



EUROPEAN COMMISSION

DG Competition

***Case M.6447 - IAG / BMI***

Only the English text is available and authentic.

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

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Decision on the implementation of remedies - Art. 6(1)(b)  
in conjunction with 6(2) - Assessment of viability

Date: 30.10.2017



Brussels, 30.10.2017  
C(2017) 7415 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [CONFIDENTIAL]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

IMPLEMENTATION OF  
COMMITMENTS

**To the notifying party:**

Dear Sir/Madam,

Subject: **Case No COMP/M.6447 – IAG / bmi**

**Assessment of the viability of Applicants and evaluation of their formal bids pursuant to Clause 1.4.9 of the Commitments attached to the Decision in the above-mentioned case following the Monitoring Trustee's opinion of 19 October 2017 – Summer 2018 IATA Season**

**1. FACTS AND PROCEDURE**

- (1) By decision of 30 March 2012 ("the Decision") based on Article 6(1)(b) in connection with Article 6(2) of Council Regulation No 139/2004,<sup>1</sup> the Commission declared the concentration by which the undertaking International Consolidated Airlines Group ("IAG", United Kingdom) acquired sole control of the undertaking British Midlands Limited ("bmi", United Kingdom) compatible with the internal market subject to conditions and obligations (the "Commitments").
- (2) Pursuant to the Commitments, IAG procures *inter alia* that slots are made available at London Heathrow airport ("Heathrow") in order to allow one or more prospective entrant(s)<sup>2</sup> to operate or increase their services on the following city pairs identified as routes of concern in the Decision:

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> Defined in the Commitments as "Any Applicant that is not a member of the oneworld Alliance or affiliated with any member of that alliance, able to offer a Competitive Air Service individually or collec-

- the "Identified UK City Pairs": London-Aberdeen and London-Edinburgh and;
  - the "Identified City Pairs": London-Aberdeen, London-Edinburgh, London-Nice, London-Cairo, London-Riyadh and London-Moscow.
- (3) The number of slots to be made available enables prospective entrant(s) to operate up to a total of 7 frequencies per day in total on the Identified UK City Pairs and in addition, up to five frequencies per day in total on the Identified City Pairs (including the Identified UK City Pairs). The Commitments do not foresee a maximum number of slots for each individual route of concern. Instead, it results from the Commitments that there are only global limits, allowing for some flexibility in the way in which slots can be allocated to the various routes of concern: a maximum of 12 daily slot pairs<sup>3</sup> (hereafter: "slots") available for all these routes, and within that global limit, a maximum of 5 daily slot pairs available for London–Nice, London–Moscow, London–Cairo and London–Riyadh.
  - (4) During the winter 2016/2017 Season, one slot pair was awarded to Aeroflot to operate a daily frequency on the London-Moscow route.<sup>4</sup> During the summer 2017 slot release process, seven slot pairs were awarded to Flybe, which operates four daily London-Edinburgh frequencies and three daily London-Aberdeen frequencies.<sup>5</sup>
  - (5) Therefore, for the summer Season 2018, six slot pairs in total remain available for London Heathrow-Nice, London Heathrow-Cairo, London Heathrow-Moscow, London Heathrow-Riyadh, London Heathrow-Aberdeen and London Heathrow-Edinburgh.
  - (6) Aeroflot and Flybe ("the Applicants") informed the Monitoring Trustee of proposed slot requests under the Commitments for the Summer 2018 IATA Season in accordance with Clause 1.4.1 of the Commitments.
  - (7) By 5 October 2017, the Slot Request Submission Deadline for the summer 2018 IATA Season, the Monitoring Trustee received a formal bid for slots from the Applicants pursuant to Clause 1.4.7 of the Commitments.

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*tively by codeshare and needing a Slot or Slots to be made available by IAG in accordance with the Commitments in order to operate a Competitive Air Service" (i.e. a scheduled passenger air transport service on one or more of the routes concerned by the slot release*

- <sup>3</sup> The Commitments require the release of a further 2 slots to Transaero for the London-Moscow route, pursuant to an agreement already entered into by IAG and Transaero before the adoption of the Decision. The Commitments provide that in the event that Transaero did not make use of these two slots and these would become available to IAG, IAG would undertake to procure that these slots will be made available to other prospective entrants such that total number of slots to be released on the various routes of concern would be increased from 12 to 14.
- <sup>4</sup> Decision of 29 July 2016 relating to the slots granted to Aeroflot (the "Winter 2016/17 Slot Award Decision").
- <sup>5</sup> Decision of 20 December 2016 relating to the slots granted to Flybe (the "Summer 2017 Slot Award Decision").

