



EUROPEAN COMMISSION

DG Competition

Case M.6447 – IAG / BMI

Only the English text is available and authentic.

REGULATION (EC) No 139/2004

MERGER PROCEDURE

Decision on the implementation of remedies -
Granting of Grandfathering rights

Date: 4/08/2020



EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

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Subject: **Case M.6447 – IAG / BMI**
 Granting of Grandfathering rights

Dear Sir or Madam,

1. FACTS AND PROCEDURE

1.1. The Commission decision of 30 March 2012

- (1) By decision of 30 March 2012 (the “Clearance Decision”) based on Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EEC) No

139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “Merger Regulation”)¹, 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) (together the “Parties” and the “Transaction”) compatible with the internal market subject to conditions and obligations (the “Commitments”).²

1.2. The competition concerns identified in the Clearance Decision

- (2) During the investigation leading to the Clearance Decision, the Commission considered that the Transaction would give rise to serious doubts as to its compatibility with the internal market as regards the London-Aberdeen, London-Edinburgh, London-Nice, London-Cairo, London-Moscow, London-Riyadh routes (the “Relevant City Pair(s)”) and on the London-Amman route, and, as well as on feed traffic issues on a number of indirect itineraries via London-Heathrow (“LHR”).³
- (3) The Commission was concerned that post-Transaction the merged entity would have had high market shares of between 50-60% and 100% on the routes mentioned in paragraph (2) and would face limited competitive constraints.⁴ In addition, the market investigation had highlighted that the Parties were each other's closest competitors.
- (4) Finally, the Commission considered that entry opportunities on the routes mentioned in paragraph (2) above would remain very limited due to the congestion and the scarcity of slots prevailing at LHR. If any, new entries and frequency increases post-Transaction would take place from airports other than LHR.⁵ Therefore, entry would not be sufficient to deter or defeat the anti-competitive effects of the Transaction.
- (5) Hence, the Commission was concerned that, as a result of the Transaction, the merged entity would increase its market power on the London-Aberdeen, London-Edinburgh, London-Nice, London-Moscow, London-Cairo, London-Amman, and London-Riyadh routes. The Commission was also concerned that post-Transaction the merged entity could engage in a foreclosure strategy consisting in restricting access to flights (or raising the costs of that access) for passengers connecting at LHR to services operated by other carriers in competition with IAG.⁶

¹ OJ L 24, 29.01.2004, p. 1-22.

² The Commitments are annexed to the Clearance Decision. Capitalized terms not explicitly defined in this decision are to be understood as defined in the Clearance Decision and the Commitments.

³ Clearance Decision, paragraphs 207, 243, 295, 396, 417, 445 and 551.

⁴ Clearance Decision, paragraphs 193, 199-200, 218-220, 232-234, 282, 352, 388, 391, 403, 410, and 434.

⁵ Clearance Decision, paragraphs 205, 241 and 292 with respect to the London-Aberdeen, London-Edinburgh, London-Nice routes.

⁶ Clearance Decision, paragraph 551.

1.3. The Commitments

- (6) In order to address the serious doubts raised by the Commission in respect of the Transaction on the routes mentioned in paragraph (2) above, as well as on feed traffic issues on a number of indirect itineraries via LHR, the Parties committed to the following:
- (a) The slot release of a number of Slots at LHR airport to allow a Prospective Entrant to operate or increase its services on London-Aberdeen and/or London-Edinburgh (the “Identified UK City Pair(s)”); up to seven (7) Frequencies per day in total) and on the London-Aberdeen, London-Edinburgh, London-Nice, London-Cairo, London-Riyadh and London-Moscow (the “Identified City Pair(s)”); up to five (5) Frequencies per day in total) (the "Slot Commitments");
 - (b) to enter into a fare combinability agreement with, and at the request of, an Eligible Air Services Provider which operate on a Relevant City Pair;
 - (c) to enter into Special Prorate Agreements for traffic with, and at the request of, an Eligible Air Services Provider, when part of the journey involves the Relevant Long-haul Destination/Origin Cities;
 - (d) to enter into a Frequent Flyer Programme ("FFP") agreement with, and at the request of, a New Air Services Provider who does not have a comparable FFP of its own.
- (7) The Commission considered that the Commitments offered by the Parties on 28 March 2012 were suitable to entirely remove the serious doubts identified by the Commission.⁷ The Commission approved the Transaction subject to full compliance with the conditions and obligations laid down in the Commitments.⁸
- (8) The detailed text of the Commitments is annexed to the Clearance Decision. In particular, Section 1 of the Commitments relates to the Slot Commitments. Pursuant to Clause 1.1.1 of the Commitments, the Parties, “*undertake to procure that Slots are made available at Heathrow to allow one or more Prospective Entrant(s) to operate or increase the following number of new or additional Frequencies on the following city pairs: (a) up to seven (7) Frequencies per day in total on the Identified UK City Pairs; and (b) up to five (5) Frequencies per day in total on the Identified City Pairs make available Slots to allow a Prospective Entrant(s) to operate one (1) daily Frequency on the Airport Pair (i.e. up to seven (7) Frequencies per week on the Airport Pair)*”.⁹

⁷ Clearance Decision, paragraphs 634 and 708.

⁸ Clearance Decision, paragraph 713.

⁹ Pursuant to Clause 1.1.2 of the Commitments, the number of daily Frequencies available to operate a service on the Identified City Pairs was increased from the original five daily Frequencies to seven daily Frequencies as the two slots provided by IAG to Transaero were returned to IAG at the end of Summer 2015 IATA Season. Therefore, at the beginning of Winter 2016/2017 IATA Season, 14 daily slot pairs were available, including seven daily slot pairs for the Identified City Pairs.

- (9) Clause 1.3.1 of the Commitments explains the purpose of the Slots Commitments, i.e. that the Slots have to be used to provide a Competitive Air Service¹⁰ on the Relevant City Pair(s) for which the Slots have been requested.
- (10) Pursuant to Clause 1.3.2 of the Commitments, the Prospective Entrant will be eligible for Grandfathering rights once it has made appropriate use of the Slots on the Relevant City Pair(s) for the Utilisation Period (i.e. six consecutive IATA Seasons). Once the Utilisation Period has elapsed, the Prospective Entrant will be entitled to use the Slots obtained on the basis of the Commitments exclusively to operate services on any European Short-haul City Pair(s)¹¹ or the Identified Long-haul City Pair(s).¹²
- (11) Clause 1.3.3 of the Commitments clarifies that the granting of Grandfathering rights is subject to the Commission's approval. This is, in turn, conditional on the Prospective Entrant committing that, if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, it will return the Slots in question to IAG or, if IAG does not want the return of the Slots, to the slot coordinator.
- (12) Clause 1.3.5 of the Commitments contains a definition of Misuse of the Slots, which will be described in more detail in Section 1.5 below. Clause 1.3.6 of the Commitments describes the consequences of Misuse.
- (13) In accordance with Clause 6 of the Commitments, a Monitoring Trustee was appointed by the Parties and approved by the Commission on 18 April 2012. The function of the Monitoring Trustee is to monitor the Parties' fulfilment of the Commitments and of any further obligations that may be contained in the Clearance Decision.

1.4. Chronology of the Divestiture Process

1.4.1. The Evaluation Decision of 4 November 2016

- (14) On 6 October 2016, Flybe Group Plc ("Flybe" or "Applicant") submitted a formal bid for Slots pursuant to Clause 1.4.7 of the Commitments. According to its application, Flybe intended to operate 18 weekly Frequencies¹³ on the London-Aberdeen route and 25 weekly Frequencies on the London-Edinburgh route for a year round and to continue the service indefinitely.
- (15) By decision of 4 November 2016 assessing the viability of Flybe and evaluating its formal bid pursuant to Clauses 1.4.4 and 1.4.9 of the Commitments (the "Evaluation Decision"), the Commission declared that:

¹⁰ Defined in the Definitions section of the Commitments as, "A non-stop scheduled passenger air transport service operated on one or more of the Relevant City Pairs."

¹¹ Defined in the Definitions section of the Commitments as, "Any route connecting London with any other part of Europe (which shall, for the avoidance of doubt, include the Identified UK City Pairs)."

¹² Defined in the Definitions section of the Commitments as, "London-Cairo, London-Moscow and/or London-Riyadh."

¹³ Defined in the Definitions section of the Commitments as, "A round-trip on a Relevant City Pair".

