swiss. Both are offering six daily services (12 combined post-merger). The two remaining carriers that provide direct services on the route are Air Berlin/Nikki (2 daily frequencies) and Helvetic (2 daily frequencies).
87. The parties estimate their market shares as [25-35]% for time-sensitive passengers and [40-50]% for non-time sensitive passengers. With respect to time-sensitive passengers the market investigation however revealed that the parties' combined market share is between

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<sup>25</sup> See also footnote 22 above.

70%-90%. The Commission's investigation has shown that Swiss and Austrian are perceived currently as the only real alternative for time-sensitive passengers on this route.

88. Swiss and Austrian are closer competitors than Helvetic and in particular Nikki, in terms of their business models<sup>26</sup>, brand reputation, airport lounges, in-flight service, pricing policy and price levels and margins. By eliminating the closest competitors, the merger is likely to lead to significant price increases for the parties' customers post-merger. In addition, the remaining two competitors will in the future be unable to match Swiss/Austrian's combined frequencies (12 daily) given that Zurich and Vienna airport are slot-constrained, at least during peak hours. Therefore, Nikki and Helvetic will not be able to constrain the merged entity and its' partners behaviour on the market for time-sensitive passengers.
89. For the above reasons, there are serious doubts that the proposed transaction will significantly impede effective competition with regard to time-sensitive passengers on the Vienna-Zurich route.

*b) Basel-Vienna*

90. Only about [25,000 – 35,000] O&D passengers are travelling on the Basel-Vienna route. Swiss offers 3 daily services. Austrian (via its regional carrier Tyrolean) entered the city pair in spring 2005 with three daily frequencies. It can be noted that Vienna is the hub of Austrian.
91. Swiss asserts, as for Basel-Munich, that also this route has been consistently loss-making. [...*Reference to Swiss' plans to transfer a large number of the routes currently operated from Basel to partners airlines' operation in the course of 2006 ...*].
92. Swiss has submitted data showing that Basel-Vienna is one of the Basel routes where Swiss incurs significant losses. [...]
93. It follows from the above that the proposed transaction would not significantly impede effective competition on the Basel-Vienna route

*c) Geneva-Vienna, Zurich-Linz, Zurich-Salzburg and Zurich-Graz*

94. About [40,000 – 50,000] direct O&D passengers are travelling on the route Geneva-Vienna. Austrian offers 4 daily frequencies as a hub operator. Swiss only offers indirect services via Zurich. As explained above, with a view to the reduced hub operations in Geneva, Swiss cannot be considered a potential direct entrant into the Geneva-Vienna city pair anymore.
95. With less than [40,000 – 50,000] direct O&D passengers the routes Zurich-Linz are relatively thin. Air Alps is operating frequencies on the routes. Swiss does not operate its own aircraft but code-shares with the operators that remain competitors to the parties post-merger.
96. The O&D traffic on Zurich-Salzburg accounts for [40,000 – 50,000] passengers. Styrian Spirit is the only carrier offering two direct daily frequencies between Zurich and

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<sup>26</sup> Lufthansa and Swiss operate relatively small aircraft with a high number of frequencies in order to feed their networks while Nikki and Helvetic are point-to-point carriers with a low number of frequencies.

Salzburg. Swiss and Hahn Air are code-sharing on the flights of Styrian Spirit. According to the parties their market share accounts for [5-10]% in the market for time-sensitive passengers and [ $<5$ ]% in the market for non-time sensitive. Post-merger Styrian Spirit will remain an independent competitor.

97. Around [15,000 – 25,000] O&D passengers are travelling annually on the route Zurich-Graz. Styrian Spirit offers three direct daily services on which Swiss code-shares. Austrian offers three indirect daily services via Vienna on this city pair. Since it is not a hub-route and the route is very thin Austrian cannot be considered a potential entrant in the market for direct services. Swiss' market share amounts to [15-25]% for time-sensitive passengers and [55-65]% for non-time sensitive passengers. Styrian Spirit will continue competing with the parties.
98. Therefore, the merger is not likely to significantly impede effective competition on the city pairs Geneva-Vienna, Zurich-Linz, Zurich-Salzburg and Zurich-Graz.

*Switzerland-Scandinavia bundle of routes*

*a) Zurich-Stockholm*

99. On the hub-to-hub route Zurich-Stockholm (Arlanda is the major airport in Stockholm and a hub of SAS) approximately [70,000 – 90,000] passengers are using the direct services of either Swiss or SAS. Another [40,000 – 60,000] passengers are connecting via the two hubs. SAS and Swiss are the only carriers offering direct services each providing two daily frequencies. Both Zurich and Stockholm Arlanda airports are congested during peak hours. Stockholm Bromma and Stockholm Skavsta are not facing slot constraints.
100. The parties claim that the airport of Arlanda can be substituted by Bromma or Skavsta, the latter only as regards non-time sensitive passengers. The investigation has shown that in principle airport substitutability might be justified from a demand-side view for all three airports for non-time sensitive passengers and between Arlanda and Bromma for non-time sensitive passengers. However, currently no carrier is offering services between Zurich and Stockholm Bromma and Skavsta. Carriers already operating out of Arlanda would incur significant costs to launch one single service from Bromma or Skavsta (which is the case for Air France KLM, British Airways and a number of other carriers). Thus, there is limited supply-side substitutability between the two airports. In any event, Zurich is slot constrained during certain peak-hours.
101. It can be concluded from the above that absent effective remedies there are serious doubts that the proposed transaction will significantly impede effective competition on the city pair Stockholm-Zurich.

*b) Copenhagen-Zurich*

102. More than 200,000 passengers are travelling on the hub-to-hub route Copenhagen-Zurich (Copenhagen is also a hub of SAS) of which [80,000 – 100,000] are direct O&D passengers. Swiss offers three daily and SAS four daily services on the route. In October 2004, Maersk Air entered the route with two daily frequencies. Swiss and Maersk Air entered into a code-share agreement under which each of the parties provides block space capacity to the other carrier. Lufthansa and Swiss expect the code-share agreement to be terminated following the implementation of the merger. Currently, the parties indicate their own market share as [ $>90$ ]% and [85-95]% for time-sensitive and non-time sensitive passengers. Maersk Air has only recently started its operations, but even if its market

share increases in line with its frequency share, it can be expected that Swiss and SAS still will have a combined market of [75-85]% for both time-sensitive and non-time sensitive passengers. The airport of Zurich and Copenhagen are congested at least during peak hours. Hence, Maersk Air is not able to easily increase sufficient frequencies to attract time-sensitive passengers. Therefore, the proposed transaction raises serious doubt that competition would be significantly impede with respect to time-sensitive passengers.

c) *Geneva-Stockholm*

103. Between Geneva and Stockholm about [25,000 – 40,000] passengers are travelling each year on the direct services of SAS (2 daily frequencies). An additional [15,000 – 20,000] O&D passengers are using indirect services of either SAS, Lufthansa or Swiss (combined 16 daily indirect frequencies). Since about 30% of time-sensitive and 35% of non-times sensitive O&D passengers are using indirect services, these can be considered to be substitutable to direct flights on the city pair Geneva-Stockholm. Air France is the only non-Star alliance carrier offering indirect services via Paris that is used by a significant number of passengers. Its market share is around [ $<5$ ]% of time-sensitive and [5-10]% for non-time sensitive passengers. Thus the parties' and their partners' market share amounts to [ $>90$ ]% of time-sensitive and [85-95]% of non-time sensitive passengers.
104. Although potential entry might be possible on this route out of Stockholm Bromma, there is a supply-side preference at least from traditional network carriers for Arlanda in which peak time slot constraints prevail. On the other hand, EasyJet as an established carrier at Geneva, flies to primary and secondary airports (such as Bromma)<sup>27</sup>. Hence, EasyJet can be considered a potential entrant on the route Geneva-Stockholm, which could operate out of Bromma. The threat of potential entry of EasyJet together with the existing indirect competition is likely to constrain the behaviour of the merged entity and SAS. In the light of the above, the proposed transaction will not significantly impede effective competition on the city pair Geneva-Zurich.

*Switzerland-Poland bundle of routes*

a) *Zurich-Warsaw*

105. The route Zurich-Warsaw accounted for over [30,000 – 50,000] O&D passengers in the relevant period. Swiss and LOT are offering three and two direct daily frequencies respectively. The proposed transaction will eliminate competition between the only two carriers operating direct services on the route. Zurich airport is slot constraint at peak times, which renders entry into the route difficult. It can be concluded from the above there are serious doubts that the proposed transaction will significantly impeded effective competition on the Zurich-Warsaw market for time-sensitive and non-time sensitive passengers.

b) *Zurich-Krakow*

106. With only [20,000 – 30,000] direct O&D passengers the route Zurich-Krakow can be considered to be relatively thin. Direct services are operated by Styrian Spirit with a total market share of about [85-95]% for time-sensitive and [65-75]% for non-time passengers. Swiss code-shares with Styrian Spirit. Styrian Spirit will continue to be a competitor to

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<sup>27</sup> In London for instance EasyJet operates out of Gatwick, Luton and Stansted.

Swiss after the merger. Therefore the proposed transaction will not significantly impede effective competition on the Zurich-Krakow city pair.

c) *Geneva-Warsaw*

107. Also the route Geneva-Warsaw is a thin route with about [10,000 – 15,000] direct O&D passengers. An additional [8,000 – 10,000] passengers are flying indirect, which account for 40% of the total overall O&D traffic. Thus, indirect flights can be considered as providing a constraint to direct services on the route. The route is served by Star Alliance member LOT with only one daily non-stop service. Lufthansa and Swiss offer one-stop services. The market shares of LOT for time-sensitive and non-time sensitive passengers are [45-55]% and [55-65]% respectively. Swiss' market shares account for [10-20]% of time-sensitive and [10-20]% of non-times sensitive passengers. Lufthansa has approximately [15-25]% for time-sensitive and [10-20]% for non-time sensitive passengers. The combined market shares (direct and indirect services) of LOT and the merged entity would post-merger amount to approximately [85-95]% for time-sensitive and [>90]% for non-time sensitive passengers. On the other hand, no significant market entry barriers have been identified. Geneva airport is only slot congested during Saturdays in the winter season and Warsaw airport is not slot congested. Potential entrants that have already established a base in Geneva or Warsaw could thus also enter this route. Given that no other concerns have been raised during the market investigation, the Commission finds that the proposed transaction does not raise serious doubts that competition is significantly impeded on the Geneva-Warsaw route.

(iii) Other overlaps on other intra-European routes

108. In addition to above routes linking the parties and their partners' respective home countries, the parties have identified 37 intra-European routes<sup>28</sup> on which only one of the parties (directly or through its partners) has direct flights, while the other (directly or through its partners) has indirect flights.

109. As it has been explained in Section V.A (iii) above, indirect flights are generally not part of the market than direct flights on short-haul routes. The market investigation has largely confirmed this. Therefore, no competition concerns arise with respect to those routes, because the concentration will not lead to any overlap of the parties' activities.

110. However, with respect to two routes, namely Zurich-Bucharest and Zurich-Helsinki, the market investigation has shown that direct and indirect flights might belong to the same market and that the proposed transaction could therefore lead to an overlap between the indirect services provided by Lufthansa and the direct services provided by Swiss on these two routes.

111. These two routes will therefore be examined below.

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<sup>28</sup> These 37 short haul routes are: Amsterdam-Basel, Barcelona-Basel, Birmingham-Basel, Brussels-Basel, Manchester-Basel, Rome-Basel, Geneva-London, Zurich-Barcelona, Zurich-Birmingham, Zurich-Bologna, Zurich-Budapest, Zurich-Florence, Zurich-Luxembourg, Zurich-Venice, Hamburg-Milan and Vienna-Nice, Madrid-Basel, Geneva-Athens, Zurich-Athens, Zurich-Dublin, Zurich-Bucharest, Zurich-Kiev, Zurich-Madrid, Zurich-Manchester, Barcelona-Hamburg, Barcelona-Munich, Madrid-Munich, Stuttgart-Madrid, Copenhagen-Rome, Copenhagen-Nice, Stockholm-Barcelona, Stockholm-Nice, Vienna-Barcelona, Vienna-Lisbon, Vienna-Malaga and Vienna-Palma.

a) *Zurich-Bucharest*

Airline	TS		NTS		Total	
	Aggreg.	ExZur/ Buc	Aggreg.	ExZur/ Buc	Aggreg.	ExZur/ Buc
Swiss (Dir)	[70-80]%	[65-75]/ 70-80]	[70-80]%	[70-80]/ [70-80]	[70-80]%	[70-80]/ [75-85]
Lufthansa + Partners	[10-20]%	[20-30]/ [10-20]	[10-20]%	[10-20]/ [5-10]	[10-20]%	[10-20]/ [5-10]
<b>Total parties</b>	<b>[80-90]%</b>	<b>[90-100]/ [80-90]</b>	<b>[85-95]%</b>	<b>[90-100]/ [80-90]</b>	<b>[85-95]%</b>	<b>[90-100]/ [80-90]</b>
Alitalia	<1%	<1	[<5]%	[<5]/ [<5]	[<5]%	[<5]/ [<5]
Malev	[<5]%	[<5]/ [5-15]	[5-10]%	[<5]/[5-10]	[<5]%	[<5]/ [5-10]

**Note:** Market shares in these tables are rounded with no decimals.

112. This is a thin route with [30,000 – 40,000] annual O&D passengers in 2004. Swiss offers one daily direct service on this route. Lufthansa and Austrian are the main competitors in all segments, except for non-time sensitive passengers departing from Bucharest, where Malev Airlines is slightly stronger than Lufthansa and Austrian.
113. Given the higher number of frequencies, the total travel time (more than 3 hours) and more interesting timetable (43 indirect services versus 7 direct services offered by Swiss<sup>29</sup>), indirect flights constraint the direct flights offered by Swiss. Lufthansa and its partner Austrian are particularly strong in the time sensitive market ([10-20]% and up to [20-30]% if we consider the market share out of Zurich). Malev presence is not significant (below 5%), particularly if one takes into consideration the point of departure.
114. The parties argue that Malev provides the shortest travel time and a high number of frequencies per week (11) and thus could provide an alternative for time sensitive passengers. However, Lufthansa has 19 weekly frequencies (which, in addition to Swiss and Austrian add up to 39 post-merger). In light of the combined high number of frequencies; the parties and its partners can cater for the flexibility needs of time sensitive passengers better than Malev. Given the slot congestions at Zurich airport during peak hours Malev or other competitors could not improve their offer by increasing frequencies or adapting its schedules, for time sensitive' requirements.
115. For the reasons given above, the proposed transactions raises serious doubts on this route for time sensitive passengers.