- (8) Table 1 below provides a summary of the slot requests presented by the Applicants, which will be assessed in the remainder of this decision:

**Table 1: Summary of slot requests and compensation offers**

<b>Identified City Pair</b>	<b>Applicant</b>	<b>Number of requested frequencies</b>	<b>Compensation offered Yes / No</b>
London–Moscow <sup>6</sup>	Aeroflot	1 daily	[CONFIDENTIAL]
London–Edinburgh	Flybe	1 additional frequency to Edinburgh on days 6 and 7	[CONFIDENTIAL]
London–Aberdeen	Flybe	1 additional frequency to Aberdeen on day 7	[CONFIDENTIAL]

- (9) Therefore, on the London Heathrow – Moscow route, Aeroflot has applied for one daily frequency at Heathrow Airport, leading to Aeroflot operating a total of 35 weekly frequencies in summer 2018 on the route. On the London Heathrow-Edinburgh route, Flybe plans to increase the number of frequencies to be offered on day six (Saturday) by one frequency to three a day and on day seven (Sunday) by one frequency to four a day from summer 2018. On the London Heathrow-Aberdeen route, Flybe plans to increase the number of frequencies to be offered on day seven (Sunday) by one frequency to three a day from summer 2018.<sup>7</sup>

## **2. REPORTS OF THE MONITORING TRUSTEE ON SLOT APPLICATIONS FOR SUMMER 2018**

### **2.1. Eligibility, slot portfolio, and independence**

- (10) On 19 October 2017, the Monitoring Trustee provided the Commission with a report containing its assessment of the eligibility of the Applicants, their independence and the question whether they have exhausted their slot portfolio. The Monitoring Trustee concluded that both Aeroflot and Flybe are eligible and independent and have exhausted their slot portfolio at Heathrow.

#### *2.1.1. Aeroflot's application*

- (11) Regarding Aeroflot independence of IAG, the Monitoring Trustee submits in substance that the assessment made in the Winter 2016/17 Slot Award Decision remains valid.
- (12) Furthermore, the Monitoring Trustee notes that Aeroflot does not have any London Heathrow slots out on lease.
- (13) Regarding eligibility, in particular on the basis of detailed exchanges with Aeroflot and IAG, the Monitoring Trustee considers that in determining whether Aeroflot has the intention to begin or increase regular operations on the Relevant City Pair, only Aeroflot's activities at Heathrow should be considered. The Monitoring

<sup>6</sup> Operations would be to Sheremetyevo airport (SVO).

<sup>7</sup> Flybe has also submitted the same requests for Winter 2018/19.

Trustee recalls that the overriding objective of the Commitments was to address the effects of the Transaction on the availability of slots at Heathrow which is particularly slot-constrained.

- (14) Upon an in-depth assessment, the Monitoring Trustee concludes that Aeroflot fulfils the definition of a Prospective Entrant, and is an Eligible Air Service Provider for the purposes of the Commitments.

*Conclusion*

- (15) As a consequence of its assessment in relation to the issues of eligibility, exhaustion of slots, and independence, the Monitoring Trustee concludes that the application from Aeroflot for slots for the summer 2018 IATA Season is valid.

*2.1.2. Flybe's application*

- (16) The Monitoring Trustee considers that Flybe's limited commercial arrangements with IAG do not breach the independence requirements of the Commitments as they do not affect the operations on the Relevant City Pairs.<sup>8</sup>

- (17) In addition, Flybe does not have any London Heathrow slots out on lease.

*Conclusion*

- (18) As a consequence of its assessment in relation to the issues of eligibility, exhaustion of slots and independence, the Monitoring Trustee concludes that the application from Flybe for slots for the summer 2018 IATA Season is valid.

**2.2. Assessment pursuant to Clause 1.4.9(a) of the Commitments**

- (19) In its report of 19 October 2017, the Monitoring Trustee assesses (pursuant to Clause 1.4.9(a) of the Commitments) whether each Applicant is a viable existing or potential competitor with the ability, resources and commitment to operate the proposed services in the long term as a viable and active competitive force. To this end, the Monitoring Trustee looked at a number of criteria, including:

(i) Financial health & regulatory approvals:

- The financial health and robustness of the airline – through evaluation of the financial statements, current and planned access to capital;
- The airline's regulatory approvals to operate in the territories relevant to the routes requested; and
- Any key risks to long term viability

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<sup>8</sup> [CONFIDENTIAL]. Aer Lingus has an arm's length codeshare with Flybe pursuant to which Aer Lingus places the Aer Lingus code on certain Flybe operated flights as part of a connecting journey on Aer Lingus' flights (i.e. not on point-to-point).

(ii) Operations and on-board offers:

- Whether the slot times in the business plan are consistent with those offered by IAG and are operationally robust;
- Whether the business plan demonstrates that sufficient aircraft and crew are available to the Applicant, or that it has a credible plan to obtain the aircraft and crew within the timescale indicated;
- Whether the business plan demonstrates that sufficient ground handling, catering and engineering support are available, and appropriate check-in and lounge facilities; and
- Whether the proposed on-board product is competitive with that offered by IAG, and whether it is consistent with achieving similar yields to those achieved by IAG.

(20) In particular, considering the level of effective competitive constraint that the Applicants may be expected to impose on the Parties, the Monitoring Trustee has assessed for the two applications received,:

- The promise of a year round service and the intended use of the slots in future years, as well as the total number of services/frequencies and total additional capacity proposed over the summer and winter seasons combined;
- The pricing structure proposed, taking account of the expected service offering;
- The network characteristics offered by the Applicant, including feed onto Relevant Long-haul Destination/Origin cities;
- Passenger loadings, yield and revenue projections;
- Cost projections;
- Net profit projections; and
- Sensitivity analysis.