- (a) Flybe is independent of and unconnected with IAG¹⁴ and had exhausted its own slot portfolio at LHR within the meaning of Clause 1.4.4 of the Commitments;¹⁵ and
 - (b) Flybe was a viable potential competitor of IAG on each Relevant City Pair for which it has requested slots under the Commitments, with the ability, resources and commitment to operate services on each of the Relevant City Pairs in the long term as a viable and active competitive force.
- (16) In reaching its conclusion on the independence of Flybe from the Parties pursuant to Clause 1.4.4 of the Commitments, the Commission, in line with the Monitoring Trustee reports of 1 September 2016 and 24 October 2016, considered a number of criteria. Thus, the Commission noted that Flybe was not an associated carrier belonging to the same group as IAG. It did not have common ownership with British Airways (or IAG or any of IAG's subsidiaries) and it did not belong to the oneworld alliance. Moreover, Flybe had no codeshare agreement with IAG on the Relevant City Pairs nor did it cooperate with IAG on the Relevant City Pairs in the provision of passenger air transport services.
- (17) With regard to the viability of Flybe as a competitor, pursuant to Clause 1.4.9 of the Commitments, the Commission assessed whether Flybe as an applicant for slots under the Commitments, “[wa]s a viable existing or potential competitor, with the ability, resources and commitment to operate services on the Relevant City Pair(s) in the long term as a viable and active competitive force”.
- (18) Accordingly, the Commission, in line with the Monitoring Trustee reports of 1 September 2016 and 24 October 2016, considered a number of criteria. These criteria included: Flybe's position as one of Europe's major regional carriers and having a long track record of operating regional services throughout Europe and in particular in the UK; Flybe's overall financial performance; the availability of aircraft to operate on the routes of concern; and the fact that Flybe had already access to the necessary ground handling services. The Commission also considered that in terms of service offerings and pricing Flybe would have the ability to act as a material competitive force.
- (19) Pursuant to Clause 1.4.10 of the Commitments, where there are several viable applicants the Commission is required to give preference to the applicant (or combination of applicants) which would provide the most effective competitive constraint on the routes of concern.

¹⁴ According to the Definitions section of the Commitments, “the Prospective Entrant [...] (a) must be independent of and unconnected with IAG. [...]; (b) it must have the intention to begin or increase regular operations on one or more of the Relevant City Pairs; and (c) to that effect, it needs a Slot or several Slots for the operation of a Competitive Air Service which competes with those of IAG”.

¹⁵ Under Clause 1.4.4 of the Commitments, “After being informed of the Slot request in accordance with Clause 1.4.2, the Commission (advised by the Monitoring Trustee) shall assess whether the Applicant meets the following criteria: (a) the Applicant is independent of and unconnected to IAG; and (b) the Applicant has exhausted its own Slot portfolio at Heathrow. If the Commission decides that the Applicant does not fulfil the above criteria, the Commission shall inform the Applicant and IAG of that decision at least two (2) weeks before the Slot Request Submission Deadline.”

- (20) Flybe was the only applicant for the Slots. Therefore, there was no need to proceed to any ranking. Nonetheless, the Commission carried out an assessment of the merits of Flybe’s bid, including its business plan, with regard to capacity, frequencies, the existence of a year-round service, the pricing structure and the service offering on the routes of concern. That assessment confirmed that Flybe would overall be a viable competitor on the London–Aberdeen route and London–Edinburgh route.

1.4.2. *The Slot Release Agreement Decision of 20 December 2016*

- (21) On 20 December 2016, British Airways Plc (“BA”)¹⁶ and Flybe submitted to the Commission the slot release agreement concluded on 15 December 2016 between the two companies for the purpose of implementing the Commitments with respect to slots requested by Flybe on the London–Aberdeen and London–Edinburgh routes (the “Slot Release Agreement”). By decision of 20 December 2016 (the “Slot Release Agreement Decision”), the Commission, in line with the Monitoring Trustee report of 13 December 2016, approved the Slot Release Agreement.
- (22) In reaching its conclusion, the Commission considered that the Slot Release Agreement was consistent with the Commitments (including Clauses 1.3.1, 1.3.2, 1.3.5, 1.3.6, 1.3.7) and that it contained a Fast Track Dispute Resolution Procedure in accordance with Clause 7 of the Commitments.
- (23) The Slot Release Agreement Decision provides that, “*during the Utilisation Period (that is, the first six consecutive IATA seasons) [Flybe] will use the BA slots solely for the purpose of operating a non-stop scheduled air transport service on the Identified UK City Pairs¹⁷ [...] Following the expiration of the Utilisation Period and subject to prior compliance with the above covenants¹⁸ and approval by the Commission (advised by the Monitoring Trustee), Flybe can use the BA slots for non-stop scheduled air transport services on any route connecting London with (i) any point in the European Union, Iceland, Norway, Switzerland or the Channel Islands, or (ii) Cairo, Moscow or Riyadh. Flybe undertakes to use the BA slots only for operations on such routes*”.¹⁹
- (24) Flybe was, therefore, granted Slots to operate 18 weekly Frequencies on the London-Aberdeen route and 25 weekly Frequencies on the London-Edinburgh route (“the 2017 Slots”).

¹⁶ BA is a subsidiary of IAG and is party to the Slot Release Agreements entered into with Flybe to release the Slots according to the Commitments.

¹⁷ Slot Release Agreement Decision, paragraph 17, letter i. Paragraph 17, letters ii., iii., and iv, of the Slot Release Agreement Decision, read as follows, “*ii. it will not to apply to ACL for any retiming of the BA slots without British Airways' prior written consent, save where retiming relates to the time window specified in the Commitments and Flybe's originally requested slots at Heathrow; iii. it will ensure that the BA slots qualify for Historical Precedence during every IATA season by (without limitation) using the BA slots at or above the minimum level specified by the EU Slot Regulation to acquire and/or retain Historical Precedence; and iv. throughout the Utilisation Period it will ensure that no Misuse occurs in relation to any of the BA slots and to immediately notify British Airways on becoming aware of, or reasonably foreseeing, any Misuse in relation to the slots.*”

¹⁸ Slot Release Agreement Decision, paragraph 17, letters i.-iv.

¹⁹ Slot Release Agreement Decision, paragraph 18.

1.5. The Grandfathering rights

- (25) Clause 1.3.1 of the Commitments provides that, *“As a general rule, the Slots obtained by the Prospective Entrant from IAG as a result of the Slot Release Procedure shall be used only to provide a Competitive Air Service on the Relevant City Pair for which the Prospective Entrant has requested them from IAG through the Slot Release Procedure. These Slots cannot be used on another city pair unless the Prospective Entrant has operated the Relevant City Pair for which these Slots have been transferred for a number of full consecutive IATA Seasons (“Utilisation Period”)”*.
- (26) Accordingly, Flybe could only use the 2017 Slots to provide a Competitive Air Service on the London-Aberdeen and London-Edinburgh routes.
- (27) Clause 1.3.2 of the Commitments provides that, *“The Prospective Entrant will be deemed to have grandfathering rights for the Slots once appropriate use of the Slots has been made on the Relevant City Pair for the Utilisation Period. In this regard, once the Utilisation Period has elapsed, the Prospective Entrant will be entitled to use the Slots obtained on the basis of these Commitments exclusively to operate services on any European Short-haul City Pair or the Identified Long-haul City Pairs (“Grandfathering”).”*
- (28) Clause 1.3.3 of the Commitments further clarifies that, *“Grandfathering is subject to approval of the Commission, advised by the Monitoring Trustee, in accordance with Clause 1.4. The Commission’s approval shall be conditional on the Prospective Entrant committing that if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, it will return the Slots in question to IAG or, if IAG does not want the return of the Slots, to the slot coordinator”*.
- (29) Therefore, Grandfathering rights would entitle Flybe to use the Slots obtained on the basis of the Commitments exclusively to operate on any European Short-haul City Pair(s)²⁰ or the Identified Long-haul City Pair(s).²¹ Such granting of Grandfathering rights is subject to: (i) appropriate use of the Slots during the Utilisation Period, i.e. during six consecutive IATA Seasons, as defined in the Definitions section of the Commitments; and (ii) Flybe’s commitment that, if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, it will return the Slots to IAG or to the slot coordinator.
- (30) Clauses 1.3.4 and 1.3.5 of the Commitments set out conditions pertaining to the usage of the Slots by the Prospective Entrant during the Utilisation Period. Pursuant to Clause 1.3.4, *“During the Utilisation Period, the Prospective Entrant shall not be entitled to transfer, assign, sell, swap or charge in breach of these Commitments any Slots obtained from IAG under the Slot Release Procedure, except for changes to any such Slots which are within the Time Window and which have been agreed with the slot coordinator”*.

²⁰ See footnote 17 of this decision.

²¹ See footnote 18 of this decision.