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<sup>29</sup> As an example, the daily Swiss flight departs from Zurich at 9:50 and arrives to Bucharest at 13:00 (travel time is more than 3 hours); whereas the return flight to Zurich is at 14:40. Lufthansa offers 10 daily frequencies and allows an arrival in Bucharest at 11:55 (travel time is around 4 hours 30).

b) *Zurich- Helsinki*

Airline	TS		NTS		Total	
	Aggreg.	ExZur/ Hel	Aggreg.	ExZur/ Hel	Aggreg.	ExZur/ Hel
Swiss (Direct code-share)	[10-20]%	[40-50]/ [<5]	[10-20]%	[10-20]/ [0-10]	[10-20]%	[10-20]/ [0-10]
Lufthansa + Partners	[5-10]%	[5-10]/ [<5]	[10-20]%	[10-20]/ [10-20]	[10-20]%	[10-20]/ [10-20]
<b>Total parties</b>	<b>[20-30]%</b>	<b>[40-50]/ [5-10]</b>	<b>[25-35]%</b>	<b>[30-40]/ [20-30]</b>	<b>[25-35]%</b>	<b>[30-40]/ [15-25]</b>
Finnair (Direct)	[70-80]%	[40-50]/ [85-95]	[60-70]%	[60-70]/ [70-80]	[60-70]%	[60-70]/ [70-80]
<b>Total incl. Finnair</b>	<b>[&gt;90]%</b>	<b>[&gt;90]/[&gt;90]</b>	<b>[&gt;90]%</b>	<b>[&gt;90]/[&gt;90]</b>	<b>[&gt;90]%</b>	<b>[&gt;90]/[&gt;90]</b>
Air France	<1%	<1	[<5]%	[<5]/ [<5]	[<5]%	[<5] /<1

116. This route has a O&D traffic of [55,000 – 65,000] is O&D. Swiss code-shares with Finnair on this route, the only carrier providing a direct service. In addition to this code-share agreement, these two airlines have concluded an extensive co-operation agreement which was expected to be implemented in the short run. Consequently, they cannot be regarded as competitors. Lufthansa and its partners are the only significant competitive constraint to Finnair/Swiss for time sensitive and non-time sensitive customers (particularly if one considers departures from Zurich). The timetable of the two daily direct flights, particularly from Zurich, does not entirely fit the needs of time sensitive passengers<sup>30</sup>. Further, direct flights on this route exceed a total travel time of 3 hours 30 minutes, which is comparable to travel times of long haul routes. In the light of these exceptional circumstances, it is considered that the indirect flights of Lufthansa represent a competitive constraint to direct flights on this route<sup>31</sup>. The constraint offered by Lufthansa will disappear post-merger, leading to a virtual monopoly of the merged entity and Finnair (above [>90]% in all segments).
117. On the basis of the foregoing, the proposed transaction raises serious doubts for both time sensitive and non time sensitive markets as long as the co-operation agreement between Swiss and Finnair exists..

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<sup>30</sup> The earliest arrival at Helsinki of the Finnair/Swiss flight is at 14:00 and the return flight is at 17:10. Lufthansa offers more than 12 daily indirect flights, making possible to depart from Zurich at 07:15 and arrive in Helsinki at 12:35.

<sup>31</sup> See paragraph 14 of decision of 5.03.2002 in case No. COMP/M.2672 – SAS/Spainair. In this decisions, indirect services were considered to be part of direct flights on routes with similar characteristics (“medium haul routes”).



(iv) Conclusion

118. The proposed transaction raises serious doubts concerning [12] intra-European routes: Zurich-Frankfurt, Zurich-Munich, Zurich-Berlin, Zurich-Düsseldorf, Zurich-Hamburg, Zurich-Hannover, Zurich-Stockholm, Zurich-Copenhagen, Zurich-Vienna, Zurich-Warsaw, Zurich-Bucharest and Zurich-Helsinki.

**D. SCHEDULED PASSENGER AIR TRANSPORT: INTERCONTINENTAL ROUTES**

119. For inter-continental routes, the parties have identified [109] O&D city pairs on which the parties (and/or their partners) operate scheduled direct or indirect services.

(i) Routes out of Switzerland where Swiss flies direct

120. On 16 long-haul routes from Switzerland on which Swiss flies direct, the combined market share of the parties exceeds 25%. These routes are: Zurich-New York, Zurich-Chicago, Zurich-Los Angeles, Zurich-Miami, Zurich-Boston, Zurich-Montreal, Zurich-Sao Paulo, Zurich-Bangkok, Zurich-Hong-Kong, Zurich-Bombay, Zurich-Tokyo, Zurich-Istanbul, Zurich-Cairo, Zurich-Johannesburg, Geneva-New York and Geneva-Tel Aviv.
121. On Zurich-New York, Zurich-Tokyo, Zurich-Istanbul, Geneva-New York and Geneva Tel Aviv, Swiss offer a direct flight and Lufthansa and its partners have a limited presence with indirect flights, with market shares below [ $<10$ ]% in all possible segments (except for the Zurich-Japan route, where the overlap is around [15-25]%, and Zurich-Tel Aviv, around [5-15]%). Other competitors exert a much more important competitive constraint to Swiss than Lufthansa and its partners did pre-merger. For instance, Continental, Japan Airlines, Turkish Airlines and El Al offer direct flights on these routes and with higher market shares. On the Zurich-Tokyo route, Japan Airlines has a market share of around [35-45]% with its direct flight, nearly double to that of Lufthansa and its partners. The proposed transaction does not remove the most significant competitors on these routes and the parties post-merger will continue to face competition from direct flights. The proposed transaction does not raise serious doubts on these routes.
122. The combined market shares on the Zurich-Sao Paulo, Zurich-Hong Kong and Zurich-Bombay routes are between 65% and 82% (up to 87% if we consider point of origin Zurich). The overlap of Lufthansa and its partners through indirect flights is moderate (from 3% to 7% in all possible segments). Other competitors hold higher market shares for indirect flights on these routes with one exception: on the city pair Zurich-Sao Paulo, a leisure route, the overlap is [10-15]% for time sensitive passengers (one third of indirect bookings). However, competitors on this route, such as Air France and Iberia, are stronger in the no-time sensitive market and/or offer more frequencies than the parties. In this market, the parties and its partners only represent one fifth of all indirect bookings. The remaining indirect services, individually or collectively, will exert a sufficient competitive constraint on the parties and their partners.
123. It is therefore concluded that the elimination of one or two indirect alternatives as a consequence of the proposed transaction will not substantially affect the conditions of competition on the above-mentioned eight city pairs, also in the light of the declaration of the Swiss and the German authorities as regards the 6<sup>th</sup> freedom.

124. The remaining eight routes where Swiss flies direct, however, require a more detailed analysis and are analysed in detailed hereinafter.

a) *Zurich-Chicago*

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[60-70]% / [70-80]%	[55-65]% / [60-70]%	[60-70]% / [60-70]%	Direct
Lufthansa + Partners	[10-20]% / [10-20]%	[10-20]% / [5-10]%	[10-20]% / [10-20]%	UA Direct
<b>Total parties</b>	<b>[80-90]% / [90-100]%</b>	<b>[70-80]% / [70-80]%</b>	<b>[70-80]% / [70-80]%</b>	
American	[6-10]% / [<5]%	[5-10]% / [5-10]%	[5-10]% / [<5]%	Code shares with LX + Indirect
<b>Total with AA</b>	<b>[90-100]% / [90-100]%</b>	<b>[80-90]% / [70-80]%</b>	<b>[80-90]% / [80-90]%</b>	
Air France	[<5]% / [<5]%	[<5]% / [5-10]%	[<5]% / [<5]%	Skyteam
British	<2% / <2%	<2% / <2%	<2% / <2%	Oneworld
Continental	<1% / <1%	<3% / <3%	[<5]% / [<5]%	Skyteam
Delta	<1% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	Oneworld
Others	[<5]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	

125. This route had a annual traffic of [35,000 – 45,000] O&D passengers) in 2004. Swiss is the main player on this route, serving a daily non-stop direct flight on this city-pair. American Airlines has concluded an extensive co-operation agreement with Swiss and code-shares with this European carrier on the route. The parties submit that all co-ordination with American Airlines will be terminated after [...]. After that date, American Airlines will become a fully-fledged competitor of the parties.

126. The parties submit that the O&D traffic is too thin to sustain two direct competitive flights. Moreover, United has already chosen Washington as the connecting point for its direct flights coming from Zurich. Therefore, United should not, according to the parties, be regarded as a potential entrant on this route for non-stop flights. This route appears to be considered too thin to potential competition pre-merger. In such circumstances, the only possible competitive constraint to the non-stop service will come from indirect flights.

127. As mentioned in Section V.A (iii) above, direct and indirect flights are generally part of the same market on long-haul routes. Lufthansa and its partners (here United, Austrian and SAS) are the main competitors to Swiss with an overall combined market of around [10-20]% for time sensitive and [10-20]% for non-time sensitive passengers and about half of the indirect traffic. The importance of the indirect flights offered by Lufthansa and its partner is higher for time sensitive passengers if one considers point of origin Zurich, and lower for non time sensitive. None of their remaining competitors, including American Airlines, have any significant presence on this route (their shares do not exceed 5% in any possible segment). Therefore, the proposed transaction will remove the main competitive constraint to Swiss on the city pair.

128. Post merger, the combined share of the parties to the concentration in the different markets, excluding American Airlines, would be around [70-80]% (up to [>90]% for time sensitive passengers if one considers point of origin data). Rivals operating indirect service will face obstacles to increase the number of existing frequencies to provide sufficient competitive constraint to the merged entity. According to the parties, the merged entity and its partners will have up to 48 frequencies per week, while British Airways currently operates 27<sup>32</sup> and Delta and American Airlines 14 each. Adding Delta's main partners in Sky team (Air France KLM and Alitalia<sup>33</sup>), Sky team's weekly frequencies go up to 34, two daily frequencies less than the parties. If the total travel time of indirect flights is considered, Lufthansa and its partner SAS provides travel times which are generally shorter than that of their competitors. Only Air France offers a shorter flight in terms of total travelling time. However, Air France only flies 7 frequencies versus the 21 offered by Lufthansa and SAS (plus the 7 weekly direct flights offered by Swiss) and therefore its possibilities to provide a constraint to with the merged entity will be reduced post-merger. In addition, the congestion at the respective hubs of these rivals and, in particular at Zurich airport, impedes them from improving the attractiveness of their services.
129. Because Chicago O'Hare is a hub airport of United, Zurich-Chicago is a hub-to-hub route with significant barriers to entry. The presence of economies of network and scope as well as the different competitive advantages described in Section VI.B (iii) to (v) above, makes this type of route difficult to enter for rivals.
130. To offer air services sufficiently attractive that offset the elimination of the main competitive constraint exercised by Lufthansa and its partners between Zurich and Chicago, indirect competitors would need to commence or improve their existing services on this city pair to offer better schedules or a higher number of frequencies. To do so, they will need to obtain the necessary rights and slots to operate fully competitive air services from Zurich and/or Chicago in terms of schedule, interconnection time and total travel time. However, given the congestion of Zurich at certain peak hours, they might encounter difficulties to obtain appropriate arrival and/or departure slots.
131. The parties argue that if the co-operation agreement with Swiss is terminated, American Airlines will become a strong player, given that Chicago is also one of its hubs. This alone could remedy any competitive concerns. However, the Commission considers that American Airlines will be disadvantaged vis-à-vis the Star Alliance partners, since this carrier has limited possibilities to co-operate with major European carriers<sup>34</sup>. Further, they could no longer be regarded as the main potential competitor given that, once the co-operation with Swiss is terminated, this city pair will no longer connect one of American Airlines' hubs to that of a partner. As regards their strength as a indirect competitor, American Airlines current holds a reduced market share of

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<sup>32</sup> According to British Airways, they only offer 14 frequencies per week.

<sup>33</sup> For the purpose of this decision, Continental frequencies will not be added to those of Air France KLM, Delta and Alitalia, as *prima facie* its recent agreements with Sky team members does not seem to be extensive enough; however this is without prejudice to a specific in-depth investigation in this regard.

<sup>34</sup> American has no immunity from the US Department of Transportation to co-operate on transatlantic routes with its main partner British Airways.

indirect flights ([<5]% for time sensitive and [<5]% for non time sensitive passengers) and its total travel time is higher than Lufthansa and any its partners. Thus, American Airlines will have reduced possibilities to interconnect at the Zurich airport and will face the same barriers mentioned above, making it more difficult to compete effectively post-merger (particularly in the time sensitive passengers market). In this regard, it has to be underlined that US carriers are less attractive for European passengers as the market shares in the table above indicates (unless they are offered through one of its European partners or Alliances). For these reasons, except for the possibility to offer feeder services from/to Chicago, American Airlines is not in a substantially better position than other competitors to offer direct flights or increase/improve their indirect air services.

132. Finally, the parties submit that market shares on this route are volatile. To prove this statement, they have indicated the evolution of market shares of one of its competitors (but not their own shares) during 2004. The fluctuation of market shares of this competitor, however, shows that this carrier has never had a significant market share in the last year (it remains at all times below 3%). Further, the parties argue that this competitor has improved the connectivity of its air services on this route thanks to a reallocation of the terminals at its hub. However, the Commission has found that, after this improvement have been made, this competitor has actually lost market shares [...]. The parties' argument in this regard can therefore be dismissed.
133. On the basis of the foregoing, it can be concluded that the proposed transaction raises serious doubts for both time sensitive and non time sensitive markets.

b) *Zurich-Los Angeles*

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[60-70]% / [60-70]%	[50-60]% / [50-60]%	[50-60]% / [50-60]%	Direct
Lufthansa + Partners	[10-20]% / [10-20]%	[10-20]% / [10-20]%	[10-20]%/ [10-20]%	
<b>Total parties</b>	<b>[80-90]% / [80-90]%</b>	<b>[60-70]% / [70-80]%</b>	<b>[70-80]% / [70-80]%</b>	
American	[<5]% / [<5]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	Oneworld
<b>Total with AA</b>	<b>[80-90]% / [80-90]%</b>	<b>[70-80]% / [70-80]%</b>	<b>[70-80]% / [70-80]%</b>	
Air France	[<5]%/[<5]%	[<5]%/[<5]%	[<5]%/[<5]%	Skyteam
British	[<5]%/[<5]%	[<5]%/[<5]%	[<5]%/[<5]%	Oneworld
Continental	[<5]%/[<5]%	[<5]% / 5-10%	[<5]%/[<5]%	Skyteam
Delta	[<5]%/[<5]%	5-10%/5-10%	5-10% / [<5]%	Skyteam
Others	[<5]%/[<5]%	[<5]%/[<5]%	[<5]%/[<5]%	

134. This route has an overall traffic of [95,000 – 115,000], half of it represented by O&D traffic ([40,000 – 60,000]). Swiss provides the sole direct service. Lufthansa and its partners are by far the main competitors, with a [10-20]% market share for time sensitive and [10-20]% for non time sensitive passengers ([10-20]% and [10-20]%)

respectively if one considers point of origin Zurich). The combined market share of the parties will post-merger exceed to [80-90]% for time sensitive and to [60-70]% for non time sensitive passengers ([80-90]% and [70-80]% out of Zurich). The strength of the merged entity is particularly important for the time sensitive market, where competitors are particularly weak; none of them exceed [ $<5\%$ ], including American Airlines (which will become a competitor of the merged entity after its co-operation agreement with Swiss is terminated). Therefore, the proposed transaction will eliminate the main competitive constraint to Swiss.

