EUROPEAN COMMISSION
DG Competition

Case M.3770 - LUFTHANSA / SWISS

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Rejection of a request for a partial waiver of the Commitments

Date: 25.07.2016

EUROPEAN COMMISSION

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PUBLIC VERSION

MERGER PROCEDURE
COMMITMENTS

To the notifying party:

Dear Sirs,

Subject: **Case No M.3770 – Lufthansa/Swiss**
Commission decision on Lufthansa's request for a partial waiver of the commitments concerning the Zurich–Stockholm and Zurich–Warsaw routes

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1. PROCEDURE

(1) On 4 November 2013, Deutsche Lufthansa AG ("**Lufthansa**") and Swiss International Air Lines Ltd. ("**Swiss**") (the "**Parties**") requested a partial waiver of the commitments ("**the Commitments**") given in the context of the Commission's 2005 clearance decision (the "**Decision**") in Case M.3770 – *Lufthansa/Swiss*.[1]

(2) The waiver request is "partial" in that it only concerns the routes Zurich–Stockholm ("**ZRH–STO**") and Zurich–Warsaw ("**ZRH–WAW**"), and does not concern the other nine European and six long-haul routes for which remedies were given in the Decision.[2]

(3) With respect to the ZRH–STO and ZRH–WAW routes, the Parties ask for "*at least*" a waiver of the fare commitments (Clause 11 of the Commitments), and if possible, also a waiver of the slot remedies and other ancillary access remedies on these two routes. Lufthansa replied on 14 February 2014 to questions from the Commission of 22 November 2013.

(4) On 12 September 2014, representatives of Lufthansa met with the services of the Directorate-General for Competition to discuss the waiver request. At the meeting, Lufthansa presented the new argument that the behavioural commitment in place was detrimental to travellers, notably by hindering Lufthansa from applying a new pricing policy. Lufthansa also offered to terminate one additional contract concluded with SAS in 1995 if that would allow the Commission to grant the waiver request on the ZHR–STO route.[3] According to Lufthansa, that contract could indeed have been seen as the basis for a closer cooperation going beyond standard code-sharing. Lufthansa supplemented its waiver request with further submissions on 16 October 2014 and 26 January 2015.

(5) On 5 March 2015, the services of the Directorate-General for Competition informed Lufthansa that the requested waiver could be granted if Lufthansa made certain modifications to its codeshare agreements with Scandinavian Airlines ("SAS") and Polskie Linie Lotnicze LOT S.A. ("LOT"). Lufthansa responded by e-mail on 28 April 2015 that it would not consider such modifications.

(6) The Monitoring Trustee (the "**Trustee**") provided comments on Lufthansa's submissions on 27 June 2014 and 3 May 2016. The Trustee's comments were transmitted to the Parties on 17 June 2016.

(7) On 22 October 2015, the Commission informed the Parties by letter, signed by Mr Henrik MØRCH, the Director of DG Competition's Directorate F, that it intended to reject the waiver request. The Parties responded to that letter in submissions on 20 November and 24 November 2015 ("the Response").

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1 M.3770 – *Lufthansa/Swiss*, Decision of 4 July 2005, adopted in application of Articles 6(1)b and 6(2) of Council Regulation (EC) No 139/2004 (the "**Merger Regulation**"), as well as the EEA Agreement and Article 11(1) of the Agreement between the European Union and the Swiss Confederation on Air Transport (the "**ATA**").

2 Recitals 1.1.1. and 1.2.1 of the Commitments on page 49 of the Decision.

3 The Bilateral Alliance Agreement with SAS of 1995; see paragraphs (47) and following.

2. BACKGROUND

2.1. Commission's assessment in the Lufthansa/Swiss merger decision of 2005

(8) The Decision conditionally authorised the acquisition by the German airline Lufthansa of Swiss. The Decision was conditional on the Parties' surrendering slots at Zurich and Frankfurt airports and other concessions, including fare commitments.

(9) The Commission had serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and Agreement between the European Union and the Swiss Confederation on Air Transport (the "ATA") on some European and long haul routes. It is relevant to note that, on some of these routes, the overlap resulted from the operations of Lufthansa's Star Alliance[4] partners rather than from either Lufthansa's or Swiss' own operations. Indeed, in the Decision, the Commission concluded that a number of Lufthansa's Star Alliance partners could not be considered competitors of Lufthansa because of the extensive nature of the cooperation between them based on a series of bilateral agreements.

(10) On the basis of an analysis of all those bilateral agreements in force, the Commission added a number of Lufthansa's Star Alliance partners' market shares, among them SAS's and LOT's, to those of Lufthansa in the competitive assessment of the relevant routes between Switzerland, Austria, Sweden, Denmark, Poland, Canada and the USA.

(11) While Swiss was operating on both routes, Lufthansa was not. The routes were operated by Lufthansa's alliance partners SAS (on ZRH–STO) and LOT (on ZRH–WAW). The Commission therefore also took into account the market shares of SAS and LOT in its assessment of the ZRH–STO and ZRH–WAW routes.

(12) In addition to the Star Alliance Agreement,[5] Lufthansa concluded the following bilateral agreements with SAS, likely to have an impact on the degree of competition on the ZHR–STO route:

(a) Bilateral Alliance Agreement, concluded on 11 May 1995;

(b) Codesharing Agreement, concluded on 1 July 1995;

(c) Marketing and Sales Agreement, concluded on 1 July 1995;

(d) Joint Venture Agreement, December, concluded on 1 July 1995 (the "**JV Agreement**").

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[4] Star Alliance is the world's largest global airline alliance founded on 14 May 1997.

[5] "Star Alliance Agreement among the members of the Star Alliance", dated 30 March 2001.

(13) In addition to the Star Alliance Agreement, Lufthansa concluded the following bilateral agreements with LOT, likely to have an impact on the degree of competition on the ZHR–WAW route:

(a) Reciprocal Codeshare Agreement, concluded on 1 June 2002;

(b) Special Prorate Agreement, concluded on 25 August 2003;

(c) Strategic Cooperation Agreement, concluded on 26 September 2003;

(d) Incentive Programme Framework Agreement, concluded on 15 June 2004;

(e) Miles and More Cooperation Agreement, concluded on 1 October 2003.