- (31) Clause 1.3.5 of the Commitments contains the definition of “Misuse” of the Slots:²²

"During the Utilisation Period, Misuse shall be deemed to arise where a Prospective Entrant which has obtained Slots released by IAG decides:

(a) not to commence services on the Relevant City Pair(s);

(b) to operate fewer daily Frequencies than those to which it committed in the bid in accordance with Clause 1.4.7 on a Relevant City Pair(s) or to cease operating on Relevant City Pair(s) unless such a decision is consistent with the “use it or lose it” principle in Article 10(2) of the EU Slot Regulation (or any suspension thereof);

(c) to transfer, assign, sell, swap, sublease or charge any Slot released by IAG on the basis of the Slot Release Procedure, except for changes to the Slot which are within the Time Window and which have been agreed with the slot coordinator;

(d) not to use the Slots on a Relevant City Pair(s), as proposed in the bid in accordance with Clause 1.4.7; or

(e) not to use the Slots properly: this situation shall be deemed to exist where the Prospective Entrant (i) loses the series of Slots at Heathrow as a consequence of the principle of “use it or lose it” in Article 10(2) of the EU Slot Regulation or (ii) misuses the Slots at Heathrow as described and interpreted in Article 14(4) of the EU Slot Regulation”.²³

- (32) Clause 1.3.6 of the Commitments describes the consequences of Misuse during the Utilisation Period and the actions that the Parties can take in the event that Misuse occurs. In particular, if IAG or the Prospective Entrant which has obtained Slots under the Slot Release Procedure become aware of or reasonably foresee any Misuse by the Prospective Entrant during the Utilisation Period, it shall immediately inform the other and the Monitoring Trustee. The Prospective Entrant shall have 30 days after such notice to cure the actual or potential Misuse. If the Misuse is not cured, IAG shall have the right to terminate the Slot Release Agreement and the Slots shall be returned to IAG.
- (33) On 25 March 2020, Flybe’s Administrators²⁴ submitted to the Commission and to the Monitoring Trustee its Request for approval of Grandfathering rights pursuant to Clause 1.3.3 of the Commitments (the “Application”).
- (34) The purpose of this decision is, therefore, for the Commission to assess, pursuant to Clause 1.3.3 of the Commitments, whether Flybe is eligible for

²² The definition of Misuse in the Slot Release Agreement entered into between IAG and Flybe in the version submitted to the Commission on 13 December 2016 (signed on 15 December 2016) makes explicit reference to the definition of Misuse in the Commitments.

²³ The notion of Misuse under the Commitments is therefore wider than the "use it or lose it" principle and the notion of misuse under the EU Slot Regulation.

²⁴ See Section I.6 on Flybe’s situation.

Grandfathering rights and, if this is the case, to approve the granting of such Grandfathering rights to Flybe.

1.6. Flybe's situation

- (35) On 5 March 2020, following financial difficulties, Flybe became insolvent and entered into administration.²⁵
- (36) From the Administrators' statement of proposals pursuant to paragraph 49 of schedule B1 to the Insolvency Act 1986 ("the Administrators' Proposals"), which was delivered on 29 April 2020, it appears that [...] ²⁶ [...].
- (37) On the day on which Flybe entered into administration, Flybe's Air Operator's Certificate ("AOC") and Operating Licence were suspended voluntarily by Flybe. On the same day, the UK Civil Aviation Authority ("CAA") formally suspended Flybe's AOC and Operating Licence. The Court appointed Ernst & Young LLP ("EY") as Administrators for Flybe. On that same date, BA served notices of termination of all the slot release agreements ("SRAs") that it had entered into with Flybe since the Summer 2017 Slot Release Process, including the Slot Release Agreement,²⁷ and used the power of attorney granted to it in those agreements to claw back the Slots for the Summer 2020 IATA Season.
- (38) On 20 March 2020, Flybe's Administrators asked BA to re-transfer to Flybe the Summer 2020 Slots and not to seek to claw back the Winter 2020/2021 Slots.²⁸ Following BA's refusal, Flybe's Administrators submitted to IAG on 9 April 2020 a written request to open the 15-day period for cooperation and consultation provided for by Clause 7.2 of the Commitments. Since that conciliation attempt failed, on 5 June 2020, Flybe's Administrators served a Notice to the ICC requesting arbitration pursuant to Clause 7.4 of the Commitments.²⁹ Since then, the Parties have agreed to stay the arbitration

²⁵ At the beginning of 2020, [...] Meanwhile, due to adverse publicity about the financial stability of the airline and the outbreak of the COVID-19 pandemic, the numbers of forward bookings fell and Flybe's losses further increased. [...] However, negotiations with the shareholders and the government for additional loan facilities said to be in the region of over £100 million failed to succeed.

²⁶ The Administrators' Proposal, pages 2-3. The Monitoring Trustee drew the Commission's attention on this point in an e-mail of 12 June 2020. In the Monitoring Trustee Report on Grandfathering rights, dated 23 July 2020, the Monitoring Trustee considers [...] With respect to the termination of the SRAs, the Commission observes that it is not necessary for the purposes of the present decision to determine whether BA would have been entitled to terminate those agreements. As further explained below, the termination of the SRAs does not affect Flybe's eligibility to obtain Grandfathering rights over the 2017 Slots.

²⁷ With its notices of termination of 5 March 2020, BA terminated all the SRAs between BA and Flybe (approved by the Commission by decisions of 20 December 2016, 18 December 2017, 21 December 2018, and 20 December 2019), thus including the SRAs related to the release of Slots different from those eligible to be grandfathered.

²⁸ In accordance with the slot coordinator procedures, the Winter 2020/2021 Slots could only be made available for slot exchange by the slot coordinator on 4 June 2020, not earlier as that was the Initial Slot Allocation deadline. Therefore, on 4 June 2020, not earlier, BA could seek to claw back the Winter 2020/2021 Slots.

²⁹ The request was also made pursuant to clause 12 of the Slot Release Agreements, as well as of Article 4 of the ICC Rules. The Administrators claimed that BA's termination of the Slot Release Agreements and claw back of the Summer Slots were unlawful as contrary to the Commitments, the SRAs, and to the 'anti-deprivation principle' under English insolvency law.

proceedings until the Commission has reached a conclusion as to whether or not to grant Grandfathering rights to Flybe.

- (39) On 16 April 2020 the CAA issued a decision to revoke the AOC and Operating Licence of Flybe.³⁰ On 30 April, Flybe – through its Administrators – appealed this decision to the Secretary of State for Transport (“SoS”).
- (40) On 28 May 2020, Flybe asked the CAA to reconsider its decision of 16 April 2020 based on the amendments to Regulation (EU) No 1008/2008 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic introduced by Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020.³¹
- (41) Under the thus amended Article 9(1)a of Regulation (EU) No 1008/2008, the competent licensing authorities, such as the CAA, “*may decide [...] not to suspend or revoke the operating licence of the Union air carrier provided that safety is not at risk, and that there is a realistic prospect of a satisfactory financial reconstruction within the following 12 months*”. This amendment applies to the assessments of all air carriers’ financial performance from 1 March 2020 until 31 December 2020. It therefore also applies to the assessment of Flybe’s financial performance.
- (42) On 2 July 2020, pending the appeal by Flybe of the CAA’s decision before the SoS, the CAA indicated that it would reconsider its decision to revoke Flybe’s AOC and Operating Licence.³² On 14 July 2020, the CAA published its decision to withdraw the decision of 16 April 2020, “*due to the amendment to EU Regulation 1008/2008 dated 28 May 2020 which retrospectively amends that Regulation*”.³³ By-mid August, the CAA is expected to conclude its assessment as to whether or not the test under Article 9(1)a of Regulation (EU) No 1008/2008 is met and therefore whether or not Flybe’s Operating Licence must be revoked. In the meantime, Flybe’s Administrators have withdrawn their appeal to the SoS.
- (43) At the time of this decision, Flybe has a valid AOC and Operating Licence, although with restrictions. As it has been published by the CAA, Flybe has undertaken not to: (i) take bookings or sell tickets for flights; (ii) request or accept payments of any kind from consumers in respect of balances for existing flight bookings unless those flights have been completed; and (iii) undertake any aircraft operation which requires a valid Operating Licence.³⁴ These restrictions apply until the CAA has confirmed in writing that they are lifted.

³⁰ This decision (1/2020) was published by the CAA in its Official Record, Series 2 No 2381, of 21 April 2020.

³¹ Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020 amending Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community in view of the COVID-19 pandemic, OJ L 165, 27.5.2020, p. 1–6.

³² Operating Licence OLA/16, Route Licence Charter C/27, Route Licence Scheduled S/27.

³³ This is Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020: <https://data.consilium.europa.eu/doc/document/PE-13-2020-INIT/en/pdf>

³⁴ CAA, Official Record, Series 2 number 2393, of 14 July 2020.

- (44) As regards Flybe’s future, the Administrators are negotiating the sale of Flybe’s business with two potential buyers. Since it is Flybe’s intention to resume operations in time for the beginning of the Winter 2020/2021 IATA Season, Flybe is engaged into advanced discussions with the CAA with a view to closing the sale of Flybe as a going concern by mid-August.

2. ARGUMENTS OF IAG AND FLYBE

- (45) IAG and Flybe have different views as to the relevant criteria for the granting of Grandfathering rights. As a consequence of those diverging views, IAG considers that Flybe is not eligible for Grandfathering rights, whereas Flybe concludes that it is eligible.