135. According to the parties, the merged entity and Lufthansa's partners offer 59 weekly frequencies; compared to 27 frequencies by American Airlines, 16 by British Airways and 18 by Delta (in combination with its main partners, Skyteam would offer 42 frequencies). In addition, Lufthansa offers shorter travel times than its main competitors Air France KLM, Delta, Continental, British Airways and American Airlines. As a result, existing rival indirect services will not be in a position to provide sufficient competitive constraints post-merger. In addition, the congestion at the respective hubs of these rivals and, in particular at Zurich airport, impedes them from improving the attractiveness of their services.
136. As a result of the merger, Zurich – Los Angeles will become a hub to hub route that will have significant barriers to entry similar to those referred to in the assessment of the Chicago – Zurich city pairs.
137. The parties argue that, from a European perspective, most of these connections are not interesting for passengers as there is no major city “behind” Los Angeles. This United hub is less important than that of Washington, Chicago or San Francisco. Given that the route is thin for O&D passengers and less important than Chicago as regards transfer traffic, the possibility for United to offer a non-stop service or increase indirect frequencies is limited. The Commission acknowledges the geographic disadvantages of this airport but barriers to entry for competitors are still significant, particularly in Zurich.
138. In one of its latest submissions to the Commission, the parties argued that market shares on this route are very volatile. As in the case of the Zurich-Chicago city pair, the parties only indicated the evolution of the shares of one of its competitors during last year (and not their own shares, as requested). The fluctuation of market shares of this competitor indicates that its market share from September 2004 to April 2005 has been increasing on the Zurich-Los Angeles city pair; however the data only indicates that the market shares of this competitor was very volatile during that period: while it has a 0-10% in April 2005, it had a market share below [ $<5\%$ ] the month before. In average the market share of the competitor over this period does not exceed [ $<5\%$ ]. It is true that the data provided indicates an overall trend towards increase. The parties attribute such increase to the fact that this competitor has improved the connectivity of its air services on the transatlantic routes thanks to a reallocation of terminals at its European hub. However, given the lack of detailed information, the Commission cannot identify whether such increase has been made at the expense of the parties or at that of other competitors. Moreover, this competitor itself has informed the Commission that [*...Evolution of the competitor's position during the period of reference...*].
139. It can therefore be concluded that the proposed transaction will eliminate the main competitor on this route and lead to a combined market share of [80-90]% for time

sensitive and [60-70]% for non time sensitive passengers ([80-90]% and [70-80]% if one takes into consideration departures out of Zurich). Post-merger, competitors would find it difficult to increase or improve existing frequencies especially due to congestion problems at Zurich during peak hours. As a consequence, the proposed transaction raises serious doubts in the markets for time sensitive and for non time sensitive passengers on the Zurich-Los Angeles route.

c) *Zurich-Miami*

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[60-70]% / [70-80]%	[55-65]% / [50-60]%	[60-70]% / [60-70]%	Direct
Lufthansa + Partners	[10-20]% / [10-20]%	[5-10]% / [5-10]%	[10-20]% / [5-10]%	
<b>Total parties</b>	<b>[80-90]% / [80-90]%</b>	<b>[60-70]% / [60-70]%</b>	<b>[60-70]% / [60-70]%</b>	
American	[5-10]% / [<5]%	[10-20]% / [10-20]%	[10-20]% / [10-20]%	Codeshare with Swiss + Indirect
<b>Total with AA</b>	<b>[80-90]% / [80-90]%</b>	<b>[70-80]% / [70-80]%</b>	<b>[70-80]% / [70-80]%</b>	
Air France	[<5%] / [<5%]	[<5%] / [<5%]	[<5%] / [<5%]	Skyteam
British	[<5%] / [<5%]	[<5%] / [<5%]	[<5%] / [<5%]	Oneworld
Continental	[<5%] / <1%	[<5%] / 5-10%	[<5%] / [<5%]	Skyteam
Delta	[<5%] / [<5%]	5-10% / 5-10%	5-10% / 5-10%	Skyteam
Others	[<5%] / [<5%]	[<5%] / [<5%]	[<5%] / [<5%]	

140. On this relatively thin route ([50,000 – 60,000] O&D passengers), the parties have a high market share for both time sensitive ([70-80]% and up to [70-80]% if looking at flights outbound Zurich) and non time sensitive passengers ([60-70]% and [60-70]% if looking at flights outbound Zurich). This market share significantly increases if American Airlines is included (see table above).
141. Further, American Airlines, and not United, could be regarded as the main potential entrant for direct or new/additional indirect flights, Miami being one of its main hubs. Therefore, if Swiss' co-operation with American Airlines is not terminated post-merger, the proposed transaction will become a hub-to-hub route for the parties.
142. On the basis of the foregoing, the proposed transaction raises serious doubts for both time sensitive and non time sensitive markets as long as the co-operation agreement between Swiss and American Airlines is not terminated.

d) Zurich-Boston

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[70-80]% / [70-80]%	[60-70]% / [60-70]%	[60-70]% / [70-80]%	Direct
Lufthansa + Partners	[5-10]% / [10-20]%	[5-15]% / [5-15]%	[5-10]% / [10-20]%	
<b>Total parties</b>	<b>[80-90]% / [85-95]%</b>	<b>[70-80]% / [85-95]%</b>	<b>[70-80]% / [80-90]%</b>	
American	[5-10]% / [<5]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	Direct code share w/ LX + Indirect
<b>Total with AA</b>	<b>[80-90]% / [90-100]%</b>	<b>[80-90]% / [80-90]%</b>	<b>[80-90]% / [80-90]%</b>	
Air France	[<5%]% / [<5%]%	[<5%]% / [<5%]%	[<5%]% / [<5%]%	Skyteam
British	[<5%]% / [<5%]%	[<5%]% / [<5%]	[<5%]% / [<5%]%	Oneworld
Continental	[<5%]% / [<5%]%	[<5%]% / [<5%]%	[<5%]% / [<5%]%	Skyteam
Others	[<5%]% / [<5%]%	[<5%]% / [<5%]%	[<5%]% / [<5%]%	

143. This route is relatively thin, with [30,000 – 45,000] O&D passengers. Swiss operates the only direct flight, with high market shares for both time sensitive and non time sensitive (see table above). This flight is code-shared with Swiss' partner American Airlines. The main competitors of Swiss pre-merger are Lufthansa and its partners, with a share of around [5-15]% in both time sensitive and non time sensitive markets ([10-20]% market share for times-sensitive passengers out of Zurich). Other competitors have a limited presence (less than 5% combined in all possible segments).
144. The proposed transaction will therefore eliminate the main competition constraint to the direct flight of Swiss and will lead to a high combined market shares in all market segments ([80-90]% for time sensitive and [70-80]% for non time sensitive, even higher if one considers point of origin elements: [85-95]% and [75-85]% respectively).
145. The parties to the concentration offer more frequencies (53 per week, 67 if American Airlines is included, versus 34 served by Skyteam (Air France, Delta and Alitalia). Air France offer 14 frequencies with slightly shorter travelling time (14 minutes) than the 18 frequencies served by Lufthansa. However, this small time difference does not appear to be sufficient to constrain the parties (Air France has a [<5%]% market share on this city pair).
146. This route is not a hub-to-hub route for the parties and its partners and no other major competitor has a hub at this airport. The parties argue that American Airlines and its affiliate American Eagle, which will become competitors of the merged entity once its co-operation agreement with Swiss is terminated, have important activities at this airport. However, it faces the same difficulties already explained as regards the Zurich-Chicago route. Furthermore, its current market share of indirect flights is low in both the time sensitive and non time sensitive market (not more than [<5%]%).

147. The parties have submitted for this route, as was argued for Zurich-Los Angeles, that one of the main competitors has increased its market share in the last year. Also in this case the Commission has not been able to identify whether such increase has been made at the expense of the parties or of other competitors (cf. paragraph 138).
148. On the basis of the foregoing, it can be concluded that the proposed transaction raises serious doubts as regards to both the time sensitive and non time sensitive markets.

e) *Zurich-Montreal*

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[70-80]% / [85-95]%	[70-80]% / [70-80]%	[70-80]% / [70-80]%	Direct
Lufthansa + Partners	[<5]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	
Air Canada	[5-10]% / [<5]%	[5-10]% / [5-15]%	[5-10]% / [5-10]%	Star
<b>Total AC</b>	<b>[80-90]% / [80-100]%</b>	<b>[85-95]% / [80-90]%</b>	<b>[80-90]% / [80-90]%</b>	
Air France	[5-10]% / [5-10]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	Skyteam
British	[<5]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	Oneworld
Others	[<5]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	

149. Another relatively thin route ([30,000 – 45,000] O&D passengers). Swiss flies the only direct service.
150. Indirect flights are less important in this route than in the previously discussed transatlantic routes (around 20% of total bookings). Lufthansa and its partners (including Air Canada<sup>35</sup>) are the main competitors on the route. They represent less than half of total indirect flights (the percentage is lower for time sensitive passengers). Air France has a relatively significant presence on this route (above 5%).
151. The parties and its partners offer more frequencies than their competitors: 42 frequencies versus 28 offered by Air France KLM and 7 offered by British Airways and American Airlines. However, Air France's indirect services are clearly superior in terms of total travel time (one hour 40 minutes less than the shortest service offered by Lufthansa and its partners) This shorter flight is offered 21 times a week.
152. The presence of competitors represents a sufficient competitive constraint for the merged entity. Air France alone has a sufficient number of frequencies and shorter travel times. For this reason, it can be concluded that the proposed transaction does not raise competition concerns on this route in both time sensitive and non time sensitive markets also in the light of the declaration of the Swiss and the German authorities as regards the 6<sup>th</sup> freedom.

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<sup>35</sup> As explained before, documents submitted by the parties suggest that their co-operation go beyond their respective home-countries.



f) Zurich-Johannesburg

Airline	TS Aggregated / ex Zurich	NTS Aggregated / ex Zurich	Total Aggregated / ex Zurich	Direct/codeshare
Swiss	[45-65]% / [50-60]%	[40-50]% / [30-40]%	[40-50]% / [40-50]%	Direct
Lufthansa + Partners	[<5]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	
<b>Total parties</b>	<b>[40-50]% / [60-70]%</b>	<b>[40-50]% / [35-45]%</b>	<b>[40-50]% / [40-50]%</b>	
SAA	[30-40]% / [30-40]%	[40-50]% / [50-60]%	[40-50]% / [45-55]%	Direct - Star
<b>Total w/SAA</b>	<b>[90-100]% / [90-100]%</b>	<b>[90-100]% / [90-100]%</b>	<b>[90-100]% / [90-100]%</b>	
Air France	<1% / <1%	[<5%]%/ [<5%]%	[<5%]%/ [<5%]%	Skyteam
British	[<5%]%/ [<5%]%	<1% / <1%	<1% / <1%	Oneworld
Emirates	[<5%]%/ [<5%]%	[<5%]%/ [<5%]%	[<5%]%/ [<5%]%	
Iberia	<1% / <1%	<1% / <1%	<1% / <1%	Oneworld
Others	[<5%]%/ [<5%]%	[<5%]%/ [<5%]%	[<5%]%/ [<5%]%	

153. The traffic on this route is [45,000 – 65,000] O&D passengers. Two carriers provide direct services on this route: Swiss and South African Airways (SAA). With two direct flights, indirect operators on this route have a limited presence (less than 5%). Lufthansa holds a market share of [0-10]% for time sensitive passengers; all other players have market shares of around [<5]%.
154. The proposed transaction will bring together the two direct carriers and main indirect competitors under the umbrella of Lufthansa’s network of alliances. The merged entity and its partners will have a combined market share of [40-50]% for time sensitive and [40-50]% for non-time sensitive ([60-70]% and [35-45]% out of Zurich). SAA is the main competitors to Swiss today. However, SAA has signed an Alliance Agreement with Lufthansa and intends to join the Star alliance in the next 12 months.
155. Lufthansa’s agreement with SAA is less extensive than e.g. with Austrian, SAS or United. There is, for instance, no clause foreseeing joint price setting or revenue sharing. [... *Reference to the geographic scope of the agreement* ...] The main areas of co-operation are schedule coordination between Europe and Southern Africa, extensive use of code sharing, coordination of CRS, marketing and sales, FFP, etc.
156. The parties argue that Lufthansa and SAA do not currently co-ordinate prices on the Germany-Southern Africa bundle of routes and there is no reason to believe that they will start doing so in the future on the routes out of Switzerland.
157. [... *Reference to the content of an internal document of the parties concerning the future relations between Swiss and SAA...*]<sup>36</sup>. It therefore has to be assumed at this

<sup>36</sup> [...]

stage that Swiss and SAA will have strong incentive to co-ordinate their competitive behaviour on this route post-merger, at least as far as capacity is concerned.

158. Further, the Air Service Agreement (ASA) between the Switzerland and the South African Union regulates the fares on this route (which are subject to double-disapproval). [...*Outline of the content of the ASA as concerns fares and capacity...*]<sup>37</sup>.
159. As a consequence, the incentive for the two designated carriers to compete, which was already limited due to the ASA, will be further reduced post-merger. For these reasons, the present operation raises serious doubts on this route for both time sensitive and non time sensitive passengers.

g) *Zurich-Bangkok*

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[30-40]% / [40-50]%	[10-20]%/ / [10-20]%	[10-20]% / [10-20]%	Direct
Lufthansa + Partners	[5-10]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	
<b>Total parties</b>	<b>[40-50]% / [40-50]%</b>	<b>[10-20]% / [15-25]%</b>	<b>[20-30]% / [20-30]%</b>	
Thai	[40-50]% / [40-50]%	[55-75]% / [60-70]%	[60-70]% / [50-60]%	Direct – Star
<b>Total w/Thai</b>	<b>[90-100]% / [85-95]%</b>	<b>[80-90]% / [80-90]%</b>	<b>[80-90]% / [80-90]%</b>	
Singapore	[<5]% / [<5]%	[<5]% / [5-10]%	[<5]% / 5-10%	Star
Emirates	[<5]% / [<5]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	
Qatar	<1% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	
Turkish	<1% / [<5]%	<1% / <1%	<1% / <1%	
Others	[<5]%	[<5]% / [<5]%	[<5]% / [<5]%	

160. Traffic on this route is [150,000 – 170,000] O&D passengers. Swiss and Thai Airways are the only carriers providing direct services on the route. Lufthansa and its partners have a market share of [0-10]% for time sensitive and [<5]% for non time sensitive passengers. The combined market share post-merger will be [40-50]% for time sensitive ([40-50]% out of Zurich) and [15-25]% for non time sensitive passengers ([15-25]% out of Zurich). If Singapore Airlines is included<sup>38</sup>, their combined market shares will be [40-50]% and [20-30]% respectively.
161. Pre-merger, Thai Airways is the main competitor of Swiss. Post-merger, all four airlines will fall under the umbrella of the Star Alliance. As in the case of the Zurich-

<sup>37</sup> [...]