(14) After analysis of the agreements referred to in recitals (12) and (13), the Commission considered that SAS and LOT were not competitors of Lufthansa, and accordingly, their market shares were added to those of Lufthansa in the Commission's assessment, giving rise to two overlaps on the origin and destination ("O&D") pairs ZRH–STO and ZRH–WAW respectively. Since only Swiss and SAS/LOT were operating on these routes and there were airport congestion problems at ZRH and STO, the Commission had serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" on both routes.

2.2. Commitments with respect to the ZRH–STO and ZRH–WAW routes

(15) With respect to the ZRH–STO and ZRH–WAW routes,[6] the Parties committed to making a specified number of slots available to potential entrants. They agreed to enter into an interline agreement with a new entrant and to allow the new entrant, on request, to be hosted in their frequent flyer programmes ("FFPs").

(16) Moreover, the Parties made the following fare commitment, valid for as long as no entry would take place on the ZRH–STO and ZRH–WAW routes: whenever the Parties reduce a published fare on a comparable reference route where entry has occurred (the "benchmark routes"),[7] they will apply an equivalent reduction on the corresponding fare on the ZRH–WAW and ZRH–STO routes (the "overlap routes").[8]

2.3. Review clauses of the Commitments and the applicable legal framework

(17) According to Clause 15.1 of the Commitments, "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

6 Commitments were also given for other routes of concern, for which however, no waiver was requested.

7 The benchmark routes are currently ZRH–DUB for ZRH–WAW and GVA–BCN for ZRH–STO. Until 2011, the benchmark route for ZRH–STO was GVA–ATH, but following Baboo Airlines' exit from that route, GVA–ATH was replaced with GVA–BCN.

8 M.3770 – *Lufthansa/Swiss*, decision of 4 July 2005, Clause 11.1 of the Commitments.

Pair, waive, modify, or substitute any one or more of the undertakings in these Commitments".[9]

(18) According to Clause 15.2 of the Commitments, "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."[10]

(19) As the circumstances justifying a waiver must be of an "exceptional" nature or show a radical or material change in market conditions, the mere finding of a change in market conditions which is not significant nor permanent nor material does not suffice to conclude that exceptional circumstances have occurred within the meaning of Clause 15.1 of the Commitments. The assessment of the effects of the notified merger is carried out *ex ante* and the Commission must make a reasonable prediction of the developments on the basis of all information available at that time. But in order to qualify as exceptional circumstances for the purposes of Clause 15.1 of the Commitments, subsequent changes in market conditions must be significant, permanent and unforeseeable.[11]

(20) Therefore the Commission considers that, in order to constitute good cause for a waiver request, the alleged changes in market circumstances must ensure that the objective of the merger remedy has been effectively achieved on a lasting basis independently of the remedy (in case of a request for a complete waiver), or it will be better achieved by the requested partial waiver of the Commitments.[12] In the context of a waiver request, such as the present one, the changes in question must therefore ensure that the competition concerns laid out in the Decision no longer arise, and are not likely to arise again.

(21) Also, it is for the Parties to prove that circumstances warranting the application of the Review Clauses of the Committmenst have occurred.[13]

(22) Finally, allowing waivers of commitments on the basis of changes in market conditions that are either not significant, not permanent and the likelihood of which is not certain, or do not ensure that the competition concerns laid out in the Decision no longer arise, and will not arise again, is bound to endanger the effectiveness of the Union merger control regime.

3. ASSESSMENT OF THE WAIVER REQUEST

(23) The Parties submit that the conditions for a waiver of the fare commitments for the two routes set out in Clause 15.2 are met. They argue that that the circum-

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9 Emphasis added.

10 Emphasis added.

11 Cf. Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("Remedies Notice"), (OJ C 267, 22.10.2008, p. 1), paragraph 74.

12 Cf. Remedies Notice, paragraphs 9 and 74.

13 Cf. Remedies Notice, paragraph 74.

stances on the ZRH–STO route have changed since Lufthansa terminated its joint venture agreement with SAS in May 2013 covering routes between Germany and Scandinavia[14] and that the Commission supposedly based its considerations on a joint venture between Lufthansa and LOT that never materialised.[15]

(24) In addition, the Parties claim that the policy of the Commission has undergone a material change over the past 10 years in a way that, if the merger were notified today, such commitments would not have been necessary. According to the Parties, such a change in the Commission's policy should be considered on par with the "*long term market evolution*" of Clause 15.2. The Parties argue, firstly, that the Commission would not identify concerns on the two routes today because its treatment of alliance partners has since changed, and, secondly, that fare commitments are no longer considered an appropriate remedy by the Commission.

4. OPINION OF THE TRUSTEE

(25) The Trustee provided an opinion on Lufthansa's initial waiver request on 27 June 2014 and assessed whether any of the elements contained in the Review Clause have been fulfilled.

(26) The Trustee compared the market conditions in 2005, which formed the basis of the Decision, to the present market conditions and concluded that:

(a) the service patterns on the identified routes ZRH–STO and ZRH–WAW have not changed since 2005, as no other carrier commenced operations on these two routes and no requests for slot transfer or ancillary access remedies by new service providers were made;

(b) the volume of passenger traffic has doubled between 2005 and 2013 on these two routes; and

(c) Swiss' fares for flights in the three lowest tariff-classes on the two identified routes were remarkably lower in 2014 than in 2005; the Trustee however, did not offer any explanations as to the cause of this development. Lastly, the Trustee states that the conditions of Clause 11.1 of the Commitments (the fare commitments) have been respected by the Parties.

(27) The Trustee considers that there has been a "substantial market change"[16] on the ZRH–STO route, in so far as the JV Agreement between Lufthansa and SAS was terminated with effect on 1 June 2013, ending the joint operational policy between Lufthansa and SAS that included pricing and network planning. However, the Trustee considered that offering any conclusions as to whether this would justify a waiver of the Commitments exceeded his mandate.

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14 Note that the geographic terms "Scandinavia" was not explicitly defined in the underlying JV Agreement. The Commission understands that the expression commonly refers to Denmark, Norway and Sweden.