2.1. IAG’s position

- (46) First, IAG considers that Flybe lacks the standing to apply for Grandfathering rights. In the first place, due to the fact that following Flybe’s insolvency and entering into administration, BA terminated the SRAs, including the Slot Release Agreement, on 5 March 2020, IAG submits that Flybe has lost all rights to the 2017 Slots and, therefore, Flybe would lack the standing to request approval for the grandfathering of the 2017 Slots.³⁵
- (47) In the second place, pursuant to the Commitments, only a Prospective Entrant would be deemed to have Grandfathering rights and apply for those rights to the Commission. According to IAG, Flybe would no longer meet the requirements to qualify as a Prospective Entrant.³⁶
- (48) In the third place, IAG argues that Flybe’s Administrators do not have standing to apply for the Grandfathering of the 2017 Slots. Flybe’s Administrators, who made the Application on 25 March 2020, are not an airline and would not qualify as a Prospective Entrant or Applicant pursuant to the Commitments. Moreover, IAG points to the fact that the Administrators’ role is not to run Flybe as an airline, but rather to represent the interests of Flybe’s creditors.³⁷
- (49) Second, IAG maintains that Flybe has not met the requirements to be deemed to have Grandfathering rights. According to IAG, since on 5 March 2020 Flybe became physically incapable of continuing its operations, Flybe has not satisfied the requirement to operate the 2017 Slots for six full consecutive IATA seasons, i.e. until the end of the Winter Season (i.e. 28 March 2020).³⁸ In other words, the Utilisation Period would have been interrupted.

³⁵ IAG’s observations on the Application of 20 April 2020.

³⁶ IAG’s observations on the Application of 20 April 2020.

³⁷ IAG’s observations on the Application of 20 April 2020.

³⁸ IAG’s observations on the Application of 20 April 2020. IAG submitted “Further observations on Flybe’s application for approval of alleged deemed Grandfathering rights” on 15 May 2020; “Observations on Flybe’s conduct prior to its application for approval of alleged deemed Grandfathering rights and its ineligibility to benefit from Regulation (EU) 2020/459” on 29 May 2020; “IAG/BA’s supplemental observations on Flybe’s Administrators’ Application for Approval of Grandfathering Rights” on 8 June 2020; on 19 June 2020; and “IAG/BA observations relating to a letter dated 9 January 2020 from HMRC to Flybe” on 13 July 2020.

- (50) According to IAG, the adoption of Regulation (EU) 2020/459,³⁹ which amends the EU Slot Regulation⁴⁰ as a response to the Covid-19 pandemic and which grants a waiver to the 80/20 rule with respect to slots allocated between 1 March 2020 and at least 24 October 2020 (“Regulation 2020/459”), does not change that assessment. [...].⁴¹ Given that Flybe entered into administration and ceased to trade already on 5 March 2020, IAG argues that Flybe cannot rely on the slot waiver to avoid the finding that it failed to meet the requirement mandated by the Commitments to operate the 2017 Slots throughout the Utilisation Period.⁴²
- (51) Third, IAG claims that Clause 1.3.3 of the Commitments, which refers to Clause 1.4 of the Commitments, requires that the Commission assesses whether Flybe is a viable existing or potential competitor when evaluating Flybe’s Application.⁴³ It also contends that Clause 1.4 of the Commitments makes clear that the Commission has discretion as to whether or not to approve Grandfathering rights and that such discretion must be exercised on the basis of the provisions in Clause 1.4. According to IAG, Clause 1.4 contains a number of forward-looking considerations that the Commission must take into account, including the need for the Prospective Entrant to submit a “*formal bid*” including the “*Key Terms*” of the proposed slot release agreement, “*a detailed business plan*” and “*whether [the] Applicant is a viable existing or potential competitor, with the ability, resources and commitment to operate services on the Relevant City Pair(s) in the long term as a viable and active competitive force*”.⁴⁴
- (52) Fourth, IAG also considers that, by failing to inform the Monitoring Trustee and BA of [...]⁴⁵ [...], Flybe failed to comply with the covenants of Clause 5 of the Slot Release Agreements and, by extension, with Clause 1.3.6 of the Commitments according to which, “*if IAG or the Prospective Entrant which has obtained slots under the Slot Release Procedure become aware of or reasonably foresee any Misuse by the Prospective Entrant during the Utilisation Period, it shall immediately inform the other and the Monitoring Trustee. The Prospective Entrant shall have 30 days after such notice to cure the actual or potential Misuse. If the Misuse is not cured, IAG shall have the right to terminate the Slot Release Agreement and the Slots shall be returned to IAG*”.⁴⁶
- (53) According to IAG, Flybe’s behaviour delayed IAG’s right to terminate the SRAs with Flybe and constituted a serious breach of the SRAs and of the

³⁹ Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports OJ L 99, 31.3.2020, p. 1–4.

⁴⁰ 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 “EU Slot Regulation”).

⁴¹ IAG’s observations on the Application of 20 April 2020.

⁴² IAG’s observations on the Application of 20 April 2020 and “Observations on Flybe’s conduct prior to its application for approval of alleged deemed Grandfathering rights and its ineligibility to benefit from Regulation (EU) 2020/459” of 29 May 2020.

⁴³ IAG’s observations on the Application of 20 April 2020.

⁴⁴ IAG’s observations on the Application of 20 April 2020 and IAG’s supplemental observations of 8 June 2020.

⁴⁵ See paragraph 36 of this decision.

⁴⁶ IAG’s observations of 29 May 2020.

underlying objective of the Commitments.⁴⁷ Had IAG been made aware of [...]. If such termination had occurred, it would have been highly unlikely that Flybe could have accrued Grandfathering rights through appropriate use of the 2017 Slots pursuant to Clause 1.3.2 and the obligation in Clause 1.3.5 to operate in accordance with the “*use it or lose it*” principle set out in Article 10(2) of the EU Slot Regulation.⁴⁸

- (54) Fifth, IAG argues that Flybe is not entitled to monetise the grandfathered slots (i.e. the 2017 Slots for which Grandfathering rights are granted by this decision) (the “Grandfathered Slots”). This is because Clause 1.3.7(a) of the Commitments, provides that, “[...] *the Slot Release Agreement may ... contain prohibitions on the Prospective Entrant transferring its rights to the Slots to a third party, making the Slots available in any way to a third party for the use of that third party, or releasing, surrendering, giving up or otherwise disposing of any rights to the Slots*”. According to IAG, this restriction is not limited to the Utilisation Period but it applies for the entire duration of the Commitments.⁴⁹
- (55) Sixth, IAG also requests the Commission that, if it is minded to approve Flybe’s request for Grandfathering rights, it gives careful consideration to the mechanics by which the Grandfathered Slots are to be returned to Flybe and sets out restrictions on the use of those slots.⁵⁰ Indeed, IAG argues that: the Grandfathered Slots could only be operated in accordance with Clause 1.3.2 of the Commitments; those slots could not be sold, or otherwise transferred, to a third party as per Clause 1.3.7(a); IAG will remain entitled to recover those slots in the event that Flybe loses its Operating Licence, in accordance with Clause 7.1(ii) of the existing SRAs; IAG will remain entitled to recover the Grandfathered Slots in the event that Flybe does not begin to operate them, or ceases to operate them, on the permitted routes in a way that is inconsistent with the “*use it or lose it*” principle (once the Covid waiver lapses).⁵¹
- (56) Moreover, were the Commission to approve Flybe’s request for Grandfathering, it will be necessary to put in place mechanisms to ensure that the restrictions to which the Grandfathered Slots are subject can be enforced by the Commission (advised by the Monitoring Trustee) and IAG against Flybe, the administrators and any purchaser of Flybe and that those restrictions also bind Flybe’s successor.⁵²
- (57) In light of the above, IAG considers that Flybe should not obtain Grandfathering rights.

⁴⁷ The objective being that of retaining slots for use by competitors during administration or bankruptcy, and limiting the chance of these slots being lost to the pool.

⁴⁸ IAG’s observations of 29 May 2020 and of 13 July 2020.

⁴⁹ IAG’s observations of 19 June 2020. IAG’s observations of 8 June 2020 also make reference to the fact that pursuant to provisions of the SRAs – Clause 5.1 and Clause 11.7 – the slots belong to BA.

⁵⁰ IAG’s observations of 19 June 2020.

⁵¹ IAG’s observations of 19 June 2020.

⁵² IAG’s observations of 19 June 2020.

2.2. Flybe's position

- (58) By contrast, Flybe considers that the only precondition to acquiring Grandfathering rights under Clause 1.3 of the Commitments is that the Prospective Entrant has made “*appropriate use*” of the relevant Slots for a period of six consecutive IATA seasons, i.e., the Utilisation Period. Flybe argues that “*appropriate use*” of Slots during the Utilisation Period should be defined as sufficient use to maintain Grandfathering rights, relying in this respect on the Commission’s decision on the implementation of commitments in Case M.6607 – *US Airways/American Airlines* dated 30 April 2018 for slots used by Delta.⁵³
- (59) In its Application, Flybe claims that before it entered administration on 5 March 2020 it had already used 40.5 of the 43 weekly slot pairs provided to Flybe under the Slot Release Agreement Decision of 20 December 2016 in accordance with the “*use it or lose it*” rule. As far as the remaining 2.5 weekly slot pairs (i.e. 5 slots) are concerned, in order to obtain the 80% utilisation for these remaining Slots, Flybe declared it was preparing to operate these Slots (without carrying passengers). However, Regulation (EU) 2020/459 made this unnecessary.⁵⁴
- (60) As a result, Flybe argues that it has made appropriate use of the 2017 Slots and should therefore be granted Grandfathering rights.

