



EUROPEAN COMMISSION
DG Competition

Case M.9287 – Connect Airways/Flybe

Only the English text is available and authentic.

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

Article 7(3)
Date: 21/02/2019



EUROPEAN COMMISSION

Brussels, 21.2.2019
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PUBLIC VERSION

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 [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying parties

**Subject: Case M.9287 – Connect Airways/Flybe
Commission decision pursuant to Article 7(3) of Council Regulation No 139/2004¹ and Article 57 of the Agreement on the European Economic Area²
Request for derogation**

Dear Sir or Madam,

- (1) On 12 February 2019, Virgin Atlantic Limited (“Virgin Atlantic”, United Kingdom), Cyrus Capital Partners, L.P. (“Cyrus”, United States of America), and Stobart Aviation Limited (“Stobart Aviation”, United Kingdom) requested, pursuant to Article 7(3) of the Merger Regulation, a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation (the “Application for a derogation”). The Application for a derogation is submitted with regard to the proposed acquisition by Virgin Atlantic, Cyrus and Stobart Aviation of joint control over the business made of Flybe Group plc (“Flybe Group”, United Kingdom) and its trading subsidiaries Flybe Limited and

¹ 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.

² OJ L 1, 3.1.1994, p. 3 (the “EEA Agreement”).

Flybe.com Limited, as well as Propius Limited (“Propius”) and Stobart Aviation’s wet lease operations (“Stobart Air”), by way of purchase of shares (the “Transaction”).

- (2) Virgin Atlantic, Cyrus, Stobart Aviation and Flybe Group are together referred to as the “Parties”.

1. THE PARTIES

- (3) Virgin Atlantic is, through its wholly-owned subsidiary Virgin Travel Group Limited, the ultimate holding company of Virgin Atlantic Airways Limited (“VAA”), and Virgin Holidays Limited, a tour operator in the United Kingdom.
- (4) VAA is an airline registered in the United Kingdom, which flies to 34 destinations worldwide, including locations across the United States, Canada, Mexico and the Caribbean, and certain destinations in Africa, the Middle East and Asia. VAA primarily provides passenger air transport services but also cargo air transport services as well as maintenance, repair, and overhaul (“MRO”) services.
- (5) Virgin Atlantic is currently jointly controlled by Virgin Group Holdings Limited (“Virgin Group”) and Delta Air Lines, Inc. (“Delta”).³ On 8 January 2019, before the submission of the Application for a derogation, Air France-KLM S.A. (“AFKL”, France), Delta and Virgin Group notified the Commission of their intention to acquire joint control over Virgin Atlantic within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation. That concentration was cleared unconditionally by the Commission on 12 February 2019.⁴
- (6) Consistent with its previous practice, the Commission undertakes to review notified concentrations affecting identical or overlapping markets in the order in which they are notified to it on a "first come, first served" basis, based on the date of notification.⁵
- (7) The Commission notes in that regard that, in assessing the competition effects of a proposed transaction under the Merger Regulation, it needs to compare the competitive conditions that would result from the notified concentration with those that would have prevailed in the absence of the concentration. As a general rule, the competitive conditions prevailing at the time of notification constitute the relevant framework for evaluating the effects of a transaction. In some circumstances, however, the Commission may take into account future changes to the market that can be reasonably predicted.

³ See Case M.6868 – *Delta Air Lines/Virgin Group/Virgin Atlantic Limited*.

⁴ See Case M.8964 – *Delta/Air France-KLM/Virgin Group/Virgin Atlantic*. Completion of this transaction remains subject to a number of regulatory approvals, including a grant of antitrust immunity for the joint venture from the US Department of Transportation. The latter is not expected before July 2019, according to Virgin Atlantic, Cyrus and Stobart Aviation. Therefore, AFKL is not expected to acquire joint control over Virgin Atlantic before July 2019.

⁵ See for example Cases M.7962 – *ChemChina/Syngenta*; M.6214 – *Seagate/HDD Business of Samsung*; M.6203 – *Western Digital Ireland/Viviti Technologies*.

- (8) Therefore, given the circumstances in this case, the Transaction should be assessed taking into account the acquisition of joint control by AFKL over Virgin Atlantic, together with its current parents Delta and Virgin Group, notified on 8 January 2019 and cleared unconditionally on 12 February 2019.
- (9) The starting point for the Commission's assessment of the Transaction is therefore a market structure in which Virgin Atlantic is jointly controlled by AFKL, Delta and Virgin Group.
- (10) AFKL and Delta provide passenger air transport services, cargo air transport services, and MRO services. Each of AFKL and Delta flies to more than 300 destinations worldwide. Virgin Group is the holding company of a group of companies active in a wide range of products and services worldwide. In particular, Virgin Group jointly controls Virgin Rail Group Holdings Limited, which operates the Inter City West Coast rail franchise in the United Kingdom.⁶
- (11) Cyrus is an investment adviser managing over USD [4] billion in securities and loans. Its client base is predominantly endowments, foundation and family offices. Cyrus has non-controlling minority investments (substantially less than [...] % of shares) in [three other airlines].
- (12) Stobart Aviation invests in, develops and operates a number of aviation-related businesses. It controls London Southend Airport, Carlisle Lake District Airport, the Stobart Jet Centre, Stobart Aviation Services, Stobart Air and Propius, its aircraft leasing business. Stobart Aviation forms one of the three core operating divisions of Stobart Group, the other two divisions being Energy and Rail & Civils. Stobart Group also holds a portfolio of infrastructure assets and investments.
- (13) Flybe Group is the parent company of Flybe Limited, which owns Flybe Aviation Services Limited, and of Flybe.com Limited (Flybe Limited, including Flybe Aviation Services Limited, and Flybe.com Limited are together referred to as "Flybe"). Flybe is a British regional airline, which currently operates 190 routes serving 12 countries from 73 departure points in the United Kingdom (29 routes) and other European countries (44 routes). Flybe operates a fleet of 76 aircraft (most of which are small turboprop aircraft with 78 or fewer seats).
- (14) In addition to its scheduled passenger regional airline services, charter and cargo transport services and white-label flying for third party airlines, Flybe's training academy provides pilot, crew, engineering and other training services in-house and to third parties. Flybe also owns a MRO facility servicing both internal and third party customers.

⁶ According to Virgin Atlantic, Cyrus and Stobart Aviation, the current franchise is due to expire in March 2020. In March 2016, the UK Department for Transport ("DfT") announced that the West Coast rail franchise would be integrated with the development and introduction of High Speed 2 services to create a new franchise (the "West Coast Partnership"). Three bidders have been shortlisted to run the West Coast Partnership and their proposals (submitted in July 2018) are currently being assessed by the DfT. Virgin Group [...]