### 2.2.1. *Flybe*

(21) Concerning financial health, the Monitoring Trustee considers that Flybe will *[CONFIDENTIAL]* over the next few years, although there are *[CONFIDENTIAL]*.<sup>910</sup> Note is also taken of the profit warning announced by Flybe on 18 October 2017. However, the Trustee considers that Flybe should be able *[CONFIDENTIAL]*. The Monitoring Trustee is of the view that Flybe *[CONFIDENTIAL]*.

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<sup>9</sup> The Monitoring Trustee considers that *[CONFIDENTIAL]*.

<sup>10</sup> Unaudited half year financial results for the six months ending 30 September 2017 are expected to be published by Flybe on its website in November 2017, after the adoption of the present decision.

- (22) The Monitoring Trustee notes that Flybe appears to have all necessary authorizations to operate the routes requested.
- (23) Moreover, regarding Flybe's operations, the Monitoring Trustee states that Flybe's business plan includes slot times that were requested.<sup>11</sup> Moreover, the routes and rotations applied for under the Commitments will be operated by aircraft available through existing commitments for new deliveries and some transfer of capacity from other parts of the Flybe network.
- (24) Concerning availability of ground facilities, no significant concerns arise.
- (25) Concerning the competitiveness of Flybe's on-board service offering, the Monitoring Trustee is of the view that there is sufficient evidence provided of a credible potential competitive operation. The reintroduction of the BA business class product means however Flybe does not have an equivalent product to compete for this passenger market.
- (26) In a composite score on Flybe, the Monitoring Trustee's conclusion with reference to Clause 1.4.9(a) is that concerns in one or more areas could, in the event of adverse circumstances, be material to the effectiveness of the implementation of the Commitments.

#### 2.2.2. *Aeroflot*

- (27) Concerning Aeroflot's financial health, the Monitoring Trustee considers that *[CONFIDENTIAL]*, which is reflected in the EUR 698 million profits reported for 2016, following the losses reported in 2015. Aeroflot will likely *[CONFIDENTIAL]*.
- (28) The Monitoring Trustee considers that Aeroflot has all the necessary approvals to continue operating the London–Moscow route. Indeed, in the bilateral negotiations between the UK and Russian governments on traffic rights (Memorandum of Understanding dated 26 May 2016), the Russian and UK governments agree to allow the first designated carrier to fly up to 35 services per week on the London–Moscow route. Aeroflot will therefore be able to operate the slots requested.
- (29) Furthermore, no significant concerns appear in relation to Aeroflot's proposed operations relating to requested slot times, availability of aircraft and crew as well as availability of ground facilities.
- (30) Finally, there is sufficient evidence provided of a credible potential competitive operation concerning operations and on-board offering.
- (31) In a composite score, the Monitoring Trustee conclusion with reference to Clause 1.4.9(a) is that no significant concerns are raised about the viability of Aeroflot with respect to effective implementation of the Commitments.

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<sup>11</sup> BA has offered the times as contained in Table 7.1 of the report of 19 October 2017. Following the initial request Flybe has requested a recent time change on its day 6 request to 09:20/10:05. BA has currently provided for the original timings during its schedule planning process, but has undertaken to ask ACL for a retime in line with the Flybe request to retime days 1-5 & 7.

### 2.3. The Monitoring Trustee's route-by-route assessment

- (32) In its report of 19 October 2017, the Monitoring Trustee assesses the slot applications for the summer 2018 IATA Season with regard to the London Heathrow – Edinburgh and London Heathrow – Aberdeen routes on which slots are requested by Flybe, and on London Heathrow – Moscow route on which slots are requested by Aeroflot.

#### 2.3.1. *Edinburgh*

- (33) The Applicant's business plan has been assessed on the entirety of the services proposed, including the existing services and the additional frequencies proposed. Further, the increase in total weekly frequencies on the route of 2, from 25 to 27 represents a small change in market offer which does not have a material impact on the viability and competitive restraint of the service. Rather an update to operating conditions at the time of the application, and changes to the business plan of the route have been considered.
- (34) The Monitoring Trustee notes that Flybe demonstrates its viability and effectiveness with regard to slot use, frequency, capacity, as well as the cost projections of its business plan, and profitability. With regard to the pricing and service level of its proposed offering, network and long-haul feed, loadings, yield and revenue projections as well as sensitivity and robustness, the Monitoring Trustee considers that Flybe demonstrates its viability and effectiveness only weakly.
- (35) In its overall assessment, the Monitoring Trustee concludes that Flybe demonstrates that it would be a viable and effective competitor on the London–Edinburgh route only weakly.
- (36) The Monitoring Trustee suggests [CONFIDENTIAL].<sup>12</sup>

#### 2.3.2. *Aberdeen*

- (37) The Applicant's business plan has been assessed on the entirety of the services proposed, including the existing services and the additional frequencies proposed. The increase in total weekly frequencies on the route of 1, from 18 to 19 represents a small change in market offer which does not have a material impact on the viability and competitive restraint of the service. Rather an update to operating conditions at the time of the Application, and changes to the business plan of the route have been considered.
- (38) The Monitoring Trustee notes that Flybe demonstrates its viability and effectiveness with regard to slot use, frequency, capacity, as well as the cost projections of its business plan, and profitability. With regard to the pricing and service level of its proposed offering, network and long-haul feed, loadings, yield and revenue projections as well as sensitivity and robustness, the Monitoring Trustee considers that Flybe demonstrates its viability and effectiveness only weakly.