3. THE COMMISSION’S ASSESSMENT

3.1. Analytical Framework

3.1.1. Context

- (61) The purpose of the Commitments is to eliminate the serious doubts that the Commission had as to the compatibility of the Transaction with the internal market. Specifically, post-Transaction, the merged entity would have had very high market shares on the routes of concern identified in paragraph (2) of this decision. In light of that, the Commitments aimed at maintaining effective competition and enticing entry on those routes.⁵⁵
- (62) As set out in Clause 1.3.1 of the Commitments, Slots made available under the Commitments shall be only used to provide a Competitive Air Service on the routes on which the Commission identified competition concerns and for which the Prospective Entrant has requested the Slots, unless the Prospective Entrant acquires Grandfathering rights for those Slots (enabling a wider use of those Slots). By enabling a Prospective Entrant to operate on the routes of concern, the Slots obtained under the Commitments contribute to restoring a Competitive Air Service on those routes, at least for the duration of the Utilisation Period.
- (63) As underlined by the Parties themselves, the purpose of the inclusion of Grandfathering rights in the Commitments is to encourage market entry by

⁵³ The Application, paragraph 2.2.

⁵⁴ The Application, paragraphs 2.2.-2.3.

⁵⁵ Form RM as submitted by IAG on 28 March 2012.

competitors on the Identified City Pairs.⁵⁶ Once Grandfathering rights are granted to the Prospective Entrant, the latter can use the Slots obtained under the Commitments to operate services on any European Short-haul City Pair(s) or the Identified Long-haul City Pair(s) (an only on those). Therefore, Grandfathering rights constitute an incentive for airlines to request slots under the Commitments. This increases the likelihood that a Prospective Entrant willing to operate a Competitive Air Service on the Identified City Pair(s), at least during the Utilisation Period, can be found.

- (64) As mentioned in paragraph (34) above, the purpose of this decision is to assess whether Grandfathering rights can be granted to Flybe pursuant to the Commitments.
- (65) This decision does not make any finding as to the lawfulness of BA's decision to terminate the SRAs with Flybe following the deterioration of Flybe's financial condition which led to Flybe being put into administration on 5 March 2020.⁵⁷ Therefore, the Commission takes no position on any contractual rights that BA asserts under the SRAs.

3.1.2. *On legal standing*

- (66) With respect to IAG's claims that Flybe and/or its Administrators do not have standing to apply for Grandfathering rights, the Commission takes account of the following considerations.
- (67) Preliminarily, it must be emphasised that the Commitments do not contain any conditions for having standing to request Grandfathering rights. Since the conditions for Grandfathering are only governed by the Commitments, it is not possible to subject Grandfathering to conditions other than those contained in the Commitments.
- (68) As to the references to "Prospective Entrant" contained in Clauses 1.3.2-1.3.3 of the Commitments, those clauses do not create a condition for standing as the concept of Prospective Entrant concerns only the eligibility of an Applicant to obtain Slots under the Slot Release Procedure.
- (69) Moreover, it cannot be said that Flybe lost all rights to the 2017 Slots following the termination of the Slot Release Agreements by BA. Although such termination is disputed, it has no bearing on the question of whether Flybe fulfils the conditions to be granted Grandfathering rights since the Commitments do not require that a slot release agreement be in force at the moment that an application for Grandfathering rights is made.

⁵⁶ Form RM, section 1.4, "*The Commitments aim to maintain effective competition and to encourage market entry by competitors on the Identified City Pairs. [...] The Commitments further encourage entry by providing: (i) That the new entrant will be deemed to have grandfathering rights over the slots once they have been used to operate service on the Relevant City Pair for six (6) consecutive IATA Seasons*".

⁵⁷ BA's decision to claw back the Summer Slots on 4 March 2020 and to terminate the SRAs on 5 March 2020 is contested by Flybe. According to BA, the right to terminate the SRAs was triggered by Flybe's entry into administration on 5 March 2020 giving rise to a right of termination under Clause 7 of the SRAs.

- (70) Concerning the fact that Flybe is in administration, the Commission considers that this does not necessarily disqualify the company from applying for Grandfathering rights, as it may resume its operations, a possibility that arises even more so now that the CAA has withdrawn its decision to revoke Flybe's AOC and Operating Licence (see paragraph (42) above).
- (71) Finally, the Commission is of the opinion that an application for Grandfathering rights may be made by Flybe's Administrators since the Application has been made on behalf of Flybe and the Administrators are entitled to represent the company following their appointment by the High Court of England and Wales.

3.1.3. *Criteria for assessing whether the granting of Grandfathering rights can be approved*

- (72) As explained in Section 1.5, Grandfathering is defined in Clause 1.3.2 of the Commitments. Pursuant to Clause 1.3.2 of the Commitments, the Prospective Entrant will be deemed to have Grandfathering rights for the Slots once, "*appropriate use of the Slots has been made on the Relevant City Pair for the Utilisation Period. In this regard, once the Utilisation Period has elapsed, the Prospective Entrant will be entitled to use the Slots obtained on the basis of these Commitments exclusively to operate services on any European Short-haul City Pair or the Identified Long-haul City Pairs ("Grandfathering")*". The Utilisation Period is defined in the Definitions section of the Commitments as, "*six (6) consecutive IATA Seasons*".⁵⁸
- (73) In addition to the above, Clause 1.3.3 of the Commitments clarifies that the granting of Grandfathering rights, which is subject to the Commission's approval, is, "*conditional on the Prospective Entrant committing that if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, it will return the Slots in question to IAG or, if IAG does not want the return of the Slots, to the slot coordinator*".
- (74) Therefore, pursuant to Clause 1.3.2 and Clause 1.3.3 of the Commitments, the only criteria for granting Grandfathering rights are "*appropriate use*" of the Slots on the Relevant City Pair(s) during the Utilisation Period and the commitment made by the Prospective Entrant that, "*if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, it will return the Slots in question to IAG or, if IAG does not want the return of the Slots, to the slot coordinator*".

3.1.3.1 *Definition of "appropriate use" of the Slots*

- (75) The notion of "*appropriate use*" is not defined in the Commitments. Therefore, the Commission must determine the meaning of "*appropriate use*" under Clause 1.3.2 of the Commitments before proceeding with the assessment as to whether it can approve the granting of Grandfathering rights to Flybe.
- (76) In the absence of an express definition, the Commission has considered the wording, the object and the context of the Commitments, in line with its

⁵⁸ According to the Definitions section of the Commitments the term "*Utilisation Period*" has the meaning given in Clause 1.3.1 of the Commitments and shall be six consecutive IATA Seasons.

previous approach in Case M.6607 – US Airways/American Airlines. On that basis, the Commission concludes that "*appropriate use*" must be understood to mean "*absence of Misuse*". The reasons for the Commission's conclusion are set out below in this section.

3.1.3.2 *Appropriate use* as "*absence of Misuse*"

- (77) Clause 1.3.2 of the Commitments, which is the one defining Grandfathering, does not define "*appropriate use*" and does not set a specific standard for such appropriate use. The Commission therefore considers the object and the context of the Commitments as relevant to interpret "*appropriate use*".
- (78) As regards the object of the Commitments, the Commission considers that the Commitments aim to remedy serious doubts as to the compatibility of the Transaction with the internal market in relation to certain routes of concern, i.e. the Relevant City Pairs. Clause 1.3.1 of the Commitments refers to the purpose of the Slot Commitments, which is to restore competition on the Relevant City Pair(s) by establishing a Competitive Air Service. Competitive Air Service is defined as, "*a non-stop scheduled passenger air transport service operated on one or more of the Relevant City Pairs*".
- (79) As regards the context of the Commitments, the Commission considers that, as explained in paragraph (63) above, Grandfathering rights constitute an incentive for the Prospective Entrant to operate the Relevant City Pairs. To entice entry by a competitor, the Prospective Entrant needs clear and verifiable principles, as well as legal certainty, notably concerning the award of Grandfathering rights, in order to decide whether or not to apply for the Slots. This in turn requires that the Prospective Entrant can trust that the criteria for obtaining Grandfathering rights (i.e. appropriate use and obligation to exclusively operate services on any European Short-haul City Pair or the Identified Long-haul City Pairs) are clearly circumscribed and not subject to arbitrary considerations.
- (80) Considering that in the ordinary language "*misuse*" can be defined as "*an occasion when something is used in an unsuitable way or in a way that was not intended*"⁵⁹ and that "*appropriate*" can be defined as "*suitable or right for a particular situation or occasion*"⁶⁰, the most evident conclusion is that "*appropriate use*" is the opposite of "*misuse*". Consequently, when applying a literal interpretation of the concepts used in the Commitments, the appropriate use of the Slots should be understood as the absence of Misuse of these Slots.
- (81) Misuse is defined in Clause 1.3.5 of the Commitments, while "*appropriate use*" is not defined. The existence of a definition of "*Misuse*" and the absence of a definition of "*appropriate use*" in the Commitments points towards a correlation between "*appropriate use*" and "*absence of Misuse*". Since Misuse of the Slots

59 Misuse (noun) in Cambridge Dictionary. Retrieved from <https://dictionary.cambridge.org/fr/dictionnaire/anglais/misuse>.