<sup>38</sup> [...]

Johannesburg route, the proposed transaction brings together the only two direct competitors on this hub-to-hub route.

162. The parties argue that Lufthansa and Thai Airways do not currently co-ordinate prices on the Germany-Thailand bundle of routes and there is no reason to believe that they will start doing so in the future on the routes out of Switzerland.
163. However, if it the Alliance Agreement between Lufthansa and Thai Airways is not as extensive as that of other Lufthansa partners (e.g. United, Austrian, SAS and LOT) and therefore its market shares should not be added to those of Lufthansa, the Commission considers that the Thai carrier would have little incentive to actively compete with Swiss. Thai's agreement with the German carrier indicates their intention to co-operate with Lufthansa at an European level, including the coordination of schedules, an extensive use of code-share beyond Germany within Europe and beyond Thailand within Asia/pacific in any direction<sup>39</sup> and coordinated marketing and distribution.
164. This lack of incentive to compete is reinforced by the existing ASA between Switzerland and the Kingdom of Thailand, which regulates prices of the two designated carriers. [...*Outline of the content of the ASA...*]<sup>40</sup>. The incentive to use this possibility and co-ordinate fares and capacity is likely to increase post-merger, since they both will become partners of the same Alliance.
165. For the above reasons, the Commission raises serious doubts as regards the competitive effects of the proposed transaction on this route for both time sensitive and non time sensitive markets.

*h) Zurich-Cairo*

<b>Airline</b>	<b>TS Aggregated / ex Zurich</b>	<b>NTS Aggregated / ex Zurich</b>	<b>Total Aggregated / ex Zurich</b>	<b>Direct/codeshare</b>
Swiss	[80-90]% / [70-80]%	[70-80]% / [70-80]%	[70-80]% / [65-75]%	Direct
Lufthansa + Partners	[5-10]% / [10-20]%	[5-10]% / [5-15]%	[5-10]% / [5-15]%	
<b>Total parties</b>	<b>[90-100]% / [80-90]%</b>	<b>[75-85]% / [75-85]%</b>	<b>[80-90]% / [80-90]%</b>	
Egyptair	[<5]% / [<5]%	[5-10]%/[5-10]%	[5-10]%/[5-10]%	Direct codeshare w/LX
Air France	[<5]% / [<5]%	[<5]%/[<5]%	[<5]%/[<5]%	Skyteam
Alitalia	[<5]1% / <1%	[<5]%/[<5]%	[<5]%/[<5]%	Skyteam
Malev	<1% / < 1%	[5-10]%/[5-10]%	[<5]% / [5-10]%	
Others	[<5]% / [<5]%	[<5]% / [<5]%	[<5]% / [<5]%	

<sup>39</sup> [...]

<sup>40</sup> [...]

166. This is a thin route with [20,000 – 35,000] O&D passengers. Overall, one fourth of passengers choose to fly indirect (one third if one considers flights out of Zurich). The main competitive constraint to Swiss' direct service is Lufthansa and its partners. The combined market share of the parties is particularly high, [90-100]% for non time sensitive ([80-90]% if we consider point of origin data) and [75-85]% for time sensitive passengers. Other competitors are Air France, Alitalia and Malev, with market shares equal or below 5%. Egypt Air is present on this route through a code-share with Swiss. Egypt Air is unlikely to launch a direct service on its own in light of the particularly low O&D traffic on this route.
167. Competitors offer more frequencies (Sky team members would have around 36 frequencies compared to the 24 offered by Star alliance partners). However, average travelling time is generally shorter for the Star alliance partners. The duration of the 19 weekly frequencies offered by Lufthansa and Austrian are shorter than those of Alitalia which, given its geographic position, could be regarded as its main competitor together with Malev. Malev's total travel time, on the other hand, is 20 minutes shorter than Lufthansa; however it only operates 4 frequencies per week.
168. Some competitors have informed the Commission that the Air Service Agreement between their countries and Egypt imposes frequencies restrictions on them so they are not able to increase their number of indirect flights on this route. Therefore, the possibility for these competitors to exert a sufficient competitive constrain on the parties is limited. Under these circumstances, it would be particularly important for these competitors to be able to improve their existing indirect flights (e.g. through re-scheduling) to attract new customers and thus efficiently compete with the parties on this city pair. Such possibility, nevertheless, is limited due to the slot congestion at the Zurich airport at certain peak times.
169. In the light of the above, the proposed transaction raises serious doubts on this city pair in both the time sensitive and non time sensitive market.
- (ii) Other routes out of Europe where Lufthansa and/or its partners fly direct
170. The parties have a combined market share of more than 25% on 21 long haul routes where one of the parties flies direct and the other indirect. In general, as regards other intercontinental routes outbound Europe (excluding Switzerland), Swiss has a limited presence after the disappearance in 2002 of its predecessor, Swiss Air. On 19 of these routes<sup>41</sup>, Swiss has a market share below 5% (in most cases, below 3%) which is lower than other competitors such as Air France, British Airways, Emirates or Iberia, which have 5% or more. The remaining indirect services, individually or collectively, could exert a sufficient competitive constraint on the parties and their partners. The proposed transaction hence does not significantly affect the competitive situation on these city pairs, also in the light of the declaration of the Swiss and the German authorities as regards the 6<sup>th</sup> freedom.

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<sup>41</sup> These are the following: Munich-New York, Düsseldorf-New York, Munich-Los Angeles, Munich-Boston, Frankfurt-Montreal, Düsseldorf-Chicago, Frankfurt-Sao Paulo, Frankfurt-Bombay, Munich-Bombay, Munich-Hong Kong, Frankfurt-Cairo, Frankfurt-Johannesburg, Vienna-New York, Vienna-Sao Paulo, Vienna-Bangkok, Vienna-Dubai, Vienna-Singapore, Vienna-Tel Aviv and Copenhagen-Cairo.

171. On the other two routes, however, Swiss has a more significant presence (above 5%) or the combined market shares are around 70%. Therefore, a more detailed assessment is required: Munich-Montreal and Vienna-Montreal.

a) *Munich-Montreal*

<b>Air line</b>	<b>TS Aggregated / ex Munich</b>	<b>NTS Aggregated / ex Munich</b>	<b>Total Aggregated / ex Munich</b>	<b>Direct/codeshare</b>
Lufthansa + Partners	[30-40]% / [40-50]%	[40-50]% / [40-50]%	[40-50]% / [40-50]%	Dir+Indirect includes Air Canada
Swiss	[5-15]% / [5-10]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	
<b>Total parties</b>	<b>[40-50]% / [50-60]%</b>	<b>[50-60]% / [50-60]%</b>	<b>[45-55]% / [50-60]%</b>	
Air France	[20-30]%/[30- 40]%	[20-30]%/[20-30]%	[20-30]%/[20-30]%	Skyteam
British	[<5]% / [<5]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	Oneworld
Others	[5-10]% / [5-10]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	

172. Lufthansa and its partners (including Air Canada) hold a market share of around [45-55]% for TS and [50-60]% for NTS on this thin route ([10,000 – 20,000] O&D passengers). Lufthansa operates the sole direct flight on this route, which is code-shared by its partner Air Canada. Swiss represents [5-15]% and [0-10]% with its indirect services. Post-merger, the parties will hold the majority of the bookings on this city pair. However, the main competitor on this route is Air France, with market shares above 20%. British Airways also has a significant presence on this route. The other competitors have market shares below 1% (e.g. Czech Airlines). Swiss offers 7 frequencies a week, whereas Air France has 11 (plus 7 offered by KLM) with a shorter average travel time; British Airways offers another 7. The disappearance of Swiss does not eliminate the competitive constrain exerted by competitors such as Air France or British Airways. Under these conditions, the proposed transaction does not significantly affects the competitive situation on this city pair, also in the light of the declaration of the Swiss and the German authorities as regards the 6<sup>th</sup> freedom.

b) *Vienna-Montreal*

<b>Airline</b>	<b>TS Aggregated / ex Vienna</b>	<b>NTS Aggregated / ex Vienna</b>	<b>Total Aggregated / ex Vienna</b>	<b>Direct/codeshare</b>
Lufthansa + Partners	[40-50]% / [ 60-70]%	[60-70]% / [50-60]%	[60-70]% / [50-60]%	Direct
Swiss	[5-10]% / [5-10]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	
<b>Total parties</b>	<b>[50-60]%/</b> <b>[70-80]%</b>	<b>[70-80]% /</b> <b>[60-70]%</b>	<b>[70-80]% /</b> <b>[60-70]%</b>	
Air Canada	[15-25]% / [<5]%	[5-10]% / [5-10]%	[5-10]% / [5-10]%	Direct c/s with LX + Ind
<b>Total AC</b>	<b>[70-80]% /</b> <b>[70-80]%</b>	<b>[70-80]% /</b> <b>[70-80]%</b>	<b>[70-80]% /</b> <b>[70-80]%</b>	
Air France	[10-20]% / [10- 20]%	[10-20]% / [10- 20]%	[10-20]% / [10-20]%	Skyteam
British	[<5]% / [<5]%	[<5]% / [5-10]%	[<5]% / [5-10]%	Oneworld
Others	[5-10]% / [5-10]%	[<5]% / [<5]%	[<5]% / [<5]%	

173. Another thin route ([10,000 – 20,000] O&D passengers) on which only Austrian provides a direct flight. Post-merger, the parties will have a combined market share of around [65-75]%. If Air Canada is included, this market share will exceed [65-75]% in all possible markets. However, the overlap produced by Swiss is lower than that of Air France, with [10-20]% and [10-20]% of the overall bookings for time sensitive and non time sensitive passengers, respectively. British Airways is also present on this city pair. These competitors are stronger if one considers the flights departing from Vienna. Air France and KLM alone offers more frequencies than the Star alliance partners (28 per week versus 17), with an average travel time shorter than that of Swiss. For these reasons, the proposed transaction does not significantly affect the competitive situation on this city pair, also in the light of the declaration of the Swiss and the German authorities as regards the 6<sup>th</sup> freedom.

(iii) Indirect/indirect overlaps

174. Out of the 72 long haul indirect/indirect routes, the only routes on which the parties will have a market share around 70% are on 11 routes Athens-Chicago, Athens-Boston, Hamburg-New York, Stuttgart-New York, Vienna-Los Angeles, Vienna-Miami, Vienna-Chicago, Brussels-Bombay, Geneva-Cairo, Munich-Tel Aviv and Düsseldorf- Tel Aviv. Further, on two routes, the merged entity and its partners will be between 80% and 84%: Copenhagen-Tel Aviv, and Nice- Tel Aviv. Notwithstanding, carriers such as Air France, British Airways and or its partners have significant market shares on these routes (in general above 10% for routes outside Europe or at least higher than the overlap) and enough frequencies to constraint the competitive behaviour of the merged entity, particularly if one considers the point of departure from Europe. In general, on these city pairs there is a wide number of possible indirect alternatives connecting at a variety of hub airports.

175. In light of the above, it can be concluded that the elimination of the competitive constraint offered by Swiss will not substantially affect the conditions of competition

on the above-mentioned city pairs. The remaining indirect services, individually or collectively, will exert a sufficient competitive constraint on the parties and its partners.

(iv) Conclusion

176. Therefore, on the basis of the foregoing, the proposed transaction raises competition concerns on 7 inter-continental routes : Zurich-Chicago, Zurich-Los Angeles, Zurich-Boston, Zurich-Miami, Zurich-Bangkok, Zurich-Johannesburg and Zurich-Cairo.

**E. OTHER MARKETS**

(i) Air cargo services

177. Lufthansa is the seventh largest cargo operator in the world<sup>42</sup>. It operates 19 freighter aircraft and five chartered freighters, in addition to the “belly space” of its passenger flights. Lufthansa is part of the WOW Alliance together with Singapore Airlines Cargo, SAS Cargo and JAL Cargo. The parties argue that WOW is only a loose alliance which facilitates interlining among its members, so they can expand their respective networks. The parties do not sell their products jointly nor do they coordinate on prices, schedules or capacity.

178. Lufthansa has signed four bilateral joint venture agreements of which three are relevant to the affected routes ([...*Name of companies with which Lufthansa has signed joint venture agreements...*])<sup>43</sup>. These agreements only cover the traffic between German and the home country of Lufthansa’s partner and do not cover overall traffic to/from Europe. Even if it was considered that Lufthansa's partners do not compete with Lufthansa, and therefore their market shares should be added to those of the German carrier, the competition assessment below would not substantially change.

179. Swiss activities in the cargo sector are rather limited. With the exception of a wet lease of part of the capacity of an A-300 freighter, Swiss relies on “belly space” cargo capacity from passenger flights. It ranks in the 33<sup>rd</sup> position in terms of scheduled freight tons.

180. The parties hold a combined market share of [ $<5$ ] % of total cargo in Europe (including road and transport) and [5-10] % for air cargo transport (around [10-20] % if Lufthansa’s partners are included)<sup>44</sup>.

181. The combination of the parties will not exceed 15% on any continent-to-continent bundle of routes: Europe to/from North America: [10-20] % (Swiss represents [ $<5$ ] %), Africa: [5-15] % (Swiss: [ $<5$ ] %), Asia: [5-15] % (Swiss: [ $<5$ ] %); Near Middle East: [5-10] % (Swiss: [ $<5$ ] %) and South America: [5-10] % (Swiss: [ $<5$ ] %). If Lufthansa’s partners are included, the market share will be [10-20] % for routes Europe-North

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<sup>42</sup> In terms of scheduled freight tons carried by IATA – (cf. IATA, World Air Transport Statistics, 48<sup>th</sup> edition, 2004, p.71)

<sup>43</sup> Further, Lufthansa has a joint venture with DHL for a limited number of vertical services; which do not affect this competitive assessment.

<sup>44</sup> Market shares are based on volume. They are primarily based on MGI data, corrected and completed with IATA/CASS, World ACD data and the parties’ own estimates where necessary.

America, [15-25]% for Europe-Asia and [10-20]% for Europe-Near/Middle East. As regards routes from Europe to specific countries, there will be eleven routes affected by the proposed transaction if one considers all partners of Lufthansa: Europe-Pakistan, Europe-Turkey, Europe-Russia, Europe-Brazil, Europe-Japan, Europe-Korea, Europe-Singapore, Europe-UAE, Europe-Egypt, Europe-South Africa, Europe-Equatorial Guinea, Europe-Cameroon and Europe-India.

