# Decision to issue interim measures directions

# Competition Act 1998

**Investigation into the Atlantic Joint Business Agreement**
**Case number 50616**

**Addressed to:**
**American Airlines Group Inc., British Airways plc, Iberia Líneas Aéreas de España SA and International Consolidated Airlines Group SA**

**Section 35 Competition Act 1998**

**17 September 2020**

# 1. INTRODUCTION AND SUMMARY

## A. Introduction

1.1. This is the decision of the Competition and Markets Authority ('**CMA**') pursuant to section 35 of the Competition Act 1998 (the '**Act**') adopted by the CMA in relation to American Airlines Group Inc ('**AA**'), British Airways plc ('**BA**'), Iberia Líneas Aéreas de España SA ('**Iberia**') and International Consolidated Airlines Group SA ('**IAG**') (together the '**Parties**').

1.2. Having carefully considered the available evidence and information, the CMA has decided for the reasons set out in this decision that it is necessary, given the present circumstances, to issue interim measures directions to the Parties.

1.3. In making its decision, the CMA has also considered representations from the Parties received on 15 September 2020.[1]

## B. Summary of the CMA's decision

1.4. The CMA has decided to issue interim measures directions under section 35 of the Act. In summary:

a. The CMA opened its investigation into the Atlantic Joint Business Agreement (the '**AJBA**') in October 2018 and has prioritised investigation of five London to US city-pair routes in respect of which it has particular concerns: London – Boston, London – Chicago (Premium[2] market only), London – Dallas, London – Miami and London – Philadelphia (the '**Routes of Concern**').

b. The CMA continues to have a reasonable suspicion that, in relation to the Routes of Concern, the AJBA has as its object and effect, the prevention, restriction or distortion of competition.[3] Evidence has not been produced to the CMA that satisfies it, on the balance of probabilities, that it would reach the conclusion that the AJBA satisfies the conditions for exemption under section 9(1) of the Act and Article 101(3) Treaty on the Functioning of the European Union (the '**TFEU**').

[1] In accordance with section 35 of the Act and Rule 13 of The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014, SI 2014/458, the Parties were given notice of the CMA's decision on 14 September 2020 and provided with an opportunity to make written representations. The Parties had previously confirmed that they did not require access to the CMA's file.
[2] See paragraph 4.3.b for the definition of Premium.
[3] For the avoidance of doubt, the CMA's finding is that the test under section 25 of the Act continues to be met. No assumption should be made on the basis of this decision, therefore, that the AJBA infringes competition law.

c. In May 2020, the CMA issued a Notice of Intention to Accept Commitments (the '**NIAC**') to consult on commitments that IAG and AA had offered to address the CMA's competition concerns (the '**Proposed Commitments**'). Most of the NIAC consultation respondents referred to the exceptional circumstances created by the impact of the COVID-19 pandemic on the airline industry and some requested that the CMA should, in some way, 'roll-over' the European Commission's 2010 Commitments (the '**2010 Commitments**') and/or pause its investigation until the sector is recovering.

d. As a result of the impact of the COVID-19 pandemic, the airline industry is currently facing exceptional circumstances. In particular, airlines are now operating significantly reduced schedules and are likely to continue doing so while measures are in place to restrict the spread of the disease. Future transatlantic schedules are, therefore, likely to be reduced until these restrictions are substantially lifted, and the UK and US economies have, at least partially, recovered from the impact of COVID-19.

e. There remains considerable uncertainty about the extent and duration of the impact of COVID-19 on the transatlantic aviation sector. Current industry estimates suggest that it may be several years before the sector recovers (e.g. IATA estimates recovery is unlikely before 2023/2024).[4] This uncertainty has increased materially since the NIAC was published.

f. As a result of this uncertainty, the CMA cannot be confident that the competition concerns it has identified, and any measures it might take for the purpose of addressing them, including by accepting commitments under section 31A of the Act, would adequately reflect the impact of the pandemic on the state of competition. The CMA does not therefore consider that it would be appropriate to accept the Proposed Commitments in the current situation.

g. As a result, the CMA will not be able to complete its investigation before the expiry of various agreements currently in place pursuant to the 2010 Commitments decision. This means that an 'enforcement gap' (i.e. a situation whereby there are no remedies in place to address the competition concerns arising from the AJBA) will arise if action is not