60 Appropriate (adjective) in Cambridge Dictionary. Retrieved from <https://dictionary.cambridge.org/fr/dictionnaire/anglais/appropriate>

is deemed to arise under a number of circumstances listed in Clause 1.3.5,⁶¹ a situation which does not give rise to Misuse can, *a contrario*, be considered as “*appropriate use*” of the Slots. By making reference to a concept which is defined in the Commitments, this interpretation is the only one which would provide the Prospective Entrant with sufficiently clear and verifiable guidance and which would fulfil the requirements of legal certainty.

3.1.3.3 “*Appropriate use*” does not require “*use until the very end of the Utilisation Period*”

- (82) Section 3.1.3 above illustrates the criteria for the assessment of whether the granting of Grandfathering rights can be approved.
- (83) Unlike Clause 1.3.2 and Clause 1.3.3 of the Commitments, Clause 1.3.1 does not contain any condition pertaining to the granting of Grandfathering rights, but only clarifies the purpose of the Commitments, which is to allow a Prospective Entrant to only use the remedy slots to operate a Competitive Air Service on the Relevant City Pair(s) during the Utilisation Period.
- (84) Contrary to what IAG argues, the expression “*for a number of full consecutive IATA Seasons*” in Clause 1.3.1, does not require the Prospective Entrant to operate the Slots until the very end of the Utilisation Period in order to be eligible to acquire Grandfathering rights. This expression merely defines the meaning of “*Utilisation Period*”. The condition for Grandfathering in Clause 1.3.2, i.e. “*to make appropriate use for the Utilisation Period*” requires that appropriate use is to be assessed for each of the six full consecutive IATA seasons covered by the Utilisation Period.
- (85) As illustrated in Section 3.1.3.2, “*appropriate use*” must be understood to mean “*absence of Misuse*”. Misuse shall be deemed to arise only in the circumstances mentioned in Clause 1.3.5 of the Commitments. In Section 3.2 below the Commission will assess more in detail whether Flybe has committed Misuse. For the purpose of the assessment of IAG’s submission, the Commission notes that since Clause 1.3.5 (b) of the Commitments entitles Flybe to rely on the “*use it or lose it*” principle established by Article 10(2) of the EU Slot Regulation, it is possible that, despite having ceased its operations since entering into administration on 5 March 2020, i.e. before the end of the last IATA season comprised in the Utilisation Period, Flybe did not commit Misuse.
- (86) Therefore, the fact that Flybe did not operate the 2017 Slots until the end of the Winter 2019/2020 IATA Season does not automatically mean that Flybe did not make “*appropriate use*” of the 2017 Slots on the Relevant City Pair(s) during the Utilisation Period. Accordingly, it cannot be said that Flybe is not entitled to Grandfathering rights based on that fact alone.

61 Misuse arises not only in case of breach of the “*use it or lose it*” principle or in case of misuse as defined under the EU Slot Regulation, but also under certain specific circumstances listed in Clause 1.3.5 of the Commitments.

3.1.4. Commitment to return the slots

- (87) It results from Clause 1.3.3 of the Commitments that the Commission can only grant Grandfathering rights on the condition that Flybe commits to return those slots to IAG or to the slot coordinator if it ceases to use them for the purposes described in Clause 1.3.2. However, it does not follow from the fact that Flybe is in administration that it cannot make such commitment. Without prejudice to Section 3.1.5, this is all the more true in the light of the recent developments, highlighted in Section 3.2.2 below, i.e., the fact that the CAA has recently withdrawn its decision to revoke the AOC and Operating Licence of Flybe and the ongoing negotiations with potential buyers to take over Flybe, enabling it to resume its operations under its existing AOC and Operating License.

3.1.5. The conditions to be a Prospective Entrant are not relevant

- (88) Given that the only criteria to obtain Grandfathering rights are appropriate use and the commitment by Flybe pursuant to Clause 1.3.3 of the Commitments (see paragraph (74) above), the Commission rejects IAG's argument that when assessing whether or not to grant Grandfathering rights the Commission should carry out a forward-looking assessment of Flybe's viability as an existing or potential competitor pursuant to Clause 1.4 of the Commitments in the same way as it does when it assesses applications for Slots by a Prospective Entrant.
- (89) The Commitments do not require Flybe to demonstrate that, in order to apply for Grandfathering rights, it still fulfils the conditions to be considered as a Prospective Entrant, that is: i) to be independent of and unconnected to IAG and having exhausted its own slot portfolio at LHR; and ii) to be a viable competitor of IAG with the ability, resources and commitment to operate services on the Relevant City Pair(s) in the long term as a viable and active competitive force. As set out above in paragraph (68), the criteria for a Prospective Entrant concern the eligibility of an applicant seeking to obtain Slots pursuant to the Slot Release Procedure and are not relevant for the assessment of whether Grandfathering rights should be granted.
- (90) Moreover, such a requirement would run contrary to the aim of the Commitments to incentivise airlines to request the Slots under the Commitments to operate a Competitive Air Service on the Relevant City Pair(s), at least during the Utilisation Period. Imposing such a further requirement for Grandfathering would create an additional burden on Prospective Entrants that is not provided for under the Commitments.
- (91) The reference to Clause 1.4 contained in Clause 1.3.3 must therefore be understood as requiring the Commission, when assessing whether or not a Prospective Entrant can be granted Grandfathering rights, to obtain the advice of the Monitoring Trustee, as it does when it carries out an assessment of the eligibility and viability of a Prospective Entrant applying to obtain Slots pursuant to the Slot Release Procedure.

3.1.6. Conclusion

- (92) In the light of the foregoing, the Commission considers that that the only criteria for obtaining Grandfathering rights are (i) "appropriate use" of the Slots on the Relevant City Pair(s) during the Utilisation Period, and (ii) the commitment

made by the Prospective Entrant that, “*if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, it will return the Slots in question to IAG or, if IAG does not want the return of the Slots, to the slot coordinator*”.

- (93) As regards (i) "*appropriate use*" of the Slots must be interpreted as "*absence of Misuse*" of the Slots, as defined in Clause 1.3.5 of the Commitments. Therefore, the Commission will assess whether Flybe should obtain Grandfathering rights based on the absence of Misuse of the Slots during the Utilisation Period.
- (94) As regards (ii), the Commission must condition the grant of Grandfathering rights on Flybe's commitment to exclusively use the Grandfathered Slots to operate services on any European Short-haul City Pair or on the Identified Long-haul City Pairs; and, if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, to return the Slots to IAG or, if IAG does not want the return of the Slots, to the slot coordinator.

3.2. Assessment of whether Flybe is entitled to obtain Grandfathering rights

3.2.1. Appropriate use

- (95) Pursuant to Clause 1.3.2 of the Commitments and as explained in paragraphs (77) to (81) above, the Commission must assess whether Flybe has made "*appropriate use*" of the Slots during the Utilisation Period before it can approve the granting of Grandfathering rights to a Prospective Entrant.
- (96) As explained above in paragraphs 59 to 64, "*appropriate use*" of the Slots is to be understood as absence of Misuse of the Slots.
- (97) Therefore, in order to determine whether Flybe is entitled to Grandfathering rights, the Commission must assess whether Misuse, as defined in Clause 1.3.5 of the Commitments, has occurred during the Utilisation Period.
- (98) Clause 1.3.3 of the Commitments and paragraph 6(a)(iv) of the Trustee Mandate require the Monitoring Trustee to advise and make a written recommendation to the Commission on whether (i) appropriate use of the slots granted to Flybe under these Commitments since the Summer 2017 season has been made on the Relevant City Pairs during the Utilisation Period, and (ii) Flybe should be awarded Grandfathering rights to the slots.
- (99) In his Monitoring Trustee Report on Grandfathering rights of 23 July 2020, the Monitoring Trustee has reviewed the slot usage on the Relevant City Pairs based on data provided by Flybe and the slot coordinator at LHR for each season of the Utilisation Period (starting in Summer 2017 and ending in Winter 2019/20 for a total of six (6) consecutive IATA Seasons).
- (100) Pursuant to Clause 1.3.5 of the Commitments, Misuse is deemed to arise under the circumstances listed in sub-Clauses 1.3.5 (a) to 1.3.5(e) of the Commitments. The Commission will therefore assess, notably on the basis of the data and analysis included in the Monitoring Trustee's report,⁶² whether

⁶² Monitoring Trustee Report on Grandfathering rights, dated 23 July 2020.

Flybe's use of the Slots during the Utilisation Period has given rise to Misuse within the meaning of the Commitments.