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<sup>12</sup> See Commission decision of 4 November 2016, C(2016) 7220 (the "Commission Summer 2017 Slot Award Decision"), para 83.



(39) In its overall assessment, the Monitoring Trustee concludes that Flybe demonstrates that it would be a viable and effective competitor on the London–Aberdeen route only weakly.

(40) The Monitoring Trustee [*CONFIDENTIAL*].<sup>13</sup>

### 2.3.3. *Moscow*

(41) The Applicant’s business plan has been assessed on the entirety of the services proposed, including the existing services and the additional frequencies proposed. The additional frequencies, which are in effect transferred to Heathrow from Gatwick rather than being completely new to the London-Moscow market, somewhat improve the attractiveness of the service offering from Heathrow, but have not changed the assessment of the strength of Aeroflot as a viable and effective competitor on the route.

(42) In the Monitoring Trustee's view, in an overall assessment, Aeroflot strongly demonstrates that it would be a viable and effective competitor on the London Heathrow–Moscow route.

## 3. COMMISSION'S ASSESSMENT

### 3.1. Eligibility, slot portfolio, and independence

#### 3.1.1. Aeroflot

(43) Aeroflot currently operates 28 weekly frequencies from London Heathrow to Moscow in the summer season, as well as 7 weekly frequencies from London Gatwick.<sup>14</sup>

(44) Aeroflot applies for 7 weekly frequencies in the summer season on the London Heathrow-Moscow route. If the slots requested were to be granted, Aeroflot would discontinue its current service from London Gatwick, and increase accordingly its services from London Heathrow. The total number of weekly frequencies being operated by Aeroflot from London (Heathrow and Gatwick) to Moscow would remain unchanged, at 35 in the summer season.<sup>15</sup>

#### *Eligibility*

(45) According to Clause 1.1.1 of the Commitments, IAG undertakes to make slots available at “Heathrow” to allow one or more “Prospective Entrant(s) to operate or increase” a “number of new or additional Frequencies [...] on the Identified City Pairs”. Under the Commitments (Clause 0, Definitions), a “Prospective En-

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<sup>13</sup> See Commission Summer 2017 Slot Award Decision, para. 125.

<sup>14</sup> During the winter season, Aeroflot operates 25 weekly frequencies from London Heathrow to Moscow and 7 weekly frequencies from London Gatwick to Moscow.

<sup>15</sup> As mentioned in the Monitoring Trustee report of 12 September 2017, there would be sufficient ASA rights for Aeroflot to operate. Aeroflot maintains the requisite authorisation under the bilateral Air Services Agreement (“ASA”) to operate these frequencies given that the first designated carrier is able to operate 35 flights per week on the London-Moscow route.

trant, “must have the intention to increase regular operations on the one or more of the Relevant City Pairs”.

- (46) Clause 1.2.1, to which the definition of “Relevant City Pairs” states that this term has the meaning given in Clause 1.2.1 and this latter clause refers to Clause 1.1.1 to identify the specific city pairs covered by the Commitments. Clause 1.1 makes reference to “Slots at Heathrow” and Clause 1.1.1 distinguishes between “Identified UK City Pairs” and “Identified City Pairs”. One of the “Identified City Pairs”, according to the Definition for this term in Section 0 of the Commitments is the route between “London-Moscow”.
- (47) The question, as underlined by IAG in its submissions, is whether the expression “London-Moscow” must be interpreted as encompassing also Gatwick Airport, or rather, as referring only to Heathrow airport.
- (48) IAG considers that, under clause 1.1.1 of the Commitments, the purpose of awarding Commitments slots is to provide "new or additional frequencies" on certain Identified City Pairs. The relevant Identified City Pair is defined in the Commitments as London-Moscow, not London Heathrow-Moscow. Since Aeroflot would simply substitute its London Gatwick service for a London Heathrow service, Aeroflot would not provide "new or additional frequencies" on the London-Moscow city pair and, hence, IAG concludes that Aeroflot it is not eligible to obtain the Heathrow slot.
- (49) The Commission considers that IAG’s literal and fragmented interpretation of the Commitments cannot be sustained. The third paragraph of the Commitments states that they need to be interpreted in light of the Commission’s decision, the general framework of EU law (in particular the Merger Regulation), and by reference to the Commission’s Remedies Notice. This obligation basically reflects the consolidated EU case law on how EU law must be interpreted.
- (50) The Court of Justice has constantly ruled that “*in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part*” (see, in particular, Case C-162/09 *Lassal* EU:C:2010:592, para. 49; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para. 50; Case C-306/05 *SGAE* [2006] ECR I-11519, para. 34, and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] EU:C:2007:619, para. 41). Thus, to interpret the context of a provision, one needs to look at the reasons which led to its adoption (Case C-162/09 *Lassal*, para. 50; Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, para. 97, and *Sturgeon and Others*, para. 42).
- (51) Likewise, the Court held that, where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness and allows an interpretation compatible with the general scheme and the spirit of the interpreted provision (see *Lassal*, para. 51-52, and *Sturgeon and Others*, para. 47).
- (52) The Commission considers that in the present case it would be wrong to endorse IAG’s interpretation of the Commitments. Such an interpretation of the Commitments would be at odds with a purposive and systematic interpretation of the Decision and the Commitments.