182. Of all these routes, only on the Europe-Equatorial Guinea route will the parties hold market shares exceeding 40%<sup>45</sup>, where Lufthansa holds a market share of [5-15]% and Swiss [25-35]%. This is an extremely thin route; the total volume carried on this route in 2004 was only [<3,000] tons. Lufthansa does not operate its own service on this route and is present through interlining agreements with other carriers. There are strong competitors on this route, such as Air France KLM (with [20-30]% of the market shares).
183. In all the affected routes there are other significant competitors such as Air France KLM, British Airways, Cargolux and EVA Air. Barriers to entry are lower than in the scheduled passenger air transport services, given the existence of the flexibility of cargo carriers as regards schedules and the possibility to use alternative airports, as shown by the market investigation. The Commission has found that companies operating freighter aircrafts can easily enter new routes in response to demand. None of the responses to the market investigation have expressed particular concerns on the above routes.
184. In the light of the above, the proposed transaction does not significantly affect competition on any of the above routes.

(ii) Supply of airline seats to tour operators

a) *German market*

185. Lufthansa's 50% subsidiary Thomas Cook operates three charter airlines which supplies airline seats to tour operators (Condor, Thomas Cook Airlines UK and Thomas Cook Airlines Belgium). In addition, Thomas Cook has a 50% joint venture with Turkish Airlines, Sun Express. Condor and SunExpress have activities in Germany and their combined market share of [20-30]% in Germany.
186. Swiss does not own a separate charter airline, but operates two A-320s under the name SwissSun and sells some airline seats on its scheduled flights to tour operators. Swiss' activities in this sector in the German market are reduced and its market share does not exceed 1%. The German market for supply for seats to tour operators is technically affected by the proposed transaction as the combined market share of the parties exceeds 15%. Notwithstanding, in light of the minor overlap of Swiss in Germany, it is concluded that the proposed transaction does not raise competition concerns on this market. Given the low market shares of Swiss in this market, a further distinction between short haul and long haul does not change this conclusion.

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<sup>45</sup> On the route Europe-Singapore, the parties will have a combined share of [5-15]%. If Singapore Airlines is included, the market share will be [40-50]%. However, as indicated above, the inclusion of Lufthansa's partner does not substantially change the conclusion of the Commission as regards the cargo markets.



*b) Swiss market*

187. While Swiss has a market share of [10-20]% in its home market; Lufthansa's Sun Express provides some limited activities in Switzerland (less than [<5]% of the total market). The proposed transaction does not raise competition concerns. Given the low market shares of Lufthansa (SunExpress) in this market, the same conclusion can be taken if long haul and short haul were to be considered separately.

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

188. In order to remove the serious doubts raised by the proposed transaction, the parties submitted Commitments pursuant to Article 6(2) of the Merger Regulation on 13.06.2005, which were subsequently refined on 01.07.2005. The full text of the Commitments is attached to this decision and form an integral part thereof.
189. Furthermore, with the view to ensure that indirect flights do constitute a competition constraint to direct flights on long-haul routes and that the effectiveness of the Commitments will not be impaired by certain regulatory measures from national aviation authorities, the competent authorities of Germany and Switzerland have submitted declarations. By the declarations, the German and Swiss authorities declare that regulatory barriers relating to 6<sup>th</sup> freedom and, where applicable, 5<sup>th</sup> freedom, will not be applicable on long haul routes. The Commission has taken note of these declarations, which form part of its assessment.

### **A. SUMMARY OF THE UNDERTAKINGS**

190. The main elements of the Commitments proposed by the Parties are the following:

(i) Remedies concerning slots

*a) Intercontinental routes*

191. The Parties commit to make available, without any compensation and in accordance with a specified procedure, a specified number of slots on six [6] long haul routes<sup>46</sup>. The purpose is to allow a new entrant to provide on each of the routes one non-stop or indirect (with a connecting time of not more than 150 minutes) scheduled passenger air service operated up to 6 times a week.

*b) European routes*

192. The Parties commit to make available, without any compensation and in accordance with a specified procedure, a specified number of slots on routes to and from Zurich, Frankfurt, Berlin, Munich, Düsseldorf, Vienna, Stockholm and Copenhagen to allow one or more new entrants to operate a new or additional non-stop scheduled daily frequencies on the eleven (11) identified European city pairs<sup>47</sup>. The frequencies that Air Berlin, NIKI, Helvetic and Maersk currently have on these routes will be counted

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<sup>46</sup> These are: Zurich to Boston, Chicago, Los Angeles, Johannesburg, Bangkok and Cairo.

<sup>47</sup> These are: Zurich to Frankfurt, Munich, Düsseldorf, Berlin, Hamburg, Hanover, Vienna, Stockholm, Copenhagen, Warsaw and Bucharest.

against the maximum number of frequencies made available by the parties. Overall, preference is given to third parties requesting the highest number of frequencies.

193. As regards the routes linking the parties' respective hubs, Zurich-Frankfurt and Zurich-Munich, the parties have undertaken to make available five frequencies per day (which correspond to the number of frequencies currently operated by Swiss on this route). In case no third party is operating these routes at a certain period in time, new entrants shall be granted "grandfather" rights, once they have operated on these routes for at least six IATA seasons.
194. In addition, the parties commit themselves not to add frequencies beyond the frequencies they have decided to operate on Zurich-Frankfurt (eleven) and Zurich-Munich (ten) for a period of six IATA seasons, starting when a potential entrant has begun operating on these routes.

c) *Conditions*

195. The conditions include *inter alia* that slots released by the Parties shall be within 90 minutes for long haul city pairs and within 30 minutes for intra-European city pairs of the time requested by the potential new entrant. The Commitments provide also conditions for slot allocations in Stockholm and Berlin and a limitation on the maximum number of slots that should be released during certain hours in Zurich, aiming at preserving the viability of connecting traffic flows of Swiss in its hub.
196. The duration of the Commitments relating to slots is unlimited in time.

(ii) Other measures

197. In addition to the traditional slot remedies, the parties commit to the following:
- a) Interlining agreements: The Parties agree to enter, at the request of a new entrant, into an interline agreement concerning any of the city pairs identified above.
- b) Frequent flyer programme (FFP): The Parties will allow a new entrant, on request, to be hosted in the parties' FFP for the relevant city pairs.
- c) Intermodal services: The Parties undertake to enter, at the request of a railway or other surface transport company operating between Switzerland and Germany, into an intermodal agreement. This would allow these transport services to increase the number of frequencies and shorten at least one leg of the round trip so they can become adequate alternative also for time sensitive passengers.
- d) Special prorate agreements: The Parties undertake to enter, at the request of a potential new entrant, into a special prorate agreement for traffic with a true origin and destination in either Germany and/or Switzerland, provided part of the journey involves the Zurich-Frankfurt or Zurich-Munich city pairs.
- e) Blocked space agreements (BSA): The Parties shall enter, at the request of a potential new entrant, into a BSA for Zurich-Bucharest.
- f) Conditions pertaining to fares. Whenever the parties reduced a published fare on a city pair of reference where entry has occurred, they undertake to apply an equivalent

reduction on the corresponding fare on Zurich-Warsaw and Zurich-Stockholm routes, as long as no entry has taken place on these routes.

g) Termination of Swiss alliance agreements with American Airlines and Finnair. These partners belong to the Oneworld Alliance. Prior to termination of the agreements, the parties have undertaken not to increase the degree of co-operation with either American Airlines or Finnair. This will remedy the competition concerns raised on the city pairs Zurich-Helsinki and Zurich-Miami.

## **B. ASSESSMENT OF THE COMMITMENTS**

198. The Commitments submitted by the parties constitute comprehensive package which takes into consideration the earliest precedents of merger cases in the aviation sector, particularly the *Air France/KLM* decision. These Commitments introduce some new elements (reduction of the “bracket periods” on which the new entrant can obtain slots, the granting of grandfather rights on certain routes and under certain conditions, unlimited duration, etc).
199. Furthermore, the definitions and the conditions pertaining to slots are both simplified and clarified (for instance, it has been made clear that the arrival and departure slots shall be allocated in a manner to allow for reasonable aircraft rotation); the preference criteria for the new entrant taking up the maximum number of frequencies have been extended, etc. The Commitments foresee intermediate measures that protect competitors and consumers before new entry is made possible according to the slot allocation procedure defined (i.e. 2006 IATA Summer Season), such as use of block space agreements and freeze of published fares. More significantly, the slots made available by the parties make it possible for new entrants to operate the same number of frequencies than Swiss currently flies in practically all relevant routes, including Zurich-Frankfurt and Zurich-Munich. As regards slots in Stockholm and Berlin, a new entrant on the Zurich-Stockholm and the Zurich-Berlin routes is not eligible to receive slots at Arlanda and Tegel unless justified (see further Clause 1.3.1).
200. The Commitments were market tested with customers and competitors. The large majority of customers considered them sufficient to remove the competition concerns created by the merger. However, certain competitors that expressed an interest in entering Zurich-Frankfurt and Munich-Frankfurt were concerned by the frequency freeze clause and requested a frequency reduction to the level operated by Lufthansa pre-merger, in order to avoid overcapacity on the markets and thus make entry attractive.
201. To respond to the concerns expressed by competitors, the parties improved the remedies going beyond the initial proposal that had been market tested. In this regard, they undertook not to add frequencies beyond a total of eleven frequencies on the Zurich-Frankfurt route and ten frequencies on the Zurich-Munich route for a period of six consecutive IATA seasons (i.e. 3 years), instead of at the level of the combined frequencies of the merged entity at the moment of effective entry of the new entrant. In addition, they committed themselves to grant “grandfather rights” on these routes. According to this provision, in case no third party is operating these routes after a given date, new entrants shall be granted “grandfather rights” on the slots being operated by the new entrant(s).
202. In the Commission’s assessment this modified remedy package is sufficient to make potential competition effective. The remedies proposed by the parties should be

proportionate, in the sense of not going beyond what is necessary to create the adequate conditions for entry on the routes. In the Commission's view, it is imperative in this case to strike a balance between the need to i) allow potential competition on these hub-to-hub routes; and ii) ensure that the efficiencies that the parties can derive from their network are not disrupted, thus harming the consumers' interests. In this regard, it can be concluded that the granting of "grandfather rights" represents an additional incentive for new entrants to enter and stay on the routes for a minimum of 3 years, as slots in Frankfurt and Munich are quite valuable assets. This, together with the limitation of the number of frequencies that the parties can operate on these routes below the combined level of frequencies operated today, sufficiently mitigates the concerns expressed by some potential competitors. In addition, the parties have submitted information which demonstrates that a reduction of frequencies at the pre-merger level would seriously disrupt the functioning of the three hubs. The reduction of a few more frequencies (one, two or three) by the parties, instead of granting "grandfather rights", may not substantially change the risk of overcapacity for new entrants, since the parties could compensate the loss of frequencies by using larger aircrafts..

203. New entrant would likely be low cost carriers, which focus on O&D passengers. Given that currently 65% of the parties' traffic is connecting passengers, there would be plenty of room on the two routes to compete for O&D customers. Further, the parties have provided examples of low cost or regional carriers (i.e. the most likely entrants on the routes in question) which are facing competition from network carriers on hub-to-hub routes with a comparable frequency imbalance and yet they are capable of generating their own demand for air service<sup>48</sup>.
204. As a result, the Commitments will remove the main identified barriers to enter the relevant routes and on balance are found capable of making effective market entry possible for third parties. For this reason, the Commission considers that the Commitments proposed are sufficient to eliminate all serious doubts as to the compatibility of the proposed transaction with the common market, the EEA Agreement and the ATA.
205. In order to ensure that the parties comply with the Commitments, the Commission attaches conditions and obligations to this decision. The Commitments provided for in paragraphs 1, 2, 3.3., 3.4, 4 to 11 and 14.1 constitute conditions of this decision, as only through full compliance therewith can the necessary changes to eliminate the serious doubts identified by the Commission on the relevant markets be achieved. The remaining Commitments constitute obligations, since they concern the implementing steps necessary to achieve the change intended.

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<sup>48</sup> The examples provided by the parties show that some low cost competitors already compete with Lufthansa on two routes within Germany with a similar unbalanced number of daily frequencies.

## VII. CONCLUSION

206. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market, with the EEA Agreement and with the ATA. This decision is adopted in application of Article 6(1)(b) and 6(2) of Council Regulation (EC) No 139/2004 and Article 11(1) of the ATA.

For the Commission  
signed  
Neelie KROES  
Member of the Commission

## COMMITMENTS PACKAGE

### CASE COMP/M.3770 - Lufthansa/Swiss

Pursuant to Article 6(2) of Council Regulation (EC) 139/2004 (the “Merger Regulation”), Deutsche Lufthansa AG (“Lufthansa”), in agreement with Swiss International Air Lines Ltd. (“Swiss”), submits the commitments specified below (the “Commitments”) in order to enable the European Commission (the “Commission”) to declare the proposed combination of Lufthansa and Swiss (the “Concentration”) compatible with the common market by means of a decision pursuant to Article 6(1)(b) of the Merger Regulation (the “Decision”).

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

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

## 0 DEFINITIONS

### **Codeshare**

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

### **Competitive Air Service**

Either:

- a non-stop scheduled passenger air service that is operated on one or more of the Identified Long-Haul City Pairs; or
- an intra-European feeder passenger air service from Zurich (the point of origin or destination on one of the Identified Long-Haul City Pairs) to the Prospective New Entrant’s European hub that connects with a passenger air service operated by the Prospective New Entrant from that hub to Boston, Chicago, Los Angeles, Johannesburg, Bangkok, or Cairo (the point of origin or destination on one of the Identified Long-Haul City Pairs), provided that the connecting time at the Prospective New Entrant’s hub is not more than 150 minutes; or
- a non-stop scheduled passenger air service that is operated on one or more of the Identified European City Pairs.

**Consummation of the Concentration**

The date on which Lufthansa exercises Call-Option 1, or, as the case may be, the date on which Almea Stiftung exercises Put-Option 1 within the meaning of Section 9(2) of the Business Integration Agreement between Lufthansa and Swiss dated 22 March 2005, leading to Lufthansa holding 49% of the shares in AirTrust AG, which shall be notified to the Commission by Lufthansa without delay.

**Blocked Space Agreement**

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

**Effective Date**

The date of the Decision, unless otherwise specified.

**FFP (Frequent Flyer Program)**

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

**Frequency or Frequencies**

Means a roundtrip on an Identified (Long-Haul or European) City Pair.