3.2.1.1. Assessment of the occurrence of Misuse within the meaning of Clause 1.3.5 (a) and 1.3.5 (d) of the Commitments

- (101) Pursuant to Clause 1.3.5 (a) of the Commitments, Misuse shall be deemed to arise where the Prospective Entrant decides not to commence services on a Relevant City Pair(s). Pursuant to Clause 1.3.5 (d) of the Commitments, Misuse occurs when the Prospective Entrant does not use the Slots on a Relevant City Pair(s).
- (102) As noted by the Monitoring Trustee, Flybe started operating non-stop services between London-Aberdeen and London-Edinburgh in the Summer 2017 IATA Season and continued providing those services during the subsequent IATA Seasons of the Utilisation Period (i.e. from Summer 2017 to Winter 2019/2020, until Flybe entered into administration).⁶³ In that regard, the Monitoring Trustee indicated that Flybe offered the following seat capacity during the Utilisation Period and therefore used the Slots during that period on the Relevant City Pair(s):
- [...]
- (103) As confirmed by the slot coordinator at LHR and as reported by the Monitoring Trustee, Flybe used the Slots exclusively on the London-Aberdeen and London-Edinburgh routes throughout the Utilisation Period.
- (104) Therefore, Flybe commenced providing non-stop passenger air transport services between London-Aberdeen and London-Edinburgh in Summer 2017 and used the Slots exclusively on those routes throughout the Utilisation Period.
- (105) The Commission thus considers that no Misuse as defined in Clause 1.3.5 (a) and 1.3.5 (d) of the Commitments occurred during the Utilisation Period.

3.2.1.2. Assessment of the occurrence of Misuse within the meaning of Clause 1.3.5 (b) of the Commitments

- (106) Pursuant to Clause 1.3.5 (b) of the Commitments, Misuse shall be deemed to arise where the Prospective Entrant, "*decides to operate fewer weekly Frequencies than those to which it committed in the bid in accordance with Clause 1.24 or to cease operating on the Airport Pair unless such a decision is consistent with the "use it or lose it" principle in Article 10(2) of the EU Slot Regulation (or any suspension thereof)*".
- (107) The "*use it or lose it*" principle, or 80/20 rule, in Article 10(2) of the EU Slot Regulation is the general principle according to which an air carrier having operated its particular series of slots for at least 80% of the relevant scheduling

⁶³ Monitoring Trustee Report on Grandfathering rights, dated 23 July 2020, Section 6.6.3. The Summer 2018 Slot Release Process culminated in the release of one additional frequency to Flybe on the London-Aberdeen route. The Summer 2019 Slot Release Process culminated in the release and consequently increase of additional daily frequencies on the London-Edinburgh route, from four to five on weekdays, and on Sunday and from three to four on Saturday.

period is entitled to the same series of slots in the equivalent scheduling period of the following year. The entitlement to the same series of slots as the one operated during the previous year is sometimes referred to as "*grandfather(ing) rights*" or "*historical precedence*".⁶⁴

- (108) Following the outbreak of COVID-19, Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports was adopted on 30 March 2020.⁶⁵ This Regulation provides for a time-limited (between 1 March 2020 and at least 24 October 2020) waiver on the "*use it or lose it*" provision of the EU Slot Regulation.
- (109) In addition, pursuant to Article 10(3) of the EU Slot Regulation, "*slots allocated to an air carrier before 31 January for the following summer season, or before 31 August for the following winter season, but which are returned to the coordinator for reallocation before those dates shall not be taken into account for the purposes of the usage calculation*". Therefore, under the slot allocation procedure, which is applicable to LHR, it is possible to return slots while such hand-backs do not affect the compliance with the "*use it or lose it*" principle.
- (110) In accordance with Articles 10(2) and 10(3) of the EU Slot Regulation, an airline can return some slots of a given series to the slot coordinator ahead of the Slot Handback Deadline,⁶⁶ without compromising its eligibility for historical precedence over this given series.
- (111) Flybe committed in its bid, submitted in accordance with Clause 1.4.7 of the Commitments, to operate 18 weekly Frequencies on the London-Aberdeen route and 25 weekly Frequencies on the London-Edinburgh route all year round and to continue the service indefinitely.
- (112) The Monitoring Trustee observed in its Report that, for each of the seasons covered by the Utilisation Period, following the rules established by the slot coordinator at LHR and under the EU Slot Regulation, Flybe has both handed back slots pre-season (ahead of the deadline), and made some within-season cancellations.⁶⁷
- (113) It then noted that, as confirmed by the slot coordinator at LHR, for all six seasons (within the Utilisation Period), Flybe has maintained operations in accordance with the rules of the Slot Regulation and the slot coordinator at LHR has confirmed there have been no situations of Misuse or breaches of the 80/20 rule. The slot coordinator at LHR has confirmed that Flybe has made use of the ability to handback slots pre-season ahead of the Coordinator's deadline.⁶⁸

⁶⁴ See for instance IATA *Worldwide Slot Guidelines*, 8.1 Edition, effective 1 January 2018, part 8.1.

⁶⁵ OJ L 99, 31.3.2020, p. 1–4.

⁶⁶ Pursuant to the Definitions section of the Commitments the Slot Handback Deadline is, "*15 January for the IATA Summer Season and 15 August for the IATA Winter Season*".

⁶⁷ As explained by the Monitoring Trustee, the 80/20 rule is only applied to slots that remain following any pre-season handbacks, but counts within-season cancellations.

⁶⁸ Monitoring Trustee Report on Grandfathering rights, dated 23 July 2020, Section 6.7.2.

- (114) On 5 March 2020, Flybe filed for administration and suspended its Operating Licence. As a result, between 5 March 2020 and the end of the Winter 2019/2020 IATA Season, Flybe did not operate on the London-Aberdeen and London-Edinburgh routes.
- (115) However, as explained in paragraph (108) above, Regulation (EU) 2020/459 provides for a waiver of the 80/20 rule during the period between 1 March 2020 and at least 24 October 2020 as a result of which the Commission considers that no breach of the “*use it or lose it*” rule has been committed.
- (116) With respect to IAG’s argument that Flybe failed to comply with the covenants of Clause 5 of the SRAs and, by extension, with Clause 1.3.6 of the Commitments, the Commission observes that, different from Clause 5 of the SRAs, Clause 1.3.6 does not require to inform IAG in the event that bankruptcy or insolvency occurs. Clause 1.3.6 only requires Flybe to inform IAG (and the Monitoring Trustee) regarding an actual or foreseeable Misuse. In that respect, Flybe operated the Slots until 5 March 2020 and, for the remainder of the Winter 2019/2020 IATA Season was covered by the waiver pursuant to Regulation (EU) 2020/459, such that, as explained above, Flybe did not commit Misuse. Hence, Flybe was not required to inform IAG of any actual or foreseeable Misuse under Clause 1.3.6.
- (117) In this decision the Commission is not assessing whether bankruptcy or insolvency as defined in the SRAs [...]
- (118) In the light of the above, the Commission concludes that no Misuse as defined in Clause 1.3.5 (b) of the Commitments occurred during the Utilisation Period.

3.2.1.3. Assessment of the occurrence of Misuse within the meaning of Clause 1.3.5 (e) of the Commitments

- (119) Pursuant to Clause 1.3.5 (e) of the Commitments, Misuse is deemed to arise where the Prospective Entrant decides, *"not to use the Slots properly: this situation shall be deemed to exist where the Prospective Entrant (i) loses the series of Slots as a consequence of the principle of 'use it or lose it' in Article 10(2) of the EU Slot Regulation, or (ii) misuses the Slots as described and interpreted in Article 14(4) of the EU Slot Regulation."*⁶⁹
- (120) First, as confirmed by the slot coordinator at LHR and reported by the Monitoring Trustee in its report of 23 July 2020⁷⁰ and as demonstrated above,

⁶⁹ Article 14(4) of the EU Slot Regulation provides that, *"Air carriers that repeatedly and intentionally operate air services at a time significantly different from the allocated slot as part of a series of slots or uses slots in a significantly different way from that indicated at the time of allocation and thereby cause prejudice to airport or air traffic operations shall lose their status as referred to in Article 8(2). The coordinator may decide to withdraw from that air carrier the series of slots in question for the remainder of the scheduling period and place them in the pool after having heard the air carrier concerned and after issuing a single warning."*

⁷⁰ Monitoring Trustee Report on Grandfathering rights, dated 23 July 2020, Sections 6.1.3, 6.2.3, 6.3.3, 6.4.3, 6.5.3, and 6.6.3.

Flybe has respected the “*use it or lose it*” principle pursuant to Article 10(2) of the EU Slot Regulation with regard to the Slots.⁷¹

- (121) Second, the Monitoring Trustee report of 23 July 2020 also confirms that the circumstances described in Article 14(4) of the EU Slot Regulation did not occur throughout the Utilisation Period.⁷²
- (122) Therefore, the Commission considers that no Misuse as defined in Clause 1.3.5 (e) of the Commitments occurred during the Utilisation Period.