- (53) The Commission recalls that commitments under the Merger Regulation are defined by the boundaries of the serious concerns raised during the analysis of the proposed concentration. Remedies are tailored-made to the competition concerns identified, as follows from Articles 6.2 and 8.2 of the Merger Regulation and the Commission's Remedies Notice (para. 9) and, whenever a doubt arises as to their scope of application, they must be necessarily interpreted in line with the competition concerns that they were aimed at solving. In the present case, the concerns were focussed on Heathrow airport.
- (54) Recital 58 of the Decision concludes that "*Given that results of the market investigation are inconclusive, the effects of the Transaction for each of the relevant routes will be examined on the narrowest possible market, namely a market comprising flights to and from Heathrow only. In line with the approach adopted in the decision relating to Case No COMP/M.5747 Iberia/British Airways, the effects of the Transaction will also be examined on a wider "London(three)" market comprising flights to and from Heathrow, Gatwick and City. Finally they will also be examined on an even wider "London(five)" market comprising flights to and from Heathrow, Gatwick, City, Luton and Stansted.*" (underline added). It appears also from, notably, recitals 379 and 394 of the Decision that "London" was treated as synonymous with "Heathrow" for the purposes of the Decision's analysis.
- (55) Therefore IAG's interpretation would run contrary to the effectiveness of the Commitments, because it would impede the increase in the service offered by a competitor of IAG in this very congested airport.
- (56) The above approach finds also strong support in the systematic interpretation of Clause 1.2.1, Clause 1.1.1 and Clause 1.1 of the Commitments, which are the relevant clauses to interpret the definition of "Relevant City Pairs". The heading of the latter Clause refers to "Slots at Heathrow" which IAG agrees to procure in the Identified City Pairs (i.e. one type of "Relevant City Pairs", the other being "Identified UK City Pairs"). It is clear, therefore, that the reference to "London-Moscow" further below in Clause 1.1.1 can only refer to the route "Heathrow-Moscow".
- (57) Finally, the Commission considers that whether Gatwick and Heathrow might now be substitutable (which in any event does not appear to be the case) would be irrelevant for the purposes of interpreting correctly the scope of the Commitments. Gatwick was not a concern for the Commission when the Decision was adopted, but only Heathrow and, therefore, the remedies offered must be interpreted in light the concerns raised at that time by the Commission, and not on the basis of further developments not anticipated in the Decision, such as the possibility that Gatwick might now be a substitutable airport because there are services from Gatwick which cover the London-Moscow route. This is an ex-post development, which cannot be used to alter the scope of the Commitments accepted by the Decision.

#### *Slot portfolio*

- (58) Furthermore, the Commission considers that Aeroflot has exhausted its slot portfolio at London Heathrow.

### *Independence*

- (59) An applicant must be independent of the Parties. The criteria for an applicant to be considered independent are set out in the definition of a "Prospective Entrant".
- (60) Aeroflot is not an associated carrier belonging to the same group as IAG. It does not have common ownership with British Airways (or IAG) and it does not belong to the oneworld alliance.
- (61) On 26 September 2012, the Commission issued a decision concluding that Aeroflot did not fulfil the criteria in Clause 1.4.4 of the Commitments in that it was not independent of and unconnected to IAG.<sup>16</sup> However, based on the Monitoring Trustee's report of 12 September 2017, the Commission notes that the Commercial Agreement between British Airways and Aeroflot which led to such conclusion in 2012, was terminated on 1 January 2014, and that no new commercial agreement has been concluded with either IAG or its affiliates since that date. Therefore, a material change in circumstances has occurred since the assessment conducted in 2012.<sup>17</sup> However the Commission notes that there remains a commercial agreement with a requirement for British Airways to make royalty payments to Aeroflot, as part of the provision of Trans-Siberian overflight traffic rights in an agreement dated 20 May 1987. This requirement is common to a number of European airlines using these flight paths. Overall, the Commission considers that British Airways (and thus IAG) and Aeroflot do not cooperate on the Relevant City Pair in the meaning of the Commitments.<sup>18</sup>
- (62) Aeroflot does not have a codeshare agreement with IAG and does not cooperate with IAG on the London-Moscow route in the provision of passenger air transport services.<sup>19</sup>
- (63) In line with the Monitoring Trustee's assessment, the Commission thus considers that Aeroflot meets the independence criteria set out in the Commitments definition of the term "Prospective Entrant".

### *Conclusion*

- (64) To conclude, on the basis of all available evidence, Aeroflot is a Prospective Entrant and an Eligible Air Service Provider for the purposes of the Commitments on the London-Moscow route.

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<sup>16</sup> Commission decision of 26 September 2012, C(2012) 6904, recital 44.