2. THE CONCENTRATION

2.1. Overview

- (15) The Transaction comprises the following two transactions, which in turn comprise three acquisitions by Virgin Atlantic, Cyrus and Stobart Aviation.
- (16) On 11 January 2019, Connect Airways Limited (“Connect Airways”), a mere acquisition vehicle jointly owned by Virgin Atlantic, through its wholly-owned subsidiary Virgin Travel Group Limited (30%), Cyrus, through its wholly-owned subsidiary DLP Holdings S.à r.l. (40%), and Stobart Aviation (30%), announced a recommended cash offer to acquire the entire issued and to be issued share capital of Flybe Group, by way of a scheme of arrangement under Part 26 of the UK Companies Act 2006 (the “first transaction”).⁷
- (17) Due to Flybe’s degrading financial position⁸ and in order to lessen the risk exposure of Flybe’s commercial counterparties (notably its credit card acquirers), the Parties had to arrange for a quicker change of control over Flybe. On 15 January 2019, Flybe Group and Connect Airways thus entered into a share purchase agreement, pursuant to which Connect Airways would acquire the entire issued share capital of Flybe (Flybe Group’s trading subsidiaries) (the “second transaction”).⁹
- (18) As part of the second transaction, Stobart Aviation will offer to sell to Connect Airways as consideration for its shareholding in Connect Airways (and resultantly Flybe) the entire issued share capital of Propius (through Propius Holdings Limited) and 40% of the ordinary share capital of Stobart Air (through Everdeal 2019 Limited).¹⁰

2.2. Acquisition of joint control over Flybe Group, Flybe, Propius and Stobart Air

- (19) The binding terms of the joint bid agreement between Virgin Atlantic, Cyrus and Stobart Aviation dated 11 January 2019 provide for the governance rights of each of the parties over Connect Airways, defined as a limited company established for the purpose of pursuing the first transaction.¹¹

⁷ Annex 1 to the Application for a derogation.

⁸ See section 5.2 below.

⁹ Annex 2 to the Application for a derogation.

¹⁰ Stobart Air is currently wholly owned and controlled by Stobart Aviation. Following internal reorganisation, Everdeal 2019 Limited will indirectly hold 100% of the ordinary share capital of Stobart Air. After the second transaction, 40% of the ordinary share capital of Everdeal 2019 Limited is expected to be held by Connect Airways and the remaining 60% is expected to be held by Everdeal Employees 2019 Limited, itself 85%-owned by an employee benefit trust.

¹¹ Annex 4 to the Application for a derogation.

- (20) In particular, pursuant to the joint bid agreement with regard to Flybe Group, including its trading subsidiaries:¹²
- (a) Each of Virgin Atlantic, Cyrus and Stobart Aviation will appoint two directors to the board of Connect Airways, with each director being attributed one vote, and the decisions of the board will be by simple majority, subject to reserved matters;
 - (b) The appointment of the Chair, the CEO and the CFO of Connect Airways is subject to the approval of each of Virgin Atlantic, Cyrus and Stobart Aviation;
 - (c) The approval of each of Virgin Atlantic, Cyrus and Stobart Aviation is required for reserved matters, notably: (i) any changes to the employment of Key Personnel (being executive directors/the board and any others to be agreed); and (ii) the business plan, including a five-year rolling fleet plan.¹³
- (21) In addition, the shareholders' agreement between Virgin Atlantic, Cyrus and Stobart Aviation in relation to Connect Airways will provide for a [...].¹⁴ [confidential information about Connect Airways' corporate governance structure].
- (22) In light of the above considerations, each of Virgin Atlantic, Cyrus and Stobart Aviation will have the possibility to exercise decisive influence over Connect Airways, which is used as a mere vehicle for the acquisition of Flybe Group, including its trading subsidiaries, by Virgin Atlantic, Cyrus and Stobart Aviation.¹⁵
- (23) Therefore, as a result of the first transaction, each of Virgin Atlantic, Cyrus and Stobart Aviation will acquire joint control over Flybe Group and its trading subsidiaries within the meaning of Article 3(1)(b) of the Merger Regulation.¹⁶
- (24) As part of the second transaction, Connect Airways will acquire the entire issued share capital of Propius. Therefore, each of Virgin Atlantic, Cyrus and Stobart Aviation will acquire joint control over Propius within the meaning of Article 3(1)(b) of the Merger Regulation.

¹² Annex 4 to the Application for a derogation, Schedule 1 – Binding terms of shareholders' agreement.

¹³ [confidential information about Connect Airways' shareholders' agreement and corporate governance structure].

¹⁴ See draft shareholders' agreement in Annex 35 to the Application for a derogation, Clause 13. Virgin Atlantic, Cyrus and Stobart Aviation expect to execute the shareholders' agreement before 22 February 2019.

¹⁵ See paragraph 147 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1 (the "Commission Consolidated Jurisdictional Notice").

¹⁶ See also paragraph 91 of the Commission Consolidated Jurisdictional Notice.

- (25) As part of the second transaction, Connect Airways will also acquire 40% of the ordinary share capital of Everdeal 2019 Limited, which will indirectly hold 100% of the ordinary share capital of Stobart Air. It has been agreed that, as a result of the shareholders' agreement and articles of association for Everdeal 2019 Limited:¹⁷
- (a) Connect Airways may appoint [number of directors] and Everdeal Employees 2019 Limited may appoint [number of directors] to the board, with each director being attributed [number of votes], and the decisions of the board will be by simple majority, subject to reserved matters;
 - (b) The consent of each of Connect Airways and Everdeal Employees 2019 Limited will be required for the approval of the [confidential information about Everdeal 2019 Limited's corporate governance structure].
- (26) Therefore, as a result of the second transaction, each of Virgin Atlantic, Cyrus and Stobart Aviation will acquire joint control over Stobart Air within the meaning of Article 3(1)(b) of the Merger Regulation.¹⁸

2.3. The first and second transactions constitute a single concentration

- (27) As indicated in sections 2.1 and 2.2 above, the Transaction comprises the first and second transactions, which in turn comprise the acquisition of joint control by Virgin Atlantic, Cyrus and Stobart Aviation (through Connect Airways), by way of purchase of shares, over: (i) Flybe Group, (ii) Flybe, and (iii) Propius and Stobart Air.
- (28) Virgin Atlantic, Cyrus and Stobart Aviation submit that, although these three acquisitions are not contractually inter-conditional, they are clearly unitary and interdependent and thus constitute a single concentration within the meaning of Article 3 of the Merger Regulation.
- (29) According to paragraph 38 of the Commission Consolidated Jurisdictional Notice, “[t]wo or more transactions constitute a single concentration for the purposes of Article 3 if they are unitary in nature. (...) For the assessment, the economic reality underlying the transactions is to be identified and thus the economic aim pursued by the parties. In other words, in order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other.” In addition, according to paragraph 45 of the Commission Consolidated Jurisdictional Notice, “[a] single concentration may therefore exist if the same purchaser(s) acquire control of a single business, i.e. a single economic entity, via several legal transactions if those are inter-conditional.”
- (30) The Commission considers that the three acquisitions by Connect Airways are *de facto* inter-conditional.

¹⁷ See email dated 20 February 2019 concerning the draft transaction documents relating to Stobart Air, at a near final stage.

¹⁸ See also paragraph 91 of the Commission Consolidated Jurisdictional Notice.