15 M.3770 – *Lufthansa/Swiss*, decision of 4 July 2005, recitals 22 and 105.

16 It appears that the Trustee's Opinion does not differentiate between the notions of "*exceptional circumstances or a radical change in market conditions*" (Clause 15.1), "*long-term market evolution*" and "*material respect*" (Clause 15.2), see also recitals (17) and (18).

(28) The Trustee considers that the three agreements on the ZRH–WAW route concluded before 2005 between Lufthansa and LOT (code-share, special prorate and strategy cooperation agreement) are still in force, and that no substantial market change can be observed**.**

(29) On 3 May 2016, the Trustee amended his initial opinion and stated he had not become aware of any exceptional circumstances within the meaning of Clause 15.1 of the Commitments on either the ZHR–STO or the ZHR–WAW routes. Furthermore, the Trustee added that he had not observed a radical change in market conditions within the meaning of Clause 15.1 of the Commitments in the execution of his functions as the Trustee under Clause 12 of the Commitments. As concerns the reduction of fares on the ZHR–STO and ZHR–WAW routes, the Trustee noted that fares were still remarkably lower in 2014 than in 2005 and that no substantial change occurred between 2014 and 2016.

5. ASSESSMENT OF THE WAIVER REQUEST

5.1. Material change in the market place

5.1.1. Parties' view

(30) The Parties submit that Clause 15.2 of the Commitments concerning a potential change in the contractual relationships underlying the Commission's finding is applicable and request a waiver for the ZRH–STO and the ZRH–WAW routes.

5.1.1.1. ZHR–STO

(31) The Parties' argue that the conditions on the ZRH–STO route have changed since the JV Agreement between Lufthansa and SAS for traffic between Germany and Scandinavia (not including Switzerland), as well as other cooperation going beyond standard code-sharing, was terminated with effect from May 2013. This constitutes a material change in the contractual relationship between Lufthansa and SAS, allowing them to request the waiving of at least the fare commitments on the ZRH–STO route pursuant to Clause 15.2. The Parties explain that while Clause 15.2 specifically refers to slots, "*the underlying rationale clearly also applies to other remedies given with respect to routes that the Commission viewed as affected only because of the relationship between Lufthansa and one of its alliance partners*".[17]

(32) The Parties further indicate that they would terminate the 1995 Bilateral Alliance Agreement between Lufthansa and SAS that was the legal basis of their JV Agreement. This intention, first expressed in the course of the meeting of 12 September 2014 between representatives of Lufthansa and the services of the Directorate-General for Competition, was also reiterated in the Response.

(33) Moreover, in their Response, the Parties argue that the Commission does not have any discretion as to the waiver of the Commitments on the ZRH–STO route, since the wording of Clause 15.2 provides that "*the Commission shall waive the commitments to the extent that the Commission finds that the reduced incentives for competition between the merged entity in the decision and the re-*

[17] Lufthansa's waiver request of 4 November 2013, page 3.

spective Lufthansa alliance carriers have changed in such a material respect as to remove the concerns".

5.1.1.2. ZHR–WAW

(34) In addition, the Parties claim that, contrary to the assumptions in the Decision, the Lufthansa-LOT pre-merger contractual relationship has not evolved into a partnership beyond industry-standard code-sharing. The Parties argue that the Commission's serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" on the ZRH–WAW route was premised on a prospective joint venture between the Parties and LOT on German-Polish routes. According to the Parties, the fact that the Parties have not established such a joint venture therefore constitutes a material change in the two undertakings' contractual relationship.

5.1.1.3. General observations

(35) Furthermore, the Parties stress that Swiss and SAS and Swiss and LOT on the ZRH–STO and ZRH–WAW routes, respectively, compete, as demonstrated by the fact that the prices for flights operated by Swiss and SAS or Swiss and LOT vary. The Parties further argue in their Response that the fact that Swiss and LOT, in particular, compete on the ZRH–WAW route amounts to a long-term market evolution and therefore Clause 15.2 of the Commitments is applicable in relation to the fare commitment on the ZRH–WAW route.

(36) Lastly, at the meeting with the services of the Directorate-General for Competition on 12 September 2014, the Parties explained that the implementation of the fare commitments was extremely costly and time-consuming. The Parties also argued that the fare commitment impeded Swiss from introducing a new comprehensive pricing strategy, directed towards a low(er) cost carrier model, as the ZRH–STO, the ZRH–WAW and the two reference routes would have to be exempted from its application. This would have negative consequences for travellers on these routes who could not benefit from the new pricing strategy.

5.1.2. The Commission's assessment

5.1.2.1. The termination of the JV Agreement between Lufthansa and SAS (ZHR–STO)

(37) First, in relation to the wording of Clause 15.2, the Commission notes that the precise wording is "may" review, waive or modify the Commitments, whereas "shall" is limited to the slots. In any event, the Commission considers that even though it shall waive the slots if it finds that the reduced incentives for competition identified in the Decision have changed materially, it must first assess as a precondition for waiving the slots whether such a change is enough to remove the serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" set out in the Decision. Therefore, even if a change in the contractual relationship between Lufthansa and SAS can be established, it shall still be evaluated whether and to what extent this removes the serious doubts as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA and conerns raised at the time of the Decision.

(38) In recitals (21) and (22) of the Decision, the Commission analysed the scope of all the bilateral agreements between Lufthansa and its Star Alliance partners and assessed case-by-case whether, in light of those agreements, Star Alliance members would have an incentive to compete with Swiss post-merger.

(39) Lufthansa and SAS were both members of the Star Alliance at the time of the Decision. In addition to the Star Alliance Agreement, they had four additional bilateral agreements, as listed in recitals (11) and (12). The Bilateral Alliance Agreement of 11 May 1995 provided the basis for further cooperation in the form of an integrated passenger and cargo air transport system, in which the two networks, facilities and operations complement one another. Beside a joint traffic system, code sharing and cooperation in revenues, fare planning, budgeting, marketing and IT-systems, the Bilateral Alliance Agreement of 11 May 1995 provided for the creation of a German/Scandinavian joint venture. A German/Scandinavian joint venture agreement, that is the JV Agreement as referred to in recital (12), was thus in place since 1995, as well as a codeshare agreement and a marketing and sales agreement; all concluded on the basis of the 1995 Bilateral Alliance Agreement.