<sup>17</sup> The Monitoring Trustee considers that a material change in circumstances occurred between the initial assessment of the Trustee during the Summer 2013 slot release process and the Winter 2016/17 process which led the Trustee to revise its conclusions for Winter 2016/17 to determine that Aeroflot was independent of IAG. Aeroflot was subsequently awarded slots on the London-Moscow route during that season. For the Summer 2018 season, in the view of the Monitoring Trustee, the situation concerning Aeroflot's independence has not changed.

<sup>18</sup> A similar assessment leads to a similar conclusion in the Commission Summer 2017 Slot Award Decision.

<sup>19</sup> The only agreement in place between BA and Aeroflot is a standard industry interline agreement, which is considered as arms' length.

### 3.1.2. Flybe

- (65) Flybe is not an associated carrier belonging to the same group as IAG. It does not have common ownership with British Airways (or IAG) and it does not belong to the oneworld alliance. Flybe does not have a codeshare agreement with IAG and does not cooperate with IAG on the London-Aberdeen and London-Edinburgh routes in the provision of passenger air transport services.<sup>20</sup>
- (66) In line with the Monitoring Trustee's assessment, the Commission thus considers that both Aeroflot and Flybe meet the independence criteria set out in the Commitments definition of the term "Prospective Entrant".
- (67) Furthermore, Flybe has exhausted its slot portfolio at London Heathrow.
- (68) To conclude, on the basis of all available evidence, Flybe is a Prospective Entrant and an Eligible Air Service Provider for the purposes of the Commitments on the London-Aberdeen and London-Edinburgh routes.

### 3.2. Assessment of the applications

- (69) Pursuant to Clause 1.4.9(a) of the Commitments, the Commission shall assess whether each applicant is a viable existing or potential competitor, with the ability, resources and commitment to operate services on the Relevant City Pairs in the long term as a viable and active competitive force.
- (70) Among the viable applicants the Commission shall give preference to the applicant (or combination of applicants) which will provide the most effective competitive constraint on the routes of concern. Given that no competing applications have been received on any of the available routes and that the applications received are for less than the full portfolio of 13 slots available under the Commitments, it is not necessary for the Commission to rank the Applicants in order of preference pursuant to Clause 1.4.9(b).

#### 3.2.1. Flybe

- (71) Flybe is one of Europe's major regional carriers and has a long track record of operating regional services throughout Europe and in particular in the UK.
- (72) For the financial year 2016/17 Flybe reported a 13% increase in the revenues (GBP 707 million vs GBP 624 million in 2015/16), and a GBP 19.9 million loss before tax (profit before tax in 2015/16 was GBP 2.7 million). Without taking into account the revaluation on USD aircraft loans (GBP 13.2 million) the group adjusted loss before tax as of 31 March 2017 was (GBP 6.7) million. The Monitoring Trustee highlights that pre-tax loss in financial year 2016/17 was mainly driven by
  - (a) a 15% increase in operating costs predominantly due to the 12% increase in seat capacity (to 12.7m seats vs. 11.3m in 2015/16);

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<sup>20</sup> Any commercial arrangements, as described in the Monitoring Trustee's report of 12 September 2017, are not relevant to the London-Aberdeen and London-Edinburgh routes.

- (b) a 3.6% fall in revenue per seat due to the increased capacity but also attributed to competitive market conditions.
- (73) Flybe had GBP 115 million of cash and cash equivalents as of 31 March 2017 (GBP 164 million on 31 March 2016). This cash decrease appears due to capital expenditure on fleet. However it appears sufficient to guarantee repayment of borrowings in the next 12 months (GBP 21 million, including borrowings related to fixed interest rates). Nevertheless, considering financial ratios, any negative event could worsen the financial health of the company in the short term.
- (74) As part of the Monitoring Trustee's monthly monitoring of Flybe's operations outlined in the Commission Summer 2017 Slot Award Decision, Flybe was asked to provide the Trustee with monthly cash statements. Over the period of operations March 2017 to August 2017, Flybe has reported a cash position of [CONFIDENTIAL].
- (75) [CONFIDENTIAL]
- (76) The Commission also takes into account the announcement made by Flybe on 18 October 2017, indicating that adjusted profit before tax ('PBT') is currently expected to be in the range of GBP 5 million to GBP 10 million for the first half of this financial year (H1 2016/17 adjusted PBT of GBP 15.9 million). This would relate to maintenance costs. The announcement also highlighted that with the fleet size now reducing, and consequently both yield and load factors are increasing. The net debt would remain broadly in line with year ended 31st March 2017.<sup>21</sup> [CONFIDENTIAL]
- (77) As highlighted by the Monitoring Trustee, some concerns would appear over [CONFIDENTIAL]. [CONFIDENTIAL]
- (78) Flybe holds a valid operating certificate.
- (79) Flybe is already present in Edinburgh, Aberdeen and London Heathrow where it has access to the necessary ground facilities.
- (80) Flybe intends to operate the London Heathrow–Edinburgh and Aberdeen routes with [CONFIDENTIAL].<sup>22</sup>
- (81) Flybe intends to operate the service throughout the year (both IATA summer and winter seasons) and to continue the service indefinitely on the two routes.