- (31) First, the acquisition of Flybe Group (the first transaction) was intended to result in the acquisition of its trading subsidiaries (Flybe) as well. As acknowledged by Virgin Atlantic, Cyrus and Stobart Aviation, the acquisition of Flybe by way of a separate transaction (the second transaction) is only a “*technical matter*” entailed by the “*severe financial distress of Flybe.*”¹⁹ After completion of the second transaction, which would precede the first transaction, Flybe Group will have no assets or market presence. However, Virgin Atlantic, Cyrus and Stobart Aviation will remain committed legally to implement the first transaction, subject to shareholder approval.
- (32) Second, the acquisition of a 100% shareholding in Propius and a 40% shareholding in Stobart Air forms part of the consideration to be paid by Stobart Aviation for its acquisition of joint control over Flybe by way of the second transaction.²⁰ In addition, completion of the two acquisitions is to occur simultaneously.²¹ Therefore, since neither of the acquisition of Flybe or of the acquisition of the shareholding in Propius and Stobart Air would take place without the other, the two acquisitions are interdependent.
- (33) Furthermore, the Commission considers that the three acquisitions are required to transfer to Virgin Atlantic, Cyrus and Stobart Aviation a single business, i.e. a single economic entity managed for a common commercial purpose to which all the assets contribute. The Commission notes in particular that, according to Virgin Atlantic, Cyrus and Stobart Aviation, “*the acquisition of Stobart Air and Propius by Connect Airways is therefore an integral part of the formation of the Connect Airways business*” and “*combining Flybe and Stobart Air in a more integrated commercial co-operation with Virgin Atlantic’s long-haul operations will create a fully-fledged UK network carrier under the Virgin Atlantic brand.*”²²
- (34) In light of the above considerations, the first and second transactions, which comprise the acquisition of joint control over Flybe Group, Flybe, Propius and Stobart Air, are interdependent and lead to the acquisition of joint control by Virgin Atlantic, Cyrus and Stobart Aviation over a single business.
- (35) Therefore, the first and second transactions constitute a single concentration within the meaning of Article 3 of the Merger Regulation.

2.4. Conclusion

- (36) The Transaction, by which Virgin Atlantic, Cyrus and Stobart Aviation acquire joint control over the business made of Flybe Group, Flybe, Propius and Stobart Air, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

¹⁹ See paragraph 3.15 of the Application for a derogation.

²⁰ More specifically, part of Stobart Aviation’s investment in Connect Airways is to be satisfied by way of a contribution in kind of Propius and a shareholding in Stobart Air.

²¹ See paragraph 3.10 of the Application for a derogation.

²² See paragraphs 3.10 and 3.19 of the Application for a derogation.

3. EU DIMENSION

- (37) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Virgin Atlantic: c. EUR [...] million; Cyrus: c. EUR [...] million; Stobart Aviation: c. EUR [...] million; Flybe Group: c. EUR [...] million). Each of them has an EU-wide turnover in excess of EUR 250 million (Virgin Atlantic: c. EUR [...] million; Cyrus: c. EUR [...] million; Stobart Aviation: c. EUR [...] million; Flybe Group: c. EUR [...] million),²³ and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.²⁴
- (38) The Transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

4. THE APPLICATION FOR A DEROGATION

- (39) Virgin Atlantic, Cyrus and Stobart Aviation request a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation to close the second transaction by the longstop date set out in the share purchase agreement of 15 January 2019 (that is to say by 22 February 2019), and more specifically:²⁵
- (a) Acquisition by Virgin Atlantic, Cyrus and Stobart Aviation (through Connect Airways) from Flybe Group of the entire issued share capital of Flybe and certain assets of Flybe Group (“Derogation 1A: Acquisition of Flybe”);
 - (b) Acquisition by Virgin Atlantic, Cyrus and Stobart Aviation (through Connect Airways) from Stobart Group of the entire issued share capital of each of Propius and of a 40% shareholding in Stobart Air (“Derogation 1B: Acquisition of Stobart Air and Propius”).
- (40) In addition, Virgin Atlantic, Cyrus and Stobart Aviation request a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation to close the first transaction, by implementing the offer to acquire the

²³ The EU-wide turnovers of Virgin Atlantic (for passenger and cargo services), Stobart Aviation and Flybe Group have been calculated on the basis of the “point of departure” methodology. Virgin Atlantic, Cyrus and Stobart Aviation submit that the EU turnover thresholds are met under the three methodologies applied by the Commission in airline cases (the “point of sale”, “point of departure” and “50/50” methodologies).

²⁴ [Confidential reference to financial information].

²⁵ All references to the capitalised term Derogation (including its numbering and title) are to be understood as defined in the Application for a derogation. As further described in paragraph (41) and section 6.1 below, Virgin Atlantic, Cyrus and Stobart Aviation would also apply for certain additional derogations from the conditions accepted in relation to Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius, and 1D: Offer for Flybe Group plc.

entire issued and to be issued share capital of Flybe Group announced on 11 January 2019 (“Derogation 1D: Offer for Flybe Group plc”).²⁶

- (41) Should Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius, and 1D: Offer for Flybe Group plc be granted, Virgin Atlantic, Cyrus and Stobart Aviation submit in their Application for a derogation that they are willing to accept the conditions set out in section 6.1 below.²⁷

5. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE MERGER REGULATION

- (42) Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that regulation shall not be implemented either before its notification or until it has been declared compatible with the internal market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on the basis of a reasoned request, grant a derogation from the obligation imposed by Article 7(1) of the Merger Regulation.
- (43) Article 7(3) of the Merger Regulation provides that, in deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.
- (44) A derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where the suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.
- (45) Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition.

5.1. The Transaction falls under the suspension obligation pursuant to Article 7(1) of the Merger Regulation

- (46) As indicated in paragraphs (36) and (38) above, the Transaction constitutes a concentration within the meaning of Article 3 of the Merger Regulation and has an EU dimension according to Article 1(2) of the Merger Regulation. Hence, the Transaction is subject to the suspension obligation laid down in Article 7(1) of the Merger Regulation.
- (47) As per their request for Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius, and 1D: Offer for Flybe Group plc, Virgin Atlantic,

²⁶ According to the Application for a derogation, Virgin Atlantic, Cyrus and Stobart Aviation request Derogation 1D: Offer for Flybe Group Plc “*out of an abundance of caution*”, if the offer for Flybe Group may not be implemented in accordance with Article 7(2) of the Merger Regulation (paragraphs 6.17-6.18 of the Application for a derogation). However, by email of 19 February 2019, they clarified that they sought a derogation for Derogation 1D: Offer for Flybe Group Plc and that they would give the same commitments as for Derogations 1A: Acquisition of Flybe and 1B: Acquisition of Stobart Air and Propius, as set out in paragraph 6.7 of the Application for a derogation.

²⁷ See paragraphs 6.7, 6.13-6.16, and 6.23-6.56 of the Application for a derogation.

Cyrus and Stobart Aviation request a derogation for completing by 22 February 2019 the transfer of shares constituting the first and second transactions. Therefore, Virgin Atlantic, Cyrus and Stobart Aviation request a derogation for completing the Transaction and acquiring *de jure* control over Flybe Group, Flybe, Propius and Stobart Air by 22 February 2019.

- (48) The Commission thus considers that implementing the measures described under Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius and 1D: Offer for Flybe Group plc would amount to a full implementation of the Transaction. Implementing these measures before the notification of the Transaction or before it has been declared compatible with the internal market by the Commission thus requires a derogation pursuant to Article 7(3) of the Merger Regulation.