(40) The fact that the JV Agreement was terminated at the end of May 2013 constitutes, indeed, a change of the contractual relationship between Lufthansa and SAS in force at the time of the Decision.

(41) The Parties submit in their waiver request that not only the JV Agreement but also all other cooperation going beyond standard code-sharing between Lufthansa and SAS has been terminated. According to the letter of termination, however, both the 1995 Bilateral Alliance Agreement and the 1995 Marketing and Sales Agreement are still in force.[18]

(42) The Parties further argue that the Commission based its assessment of the ZRH–STO route on the assumption of "spill-over effects" from the JV Agreement, namely its possible expansion to also include a cooperation of Swiss and SAS on the ZRH–STO route. However, the Decision does not make reference to this theory.

(43) As the assessment in the Decision is based not only on the said JV Agreement but also on a comprehensive evaluation of the cooperation between Lufthansa and SAS and since the 1995 Bilateral Alliance Agreement enabling such cooperation is still in place, the mere termination of the JV Agreement, i.e. the JV Agreement for traffic between Germany and Scandinavia, does not justify a conclusion that the current contractual relationships between the two undertakings have changed in such a material respect as to remove the concerns set out in the Decision for the ZRH–STO route.

(44) Moreover, a comparison between the competitive conditions on the ZRH–STO and ZRH–WAW routes equally indicates that the JV Agreement alone was not decisive for the conclusion in the Decision that there was no sufficient competition on the ZRH–STO route. Similarly to the ZRH–WAW route, other agree-

[18] Letter of Termination between SAS and Lufthansa of 2 May 2013 points (E) and 4. See also the Alliance Agreement between Lufthansa and SAS of 11 May 1995, *inter alia* "whereas (A)", points 2.1. and 2.2. etc.

ments in place provide for a degree of cooperation between Lufthansa and SAS on the ZRH–STO route likely to raise serious doubts, even after the termination of the JV Agreement. Indeed on the ZRH–WAW route there has never been a joint venture agreement between Lufthansa and LOT and yet the Commission raised serious doubts in the Decision,

(45) Considering the serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" set out in the Decision, and relevant commitments offered for the ZRH–WAW route in the absence of a similar joint venture agreement, and since the cooperation level between Lufthansa and SAS today is comparable to the degree of cooperation between Lufthansa and LOT, the Commission is of the view that the serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" at the time of the Decision would still exist in relation to both routes (absent the commitments).

(46) The Parties further argue in this regard that the Commission raised concerns on the ZRH–WAW route assuming that a joint venture agreement between Lufthansa and LOT would be concluded in the future. However, such consideration is not stated anywhere in the Decision (see also recital (51)).

5.1.2.2. The possible termination of the 1995 Bilateral Alliance Agreement with SAS (ZHR–STO)

(47) As stated in recital (4), in September 2014 the Parties offered, in a meeting with the services of the Directorate-General for Competition, to terminate the 1995 Bilateral Alliance Agreement, if this were considered crucial to the Commission's assessment of the nature of Lufthansa and SAS's cooperation.

(48) Since the 1995 Bilateral Alliance Agreement provides the basis for all other bilateral agreements between the two companies and explicitly refers to a joint venture, its termination seen in conjunction with the termination of the JV Agreement, in principle might amount to a material change in the contractual relationship assessed in the Decision. Therefore, if the Parties were to terminate the 1995 Bilateral Alliance Agreement, this might allow the Commission to consider whether Clause 15.2 of the Commitments could apply in relation to the ZRH–STO route.

(49) However, in light of the evolution of the contractual relationship between Lufthansa and SAS since the adoption of the Decision as discussed in Section 5.4, the Commission considers that the serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" identified at the time of the Decision would likely persist after a potential change in the contractual relationship between Swiss and SAS consisting in the termination of the 1995 Bilateral Alliance Agreement.

5.1.2.3. The contractual relationship between Lufthansa and LOT (ZHR–WAW)

(50) LOT is also a member of the Star Alliance. In addition, it has a strategic cooperation agreement, a reciprocal codeshare agreement, a special prorate agreement and a *Miles&More* cooperation agreement with Lufthansa, as well as an agreement for the participation of LOT in Lufthansa's incentive programmes. Accord-

ing to the Decision, the agreements between LOT and Lufthansa provided the basis for at least joint networking and joint pricing beyond their home Member States. All bilateral agreements were in place at the time of the Decision and still remain in force today. As a result, there has not been any change in the contractual relationship between Lufthansa and LOT since the adoption of the Decision.

(51) The Parties argue that the Decision is based on the potential evolution of the cooperation between Lufthansa and LOT into a joint venture and that the fact that such evolution never occurred amounts to a change in the two companies' contractual relationship. The Commission considers, however, that no reference is made to the possibility of a joint venture in the Decision and as the Commission's assessment was based on the bilateral agreements already in place, the mere lack of a contractual development cannot be seen as amounting to a material change in the contractual relationship between Lufthansa and LOT.

5.1.2.4. Price developments and level of competition

(52) The Parties allege that not only have prices gone down considerably since the adoption of the Decision but that competition exists between Lufthansa and SAS as well as Lufthansa and LOT, which charge different prices for their flights on the ZRH–STO and ZRH–WAW routes respectively.

(53) Given that the preconditions for granting the waiver request are not met, the question of price developments does not need to be discussed in this Decision. However, for the sake of completeness, and given that the Parties have raised the issue, the Commission has considered the issue.

(54) It should first be noted that, after the adoption of the Decision, Swiss entered into a codeshare agreement with SAS on the ZHR–STO route (in 2006) and with LOT on the ZRH–WAW route (in 2007). According to these codeshare agreements, the marketing carrier is free to set prices respecting however the passengers' booking classes, as determined by the operating carrier (the so-called "mapping of fare classes").

(55) The Commission found that the Parties' claim that Swiss and SAS or LOT charge different prices did not appear *prima facie* to be factually correct for individual flights. For such flights, prices offered by the operating carrier were almost identical to those of the marketing carrier (for the same flight). The Parties however argued that prices of individual flights for the same flight were an inappropriate point of reference, as a single flight on a given day does not constitute a relevant market. Instead, the comparison would have to be made between all the flights available on a given day. The Parties submitted graphs showing the comparative evolution of prices on flights scheduled for the same day and operated by each of the carriers on the two routes.