3.2.1.4. Assessment of the occurrence of Misuse within the meaning of Clause 1.3.5 (c) of the Commitments

- (123) Pursuant to Clause 1.3.4 of the Commitments, *"the Prospective Entrant shall not be entitled to transfer, assign, sell, swap, or charge in breach of these Commitments any Slots obtained from the Parties under the Slot Release Procedure, except for changes to any such Slots which are within the Time Window and which have been agreed with the slot coordinator."*
- (124) Pursuant to Clause 1.3.5 (c) of the Commitments, Misuse is deemed to arise where the Prospective Entrant decides, *"to transfer, assign, sell, swap, sublease or charge any Slot released by the Parties on the basis of the Slot Release Procedure, except for changes to the Slot which are within the Time Window and which have been agreed with the slot coordinator"*.
- (125) It stems from Clause 1.3.5 (c) of the Commitments that Misuse arises from the breach of Clause 1.3.4 of the Commitments as well as from the sublease of the Slots, unless such sublease has been agreed with the slot coordinator.
- (126) The Monitoring Trustee has found, based on information obtained from the slot coordinator at LHR, that no Misuse as defined in Clause 1.3.5 (c) of the Commitments occurred during the Utilisation Period.
- (127) Indeed, during the Utilisation Period, Flybe did not transfer, assign, sell, swap, sublease or charge any Slot.⁷³
- (128) Therefore, the Commission considers that no Misuse as defined in Clause 1.3.5 (c) of the Commitments occurred during the Utilisation Period.

3.2.1.5. Conclusion on Misuse

- (129) On the basis of the above, Flybe did not commit any Misuse, as defined in Clause 1.3.5 of the Commitments, during the Utilisation Period.
- (130) Accordingly, in line with the written recommendation of the Monitoring Trustee, the Commission concludes that Flybe has made appropriate use of the Slots during the Utilisation Period.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Monitoring Trustee Report on Grandfathering rights, dated 23 July 2020, Sections 6.1.3, 6.2.3, 6.3.3, 6.4.3, 6.5.3, and 6.6.3.

3.2.2. Commitment pursuant to Clause 1.3.3

- (131) Pursuant to Clause 1.3.3 of the Commitments, the Commission's approval of the granting of Grandfathering rights to Flybe is subject to its commitment, if it ceases to use the Slots in question for the purposes described in Clause 1.3.2, to return the Slots in question to IAG or, if IAG does not want the return of the Slots, to the slot coordinator.
- (132) In line with Clause 1.3.2 of the Commitments, the Grandfathering Slots can exclusively be used to operate services on any European Short-haul City Pair or the Identified Long-haul City Pairs. Flybe must therefore commit that, as set out in Clause 1.3.3 of the Commitments, if it ceases to use the Slots for the purposes described in Clause 1.3.2, it will return those Slots to IAG or to the slot coordinator. Since at the time of this decision Flybe is in administration, this obligation shall be understood as being incumbent not only on Flybe, but also on any of its successors, or party acquiring the rights to use the Grandfathered Slots by whatever means.⁷⁴
- (133) In its Application of 25 March 2020, Flybe acknowledged [...] ⁷⁵
- (134) On 27 July 2020, Flybe formally committed that, in the event the Commission approves Flybe's application for Grandfathering rights, Flybe will continue to operate the 2017 Slots pursuant to Clauses 1.3.2 and 1.3.3 and that, in the event Flybe does not operate the 2017 Slots in line with Clauses 1.3.2 and 1.3.3 of the Commitments, Flybe will return the 2017 Slots to BA ("the Assurance").⁷⁶
- (135) Flybe further committed that, in the event of an acquisition of Flybe's business including the 2017 Slots for the purposes of Article 8a1(b)(iii) of Regulation 95/93 of the Council and Parliament as amended, Flybe will procure that the acquirer of the business will confirm the same Assurance to the Commission.⁷⁷
- (136) Finally, Flybe, being aware of the Commission's desire to avoid the return of the Grandfathered Slots to the slot pool, by its Assurance committed to seek to ensure that the Grandfathered Slots are not lost and thus no longer available for a Prospective Entrant on the European Short-haul City Pair(s) or Identified Long-haul City Pairs (as defined in the Commitments). Therefore, if following the grant of Grandfathering rights to it, Flybe reasonably becomes aware of any possibility of Misuse as defined in Clause 1.3.5 of the Commitments prior to the restart of flight operations by Flybe, it committed to notify BA using the procedure set out in Clause 1.3.6 of the Commitments. Were Misuse reasonably likely to occur within 30 days of Flybe's notification to BA, Flybe committed to

⁷⁴ To that effect, so as to ensure the respect of the Commitments, the Commission reserve the right to address in the future a decision to any purchaser of Flybe or of its assets.

⁷⁵ Application, paragraph 5.3.

⁷⁶ Assurance to the European Commission in respect of Flybe Limited's (in administration) application for approval of grandfather rights in accordance with clauses 1.3.2 and 1.3.3 of the Commitments annexed to the 6(1)(b) decision of the European Commission in Case M.6447 – IAG/BMI dated 30 March 2012 (the "Assurance"), paragraph 1.2.

⁷⁷ *Ibid.*

return the Grandfathered Slots to BA without waiting for the procedure in Clause 1.3.6 to be completed.⁷⁸

- (137) The Commission further notes that the CAA has recently withdrawn its decision to revoke Flybe's AOC and Operating License. This is because the recently introduced changes to Regulation (EU) No 1008/2008 in view of the Covid-19 pandemic give the CAA some flexibility in assessing Flybe's financial status and to take account of the impact of the pandemic on Flybe's finances. As a result, Flybe currently has a valid AOC and Operating Licence. Moreover, both the CAA and Flybe have confirmed that there are ongoing negotiations with two credible buyers of Flybe which should allow for a sale of Flybe as a going concern to take place by mid-August 2020.
- (138) On the basis of the information available to it, the Commission considers that, Flybe will utilise the Grandfathered Slots in accordance with Clause 1.3.2 and Clause 1.3.3 of the Commitments.
- (139) The Commission therefore concludes that Flybe satisfies both conditions to be granted Grandfathering rights: (i) having made appropriate use of the 2017 Slots; and (ii) having committed to use the Grandfathered Slots in accordance with Clause 1.3.2 and Clause 1.3.3 of the Commitments.

3.2.3. Additional considerations in respect of Flybe's use of the Slots for which Grandfathering rights are granted

- (140) In line with the Commitments, the transfer of the Grandfathered Slots shall take place by means of an *ad hoc* Slot Release Agreement entered into between IAG/BA and Flybe.
- (141) As provided for in the Commitments, the Slot Release Agreement concerning the transfer of the Grandfathered Slots from BA to Flybe, shall be in line with the Commitments and approved by the Commission.
- (142) This Slot Release Agreement shall therefore contain certain restrictions on the use of the Grandfathered Slots.
- (143) In the first place, in line with Clause 1.3.2 of the Commitments, the Grandfathered Slots can only be used to operate services on any European Short-haul City Pair or the Identified Long-haul City Pairs.
- (144) In the second place, Clause 1.3.3 of the Commitments provide that Flybe, if it ceases to use the Grandfathered Slots for the purposes described in Clause 1.3.2, will return them to IAG or the slot coordinator.
- (145) In line with that provision, Clause 1.3.7 of the Commitments provide that, "*For the avoidance of doubt, the Slot Release Agreement may: (a) contain prohibitions on the Prospective Entrant transferring its rights to the Slots to a third party, making the Slots available in any way to a third party for the use of that third party, or releasing, surrendering, giving up or otherwise disposing of any rights to the Slots*".

⁷⁸ The Assurance, paragraph 1.4.

- (146) The Grandfathered Slots, or any rights thereto, can therefore not be transferred or sold to a third party that is independent from and unconnected to Flybe, but must be returned to either BA or the slot coordinator in the event that the conditions under Clause 1.3.2 of the Commitments cannot be met.
- (147) The restriction set out in paragraph (143) also applies if a change of control over Flybe occurs, since the undertaking acquiring control over Flybe shall be considered bound by Flybe's commitment under Clause 1.3.3 of the Commitments to return the Grandfathered Slots to IAG or to the slot coordinator if the Grandfathered Slots are no longer used in accordance with Clause 1.3.2 of the Commitments.
- (148) The above restrictions on the use of the Grandfathered Slots flow from the obligation in Clause 1.3.3 of the Commitments to use the Grandfathered Slots in accordance with Clause 1.3.2 of the Commitments.

4. CONCLUSION

- (149) Given that Flybe has made appropriate use of the 2017 Slots during the Utilisation Period and in view of its commitment to use those Slots in accordance with Clause 1.3.3, the Commission approves the granting of Grandfathering rights as regards the 2017 Slots to Flybe pursuant to Clause 1.3.3 of the Commitments. This approval is conditional upon Flybe remaining an airline under the meaning of Regulation (EU) No 1008/2008 and complying with its commitment pursuant to Clause 1.3.3 of the Commitments that, if Flybe or its successor ceases to use the 2017 Slots in question for the purposes described in Clause 1.3.2 of the Commitments, it will return those Slots in question to IAG or, if IAG does not want the return of those Slots, to the slot coordinator.
- (150) This Decision is adopted in application of Clause 1.3.3 of the Commitments.

For the Commission

(Signed)
Olivier GUERSENT
Director-General