5.2. The effects of the suspension on the undertakings concerned and third parties

5.2.1. Virgin Atlantic's, Cyrus' and Stobart Aviation's arguments

- (49) Virgin Atlantic, Cyrus and Stobart Aviation consider that the suspension obligation imposed in Article 7(1) of the Merger Regulation would cause irreparable damage to Flybe and third parties.
- (50) More specifically, Virgin Atlantic, Cyrus and Stobart Aviation submit that the requested derogation, as described in section 4 above, is necessary to maintain Flybe as a going concern until the final decision of the Commission on the compatibility of the Transaction with the internal market. Without the derogation, Virgin Atlantic, Cyrus and Stobart Aviation consider that Flybe would become insolvent. The resulting insolvency process would have adverse consequences for Flybe, its employees, its customers and third parties. In particular, (i) Flybe would be unable to fly due to the loss of secured aircraft and the subsequent loss of its operating licence; (ii) Flybe would lose critical staff; (iii) Flybe would be unable to honour payments due under third party contracts; and (iv) eventually, the interests of consumers would be irreparably harmed.
- (51) In addition, Virgin Atlantic, Cyrus and Stobart Aviation submit that the derogation would not have any adverse effects on any third party.

5.2.2. The Commission's assessment

- (52) The Commission considers it likely that, if the requested derogation from the suspension obligation, as described in section 4 above, is not granted, Flybe will likely cease to be a going concern and to effectively compete for the provision of air transport services on the routes on which it currently operates.
- (53) While Flybe has experienced negative operational results in three of the last four financial years, its financial position worsened in Spring 2018. Flybe issued a profit warning to the market on 3 April 2018.²⁸ [confidential information about Flybe's financial situation]. As recognised by Flybe's board in approving entry

²⁸ As at 25 January 2019. See annex 6 to the Application for a derogation.

into the share purchase agreement described in paragraph (17) above, Flybe faced an imminent risk of insolvency by 15 January 2019.

- (54) Flybe's current financial position remains precarious, [confidential information about Flybe's financial situation].²⁹ [Further confidential information about Flybe's financial situation].³⁰
- (55) Indeed, despite the announcement of the first transaction described in paragraph (16) above and the offer of financial support from Virgin Atlantic, Cyrus and Stobart Aviation, Flybe's credit card acquirers were unwilling to agree to a normalisation of their operations in circumstances where a change of control over Flybe would not occur pending the EU merger review process and the approval of the scheme of arrangement (by which the first transaction would be implemented).³¹ More specifically, [confidential information about Flybe's financial situation].³²
- (56) In light of the above and of the available evidence, the Commission considers it likely that the non-acquisition by Connect Airways of title to Flybe's shares by 22 February 2019, due to the suspension obligation under Article 7(1) of the Merger Regulation, would have negative effects on Flybe's ability to continue trading as a going concern.
- (57) In the Commission's view, the suspension obligation might also lead to the loss of key assets and rights for Flybe's commercial operations, such as key personnel, aircraft, operating licence and slots.
- (58) The Commission notes that Flybe has seen very high levels of staff attrition since November 2018.³³ In particular, the Commission considers that the suspension obligation will further hinder Flybe's ability to retain key personnel, such as nominated post-holders required for licencing purposes, finance and safety teams, as well as pilots.
- (59) In view of Flybe's financial position, the Commission considers it likely that a number of its commercial counterparties will terminate certain agreements needed to maintain Flybe as a viable air carrier. For instance, [confidential information on Flybe's fleet requirements and overhaul supply sources],³⁴ hence hampering Flybe's ability to maintain its fleet and ensure continuation of its air transport

²⁹ [Confidential information about Flybe's financial situation.] (see paragraph 4.28 of the Application for a derogation).

³⁰ See annex 3 to the Application for a derogation.

³¹ See paragraph 1.8 of the Application for a derogation.

³² See paragraph 5.6 of the Application for a derogation and <https://investegate.co.uk/flybe-group-plc--flyb-/rns/publication-and-posting-of-scheme-document/201902071735584317P/>.

³³ See paragraph 6.47 of the Application for a derogation.

³⁴ See paragraph 6.34.4 of the Application for a derogation.

services. The loss of aircraft could eventually lead to the loss of Flybe's operating licence.

- (60) The suspension obligation might also have negative effects on Flybe's slot portfolio. First, the inability to normalise its commercial relationships with the credit card acquirers is likely to hamper Flybe's ability to provide air transport services. In turn, Flybe might be unable to maintain grandfather rights in slots.³⁵ Second, in view of its financial position, [confidential information on Flybe's strategy to improve its liquidity level].³⁶ However, given that slots constitute critical rights to operate passenger air transport services,³⁷ the reduction in Flybe's slot holding would be detrimental to its viability as an air carrier.
- (61) The Commission also considers that the suspension obligation is likely to have adverse effects on third parties, in particular employees, passengers and creditors.
- (62) In the absence of a derogation from the suspension obligation and in case of insolvency, approximately 2 300 jobs might be lost.³⁸
- (63) The suspension obligation might have negative effects on air transport passengers, whose flights might be cancelled. Based on the estimates provided by Virgin Atlantic, Cyrus and Stobart Aviation, Flybe's insolvency could result in (i) the grounding of all Flybe flights and the repatriation of about [1 – 10 000] passengers, and (ii) the cancellation of over [250 000 – 500 000] future bookings affecting over [500 000 – 1 000 000] customers.³⁹ In addition, passengers are likely to be left with reduced choice or even no service on the routes where Flybe is the only operator. In addition, the suspension obligation might harm air carriers to which Flybe provides feeder traffic.
- (64) In respect of creditors, the suspension obligation is likely to hamper Flybe's ability to honour payments due under third party contracts.
- (65) The suspension obligation is also likely to have negative effects on the members of the British Regional Airlines Group Pension Scheme ("BRAL"),⁴⁰ which

³⁵ Pursuant to Article 8(2) of the Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ L 14, 22.1.1993, p.1 (the "Slot Regulation"), an air carrier having operated its allocated slots for at least 80% of the time during the relevant IATA Season is entitled to the same slots in the equivalent scheduling period for the following year (the "grandfather rights").

³⁶ See paragraph 4.9 of the Application for a derogation.

³⁷ Pursuant to recital 4 of the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011), "*access to such resources [slots] is of crucial importance for the provision of air transport services and for the maintenance of effective competition.*".

³⁸ See paragraph 5.9.1 of the Application for a derogation.

³⁹ See paragraphs 5.9.3 and 5.9.5 of the Application for a derogation.

⁴⁰ Virgin Atlantic, Cyrus and Stobart Aviation note that [...] (see paragraph 5.9.2 of the Application for a derogation).

might risk being wound up if it is not adequately funded and does not have sufficient assets to meet its liabilities.

- (66) Besides, the Commission considers that the derogation from the suspension obligation is unlikely to have a negative impact on other potential acquirers of Flybe or of Flybe's assets. To the contrary, the implementation of the measures described in section 4 above would maintain Flybe's key assets (e.g. slots, personnel and aircraft) and thus preserve the possibility of an onward sale of Flybe's air transport business.

5.2.3. Conclusion

- (67) Against this background and based on the available evidence, the Commission concludes that the suspension obligation imposed by Article 7(1) of the Merger Regulation could lead to serious harm to Flybe and to third parties.