(56) At face value, these graphs appear to indicate a certain degree of price differentiation among flights operated by different carriers on the same day. However, it remains unclear how reliable this analysis is (for example it is unclear to what extent this analysis has factored in the discrepancy in departure times).

(57) The Commission therefore considers that further economic analysis would have to be carried out to verify or reject the Parties' claims in relation to price devel-

opments on the two routes. As set out at recital (22), it was for the Parties to substantiate their assertions with cogent and credible economic evidence.

(58) Further, in their Response, the Parties refer to the conclusion of the Trustee that on the ZRH–WAW route the passengers' volumes have doubled and the fares are remarkably lower in 2014 than they were in 2005. According to the Parties, this development results from the high level of competition between Swiss and LOT on this route, which has led to lower prices and increased demand.

(59) Even though prices have indeed been reduced since the adoption of the Decision, the Parties do not adduce any compelling evidence that any such price reductions are caused by competition between Swiss and LOT. Reductions could also be attributed to the decline in fuel prices or the competitive behavour of other carriers on the reference routes. In particular, the very existence of the price commitments that require the pricing on this route to evolve in parallel to the prices on the reference route where there is competition may have been instrumental in such a decline in fare prices. Therefore, any conclusion on the pricing evolution of Swiss since the Decision and in light of the undertaken fare commitment is not indicative of the competition levels and pricing on the ZRH-WAW route absent the Commitments.

5.1.2.5. New pricing structure

(60) At the meeting between the Parties and the services of the Directorate-General for Competition in September 2014, Lufthansa’s representatives explained their new pricing strategy on intra-European routes, which follows the pricing strategy of low-cost carriers in its core elements (separate pricing for checked baggage, seat reservation, collected miles). According to Lufthansa, such a pricing strategy cannot be introduced on the ZRH–STO and ZRH–WAW routes and their reference routes, as applying the new price policy in conjunction with the correlation structure established for the effective implementation of the Commitments would be very difficult in practice.

(61) In an e-mail dated 19 May 2015, however, Lufthansa informed the Commission that it intended to apply the new pricing structure to all flights of carriers belonging to Lufthansa, including Swiss, from 23 June 2015. The new pricing strategy would be implemented, while respecting the obligations undertaken in the framework of the Commitments.

(62) The Commission requested additional information from the Parties as to the structure and application of the new price policy on 20 May 2015. The Parties submitted their reply to the Commission's request on 8 June 2015, on the basis of which the Commission analysed the compatibility of the new pricing policy with the Commitments and sought to that effect the view of the Trustee. On 12 June 2015, the Trustee confirmed the Parties' position that the new price policy would not infringe the obligations undertaken under the Commitments. Upon a preliminary analysis and considering the Trustee's assessment, the services of the Directorate-General for Competition also reached the preliminary conclusion that the application of the new fare structure would not amount to a circumvention of the Commitments, to the extent that it is applied within the spirit of Clause 11.1 of the Commitments. Lufthansa was informed accordingly.

(63) The Trustee further informed the Commission by e-mail of 26 June 2015 that the new fare structure had been introduced as of 23 June 2015. The fact that the Parties have been able to change their price policy while remaining within the framework set by the Commitments thus confirms that the existence of the fare commitment does not impede Lufthansa from adapting its pricing policy to increase its competitiveness.

5.1.2.6. Termination of fare commitments

(64) Last, it should be noted that Clause 11.1 of the Commitments stipulates that the conditions relating to fares "*[…] shall end for the respective city pair once a New Air Service Provider has begun operations on the respective city pair.*" No entry event has occurred on the two routes. Swiss, SAS and LOT remain the only carriers offering direct services on ZRH–STO and ZRH–WAW. Moreover, Zurich and Stockholm Arlanda airports are congested during peak hours, which renders entry into these routes more difficult and thus less likely.

(65) In their Response, the Parties argue that the lack of entry further demonstrates the high degree of competition and low prices, in particular on the ZRH–WAW route.

(66) However, the Commission considers that it is not possible to reach a conclusion on the competitiveness of the two routes absent the Commitments, given that the Commitments have determined Lufthansa's pricing strategy on the two routes since 2005. Moreover, Lufthansa's claim that the lack of entry is indicative of the high competitiveness of the two routes is not substantiated and could be related to other factors.

(67) The objective requirement set by the Commitments in Clause 11.1 of a New Air Service Provider as referred to in recital (64) has not been met. Therefore, the legal test in relation to the fare commitments has not been met.

5.1.2.7. Conclusion

(68) The termination of the JV Agreement between Lufthansa and SAS for traffic between Germany and Scandinavia does not suffice to justify a conclusion that the current contractual relationships have changed in such a material respect as to remove the concerns set out in the Decision for the ZRH–STO route. Moreover, there is no change in the competitive conditions on the ZRH–WAW route where the cooperation between Lufthansa and LOT seems to have been much lighter than on the ZRH–STO route. As the level and intensity of cooperation among the two operators, as well as the competitive conditions, on each of the ZRH–STO and ZRH–WAW routes remains essentially the same in the absence of the JV Agreement (in particular no entry or exit of competitors has taken place), the same competitive assessment would apply to both routes. Therefore, the legal test set out at the second sentence of Clause 15.2 of the Commitments is not satisfied. Separately, the lack of entry of any new carrier in itself could be seen as justifying the maintenance of the fare commitments on the ZRH–STO and the ZRH–WAW route.

(69) Should the Parties indeed terminate also the 1995 Bilateral Alliance Agreement between Lufthansa and SAS, Clause 15.2 of the Commitments might, in principle and subject to a separate Commission Decision, trigger a review of the

commitments with regard to the ZRH–STO route, but not of the commitments with regard to the ZRH–WAW route, to the extent that the cooperation between Lufthansa and SAS would potentially fall below the degree of cooperation between Lufthansa and LOT (so as to avoid treating the ZRH–STO and ZRH–WAW routes differently, all else being equal and taking account of the fact that cooperation between Lufthansa and LOT, on the one hand, and between Lufthansa and SAS, on the other hand, is the result of a bundle of agreements that has to be considered in its entirety).[19] This, however, is not yet the case. Even if it were the case, the termination of the 1995 Bilateral Alliance Agreement would merely trigger the review clause. This in itself would therefore not suffice to conclude that the waiver requested by the Parties should indeed be granted.