#### 3.2.1.1. London Heathrow – Edinburgh

- (82) Flybe currently operates four daily frequencies on the London – Edinburgh route, on Monday to Friday, two frequencies on Saturdays and three frequencies on Sundays. The request is about an incremental increase in frequencies, by one frequency on Saturday and Sunday, with services increasing from Summer 2018 to

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<sup>21</sup> <https://otp.tools.investis.com/clients/uk/flybe1/rns/regulatory-story.aspx?cid=59&newsid=940655>.

<sup>22</sup> Flybe has [CONFIDENTIAL].

three frequencies on Saturday and four frequencies on Sunday.<sup>23</sup> These frequencies are spread across the day, and have to be compared with the 12 frequencies planned to be offered by IAG.<sup>24</sup>

- (83) In terms of annual capacity, Flybe would offer [CONFIDENTIAL] flights (vs [CONFIDENTIAL] flights under the previous planning) and [CONFIDENTIAL] seats (vs [CONFIDENTIAL] in the previous planning) on this route.
- (84) The actual performance compared to the previous business plan prepared by Flybe for the route shows that [CONFIDENTIAL].<sup>25</sup>
- (85) [CONFIDENTIAL], the assessment made by the Commission in its Summer 2017 Slot Award Decision remains valid to a large extent for the enhanced operations including only two additional slots (from 25 to 27 weekly slots). For instance, the proposed incremental frequencies make the overall service offering [CONFIDENTIAL].
- (86) Over the medium term 3-year period, Flybe expects to [CONFIDENTIAL]. In light of a sensitivity analysis provided by the Trustee [CONFIDENTIAL]; therefore the Commission is of the view that these projections provide [CONFIDENTIAL].
- (87) The Commission considers that the proposed incremental frequencies do not have a material impact on the assessment of the strength of Flybe as a viable and effective competitor on the route.
- (88) As already concluded in the Commission Summer 2017 Slot Award Decision, to mitigate any risk that Flybe would not operate on the route as envisaged in its application, and in particular in case of risk of Misuse, the Monitoring Trustee should closely and regularly monitor Flybe's performance on the London Heathrow–Edinburgh route under the relevant provisions of the Commitments, in particular Clause 1.3.6 in order to identify any early sign of possible risks on the route.
- (89) Based on the above, the Commission considers that Flybe is a viable potential competitor of IAG on the London Heathrow–Edinburgh route, with the ability, resources and commitment to operate services on this route in the long term as a viable and active competitive force.

#### 3.2.1.2. London Heathrow – Aberdeen

- (90) Flybe currently operates three daily frequencies on the London – Aberdeen route, on Monday to Friday, one frequency on Saturday and two frequencies on Sundays. The request is about an incremental increase in frequencies, by one frequency on Sunday, with services increasing from Summer 2018 to three frequencies.<sup>26</sup>

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<sup>23</sup> The same increases have been requested by Flybe for Winter 2018/19.

<sup>24</sup> IAG would use a mix of Airbus 319, Airbus A320, Airbus A321, and Boeing 767 aircraft.

<sup>25</sup> However, in its 2018 business plan, Flybe mentions that [CONFIDENTIAL]. The same applies to the London Heathrow-Aberdeen route.

<sup>26</sup> The same increases have been requested by Flybe for Winter 2018/19.

These frequencies are spread across the day, and have to be compared with the 8 frequencies planned to be offered by IAG.<sup>27</sup>

- (91) In terms of annual capacity, Flybe would offer [CONFIDENTIAL] flights (vs [CONFIDENTIAL] flights under the previous planning) and [CONFIDENTIAL] seats (vs [CONFIDENTIAL] in the previous planning) on this route.
- (92) The actual performance compared to the previous business plan prepared by Flybe for the route shows that [CONFIDENTIAL].
- (93) On this route also, [CONFIDENTIAL], the assessment made by the Commission in its Summer 2017 Slot Award Decision remains valid to a large extent for the enhanced operations including only one additional slot (from 18 to 19 weekly slots). For instance, the proposed incremental frequency makes the overall service offering [CONFIDENTIAL].
- (94) Over the medium term 3-year period, Flybe expects [CONFIDENTIAL]. In light of a sensitivity analysis provided by the Trustee [CONFIDENTIAL]; therefore the Commission is of the view that these projections provide some [CONFIDENTIAL].
- (95) The Commission considers that the proposed incremental frequency does not have a material impact on the assessment of the strength of Flybe as a viable and effective competitor on the route.
- (96) As already concluded in the Commission Summer 2017 Slot Award Decision, to mitigate any risk that Flybe would not operate on the route as envisaged in its application, and in particular in case of risk of Misuse, the Monitoring Trustee should closely and regularly monitor Flybe's performance activities on the London Heathrow–Aberdeen route under the relevant provisions of the Commitments, in particular Clause 1.3.6, in order to identify any early sign of possible risks on the route.
- (97) Based on the above, the Commission considers that Flybe is a viable potential competitor of IAG on the London Heathrow–Aberdeen route, with the ability, resources and commitment to operate services on this route in the long term as a viable and active competitive force.