5.3. The threat to competition posed by the Transaction

- (68) Based on information provided by Virgin Atlantic, Cyrus and Stobart Aviation, the Parties' activities overlap in the provision of (i) passenger air transport services, (ii) cargo air transport services, and (iii) MRO services.
- (69) In addition, the Transaction would give rise to vertical relationships in relation to the provision of (i) access to flights of another carrier for connecting passengers ("feeder traffic")⁴¹, (ii) MRO services, (iii) franchise services, (iv) aircraft leasing services, (v) ground-handling services, and (vi) airport infrastructure services.
- (70) Considering the Parties' business models, and in particular Flybe's focus on the provision of short-haul point-to-point and connecting air transport services, the Commission will, at this stage, assess the threat to competition posed by the Transaction in the markets which are most likely to be affected by the Transaction, that is to say: (i) the provision of passenger air transport services on specific routes (the "point of origin/point of destination" or "O&D approach"), (ii) the provision of passenger air transport services on all routes to or from a specific airport (the "airport-by-airport approach"), and (iii) the provision of feeder traffic.

5.3.1. Passenger air transport services – O&D approach

- (71) In its prior decision practice related to passenger air transport services provided by active air carriers, the Commission has defined the relevant market on the basis of the "point of origin/point of destination" ("O&D") city-pair approach, whereby the effects of a transaction on competition are assessed for each O&D separately.⁴²

⁴¹ Feeder traffic is traffic made up by passengers connecting at either or both ends of the route.

⁴² See for instance Case M.7541 – IAG/Aer Lingus, paragraph 14. Under the O&D approach, the Commission has distinguished the retail market for the supply of scheduled passenger air transport services from the wholesale market for the supply of seats to tour operators (see for instance Case M.8046 – TUI/Transat France, paragraph 66). The Commission has also left open the question of whether the supply of dry seats to passengers by a charter airline on a given route could be considered

- (72) The passenger air transport activities of Flybe and of Virgin Atlantic (or its parents AFKL, Delta and Virgin Group)⁴³ overlap, on a direct/direct basis, on several O&Ds, with combined market shares⁴⁴ of at least [60-70]% on five O&Ds (Paris-Manchester, Amsterdam-Birmingham, Amsterdam-Southampton, Paris-Birmingham, Amsterdam-London⁴⁵). On two of these O&Ds (Paris-Manchester and Amsterdam-London), a strong competitor is also active (respectively, easyJet and British Airways). However, on the three remaining O&Ds (Amsterdam-Birmingham, Amsterdam-Southampton, Paris-Birmingham), the Transaction would create a (quasi-)monopoly.
- (73) The high combined market shares on the O&Ds referred to in the previous paragraph stem from the activities of Flybe and AFKL. The Commission acknowledges that the acquisition of joint control by AFKL over Virgin Atlantic is not expected to be completed before July 2019, i.e. it is expected to take place after the Commission is likely to issue its final decision about the Transaction under the Merger Regulation. Nevertheless, and without prejudice to the Commission's fully-fledged assessment of the Transaction, *prima facie*, the Transaction appears to pose a threat to competition in the provision of passenger air transport services on at least the three following O&Ds: Amsterdam-Birmingham, Amsterdam-Southampton, and Paris-Birmingham.
- (74) In addition, Flybe provides scheduled passenger air transport services on several O&Ds in the United Kingdom, on which Virgin Group, through the Inter City West Coast rail franchise, provides train services.
- (75) In its prior decision practice, when defining the relevant O&D markets for air transport services, the Commission has also considered other transport alternatives to the extent that they are substitutable to a flight (intermodal competition). This has been considered in cases where alternative modes of transport on the respective O&D can be considered comparable in terms of price, quality and travel time and could therefore be considered as valuable alternatives by customers.⁴⁶
- (76) Should the passenger air transport services provided by Flybe and the passenger train services provided by Virgin Group form part of the same market, the

as part of the same market as scheduled services provided on that same route for non-premium passengers (see for instance Case M.6828 – *Delta Air Lines/Virgin Group/Virgin Atlantic Limited*, paragraph 68). Given Flybe's business model, which is not focussed on the wholesale supply of airline seats or the supply of charter services, these two possible markets will not be considered further at this stage.

⁴³ According to Virgin Atlantic, Cyrus and Stobart Aviation, Stobart Aviation only operates flights for other carriers under franchise agreements and is not responsible for the marketing of scheduled passenger air transport services. Therefore, Stobart Aviation is not considered as active on any O&D (see paragraph 8.34 of the Application for a derogation). Cyrus (or any entity controlled by it) is not active in passenger air transport services.

⁴⁴ Based on the number of bookings during each of Winter 2017/2018 and Summer 2018 IATA Seasons.

⁴⁵ If the O&D is defined as the Amsterdam Schiphol-London City airport pair.

⁴⁶ See for instance case M.6447 – *IAG/bmi*, paragraph 75.

Transaction would lead to overlaps on several O&Ds within the United Kingdom, with combined market shares⁴⁷ exceeding [60-70]% on two O&Ds [...]. The Transaction would even create a (quasi-)monopoly on these two O&Ds if intermodal competition between the Parties is taken into account. Therefore, the Commission concludes, without prejudice to the Commission's fully-fledged assessment of the Transaction, that the Transaction would *prima facie* pose a threat to competition on at least these two routes.

5.3.2. Passenger air transport services – airport-by-airport approach

- (77) In a number of prior decisions related to air carriers, where the transaction entailed the transfer of slots at certain airports, the Commission has considered the effects of the transaction on the operation of passenger air transport services at a given airport in terms of the slot portfolio held by a carrier at the airport, without distinguishing between the specific routes served to or from that airport.⁴⁸
- (78) Considering that slots are among Flybe's most valuable assets,⁴⁹ it is necessary to assess whether the Transaction is likely to increase the Parties' slot holdings held at specific airports to an extent that it would pose a threat to competition on the markets for passenger air transport at those airports.
- (79) Flybe and Virgin Atlantic (or its parents AFKL, Delta and Virgin Group)⁵⁰ have overlapping slot portfolios at the following coordinated⁵¹ (Level 3)⁵² airports: London Gatwick, London City, Birmingham, Manchester, Paris Charles de Gaulle, and Amsterdam Schiphol.⁵³

⁴⁷ Based on the number of bookings during each of Winter 2017/2018 and Summer 2018.

⁴⁸ See for instance Cases M.8869 – *Ryanair/LaudaMotion*, paragraph 112, M.8672 – *easyJet/Certain Air Berlin assets*, paragraph 41, M.8633 – *Lufthansa/Certain Air Berlin assets*, paragraph 58; M.6447 – *IAG/bmi*, paragraph 483.

⁴⁹ The Commission notes in particular that [confidential information about Connect Airways' corporate governance structure].

⁵⁰ According to Virgin Atlantic, Cyrus and Stobart Aviation, Stobart Aviation has only limited slot holding at peak travel times at Dublin airport (see paragraph 8.14 of the Application for a derogation). Cyrus (or any entity controlled by it) does not hold slots.

⁵¹ Under the Slot Regulation, a coordinated airport is defined as an airport with a high level of congestion where demand exceeds capacity during the relevant period and where, in order to land or take off, it is necessary for an air carrier to have a slot allocated by a coordinator.