(70) A comparison of the contractual relationship between Lufthansa and LOT which gave rise to serious doubts at the time of the Decision and the current level of cooperation between Lufthansa and SAS, consisting in the codeshare agreement between Swiss and SAS on the ZHR–STO route concluded after the adoption of the Decision and several cooperation agreements in place at the time of the Decision, indicate that the termination of the 1995 Bilateral Alliance Agreement would likely not suffice to conclude that the waiver requested by the Parties should indeed be granted.

5.2. Commission's alleged change of policy approach to alliance partners

5.2.1. Parties' view

(71) The Parties argue that the Commission has fundamentally revised its approach to assessing the role of alliance partners since 2005 and that if the assessment were to be done today, the ZRH–WAW and ZRH–STO routes would not be considered affected markets. Therefore, there would not be any basis for requesting remedies with regard to the serious doubts on these two routes.

(72) According to the Parties, the Commitments reflect a presumption that any alliance partner of one of the Parties should be treated as if it were a party to the merger and that this is a presumption that the Commission has meanwhile abandoned.

(73) In support of their position, the Parties submit that in *Lufthansa/Brussels Airlines* the Commission did not find that Lufthansa's cooperation agreements with SAS and LOT, which had not changed materially since the *Lufthansa/Swiss* merger, raised serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" or that the merger would lessen these airlines' incentives to compete with Brussels Airlines post-merger.[20] As a result, the Commission did not view the putative "overlaps" between Brussels Airlines and Lufthansa's alliance partners SAS and LOT as affected markets. Furthermore, Lufthansa submits that the same approach was fol-

[19] See recitals (12) and following.

[20] M.5335 – *Lufthansa/SN Airholding (Brussels Airlines)*, decision of 22 June 2009, recitals 106-109.

lowed in two further subsequent merger decisions, *Lufthansa/Austrian Airlines*, and *Iberia/British Airways*.[21]

(74) The Parties submitted, annexed to their Response, a Memorandum of 26 September 2008, where they present their views as to the treatment of alliance partners in merger cases. According to the Parties, this Memorandum was submitted upon invitation by the services of the Directorate-General for Competition which was at the time re-evaluating its approach to alliance partners. In this Memorandum, Lufthansa criticises the approach taken in *Lufthansa/Swiss* on grounds that none of the agreements in question envisages an automatic extension to carriers newly acquired by Lufthansa and that agreements of this kind are not for merger control but if needed for an assessment under Article 101.

(75) The Parties argue that the Commission's greater familiarity with the realities of continued competition between alliance partners and the alleged change in policy after *Lufthansa/Swiss* should be considered on par with the kind of "long-term evolution" of market conditions explicitly mentioned in Clause 15.2 (first sentence) of the Commitments as a basis for waiving any of the Commitments.

(76) The Parties further allege a discrimination against *Lufthansa/Swiss*, and point to a merger involving competing alliance partners *Iberia/British Airways,*[22] which was authorised without remedies for overlaps between one of the merging parties and the other's alliance partners.

5.2.2. Commission's Assessment

(77) First, the Parties' claim that cooperation among any alliance partners should not be of concern in the context of merger control is not reflected in the Commission's most recent approach. Every transaction is assessed on the basis of its own merits and in light of the applicable factual and legal circumstances.

(78) The Parties' are directed to the Commission Decision in the *IAG/bmi* case.[23] In that case, the Commission assessed the impact of a code-share agreement between IAG and Royal Jordanian on their incentive to compete post-merger on the London–Amman route. Specifically, bmi operated direct services on the London–Amman route, while IAG only code-shared with its oneworld partner Royal Jordanian. The continuation of the codeshare following the implementation of the merger would have resulted in a "parallel codeshare" (IAG, both, operating direct service and code-sharing on a third party carrier's direct service). The Commission considered that in such a scenario, IAG would not be constrained by Royal Jordanian following the implementation of the merger and thus had serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" on that route. In order to dispel the Commission's serious doubts in that case, IAG undertook to discontinue its current codeshare arrangements with Royal Jordanian insofar as they concerned point-to-point passengers on that route.[24]

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21 M.5440 – *Lufthansa/Austrian Airllines*, decision of 28.8.2009 and M.5747 – *Iberia/British Airways*, decision of 14 July 2010.

22 M.5747 – *Iberia/British Airways*, decision of 14 July 2010.

23 M.6447 – *IAG/bmi*, decision of 30 March 2012.

24 M.6447 – *IAG/bmi*, decision of 30 March 2012, recitals 397–417.

(79) The Commission has not, therefore, as a matter of policy, excluded the relationships between alliance partners from its purview nor the impact of those relationships on their alliance partners' incentive to compete post-merger. This is the case even for cases which concern less close integration and cooperation such as code-sharing. Moreover, as a matter of principle, the Commission carries out its assessment of alliance partners on a case-by-case basis. The fact that the Commission came to different conclusions in some recent decisions, which were each based on different sets of facts and different circumstances, is not a valid reason for revising the Commission's assessment in the Decision.

(80) It follows that cooperation agreements can, generally, lead to a substantial impediment of effective competition, and the Commission remains under duty to take them into consideration when reviewing airline mergers.

(81) Second, the Commission's practice in relation to the treatment of certain airline alliances in other cases does not militate for waiving the Commitments in this case. In particular, any alleged differences in the Commission's approach in its assessment of certain recent airline mergers concerning different markets, than those discussed in the present Decision, cannot be considered as a long-term market evolution or – even more so – a change in the underlying agreements between Lufthansa and its alliance partners.

(82) Third, the Parties allege that the Commission would discriminate against them compared to other airlines, notably IAG Group, by not granting the requested waiver. However, this claim is unfounded. Each case is assessed on its own merits and every commitment waiver request follows the rules outlined by the commitments submitted by the parties themselves. The Commitments in the case at hand require a "*long term market evolution*" for a waiver to be granted. While it is not inconceivable that the Commission's decisional practice may also have an impact on the long term market evolution, nothing in the present case supports the concusion that this has been the case on the ZRH–WAW and RZH–STO routes.