**IATA Scheduling Conference**

Industry conference of airlines and airport coordinators worldwide to solve scheduling issues where there are discrepancies between the slots requested by the airlines and allocated by the airport coordinators. The IATA scheduling conference for the winter season takes place in mid June, the one for the summer season in mid November (exact dates vary, next IATA scheduling conference for Summer 2006 takes place from 12.11.2005-15.11.2005).

**IATA Scheduling Period or IATA Season**

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

**Identified Long-Haul City Pairs**

Zurich-Boston, Zurich-Chicago, Zurich-Los Angeles, Zurich-Johannesburg, Zurich-Bangkok, Zurich-Cairo.

**Identified European City Pairs**

Zurich-Frankfurt, Zurich-Munich, Zurich-Berlin, Zurich-Duesseldorf, Zurich-Hamburg, Zurich-Hanover, Zurich-Stockholm, Zurich-Copenhagen, Zurich-Vienna, Zurich-Warsaw, Zurich-Bucharest.

**Indemnified Party**

Has the meaning given to it in Paragraph 12.2.6.

**Interline Agreement**

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

**Intermodal Agreement**

An agreement between an airline and a railway company or another surface transport provider under which the contracting parties accept each other's travel documents (tickets).

**Intermodal Partner**

Has the meaning given to it in Paragraph 8.1.

**Merged Entity**

Lufthansa and Swiss and companies and/or affiliated businesses controlled by the entities after the Consummation of the Concentration.

**MITA**

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

**Monitoring Trustee**

Means an individual or institution, independent from Lufthansa, Swiss or the Merged Entity, who is approved by the Commission and appointed by Lufthansa and who has the duty to monitor the Merged Entity's compliance with the conditions and obligations attached to the Decision as more fully described in Clause 12.

**New Air Service Provider**

Either:

- any airline (that is not a member of the Star Alliance) that commences a new non-stop service on an Identified European City Pair or that increases the number of Frequencies it operates on an Identified European City Pair; or
- any airline (that is not a member of the Star Alliance), that individually, or collectively by codeshare, provide(s) a new or additional Competitive Air Service.

**Prospective New Entrant**

Any airline (that is not a member of Star Alliance), able to offer a new or additional Competitive Air Service individually or collectively by Codeshare and needing a slot or slots to be made available by the Merged Entity in accordance with the Commitments to operate a Competitive Air Service.

**Published Fare**

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

**Requesting Party**

Has the meaning given to it in Paragraph 13.2.



**Slot Return Date**

31st January for the IATA Summer Scheduling Period and 31st August for the IATA Winter Scheduling Period.

**Slot Transfer Agreement**

An agreement between the Merged Entity and a Prospective New Entrant that provides for conditions on the transfer of slot(s) to the Prospective New Entrant according to the principles laid down in Clause 1 and Clause 3 of these Commitments. The agreement may (i) contain prohibitions on the Prospective New Entrant transferring any slots released by the Merged Entity to a third party, swapping such slots for other slots with a third party, making available such slots in any way to any third party for the use of that third party, or releasing, surrendering, giving up or otherwise disposing of such slots; and (ii) provide for reasonable financial compensation to the Merged Entity if the Prospective New Entrant, as a result of a deliberate violation of the aforementioned prohibitions, is unable to return the slots in question to the Merged Entity.

**Special Prorate Agreement**

An agreement between two or more airlines on the apportionment of through fares on journeys with two or more legs that are operated by different airlines.

**Standard Slot Allocation Procedure**

Has the meaning given to it in Paragraph 1.3.1.

**1 SLOTS****1.1 SLOTS FOR CERTAIN IDENTIFIED LONG-HAUL CITY PAIRS**

**1.1.1** The Merged Entity undertakes to make slot(s) available at Zurich to allow a Prospective New Entrant to operate one (1) new or additional daily Frequency, and up to a maximum of six (6) Frequencies per week, on the following of the Identified Long-Haul City Pairs:

- Zurich-Boston
- Zurich-Chicago
- Zurich-Los Angeles
- Zurich-Johannesburg
- Zurich-Bangkok
- Zurich-Cairo

To the extent that Swiss, at the time of the Effective Date, operates fewer than six (6) weekly Frequencies on any Identified Long-Haul City Pair, the Merged Entity shall not be obliged to offer more slot(s) at Zurich on any Identified Long-Haul City Pair than Swiss actually operates at that time.

**1.1.2** The Merged Entity will make slots available to the Prospective New Entrant selected in accordance with Clause 3.

## **1.2 SLOTS FOR CERTAIN IDENTIFIED EUROPEAN CITY PAIRS**

**1.2.1** The Merged Entity undertakes to make slot(s) available at Zurich and/or Frankfurt and/or Munich and/or Duesseldorf and/or Berlin (Tegel) and/or Vienna and/or Stockholm (Arlanda) and/or Copenhagen to allow one or more Prospective New Entrant(s) to operate a new or additional Frequency on the following Identified European City Pairs. The Merged Entity shall be obliged to make available to Prospective New Entrants the number of slots needed to support in aggregate:

- for flights between Zurich and Frankfurt: up to five (5) Frequencies per day;
- for flights between Zurich and Munich: up to five (5) Frequencies per day;
- for flights between Zurich and Duesseldorf: up to four (4) Frequencies per day;
- for flights between Zurich and Berlin: up to three (3) Frequencies per day;
- for flights between Zurich and Hamburg: up to four (4) Frequencies per day;
- for flights between Zurich and Hanover: up to two (2) Frequencies per day;
- for flights between Zurich and Vienna: up to four (4) Frequencies per day;
- for flights between Zurich and Stockholm: up to two (2) Frequencies per day;
- for flights between Zurich and Copenhagen: up to three (3) Frequencies per day;
- for flights between Zurich and Warsaw: up to two (2) Frequencies per day;
- for flights between Zurich and Bucharest: up to one (1) Frequency per day.

In the event that no Prospective Entrant is operating a Competitive Air Service on the Zurich-Frankfurt or Zurich-Munich city pairs by the end of [...], any Prospective New Entrant will be authorised to use any slots released for the respective city pair (Zurich-Frankfurt or Zurich-Munich) at its discretion for any other city pair once it has operated on the respective city pair (Zurich-Frankfurt or Zurich-Munich) for at least six full IATA Seasons.

**1.2.2** Subject to the Commission's confirmation of the competitiveness of the service, Frequencies of a Competitive Air Service operated by an airline independent of and unconnected to the Merged Entity on the Identified European City Pairs shall be counted against the number of slots to be released by the Merged Entity under Paragraphs 1.1.1 and 1.2.1.

**1.2.3** Notwithstanding the foregoing the Merged Entity will make available slots to Air Berlin, NIKI, Helvetic, and Maersk Air who already operate Competitive Air Services within the meaning of Paragraph 1.2.2 on the city pairs Zurich-Duesseldorf, Zurich-Berlin, Zurich-Hamburg, and Zurich-Hanover (in each case Air Berlin), Zurich-Vienna (NIKI and Helvetic), and Zurich-Copenhagen (Maersk Air) as follows:

- In light of the fact that Air Berlin is already currently operating three (3) Frequencies between Zurich and Duesseldorf, three (3) Frequencies between Zurich and Berlin, two (2) Frequencies between Zurich and Hamburg, and two (2) Frequencies between Zurich and Hanover, the Merged Entity will make slots available to Air Berlin on these city pairs as necessary to enable Air Berlin to operate (i) a total of four (4) Frequencies between Zurich and Duesseldorf, and/or (ii) a total of four (4) Frequencies between Zurich and Berlin, and/or (iii) a total of (4) Frequencies between Zurich and Hamburg, and/or (iv) a total of three (3) Frequencies between Zurich and Hanover.

- On the basis that NIKI and Helvetic are each already operating two (2) Frequencies between Zurich and Vienna, the Merged Entity will make slots available to NIKI and/or Helvetic on this city pair as necessary to enable either NIKI or Helvetic to operate a total of four (4) Frequencies between Zurich and Vienna.
- On the basis that Maersk Air is already operating two (2) Frequencies between Zurich and Copenhagen, the Merged Entity will make slots available to Maersk Air on this city pair than as necessary to enable Maersk Air to operate a total of three (3) Frequencies between Zurich and Copenhagen.

For the avoidance of doubt, slots transferred to Air Berlin, NIKI, Helvetic, or Maersk Air, as the case may be, do not have to be returned to the Merged Entity merely because the respective airline subsequently increases its Frequencies on the relevant Identified European City Pair above the respective total number of Frequencies stated in Clauses 1.2.1-1.2.3, but only if the conditions for a slot return provided in Clause 1.3.6 are met.

- 1.2.4** The Merged Entity will inform the Monitoring Trustee and the Commission of the announced commencement by a carrier of a new or additional Competitive Air Service on an Identified European City Pair that does not use slots made available by the Merged Entity as soon as possible following the announcement of that service. The Commission will confirm to the Merged Entity, in accordance with Clause 3, whether or not such new or additional Competitive Air Service is sufficient for the relevant carrier to qualify as a competitor with respect to that Identified European City Pair once such service is commenced.

### **1.3 CONDITIONS PERTAINING TO SLOTS**

- 1.3.1** At least three (3) weeks prior to the IATA Scheduling Conference for the traffic season in which the Prospective New Entrant intends to commence a new or additional Competitive Air Service, the Prospective New Entrant shall notify the Merged Entity of its intention to request slots pursuant to the Commitments. A Prospective New Entrant shall be eligible to receive slots pursuant to these Commitments only if it can demonstrate that all reasonable efforts to obtain slots for the Identified European or Long-Haul City Pair(s) through the normal workings of the slot allocation procedure before the beginning of the relevant IATA Season (the “Standard Slot Allocation Procedure”) have failed. To this end, the Prospective New Entrant shall apply for these slots at the forthcoming IATA Scheduling Conference through the Standard Slot Allocation Procedure and maintain an “open book” policy for the airports concerned during the entire period between the notification to the Merged Entity of its intention to apply for slots in order to operate services on an Identified European or Long-Haul City Pair and the end of the respective IATA Scheduling Period, including the allocation of slots by the coordinator from the waitlist following the Slot Return Date.

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

- (i) slots were obtained through the Standard Slot Allocation Procedure within ninety (90) minutes of the times requested, but such slots have not been

accepted by the Prospective New Entrant in the case of an Identified Long-Haul City Pair; or

- (ii) slots were obtained through the Standard Slot Allocation Procedure within thirty (30) minutes of the times requested, but such slots have not been accepted by the Prospective New Entrant in the case of an Identified European City Pair; or
- (iii) slots were obtained through the Standard Slot Allocation Procedure more than ninety (90) minutes from the times requested and the Prospective New Entrant did not give the Merged Entity the opportunity to exchange those slots for slots within ninety (90) minutes of the times requested in the case of an Identified Long-Haul City Pair; or
- (iv) slots were obtained through the Standard Slot Allocation Procedure more than thirty (30) minutes from the times requested and the Prospective New Entrant did not give the Merged Entity the opportunity to exchange those slots for slots within thirty (30) minutes of the times requested in the case of an Identified European City Pair.

In the light of the Merged Entity's limited slot holdings at Stockholm, a Prospective New Entrant shall not be eligible to receive slots at Arlanda pursuant to these Commitments if: (i) slots are available at Bromma; and (ii) the Prospective New Entrant does not have a reasonable business justification for commencing services from/to Arlanda rather than Bromma, such as existing operations at Arlanda or the need to provide connecting services.

A Prospective New Entrant shall not be eligible to receive slots at Tegel pursuant to these Commitments if: (i) slots are available at Tempelhof and/or Schoenefeld; and (ii) the Prospective New Entrant does not have a reasonable business justification for commencing services from/to Tegel rather than Tempelhof or Schoenefeld, such as existing operations at Tegel or the need to provide connecting services.

**1.3.2** The slots released by the Merged Entity shall be within ninety (90) minutes in the case of an Identified Long-Haul City Pair and within thirty (30) minutes in the case of an Identified European City Pair of the time requested by the Prospective New Entrant, if the Merged Entity has slots available within this time-window. Arrival and departure slots shall be such as to allow for reasonable aircraft rotation. In the event that the Merged Entity does not have slots available within this time-window, it shall offer to release the slots closest in time to the Prospective New Entrant's request. The Merged Entity does not have to offer slots, however, if the slots that the Prospective New Entrant can obtain through the Standard Slot Allocation Procedure are closer in time to the Prospective New Entrant's request than the slots that the Merged Entity has available.

**1.3.3** Requests for slots to the slot coordinator and to the Merged Entity shall be renewed by the Prospective New Entrant for each subsequent IATA Season.

If the New Air Service Provider has obtained slots from the Merged Entity pursuant to these Commitments for a particular IATA Season and requests for the following IATA Season some or all of the slots at the same times as the slots released by the Merged Entity, the Merged Entity shall make slots available to the New Air Service

Provider at the same time as in the previous IATA Summer or Winter Season respectively, unless the Merged Entity does not hold a slot at that time, in which case it shall release a slot as close as possible in time to the slot granted in the preceding IATA Season, provided the New Air Service Provider has complied with the conditions and procedure described in this Clause 1.3.

- 1.3.4** Where one or more slots have been made available by the Merged Entity, the New Air Service Provider shall remain under a continuing obligation to make all reasonable efforts to obtain suitable slots at Zurich and/or Frankfurt and/or Munich and/or Duesseldorf and/or Berlin (Tegel) and/or Vienna and/or Stockholm (Arlanda) and/or Copenhagen through the normal workings of the Standard Slot Allocation Procedure enabling it to provide a Competitive Air Service.
- 1.3.5** For the purposes of these Commitments, it is accepted that a single daily connecting service departing from Zurich can constitute part of a new or additional Competitive Air Service on more than one Identified European or Long-Haul City Pair.
- 1.3.6** Where a Prospective New Entrant that has obtained slots pursuant to these Commitments decides: (i) not to commence services on an Identified European or Long-Haul City Pair (so-called non-used slots); (ii) to operate a lower number of Frequencies or decides to cease operating on an Identified European or Long-Haul City Pair (so-called misused or under-used slots); or (iii) not to use the slots on the Identified European or Long-Haul City Pair (so-called improperly used slots), it shall inform the Merged Entity in writing and return such non-used, misused, under-used, or improperly used slots to it immediately. In these circumstances, the Merged Entity shall make the returned slots available to any other Prospective New Entrant.

For the purposes of this Paragraph, a Prospective New Entrant will be deemed to have ceased operating on an Identified European or Long-Haul City Pair where it has not used at least 80% of its slots during the IATA Season for which they had been allocated for the Identified European or Long-Haul City Pair in question, unless such non-use is justified on one of the grounds referred to in Article 10(5) of Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ No L 14/1, 22.1.1993) or in any other regulation that amends or supersedes it. Should the Prospective New Entrant be found to have improperly used slots pursuant to this Paragraph, the Merged Entity may refuse to surrender slots to the said Prospective New Entrant in the future on this Identified European or Long-Haul City Pair.