⁵² Under the 8th Edition of Worldwide Slot Guidelines issued by IATA (effective 1 January 2017), a Level 3 airport "is one where: a) Demand for airport infrastructure significantly exceeds the airport's capacity during the relevant period; b) Expansion of airport infrastructure to meet demand is not possible in the short term; c) Attempts to resolve the problem through voluntary schedule adjustments have failed or are ineffective; and d) As a result, a process of slot allocation is required whereby it is necessary for all airlines and other aircraft operators to have a slot allocated by a coordinator in order to arrive or depart at the airport during the periods when slot allocation occurs." A Level 3 airport under the IATA Worldwide Slot Guidelines corresponds to a coordinated airport under the Slot Regulation.

⁵³ Flybe [confidential information about Flybe's slot holding at London Heathrow airport]. It operates on the basis of slots released by IAG under the commitments in Case M.6447 – *IAG/bmi*.

- (80) Based on data provided by Virgin Atlantic, Cyrus and Stobart Aviation, the Parties' combined average slot holding would be below [20-30]% at all but three airports: Birmingham, Paris Charles de Gaulle, and Amsterdam Schiphol airports.⁵⁴ At Birmingham airport, both the Parties' combined average slot holding and the average congestion rate at the airport would remain below [40-50]%.⁵⁵ Conversely, the Parties' combined average slot holding at Paris Charles de Gaulle and Amsterdam Schiphol airports would exceed [50-60]% and [60-70]% respectively, with an average increment brought about by the Transaction of [0-5]%.⁵⁶ In addition, the average congestion rate appears to exceed [60-70]% at each of these two airports.⁵⁷
- (81) Therefore, without prejudice to the Commission's fully-fledged assessment of the Transaction, the Commission cannot exclude that, *prima facie*, the Parties might have post-Transaction a sufficient degree of market power to foreclose access of other carriers to the markets for the provision of passenger air transport services at Paris Charles de Gaulle and Amsterdam Schiphol airports.
- (82) In addition, in a prior decision, the Commission has considered that a dominant carrier at a relevant airport would in principle have a strong incentive to pursue a foreclosure strategy, as any new service or expansion by another carrier would be likely to introduce or increase competition on one of the dominant carrier's routes. Such dominant carrier would have a greater incentive than any other carrier at the airport to keep slots out of reach of the other carriers. The incentive to foreclose would also grow with the increased size of the slot portfolio it would control at the airport.⁵⁸
- (83) In that context, considering that AFKL is the national home-based carrier at Paris Charles de Gaulle and Schiphol airports and has its hubs at those airports, the Commission considers that it [confidential information about the Parties' positions at these airports] the markets for passenger air transport services at Paris Charles de Gaulle and Amsterdam Schiphol airports.

⁵⁴ See Appendix 4 to the Application for a derogation, which refers to the Parties' overall slot holdings based on average weekly departure and arrival slot holdings (that is to say the ratios between the slots allocated to the Parties and airport capacity) for each of the Summer 2018 and Winter 2018/2019 IATA Seasons.

⁵⁵ See Annex 36 to the Application for a derogation, which refers to the ratio between the total number of slots allocated during each of the Summer 2018 and Winter 2018/2019 IATA Seasons and airport capacity.

⁵⁶ See Appendix 4 to the Application for a derogation, which refers to the Parties' overall slot holdings (that is to say the ratios between the slots allocated to the Parties and airport capacity) based on average weekly departure and arrival slot holdings for each of the Summer 2018 and Winter 2018/2019 IATA Seasons.

⁵⁷ See Annex 36 to the Application for a derogation, which refers to the ratio between the total number of slots allocated during each of the Summer 2018 and Winter 2018/2019 IATA Seasons and airport capacity. Only the opening hours of the airport during which a material number of slots are actually allocated to air carriers for the provision of passenger air transport services have been taken into account.

⁵⁸ See Case M.8633 – *Lufthansa/Certain Air Berlin assets*, paragraph 266.

- (84) [Confidential information about the Parties' slot holdings at and the capacity of the airports of Paris CDG & Amsterdam Schiphol].
- (85) Therefore, the Commission concludes, without prejudice to the Commission's fully-fledged assessment of the Transaction, that the Transaction would *prima facie* pose a threat to competition on the markets for passenger air transport services (all O&Ds) to or from Paris Charles de Gaulle and Amsterdam Schiphol airports.

5.3.3. Feeder traffic

- (86) In its prior decision practice in relation to air carriers providing feeder traffic, the Commission has assessed whether the merged entity post-transaction would have the ability and incentive to deny or hamper access to its short-haul flights for passengers connecting at a certain hub airport onto flights operated by another carrier to destinations to which the merged entity also offers air passenger transport services from the same hub airport or from another hub airport. The Commission has then assessed whether such a foreclosure strategy would be likely to significantly impede effective competition.⁵⁹
- (87) Flybe has several interlining and codeshare agreements with several third party airlines and provides feeder traffic for their long-haul flights. It also has codeshare agreements with AFKL and Virgin Atlantic.
- (88) Virgin Atlantic, Cyrus and Stobart Aviation submit that these feeder traffic agreements are part of Flybe's business model and are important for Flybe to maintain financially sustainable operations. Furthermore, they claim that, post-Transaction, they would neither have the ability nor the incentive to foreclose feeder traffic to other airlines.⁶⁰
- (89) Nevertheless, at this stage, Virgin Atlantic, Cyrus and Stobart Aviation have only submitted partial data about the feeder traffic provided by the Parties. In view of the lack of comprehensive data and considering that one of the objectives of the Transaction is "*through linking an enhanced Flybe regional network with Virgin Atlantic's long-haul operations, increasing feeder traffic*",⁶¹ the Commission is not in a position, at this stage, to exclude that the Transaction would *prima facie* pose a threat to competition in relation to feeder traffic.

5.3.4. Conclusion

- (90) In light of the above considerations, on the basis of the information available and without prejudice to the Commission's fully-fledged assessment of the Transaction, *prima facie*, the Transaction might pose a threat to competition in the markets for the provision of passenger air transport services on at least five O&Ds (Amsterdam-Birmingham, Amsterdam-Southampton, Paris-Birmingham, Bir-

⁵⁹ See Cases M.6447 – IAG/bmi, paragraph 509 *et seq.* and M. 7541 IAG/Aer Lingus, paragraph 443 *et seq.*

⁶⁰ See paragraphs 8.105-8.113 of the Application for a derogation.

⁶¹ See paragraph 3.21 of the Application for a derogation.

mingham-Edinburgh, and Birmingham-Glasgow) and on all O&Ds to or from Amsterdam Schiphol and Paris Charles de Gaulle airports.

- (91) In addition, *prima facie*, it cannot be excluded that the Transaction would pose a threat to competition in the market for the provision of feeder traffic to air carriers competing with the Parties on various O&Ds.