(83) Therefore, the Commission considers that the Parties have failed to prove a "*long-term market evolution*" and, thus, have not met the legal test set out at the first sentence of Clause 15.2 of the Commitments.

5.3. Alleged inconsistency of fare commitments with the Commission's more recent remedies policy

5.3.1. Parties' view

(84) The Parties also submit that purely behavioural commitments such as the fare commitments in question are inconsistent with the Commission's more recent general remedies policy. In addition, the Parties claim that the fare commitments required in *Lufthansa/Swiss* are particularly problematic because they have the potential to distort competition on both the benchmark and the overlap routes, with detrimental effects for consumers.

(85) First, the Parties claim that, in considering whether to lower fares on the benchmark routes, Swiss has to take into account the additional revenue impact on the overlap routes (ZRH–STO and ZRH–WAW). This may prevent the Parties from offering lower fares on the benchmark routes in the first place, which would be

detrimental to O&D passengers on those benchmark routes. According to the Parties, passengers on those benchmark routes are thus deprived of potential fare reductions that would make sense for Swiss as a business matter, if there was no obligation to also lower fares on the overlap routes.

(86) Second, maintaining lower fares (than Swiss would otherwise apply in the absence of the fare commitment) on the overlap routes may also distort competition by artificially reducing the incentives of existing competitors and new entrants to expand their services on the overlap routes.

(87) Third, in their Response, the Parties argue that the fare commitments are not necessary, because the level of competitiveness on the two routes is very high. According to the Parties, the reduction of the prices on the two routes and the fact that no new entry has taken place demonstrates the high degree of competition currently existing on the ZHR–STO and ZRH–WAW routes.

5.3.2. Commission's Assessment

(88) Fare commitments represent a behavioural remedy, whereby the Parties oblige themselves to limit their fares on a route on which they enjoy a monopolistic position.

(89) The Commission clarified in the Commission Notice on remedies that "commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate the serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their practical utility is fully ensured by effective implementation and monitoring in line with the considerations set out in paragraphs 13–14, 66, 69, and if they do not risk leading to distorting effects on competition."[25]

(90) In practice, such a remedy in the airline sector raises a number of issues such as:

(a) the difficulty of identifying comparable routes;

(b) the difficulties related to the monitoring of the companies' discount programs;

(c) the difficulty of identifying the level of competitive fares, especially where the merging parties had extensive cooperation already pre-merger and fares might have been at a supra-competitive level;

(d) the problem of imposing limitations on the setting of fares in flights originating outside the Union; and

(e) the risk that potential entrants would definitively be excluded from the route.

[25] Cf. Remedies Notice, paragraph 17.

(91) Both ZRH–STO and ZRH–WAW are "thin" routes (routes with a relatively small amount of passengers). It follows that, absent new entries since 2005 despite the slot commitment, slot commitments as a stand-alone commitment may not be a satisfactory solution in the present case. The mere fact that the Commission has not considered fare commitments as a complement to slot remedies in some other cases, cannot be a valid reason to waive fare commitments and leave consumers unprotected in the case at hand.

(92) In addition, even if fare commitments have not been considered appropriate in some instances in recent Commission decisions, this is not a valid reason for waiving the Commitments in the present case. In principle, an alleged change in the Commission's policy is not in itself sufficient as a ground for waiving the Commitments in the present case.

(93) The information in the Commission's possession does not show that the Commitments' objectives have been achieved on the lasting basis independently from the remedies the waiver of which is requested. The Parties have not provided evidence for their claim that the lack of entry and the fare reductions on the two routes allegedly result from the competition between Lufthansa and SAS respectively LOT, and not from their undertaking to respect the fare commitments. Rather, according to the Trustee, the fares at least in the three lowest tariff classes went down considerably between 2005 and 2014. This appears to indicate that the fare remedies have actualy been successful in preventing price rises.

(94) It follows that the Parties' claims of the alleged differences in the Commission's review of different individual airline mergers during the last ten years cannot be considered as a substantial change in the market place within the meaning of Clause 15.2, first sentence of the Commitments, or justify the requested waiver.

5.4. The codeshare agreements on the two routes

(95) Even if the conditions for requesting a waiver of the Commitments in the two routes were considered fulfilled, an important change in the contractual relationships of SAS and LOT with Lufthansa and Swiss respectively introduced after the adoption of the Decision, namely the introduction of codeshare agreements, has to be taken into account in assessing the Parties' waiver request.

(96) At the time of the Decision, there were no codeshare agreements between Swiss and SAS on the ZHR–STO route and Swiss and LOT on the ZHR–WAW route. As a consequence of the takeover by Lufthansa, however, a codeshare agreement between Swiss and SAS came into force in March 2006 and a code-share agreement between Swiss and LOT in March 2007.

(97) The codeshare agreements between Swiss and SAS and Swiss and LOT are free-flow parallel hub-to-hub agreements in a duopoly market and cover both O&D passengers and connecting passengers. Under the current codeshare agreements, the marketing carrier has the obligation to respect the passengers' booking classes (the so-called "mapping of fare classes"). The Parties further submit that neither Lufthansa nor Swiss currently have access to SAS' or LOT's inventory. They explain that access is limited to information on whether seats are available at the time of sale and does not extend to how much capacity remains free.

(98) The Parties argue that their codeshare agreements on the two routes enable them to offer better service to their customers. Zurich is Swiss' hub and as a result almost half of the passengers on the two routes are connecting passengers. Through the codeshare agreement, the companies are able to offer their passengers a broader range of flights and thus ensure better connection and shorter travelling time. The Parties further indicate that a codeshare is the only means to broaden their offer on the two routes, as due to technical constraints imposed by the companies' IT-systems, the same result would not be achieved on the basis of pro-rate agreements.

(99) As to the possible impact of such codeshare agreements on competition on each of the two routes, the Commission considers that these existing codeshare agreements are relevant for the assessment of the merger. Should a similar transaction be notified today, the codeshare agreements between Swiss, SAS and LOT may raise competition concerns and the parties may have to offer commitments to remove those concerns, as was the case in *IAG/bmi*.