### 3.2.2. Aeroflot - London Heathrow–Moscow

- (98) Aeroflot holds a valid operating certificate.
- (99) Aeroflot's fleet comprises [CONFIDENTIAL] aircraft with over 50 on order. It plans to operate the service with A321 aircraft, A330 aircraft, and B737-8 aircraft.
- (100) In 2016 Aeroflot reported profit of around 700 million before tax (vs loss of EUR 21.3 million in 2015). 2016 audited accounts reported EUR 412 million of cash and cash equivalent as of 31 December 2016 (2015: EUR 402 million). At the end of the second quarter of 2017, cash held was at EUR 1,062 million. However,

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<sup>27</sup> IAG would use a mix of Airbus 319, Airbus A320, and Airbus A321 aircraft.



there may still be some concern about possible impacts from the current circumstances in Russia, which may relate to the RUB-USD exchange rate.

- (101) Aeroflot has been successfully operating the London–Moscow route in the past and will be able to build on existing infrastructure and expertise.
- (102) Aeroflot has ground handling agreements in place at London Heathrow. Aeroflot self-handles at SVO.
- (103) In general, the assessment of Aeroflot made in the Winter 2016/17 Slot Award Decision remains valid.
- (104) Aeroflot intends to increase its existing service by one daily frequency on the London Heathrow–Moscow from Summer 2018 and continue to operate this frequency beyond this period. This requested slot will replace the existing daily service currently operated from London Gatwick. In total, Aeroflot will offer 35 weekly frequencies in the summer and 32 weekly frequencies in the winter seasons. The Monitoring Trustee confirms that flights are scheduled throughout the day with daily frequencies varying according to the day of the week and season between four and seven frequencies per day.
- (105) These are higher frequencies than that currently offered by BA (3 per day averaging 21 weekly frequencies for summer 2017).
- (106) Aeroflot intends to operate the service throughout the year (both IATA summer and winter seasons) and to continue the service beyond summer 2018. It would offer *[CONFIDENTIAL]* flights and *[CONFIDENTIAL]* seats per year.
- (107) Aeroflot plans to operate the Moscow service using a mix of Airbus A330, Airbus A320 (family), and Boeing B738 aircraft providing two classes of service.
- (108) The actual performance compared to the business plans prepared for Winter 2016/17 and Summer 2017 for the route shows that Aeroflot achieved *[CONFIDENTIAL]*.
- (109) Aeroflot will have a very strong market position on the route, although British Airways has the right to increase operations and offer up to 35 weekly frequencies as the first designated carrier of the United Kingdom under the current ASA.<sup>28</sup>
- (110) In relation to fares, the lead-in fares proposed by Aeroflot's would be *[CONFIDENTIAL]*.
- (111) Therefore, the Commission considers that frequencies, capacities, service offering and pricing of by Aeroflot would be competitive.

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<sup>28</sup> Other carriers from both the Russian and UK side would have the right to apply to operate flights between London and Moscow as second designated carriers under the ASA. While granting an additional frequency is likely to increase the market position of Aeroflot, such assessment of the Applicant's competitive position is not required when assessing the business plan pursuant to the Commitments, which specify the criteria for the Commission's assessment.

- (112) Aeroflot does not have other long haul operations at Heathrow airport apart from the London-Moscow route. At the Russian end of the route, Aeroflot has simulated the additional value the new flight from London Heathrow would provide and has indicated that it expects to see the largest positive impacts [CONFIDENTIAL].
- (113) Against an estimated historical load factor of [CONFIDENTIAL]<sup>29</sup>, the first year of the business case realistically forecasts a [CONFIDENTIAL]. The load factor is expected to evolve to [CONFIDENTIAL] in Year 2 and reach [CONFIDENTIAL] by Year 3.
- (114) While Aeroflot's costs are [CONFIDENTIAL], the Commission considers that they are reasonable because [CONFIDENTIAL].
- (115) Taking into account [CONFIDENTIAL], as considered by the Monitoring Trustee, profits [CONFIDENTIAL].<sup>30</sup>
- (116) In light of the above, the Commission concludes that Aeroflot is a viable competitor with the ability, resources and commitment to operate services on the London Heathrow–Moscow route in the long term as a viable and active competitive force.

### **3.3. Conclusion**

- (117) In the light of the above, taking into account the relevant evidence and the analyses of the Monitoring Trustee, the Commission concludes that both Applicants meet the criteria in Clause 1.4.9 in that they are viable competitors with the ability, resources and commitment to operate services in the long term as a viable and active competitive force on the Relevant City Pairs.

## **4. OVERALL CONCLUSION**

- (118) The Commission considers that Aeroflot and Flybe are independent of and unconnected to IAG and have exhausted their own slot portfolios at Heathrow within the meaning of Clause 1.4.4 of the Commitments.
- (119) Furthermore, the Commission considers that Aeroflot and Flybe are viable potential competitors of IAG on the routes for which they request slots under the Commitments, with the ability, resources and commitment to operate services on these routes in the long term as viable and active competitive forces.
- (120) This decision is adopted pursuant to Clause 1.4.9 of the Commitments.

*For the Commission,*

*(Signed)*  
*Johannes LAITENBERGER*  
*Director-General*

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<sup>29</sup> Winter 2016/17 and summer 2017.

<sup>30</sup> Forecast appear [CONFIDENTIAL], as described by the Monitoring Trustee.