- 1.3.7** Should the New Air Service Provider notify the Merged Entity too late in an IATA Season for it to use the returned slots pursuant to Article 10(2) of Regulation (EEC) 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, as amended, reviewed or replaced from time to time, either with immediate effect or after the deadline provided for in Article 10(3) of that Regulation and before the effective start of the respective IATA Season, the Merged Entity shall be entitled to require the Prospective New Entrant to transfer to it a comparable slot as compensation in the event the slot is lost. If, for any reason, the Prospective New Entrant is unable to transfer to the Merged Entity a comparable slot, the Merged Entity may justify the non-use of the surrendered slot on the basis of Article 10(5) of Regulation (EEC) 95/93 in order to recover and retain the unused slot.

- 1.3.8** To ensure that the slots released by the Merged Entity are used in a manner consistent with these conditions, a mechanism shall be agreed by the Merged Entity and the Prospective New Entrant, and approved by the Commission, that will allow the Monitoring Trustee to monitor and report to the Commission on how, when and where the slots are being released, used, and returned.
- 1.3.9** Slots made available by the Merged Entity under these Commitments shall be offered without any compensation.
- 1.3.10** Slots may be requested by a Prospective New Entrant from the Merged Entity at any time in the day during opening hours of the Zurich airport.
- 1.3.11** To ensure the viability of the Merged Entity's hub-and-spoke network at Zurich airport, the Merged Entity shall not be obliged to release (i) more than four (4) departure slots in any one of the following periods: 12:00-01:00 p.m., 05:00-06:00 p.m., and (ii) more than four (4) arrival slots in any one of the following periods: 06:00-07:00 a.m., 11:00-12:00 p.m., and 09:00-10:00 p.m. at Zurich airport (Zurich time). In the event that a request is made for the release of more than four (4) slots in any of the aforementioned periods, the Merged Entity shall offer the Prospective New Entrant the next closest slot to the time requested in accordance with Paragraph 1.3.1 above.
- 1.3.12** The Merged Entity may enter into a Slot Transfer Agreement with the Prospective New Entrant. Such an agreement shall be subject to the prior approval of the Commission, and shall provide for fast-track dispute resolution according to Clause 13.

## **2 DURATION OF THE COMMITMENTS**

To ensure that a Prospective New Entrant on any Identified European or Long-Haul City Pair has guaranteed access to a structural remedy, save where otherwise indicated, these Commitments are unlimited in duration and may be invoked at any time by a Prospective New Entrant, subject to Clause 1 and 15.

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

- 3.1** A Prospective New Entrant wishing to obtain slots from the Merged Entity pursuant to these Commitments shall notify the Merged Entity of its intention to apply for these slots at the forthcoming IATA Scheduling Conference within the time period specified in Paragraph 1.3.1. A copy of this notification shall be sent immediately by the Merged Entity to the Monitoring Trustee and the Commission.
- 3.2** Should a Prospective New Entrant be unable to obtain slots through the Standard Slot Allocation Procedure at the IATA Scheduling Conference for the traffic season in which services are intended to commence, it shall apply to the Merged Entity for slot releases within one (1) week following the end of that IATA Scheduling Conference.

The application shall take into account the slots obtained at the slot conference within ninety (90) minutes of the times requested in the case of an Identified Long-Haul City Pair and give the Merged Entity the opportunity to exchange slots obtained more than ninety (90) minutes from the times requested, for slots of the Merged Entity within ninety (90) minutes of the times requested pursuant to Paragraph 1.3.1.

The application shall, similarly, take into account the slots obtained at the slot conference within thirty (30) minutes of the times requested in the case of an Identified European City Pair and give the Merged Entity the opportunity to exchange slots obtained more than thirty (30) minutes from the times requested for slots of the Merged Entity within thirty (30) minutes of the times requested pursuant to Paragraph 1.3.1.

A copy of the application shall be sent immediately by the Merged Entity to the Monitoring Trustee and the Commission. Within two (2) weeks following the end of the IATA Scheduling Conference for the traffic season in which services are intended to commence, the Merged Entity shall identify to the Prospective New Entrant a time frame of 20 minutes in which slots it intends to make available to the Prospective New Entrant.

Within four (4) weeks following the end of the IATA Scheduling Conference for the IATA Season in which services are intended to commence, the Merged Entity shall submit to the Monitoring Trustee and to the Commission a proposal for the selection of the Prospective New Entrant on the Identified European or Long-Haul City Pair, and shall identify to the Prospective New Entrant the exact time of the slots it intends to make available to the Prospective New Entrant.

**3.3** When making a proposal for the selection of the Prospective New Entrant on any particular Identified Long-Haul City Pair, the Merged Entity shall accord a preference to:

- (a) a Prospective New Entrant that has indicated that it intends to operate a non-stop scheduled passenger air service; and then
- (b) a Prospective New Entrant that has indicated that it intends to operate an intra-European feeder passenger air service from Zurich to that carrier's European hub to connect with a new non-stop scheduled service from that hub operated by the Prospective New Entrant to Boston, Chicago, Los Angeles, Bangkok, Johannesburg or Cairo, as the case may be; and then
- (c) a Prospective New Entrant that has indicated that it intends to operate an intra-European feeder passenger air service from Zurich to that carrier's European hub to connect with an existing non-stop scheduled service from that hub operated by the Prospective New Entrant to Boston, Chicago, Los Angeles, Bangkok, Johannesburg or Cairo, as the case may be.

**3.4** When making a proposal for the selection of the Prospective New Entrant, the Merged Entity shall accord a preference to the Prospective New Entrant that has indicated that it intends to operate the highest number of Frequencies.

- 3.5** The Commission shall decide after hearing the Monitoring Trustee (as provided for in Paragraph 12.2.1) whether or not to approve the Merged Entity's proposal pursuant to the following criteria:
- the Prospective New Entrant is independent of and unconnected to the Merged Entity; and
  - the Prospective New Entrant is a viable existing or potential competitor, with the ability, resources and commitment to operate the Identified European or Long-Haul City Pair in the long term as a viable and active competitive force.
- 3.6** To assist the Monitoring Trustee in the preparation of his advice and/or the Commission in taking its decision, the Monitoring Trustee and/or the Commission may request the Prospective New Entrant to provide to the Monitoring Trustee and/or the Commission a detailed business plan. This plan shall contain a general presentation of the company including its history, its legal status, the list and a description of its shareholders and the two most recent yearly audited financial reports. The detailed business plan shall provide information on the plans that the company has in terms of development of its network, fleet etc, and detailed information on its plans for the route on which it wants to operate. The latter should specify in detail planned operations on the route over a period of three (3) years (size of aircraft, number of Frequencies operated, planned time-schedule of the flights) and expected financial results (expected traffic, revenues, profits). The Monitoring Trustee and/or the Commission may also request a copy of all co-operation agreements the Prospective New Entrant may have with other airlines. Business secrets and confidential information will be kept confidential by the Commission and the Monitoring Trustee and will not become accessible to other undertakings or to the public.
- 3.7** In case the Commission does not approve the proposal submitted by the Merged Entity, if other carriers have applied to the Merged Entity for slots, the Merged Entity shall communicate to the Monitoring Trustee and the Commission without delay a new proposal for the selection of a Prospective New Entrant on the Identified European or Long-Haul City Pair.
- 3.8** Within one (1) week after the approval by the Commission of the selection of the Prospective New Entrant on the Identified European or Long-Haul City Pair, the Merged Entity shall submit its written proposal for slot releases as approved by the Commission to this Prospective New Entrant.

#### **4 FREQUENCY FREEZE**

The Merged Entity shall not add Frequencies on the Zurich-Frankfurt and Zurich-Munich city pairs beyond those it has decided to operate on these city pairs, i.e. it shall not add Frequencies beyond a total of eleven (11) Frequencies on Zurich-Frankfurt and ten (10) Frequencies on Zurich-Munich, for a period of six (6) consecutive IATA Seasons starting when a New Air Service Provider begins operations on the relevant city pair.



## **5 TERMINATION OF SWISS' ALLIANCE AGREEMENTS**

- 5.1** The Merged Entity undertakes to terminate all co-operation with American Airlines effective no later than [...], except for a free-flow code share agreement. In addition, prior to the dates indicated, the Merged Entity undertakes not to increase the degree of cooperation with American Airlines beyond the level in existence at the Effective Date.
- 5.2** The Merged Entity undertakes to terminate all co-operation with Finnair (with the exception of a free-flow code share agreement) effective no later than [...]. In addition, prior to the termination of its cooperation, the Merged Entity undertakes not to increase the degree of cooperation with Finnair beyond the level in existence at the Effective Date.

## **6 INTERLINE AGREEMENTS**

- 6.1** At the request of a New Air Service Provider, the Merged Entity shall enter into an Interline Agreement concerning any Identified European or Long-Haul City Pair operated by the New Air Service Provider.
- 6.2** Any such Interline Agreement shall be subject to the following restrictions:
- it shall apply to the first class, business class and leisure travel categories only;
  - it shall provide for interlining on the basis of the Merged Entity's published one-way fares when a one-way ticket is issued or half of the Merged Entity's published round-trip fares when a round-trip ticket is issued;
  - it shall be limited to true origin and destination traffic on the Identified Long-Haul or European City Pair operated by the New Air Service Provider;
  - it shall be subject to the MITA principles; and
  - it shall include the possibility for the New Air Service Provider, and/or travel agents, to offer a return trip comprising services provided one-way by the Merged Entity and one-way by the New Air Service Provider.
- 6.3** Subject to seat availability in the relevant fare category, the Merged Entity shall carry a passenger holding a coupon issued by a New Air Service Provider for travel on an Identified European or Long-Haul City Pair. However, to avoid abuse, the Merged Entity may require that the New Air Service Provider or the passenger, where appropriate, pay the (positive) difference between the fare charged by the Merged Entity and the fare charged by the New Air Service Provider. In cases where the New Air Service Provider's fare is lower than the value of the coupon issued by the Merged Entity, the Merged Entity may endorse its coupon only up to the value of the fare charged by the New Air Service Provider. A New Air Service Provider shall enjoy the same protection in cases where the Merged Entity's fare is lower than the value of the coupon issued by the New Air Service Provider.
- 6.4** Disputes between the Merged Entity and New Air Service Providers regarding Interline Agreements pursuant to this Clause 6 shall be subject to mediation pursuant to Paragraph 12.2.1 (v) and fast track dispute resolution pursuant to Clause 13.

- 6.5** All interline agreements entered into pursuant to this Clause 6 for a particular Identified European or Long-Haul City Pair shall lapse automatically in the event that the New Air Service Provider ceases to operate on that Identified European or Long-Haul City Pair.

## **7 FREQUENT FLYER PROGRAM**

- 7.1** If a New Air Service Provider does not participate in the Merged Entity's Frequent Flyer Program ("FFP") or does not have its own comparable FFP, the Merged Entity shall allow it, on request, to be hosted in its FFP for the Identified European or Long-Haul City Pairs operated by the New Air Service Provider. The agreement with the New Air Service Provider shall be on terms such that the New Air Service Provider shall have equal treatment with the Merged Entity's alliance partners on the same Identified European or Long-Haul City Pair. Financial conditions will reflect the average conditions agreed upon with the Merged Entity's alliance partners.
- 7.2** Disputes between the Merged Entity and New Air Service Providers regarding FFP agreements pursuant to this Clause 7 shall be subject to mediation pursuant to Paragraph 12.2.1 (v) and fast track dispute resolution pursuant to Clause 13.
- 7.3** Any agreement relating to a particular Identified European or Long-Haul City Pair and entered into pursuant to this Clause 7 shall lapse automatically in the event that the New Air Service Provider ceases to operate that Identified European or Long-Haul City Pair.

## **8 COMMITMENT TO FACILITATE INTERMODAL SERVICES**

- 8.1** At the request of a railway or other surface transport company operating between Switzerland and Germany (an Intermodal Partner), the Merged Entity shall enter into an Intermodal Agreement whereby they provide passenger air transport on their services on any of the Identified European City Pairs as part of an itinerary that includes surface transportation by the Intermodal Partner.
- 8.2** Any Intermodal Agreement entered into pursuant to this Clause 8 shall be based on MITA principles (including the Intermodal Interline Traffic Agreement - Passenger and IATA Recommended Practice 1780e). The Merged Entity shall accept full pro-rating according to the terms applied by MITA members, including on routes where only rail services are provided. No restrictions shall apply to fare combinations between carriers that are IATA intermodal MITA members and the most restrictive conditions rule shall apply only for the applicable segment and its carrier. The Merged Entity and the Intermodal Partner may waive minimum stay requirements on any fare and any city pair they operate. Such decisions are respected and published reciprocally. Where the Intermodal Partner requires notification of a sector mileage, a location identifier or an add-on fare, the Merged Entity shall make such a request to IATA under normal IATA procedures.
- 8.3** At the request of a potential Intermodal Partner, the Merged Entity shall make its best efforts in good faith to reach an agreement on conditions comparable to those granted to other Intermodal Partners on the Identified European City Pair or, in the

absence of such Intermodal Partners, to those granted to other Intermodal Partners on comparable city pairs, provided that the necessary requirements are met especially with regard to safety, quality of service, insurance coverage and liability limits. The conditions of such an agreement shall override the general obligations arising pursuant to this Clause 8.

- 8.4** Disputes between the Merged Entity and Intermodal Partners regarding Intermodal Agreements pursuant to this Clause 8 shall be subject to mediation pursuant to Paragraph 13.2.1 (v) and fast track dispute resolution pursuant to Clause 13.

## **9 SPECIAL PRORATE AGREEMENTS ON SEGMENTS BEYOND FRANKFURT, MUNICH OR ZURICH**

- 9.1** At the request of a Prospective New Entrant, the Merged Entity shall enter into a Special Prorate Agreement with it for traffic with a true origin and destination in either Germany and/or Switzerland, provided part of the journey involves the Frankfurt-Zurich or Munich-Zurich. The conditions for a Special Prorate Agreement shall be on terms such that the New Air Service Provider shall have equal treatment with the Merged Entity's alliance partners on the same Identified European or Long-Haul City Pair or, in the absence of such alliance partner, with other airlines on the same Identified European or Long-Haul City Pair or, in the absence of such airline, with other airlines on comparable city pairs.

- 9.2** Disputes between the Merged Entity and a Prospective New Entrant regarding Special Prorate Agreements pursuant to this Clause 9 shall be subject to mediation pursuant to Paragraph 12.2.1 (v) and fast track dispute resolution pursuant to Clause 13.

## **10 BLOCKED SPACE AGREEMENTS ON CERTAIN IDENTIFIED EUROPEAN CITY PAIRS**

- 10.1** At the request of a Prospective New Entrant on the Zurich-Bucharest city pair, the Merged Entity shall enter into a Blocked Space Agreement with it.