5.4. Balance of interests

- (92) In this section, the Commission will balance, on the one hand, the negative effects that the suspension of the implementation of the Transaction would have on the undertakings concerned and third parties, and, on the other hand, the threat to competition in the EEA that the Transaction is likely to pose.
- (93) To this end, the Commission notes, on the one hand, that the suspension of the implementation of the Transaction would seriously and negatively affect Flybe's viability and ability to preserve its key assets and thus to remain an effective competitor on the markets for the provision of passenger air transport. It would also seriously affect third parties, specifically Flybe's employees, customers and creditors (see section 5.2 above).
- (94) On the other hand, based on the information currently available and without prejudice to the Commission's fully-fledged assessment of the Transaction, the Commission considers that *prima facie* the Transaction might pose a threat to competition on (i) at least three O&Ds (Amsterdam-Birmingham, Amsterdam-Southampton and Paris-Birmingham) due to AFKL's and Flybe's overlapping passenger air transport operations, (ii) at least two O&Ds (Birmingham-Edinburgh, and Birmingham-Glasgow) due to the overlapping passenger train and air transport operations of respectively Virgin Group and Flybe, and (iii) all O&Ds to or from two highly congested airports (Amsterdam Schiphol and Paris Charles de Gaulle), due to AFKL, Delta and Flybe's overlapping slot portfolios. In addition, the Commission cannot exclude at this stage that the Transaction would pose a threat to competition on the markets for the provision of feeder traffic to air carriers competing with the Parties on various O&Ds (see section 5.3 above).
- (95) Therefore, in balancing the interests at stake, the Commission considers it necessary to grant Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius and 1D: Offer for Flybe Group plc. Nevertheless, such granting should be made subject to adequate conditions, ensuring that the derogations would not bring about an irreversible change in the competitive structure of the affected markets or result in anti-competitive effects.
- (96) Consequently, the Commission concludes that, as the Transaction might *prima facie* pose a threat to competition, the requested derogation from the suspension obligation as described in section 4 above can only be granted subject to the conditions set out in section 6 below.

6. CONDITIONS

- (97) According to Article 7(3), fourth sentence, of the Merger Regulation, a derogation from the suspension obligation laid down in Article 7(1) of the Merger Regulation

may be made subject to conditions and obligations in order to ensure conditions of effective competition.

- (98) In view of the *prima facie* threat to competition posed by the Transaction, and in order to preserve the conditions of effective competition on the markets on which the Parties are active, the Commission considers it necessary that the implementation, in part or in full, of the measures described under Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius and 1D: Offer for Flybe Group plc is made subject to adequate conditions.

6.1. Conditions accepted by Virgin Atlantic, Cyrus and Stobart Aviation

- (99) In the Application for a derogation, Virgin Atlantic, Cyrus and Stobart Aviation are willing to accept as conditions, in respect of Derogations 1A: Acquisition of Flybe, 1B: Acquisition of Stobart Air and Propius and 1D: Offer for Flybe Group plc, that no voting rights would be exercised by Connect Airways, and the acquired business would be held separate, subject to the following exceptions:⁶²
- (a) Replacement of existing Flybe Group guarantor obligations in favour of Flybe with Connect Airways (“Derogation 1C: Flybe Guarantees and Letters of Credit”);
 - (b) Replacement of Flybe Group by Flybe as principal employer of the BRAL and additional steps to ensure that the BRAL is adequately funded in line with regulatory requirements (“Derogation 1E: Flybe Pension Scheme”);
 - (c) Secondment by Virgin Atlantic and Stobart Aviation of aviation finance experts to Flybe (“Derogation 2A: Finance support”);
 - (d) Provision by Virgin Atlantic, Cyrus and Stobart Aviation of the necessary funding to Flybe to enable it to operate until completion of the EU merger control procedure (“Derogation 2B: Debt Funding”);
 - (e) Engagement of Virgin Atlantic, Cyrus and Stobart Aviation with Flybe in an effort to achieve improvement (or not a worsening) of credit terms offered by banks, credit card acquirers and other financial counterparties (“Derogation 3A: Engagement with Banks”);
 - (f) Agreement and implementation of improved commercial terms with Flybe’s key suppliers by Virgin Atlantic, Cyrus and Stobart Aviation (“Derogation 3B: Commercial Agreements”);

⁶² See paragraphs 6.7, 6.13-6.16, 6.23-6.55 and 6.56.1 of the Application for a derogation. In line with the Application for a derogation, these exceptions are further referred to as Derogations. All references to the capitalised term Derogation (including its numbering and title) are to be understood as defined in the Application for a derogation.

- (g) Granting to Connect Airways of limited informational, commercial and veto rights on key routes⁶³ and slots at capacity-constrained airports⁶⁴ (“Derogation 4A: Fleet and Network Changes”);
 - (h) Extension of the existing codeshare agreement between VAA and Flybe, notably to broaden its geographic scope (“Derogation 4B: Codeshare Proposals”);
 - (i) Participation of Flybe in VAA’s loyalty scheme (Flying Club), in replacement of Flybe’s current loyalty programme (due to be terminated by 24 April 2019) (“Derogation 4C: Loyalty Scheme”);
 - (j) Notification to Virgin Atlantic, Cyrus and Stobart Aviation of resignations of key individuals and post-holders in Flybe; granting to Connect Airways of the right to discuss and authorise retention payments and, in case of resignation of the CEO or CFO, right to be consulted and to veto the appointment of a replacement (“Derogation 5A: Staff/Key Functions”);
 - (k) Attendance by a Connect Airways observer from Cyrus in Flybe’s board meetings (the “Connect Airways Observer”) and appointment of an additional member, unaffiliated to Virgin Atlantic or Stobart Aviation, to Flybe’s board (the “Connect Airways Board Member”) (“Derogation 5B: Flybe Limited Board”);
 - (l) Provision by Virgin Atlantic, Cyrus and Stobart Aviation of expertise to support Flybe’s Brexit preparations, possibly by way of secondment (“Derogation 5C: Brexit support”).
- (100) In addition, in the Application for a derogation, Virgin Atlantic, Cyrus and Stobart Aviation are also willing to accept the following additional conditions:⁶⁵
- (a) Virgin Atlantic will ensure that information relating to Flybe will not be shared with AFKL (whether as a future or, following completion of the transaction referred to in paragraph (5) above, a current shareholder of Virgin Atlantic), except to the extent it is information in the public domain or which relates to the regulatory process of the Transaction;⁶⁶

⁶³ In particular, the routes on which the overlapping operations of AFKL and Flybe give rise to *prima facie* competition concerns (see section 5.3.1 above). These veto rights are meant to enable Virgin Atlantic, Cyrus and Stobart Aviation to fulfil the condition set out in paragraph (100)(c).

⁶⁴ In particular, the airports at which the overlapping slot portfolios of AFKL and Flybe give rise to *prima facie* competition concerns (see section 5.3.2 above). These veto rights are meant to enable Virgin Atlantic, Cyrus and Stobart Aviation to fulfil the condition set out in paragraph (100)(c).

⁶⁵ See paragraphs 6.56.2-6.56.10 of the Application for a derogation.

⁶⁶ As indicated in footnote 4 above, completion of the transaction referred to in paragraph (5) above remains subject to a number of regulatory approvals, including a grant of antitrust immunity for the joint venture from the US Department of Transportation. The latter is not expected before July 2019, according to Virgin Atlantic, Cyrus and Stobart Aviation. Therefore, AFKL is not expected to acquire joint control over Virgin Atlantic before July 2019.