(100) Furthermore, the codeshare agreements on ZHR–STO and ZHR–WAW have to be seen in conjunction with the other agreements in place between Lufthansa (Swiss), SAS and LOT. The existence of the codeshare agreements, which are but another form of airline cooperation, shows that the degree of cooperation between Lufthansa and LOT as well as Lufthansa and SAS has not decreased, contrary to what is argued by the Parties (at least with regard to the ZRH–STO route).

(101) The Commision's assessment at the time of the Decision was based on an overall review of the contracts in place at the time and the degree of cooperation between Lufthansa, Swiss, SAS and LOT. The result of the assessment at the time was that in particular the degree of cooperation gave rise to serious doubts (absent remedies) as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" which were addressed by the Commitments.

(102) However, following the implementation of the merger, Swiss concluded codeshare agreements with SAS and LOT post-transaction thus increasing the degree of cooperation with SAS and LOT even further. Should the Parties now terminate one or more of the agreements in place at the time of the Decision, the degree of cooperation would still amount to a situation of strong contractual links between Lufthansa and SAS as analysed in section 5.1.2.

(103) Not taking the codeshare agreements into account in the assessment of the waiver request would therefore amount to giving the Parties the possibility to circumvent the application of the Commitments by replacing the old cooperation agreements with new cooperation agreements.

(104) On 5 March 2015, the services of the Directorate-General for Competition discussed the possibility of reducing the scope of their ongoing codeshare agreements with the Parties in order to limit their potential anti-competitive effects. This could potentially be achieved by restricting their cooperation to a "behind and beyond" codeshare, and repealing it for O&D passengers on these two "hub-to-hub" routes. However, in its e-mail dated 28 April 2015, Lufthansa informed the Commission that this would not be commercially acceptable. Therefore, the serious doubts as to the compatibility of the merger with the internal market, the

EEA Agreement and the "ATA" in relation to the Parties' ongoing codeshare agreements in the two routes persist.

(105) Lastly, in an e-mail dated 18 December 2014, the Parties submitted that SAS announced a codeshare agreement with Etihad Airways ("Etihad"), pursuant to which Etihad would be able to place its code on flights operated by SAS to Frankfurt and Zurich. According to the Parties, this codeshare confirms that SAS operates independently from Lufthansa, which currently competes fiercely with Etihad. If SAS and Lufthansa were as close partners as set out in the Decision, SAS would not have entered into a codeshare agreement with one of Lufthansa's main competitors.

(106) The Commission considers however that the cooperation between SAS and Etihad is of a comparatively lighter nature than the one between SAS and Lufthansa, and therefore does not go against close cooperation between Lufthansa and SAS. Etihad itself is a non-Union carrier and therefore does not possess the right to operate the ZHR–STO route.[26] It cannot therefore enter this market by extending its own operations to it; the codeshare will therefore be "unilateral", that is, only SAS will be operating its aircraft on the route, and Etihad is confined to the role of a marketing carrier. Placing Etihad's code on SAS's flights would therefore have but a limited impact on competition on the route. Furthermore, a unilateral codeshare does not amount to a particularly close cooperation between SAS and Etihad. The Commission has in the past concluded that pure marketing codeshares are a less intense form of cooperation and have a lower impact on competition.[27]

6. CONCLUSION

(107) For the reasons set out above, and following a comprehensive consideration of your request, the Commission has come to the conclusion that there are insufficient grounds to grant a waiver.

(108) Since no new entry or other exceptional circumstances or a radical change in market conditions occurred, the conditions for waiving the Commitments pursuant to Clause 15.1 of the Commitments are not fulfilled.

(109) Also, the Parties have failed to demonstrate that the conditions for reviewing, waiving or modifying the Commitments to the Decision pursuant to Clause 15.2 have been fulfilled.

(110) This conclusion is based on five reasons.

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[26] Etihad Group co-controls Alitalia within the meaning of the Merger Regulation (see M.7333 – *Alitalia/Etihad*, recital 22). The Etihad group includes Air Serbia (formerly Jat Airways), the flag carrier and main air-line of Serbia, which Etihad jointly controls together with the Serbian Government (M.7333 – *Alitalia/Etihad*, recital 5). Theoretically therefore both Alitalia and Air Serbia could enter the ZRH–STO route under the European Open Skies framework. However, the Commission does not have any indication that entry of either carrier would be envisaged in the near future, nor have the Parties alleged such an entry.

[27] See e.g. M.7333 – *Alitalia/Etihad*, recitals 164 and following.

(111) First, the termination of the JV Agreement with SAS does not affect the existing contractual basis for further cooperation that was considered in the Decision and would thus be insufficient to trigger a review pursuant to Clause 15.2.

(112) Second, even if the termination of the JV agreement were hypothetically considered relevant in the present case, the competitive situation on both routes would still raise serious doubts as to the compatibility of the merger with the internal market, the EEA Agreement and the "ATA" so that the conditions of Clause 15.2 would not be met. Indeed, on both ZRH–STO and ZRH–WAW, only two carriers operate and they are engaged in a parallel hub-to-hub free-flow codeshare agreements.

(113) Third, on the ZRH–WAW route, no contractual change has occurred since the Decision.

(114) Fourth, the acceptance by the Commission of structural commitments, as opposed to behavioural fare commitments, in certain recent airline cases concerning routes and markets that are not subject to the present Decision cannot be considered as a substantial change in the market or ortherwise warrant the requested waiver. Similarly, the mere fact that fare commitments were not considered in certain recent airline merger cases may not constitute a reason for waiving fare commitments in the present case.

(115) Fifth, the alleged change in the Commission's treatment of alliance partners would not amount to a long term market evolution within the meaning of Clause 15.2 of the Commitments.

(116) Overall, the Commission concludes that the requested waiver of the Commitments does not meet the conditions of Clauses 15.1 and 15.2 (first and second sentences) of the Commitments. Nor would it improve the overall effectiveness of the Commitments. Therefore, the Commission has decided to reject Lufthansa's request for a partial waiver of the Commitments given in the context of the Commission's decision authorising the merger in Case M.3770 – *Lufthansa/Swiss*.

For the Commission

(Signed)
Margrethe VESTAGER
Member of the Commission