- 10.2** Until the end of the 2005/2006 IATA Winter Season, the Merged Entity shall enter into a Blocked Space Agreement with any Prospective New Entrant on Identified European City Pairs that requests this.

- 10.3** Any blocked space agreement shall be based on a fixed number of seats (hard block basis) and apply for at least one entire IATA Season. The number of seats covered by such an agreement shall be a maximum of 15% of the seats offered on a particular Frequency and in any event not more than 30 seats on a particular aircraft. The conditions for any such Blocked Space Agreement shall be comparable to those entered into with the Merged Entity's alliance partners on the same Identified European City Pair or, in the absence of such alliance partner, with other airlines on the same Identified European City Pair or, in the absence of such airline, with other airlines on comparable city pairs. The Prospective New Entrant shall carry the full commercial risk attached to the re-sale of the seats covered by the Blocked Space Agreement.

- 10.4** Disputes between the Merged Entity and Prospective New Entrant regarding Blocked Space Agreements pursuant to this Clause 11 shall be subject to mediation pursuant to Paragraph 12.2.1 (v) and fast track dispute resolution pursuant to Clause 13.

## **11 CONDITIONS RELATING TO FARES**

- 11.1** On the Zurich-Warsaw and Zurich-Stockholm city pairs, the Merged Entity shall, each time it reduces a Published Fare on (a) comparable reference route(s) to be determined by the Monitoring Trustee in consultation with the Merged Entity and the Commission, apply an equivalent reduction (in percent) to the corresponding fares on Zurich-Warsaw and Zurich-Stockholm. This obligation on the Merged Entity shall end for the respective city pair once a New Air Service Provider has begun operations on the respective city pair. In choosing the reference route(s), the Monitoring Trustee shall use (a) route(s) on which the Merged Entity is active, on which entry has occurred, and which is comparable to Zurich-Warsaw or, as the case may be, Zurich-Stockholm, in an appropriate manner.
- 11.2** In view of the fact that the next IATA Season for which slots have not yet been allocated is the Summer 2006 IATA Season, the Merged Entity shall not increase Published Fares on any Identified European City Pair until the beginning of the Summer 2006 IATA Season, except in the case of a price increase in IATA fares.

## **12 MONITORING TRUSTEE**

### **12.1 APPOINTMENT OF MONITORING TRUSTEE**

- 12.1.1. A Monitoring Trustee shall be appointed in accordance with the procedure described in Paragraph 12.1.2. The Monitoring Trustee must be familiar with the airline industry and have the experience, competence and independence necessary for this appointment. The Monitoring Trustee will have had no direct or indirect employment, consultancy or other relationship with Lufthansa or Swiss during the past three years and will have no such relationship with the Merged Entity for two following the completion of its mandate.
- 12.1.2. Within one (1) week of the Effective Date, Lufthansa, in agreement with Swiss, shall submit a list or one or more persons whom Lufthansa proposes to appoint as the Monitoring Trustee to the Commission for approval.

The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out in Paragraph 12.1.1 and shall include:

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

The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, Lufthansa, in agreement with Swiss, shall appoint or cause to be appointed the individual or institution concerned as Monitoring Trustee. If more than one name is approved, Lufthansa, in agreement with Swiss, shall be free to choose the Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

If all the proposed Monitoring Trustees are rejected, Lufthansa, in agreement with Swiss, shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in Paragraph 12.1.1.

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

## **12.2 MONITORING TRUSTEE'S MANDATE**

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

- (i) to monitor the satisfactory discharge by Lufthansa or, as the case may be, the Merged Entity of the obligations entered into in these Commitments in so far as they fall within the scope of these Commitment;
- (ii) to propose to the Merged Entity such measures as the monitoring Trustee considers necessary to ensure the Merged Entity's compliance with the conditions and obligations attached to the Decision;
- (iii) to advise and make a written recommendation to the Commission as to the suitability of any Slot Transfer Agreement and Prospective New Entrant submitted for approval to the Commission under Clauses 1 and 3;
- (iv) to provide written reports to the Commission on the parties compliance with these Commitments and the progress of the discharge of its mandate, identifying any respects in which the parties have failed to comply with these Commitments or the Monitoring Trustee has been unable to discharge its mandate;
- (v) to mediate any disagreements relating to the terms of the Interline Agreement provided for in Clause 6, the FFP provided for in Clause 7, the Intermodal Agreement provided for in Clause 8, the Special Prorate Agreement provided for in Clause 9 and the Blocked Space Agreement provided for in Clause 10, if mediation is agreed to by the other party or parties to the agreement in question, and submit a report upon the outcome of the mediation to the Commission; and

(vi) at any time, to provide to the Commission, at its request, a written or oral report on matters falling within the scope of these Commitments.

12.2.2 The Merged Entity shall receive simultaneously a non-confidential version of any written recommendation made by the Monitoring Trustee to the Commission (as provided for in Paragraph 12.2.1(iii)).

12.2.3 The reports provided for in Paragraph 12.2.1(iii) to (vi) shall be prepared in English. The reports provided for in Paragraph 12.2.1(iv) shall be sent by the Monitoring Trustee to the Commission within ten (10) working days from the end of every IATA Season following the Monitoring Trustee's appointment or at such other time(s) as the Commission may specify, and shall cover developments in the immediately preceding IATA Season. The Merged Entity shall receive simultaneously a non-confidential copy of each Monitoring Trustee report.

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

12.2.5 The Monitoring Trustee shall have full and complete access to any of the Merged Entity's books, records, documents, management or other personnel facilities, sites, technical information necessary to fulfil its duties under these Commitments.

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

At the expense of the Merged Entity, the Monitoring Trustee may appoint advisors, subject to the Commission's prior approval, if the Monitoring Trustee considers the appointment of such advisors necessary for the performance of its duties under the mandate, provided that any fees incurred are reasonable and upon which the Merged Entity has been consulted.

### **12.3 TERMINATION OF MANDATE**

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

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

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

- 12.3.2 If the Monitoring Trustee is removed the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to Paragraph 12.1.2.
- 12.3.3 Aside from being removed in accordance with Paragraph 12.3.1, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the Commitments might not have been fully and properly implemented.

### **13 FAST TRACK DISPUTE RESOLUTION**

- 13.1** In the event that a Prospective New Entrant, a New Air Services Provider or an Intermodal Partner has reason to believe that the Merged Entity is failing to comply with the requirements of Clauses 1.3.12, 6, 7, 8, 9, 10 and 11 of the Commitments vis-à-vis that party, the fast track dispute resolution procedure described in this Clause 13 will apply.
- 13.2** Any Prospective New Entrant, New Air Services Provider or Intermodal Partner who wishes to avail itself of the fast track dispute resolution procedure (a Requesting Party) must notify the Merged Entity in writing setting out in detail the reasons leading that party to believe that the Merged Entity is failing to comply with the requirements of Clauses 1.3.12, 6, 7, 8, 9, 10 and 11 of the Commitments (the "Notice"). The Requesting Party and the Merged Entity will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not to exceed fifteen (15) business days after receipt of the Notice, which may be extended by mutual consent.
- 13.3** Should the Requesting Party and the Merged Entity fail to resolve their differences of opinion through cooperation and consultation as provided for in Paragraph 13.2, the Requesting Party shall nominate an arbitrator.
- 13.4** The Merged Entity shall, within two weeks of receiving notification in writing from a Requesting Party of the appointment of the Requesting Party's arbitrator, nominate its arbitrator and provide to the Requesting Party in writing detailed reasons for its challenged conduct.
- 13.5** The arbitrators nominated by the Merged Entity and the Requesting Party shall, within one week from the nomination of the former, agree to appoint a third arbitrator. If the arbitrators nominated by the Merged Entity and the Requesting Party cannot agree on the nomination of a third arbitrator, they shall ask the President of the International Chamber of Commerce ("ICC") to appoint the third arbitrator.
- 13.6** The arbitrators shall be instructed to establish an arbitration tribunal and to make a preliminary ruling on the contested issues within one month of the appointment of the third arbitrator, which may be extended, if necessary, by the unanimous

agreement of all three arbitrators. The preliminary ruling shall be applicable immediately and until the final decision is issued. The final decision shall be taken by the arbitrators within six (6) months of the appointment of the third arbitrator, which may be extended, if necessary, by the unanimous agreement of all three arbitrators.

- 13.7** In their preliminary ruling and their final decision, the arbitrators shall also decide the action, if any, to be taken by the Merged Entity in order to ensure compliance with Clauses 1.3.12, 6, 7, 8, 9, 10 and 11 of the Commitments vis-à-vis the Requesting Party, including making a preliminary or final binding determination of the disputed contractual conditions in the agreements referred to in Clauses 6, 7, 8, 9 and 10 of the Commitments.
- 13.8** Any of the arbitrators will be entitled to request any relevant information from the Merged Entity or the Requesting Party in order to enable the arbitrators to reach a decision.
- 13.9** The burden of proof in any dispute under this fast track dispute resolution procedure shall be borne as follows: i) the Requesting Party must produce evidence of a *prima facie* case, and ii) if the Requesting Party produces evidence of a *prima facie* case, the arbitrator must find in favour of the Requesting Party unless the Merged Entity can produce evidence to the contrary.
- 13.10** The arbitrators shall be instructed not to disclose confidential information and to apply the standards attributable to confidential information and business secrets by European Community competition law.
- 13.11** The arbitration shall be in English and conducted pursuant to ICC rules. The arbitration award shall, in addition to dealing with the merits of the claim, impose the fees and costs of the prevailing party upon the party that is unsuccessful.
- 13.12** In the event of disagreement between the parties to the arbitration regarding the interpretation of the Commitments, the arbitrators shall seek the Commission's interpretation of the Commitments before finding in favour of any party to the arbitration. The Commission may, at any time, issue a submission during the arbitration procedure.
- 13.13** Nothing in the arbitration procedure shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the EC Treaty.

## **14 GENERAL PROVISIONS**

- 14.1** The Commitments shall take effect on the Effective Date; provided, however, that the Merged Entity shall not be required to transfer any slots with effect prior to the 2006 IATA Summer Season. If the Concentration is abandoned, abrogated, unwound, not approved or disapproved by a relevant government authority, or otherwise terminated, then these Commitments shall automatically cease to apply.



- 14.2** Upon request of the Merged Entity, the Commission may extend any deadline provided for in the Commitments. The Merged Entity's request needs to be submitted at least one (1) month prior to expiry of the deadline. Only in exceptional circumstances shall the Merged Entity be entitled to request an extension within the last month of any deadline. The Merged Entity's request shall be properly reasoned and shall specify the intervening circumstances that in the Merged Entity's opinion justify an extension.
- 14.3** If the approval of the Concentration by another governmental authority is made subject to requirements that are potentially inconsistent with these Commitments, Lufthansa may request a review and adjustment of these Commitments in order to avoid such inconsistencies.

## **15 REVIEW CLAUSE**

- 15.1** The Commission may, in response to a request from the Merged 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 these Commitments.
- 15.2** At the request of the Merged Entity, all the Commitments submitted herein may be reviewed, waived or modified by the Commission based on long-term market evolution. In particular, the Commission shall waive the obligation to make slots available to the extent that it finds that the contractual relationships underlying the Commission's finding of reduced incentives for competition between the merged entity in the Decision and the respective Lufthansa alliance carriers have changed in such a material respect as to remove the concerns identified by the Commission.
- 15.3** The Commission will consider such a request as a matter of urgency in the case of the Frequency freeze provided for in Clause 4, when the Merged Entity can demonstrate that, in the case of exceptional events, additional flights are required on a short term basis.

1 July 2005

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Dr. Holger Häty

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Nicolai von Ruckteschell

Duly authorized to act on behalf of Lufthansa AG

**- Declaration by the German civil aviation authorities to the European Commission**

In order to allow the European Commission to declare, in view of the Commitments proposed by Lufthansa and Swiss, the proposed concentration between Lufthansa and Swiss compatible with the common market, the German civil aviation authorities declare the following:

The German civil aviation authorities shall not use their powers to prohibit, disapprove or in any way hinder sixth freedom price leadership by European Union and European Economic Area carriers on any route between Germany and any third country destination.

The German civil aviation authorities have taken note of the fact that the Commission will take the same approach when assessing future alliances or merger cases in the air transport sector in order to ensure equivalent treatment for German air carriers with respect to sixth freedom price leadership in the other markets of the European Economic Area.

## **Declaration by the Federal Office for Civil Aviation of Switzerland**

In order to allow the European Commission to declare, in view of the Commitments proposed by Lufthansa and Swiss, the proposed concentration between Lufthansa and Swiss compatible with the common market, the Swiss civil aviation authorities declare the following:

a) The Federal Office for Civil Aviation of Switzerland will not use their powers to prohibit, disapprove or in any way hinder sixth freedom price leadership on the following city pairs:

Zurich-Chicago  
Zurich – New York  
Geneva - New York  
Zurich – Los Angeles  
Zurich – Miami  
Zurich – Boston  
Zurich – Montreal  
Zurich – Sao Paolo  
Zurich – Bombay  
Zurich - Bangkok  
Zurich – Hong Kong  
Zurich – Tokyo  
Zurich - Istanbul  
Geneva – Tel Aviv  
Zurich– Johannesburg  
Zurich - Cairo

The Federal Office for Civil Aviation of Switzerland has taken note of the fact that the Commission will take the same approach when assessing future alliances or merger cases in the air transport sector in order to ensure equivalent treatment for Swiss air carriers with respect to sixth freedom price leadership in the other markets of the European Economic Area.

b) The Federal Office for Civil Aviation of Switzerland will grant fifth freedom rights to one or more additional entrants within the framework of the Agreement between the European Community and the Swiss Confederation on Air Transport, to allow such entrant(s) to operate in total one competitive daily direct passenger service on each of the city pairs Zurich-Chicago, Zurich-Los Angeles, Zurich-Boston, Zurich-Bangkok, Zurich-Johannesburg and Zurich-Cairo. In addition, the Swiss civil aviation authorities undertake not to impose restrictions as to price and capacity or other matters which would impede the new entrant(s) from competing effectively on these routes.

c) The Federal Office for Civil Aviation of Switzerland commits to use its best endeavours to negotiate with the United States, Thailand, South Africa, Egypt and Romania a modification of the current designation provisions in its existing ASAs with these countries, in order to allow Switzerland to designate any Swiss Air Carrier owned and controlled by Community nationals.

d) the Federal Office for Civil Aviation of Switzerland commits to use its best endeavours to negotiate with the Romanian civil aviation authorities the introduction of a multiple designation

clause in the existing Air Service Agreement (ASA) between Switzerland and Romania, in order to allow a second carrier to operate daily direct passenger service between Zurich and Bucharest.

Federal Office for Civil Aviation

A handwritten signature in black ink, appearing to read 'Cron', is positioned below the text 'Federal Office for Civil Aviation'.

Raymond Cron, Director General

Berne, 4<sup>th</sup> July 2005