- (b) Virgin Atlantic will ensure that information relating to the O&Ds on which Flybe's air transport services and Virgin Group's train transport services overlap will not be shared with Virgin Group, except to the extent that it is information in the public domain or relates to the regulatory process of the Transaction. In addition, Virgin Group agrees not to exercise its voting rights at meetings of the boards of directors of Virgin Atlantic and VAA with respect to these O&Ds;
- (c) The Flybe services and assets relating to Amsterdam-Birmingham, Amsterdam-Southampton and Paris-Birmingham will be maintained and all Flybe held slots at Amsterdam Schiphol and Paris Charles de Gaulle airports will be maintained;
- (d) Within the actions permitted by the Derogations sought, Virgin Atlantic, Cyrus and Stobart Aviation will take no steps to limit Flybe feeder traffic provided to any existing counterparty, nor to limit potential new feeder relationships into which Flybe wishes to enter;
- (e) Within the actions permitted by the Derogations sought, Virgin Atlantic, Cyrus and Stobart Aviation will take no steps to limit Flybe services to any third party airline (such as franchise or wet lease services);
- (f) In respect of Derogation 1C: Flybe Guarantees and Letters of Credit Virgin Atlantic, Cyrus and Stobart Aviation will not include in the contractual arrangements relating to the Flybe guarantees any provisions which would prevent the relevant obligations to be assigned to a third party purchaser of Flybe, in the event that a third party purchaser will be required;
- (g) In respect of the Flybe agreements which Virgin Atlantic, Cyrus and Stobart Aviation re-negotiate or for which they facilitate the re-negotiation, they will not include any provisions which would prevent the relevant obligations from being assigned to a third party purchaser of Flybe, in the event that a third party purchaser will be required;
- (h) In respect of Derogation 2A: Finance support, the Parties will ensure the following restrictions and obligations are placed on secondees: (i) all duties to be owed to Flybe for the duration of the secondment period; (ii) no direct reporting of Flybe financial performance to the Parties; and (iii) a customary non-disclosure agreement to be signed restricting the sharing of any commercially sensitive information obtained during the course of the secondment;
- (i) In respect of Derogation 4B: Codeshare Proposals, Virgin Atlantic, Cyrus and Stobart Aviation will take no steps to preclude or replace any current or future codeshare between Flybe and any other counterparty;
- (j) In respect of Derogation 5B: Flybe Limited Board:
 - the Connect Airways Observer will have very limited obligations and permission to report back to Virgin Atlantic, Cyrus and Stobart Aviation, only in respect of fundamental issues, such as that Flybe [examples of reporting obligations]; and

- the Connect Airways Observer will be subject to a customary non-disclosure agreement protecting the confidentiality of Flybe information as disclosed in any Board meeting (and such obligations to continue for a period of six months if the Proposed Transaction does not proceed); and;
 - the Connect Airways Board Member will be subject to a customary non-disclosure agreement, protecting the confidentiality of Flybe information as disclosed in any Board meeting and preventing any reporting to Connect Airways or the Parties.
- (101) In the Application for a derogation, Virgin Atlantic, Cyrus and Stobart Aviation are also willing to accept as an additional condition that they would formally notify the Transaction pursuant to the Merger Regulation without delay and endeavour to submit a complete Form CO at the latest by 10 May 2019.⁶⁷
- (102) Finally, Virgin Atlantic, Cyrus and Stobart Aviation accept as an additional condition to appoint as soon as possible after the adoption of this decision an independent trustee to supervise compliance with the terms under which the derogation is granted during the interim period and until the date when the restriction of Article 7(1) of the Merger Regulation no longer applies. Virgin Atlantic, Cyrus and Stobart Aviation accept that the appointment will be subject to the Commission's approval of the relevant trustee and will be largely on standard mandate terms.⁶⁸

6.2. Assessment of the conditions proposed by Virgin Atlantic, Cyrus and Stobart Aviation

- (103) The Commission considers that the conditions offered by Virgin Atlantic, Cyrus and Stobart Aviation are adequate and ensure that the conditions of effective competition are preserved.
- (104) First, the non-exercise of voting rights mentioned in paragraph (99) above ensures that Flybe remains commercially autonomous, to the extent possible, such as to preserve its saleability.
- (105) In that respect, the exceptions from the non-exercise of voting rights by Connect Airways and the hold-separate obligations referred to in section 6.1 above are limited to the actions and decisions necessary to restore the viability of Flybe as a going concern and to maintain its operations to the extent possible until the end of the merger review process.
- (106) The limitations in terms of non-exercise of voting rights and hold-separate obligations also confine the exchange of information between Virgin Atlantic, Cyrus and Stobart Aviation on the one hand, and the acquired business on the other hand, to the minimum necessary and circumscribe the influence of Virgin Atlantic, Cyrus and Stobart Aviation over the acquired business. In addition, they

⁶⁷ See paragraphs 6.7 and 6.56.11 of the Application for a derogation.

⁶⁸ This condition was accepted by Virgin Atlantic, Cyrus and Stobart Aviation by email of 20 February 2019.

restrain the level of integration of the target business into the operations of Virgin Atlantic, Cyrus and Stobart Aviation. Therefore, they contribute to the reversibility of the implementation of the Transaction, should the Commission issue a prohibition decision pursuant to Article 8(3) of the Merger Regulation.

- (107) Second, the conditions set out in paragraph (100) above contribute to preserving Flybe's position in the markets most likely to be negatively affected by the Transaction until the end of the merger review process, thus to ensuring that the implementation of the derogations do not lead to any structural change on these markets. In particular, the limited informational, commercial and veto rights on key routes and slots at capacity constrained airports (Derogation 4A: Fleet and Network Changes) will allow Virgin Atlantic, Cyrus and Stobart Aviation to maintain Flybe's services and assets relating to the routes and airports which give rise to *prima facie* competition concerns. By doing so, the conditions also contribute to protecting Flybe's assets used to operate in these markets, in particular slots, thus to facilitating their transfer, should such a transfer be required to remedy any serious doubts that the Transaction may raise as to its compatibility with the internal market. Similarly, the conditions ensure that Virgin Atlantic, Cyrus and Stobart Aviation will not take any step that would lead to foreclosing competing air carriers from access to Flybe's feeder traffic.
- (108) Third, the conditions aim at ensuring that the implementation of the requested derogations does not hamper the acquisition of Flybe, in whole or in part, by a third party. In particular, the conditions set out in paragraphs (100)(f) and (g) above aim at facilitating the assignment to a third party of any contracts entered into or renegotiated during the interim period.

6.3. Conclusion

- (109) In light of the above considerations, the Commission concludes that the conditions proposed by Virgin Atlantic, Cyrus and Stobart Aviation in the Application for a derogation are sufficient to ensure the conditions of effective competition until the end of the merger review process.
- (110) Pursuant to Article 18(1) of the Merger Regulation, Virgin Atlantic, Cyrus and Stobart Aviation have been given the opportunity to make known their views in relation to the conditions set out in section 6.1 above and have expressed their agreement with the conditions.⁶⁹

7. CONCLUSION

- (111) The Commission considers that Virgin Atlantic's, Cyrus' and Stobart Aviation's request for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation, as described in section 4 above, meets the requirements set out in Article 7(3) of the Merger Regulation, subject to compliance with the conditions set out in section 6.1 of this decision.

⁶⁹ See paragraph 6.56 of the Application for a derogation, as well as emails of 19 and 20 February 2019.

- (112) Based on the above considerations, and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, Virgin Atlantic, Cyrus and Stobart Aviation are granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation for the measures identified in section 4 of this decision and until the Commission takes a final decision on the compatibility of the Transaction with the internal market under the Merger Regulation, subject to compliance with the conditions set out in section 6.1 of this decision.

For the Commission

(Signed)

Margrethe VESTAGER

Member of the Commission