[4] IATA report issued on 28 July 2020.

taken urgently on an interim basis for the purpose of protecting the public interest in preserving competition on the Routes of Concern.[5]

h. The Parties have made representations to the effect that their position on the CMA's issuing of these interim measures is without prejudice to the Parties' position: (i) during the CMA's ongoing investigation and in particular as the CMA updates its ongoing investigation; and/or (ii) should any third party, other authority, or the CMA in the future, commence or conduct any proceedings or legal action against the Parties in respect of the AJB or any similar cooperation agreement. The Parties have also made representations to the effect that their position on the issuing of these interim measures should not be construed as implying that the Parties agree with any preliminary concerns identified by the CMA in its ongoing investigation.

i. Accordingly, the CMA has, for the reasons given in this decision, decided to issue the interim measures directions as set out in the Appendix to this decision.

[5] There are additional relevant factors in respect of the London – Philadelphia route which mean that the same need to act urgently to protect the public interest does not arise on that Route of Concern.

## 2. BACKGROUND

2.1. This section sets out a summary of the European Commission's previous investigations, the CMA's investigation to date, the recent consultation on Proposed Commitments, an overview of the exceptional circumstances created by the impact of the COVID-19 pandemic on the airline industry, and the CMA's decision not to accept commitments.

### A. The European Commission's previous investigations

#### 2010 AJBA investigations and commitments decision

2.2. The AJBA was established in 2008 between AA, BA and Iberia, covering all passenger air transport services on routes between Europe and North America. The arrangements provide for extensive cooperation on transatlantic routes, which includes pricing, capacity and scheduling coordination, as well as revenue-sharing. The business conducted pursuant to the AJBA is known as the Atlantic Joint Business (the '**AJB**').

2.3. The European Commission (the '**Commission**') investigated the AJBA in 2009/2010, issuing a Statement of Objections in September 2009. The Commission provisionally found that the extensive cooperation between the parties may breach EU competition rules under Article 101(1) of the TFEU.

2.4. The Commission's concerns focused on likely consumer harm on six transatlantic routes: London – Dallas; London – Boston; London – Miami; London – Chicago; London – New York; and Madrid – Miami. The Commission was concerned that, as a result of the AJBA, the parties would to a large extent act as a single entity on these routes, which would deprive the market of the competitive pressure that was previously exerted by them on each other and on other competitors. The remaining competitors would be unable to compete effectively, due to the parties' strong position on these routes and the barriers to entry (the shortage of peak-time slots at London Heathrow airport ('**LHR**'), the parties' frequency advantage and their control of most connecting traffic on the routes).

2.5. The Commission subsequently accepted commitments from the undertakings who were then parties to the AJBA (AA, BA and Iberia) to address competition concerns in relation to the six transatlantic routes for a 10 year period until July 2020.[6] These 2010 Commitments were primarily aimed at enabling competing airlines to start operating or increase their

[6] Case COMP/F-1/39.596 - BA/AA/IB European Commission Commitments decision dated 14 July 2010.

services on the affected routes by lowering barriers to entry. The 2010 Commitments included the following key elements:

a. The parties made available landing and take-off slots at LHR or London Gatwick ('**LGW**') airports, at the entrant's choice, on routes to Boston, New York, Dallas and Miami. The slots on the New York route would be available only if the number of daily competitor services reduced from the 2010 levels.

b. The parties allowed fare combinability agreements ('**FCAs**') and special prorate agreements ('**SPAs**') in relation to the six routes of concern, to enable competitors to offer tickets on the parties' flights and facilitate access to connecting passengers.

c. The parties provided access to their frequent flyer programmes ('**FFPs**') on the relevant routes, allowing passengers of new entrants approved by the Commission to accrue and redeem miles on the parties' FFPs via agreements ('**FFPAs**').

2.6. The 2010 Commitments have been used by a number of airlines to provide competing services using four sets of slots between London airports and three US city airports (Virgin Atlantic Airways ('**Virgin Atlantic**') has used a slot to operate a service on the London – Miami route, Delta Air Lines Inc ('**Delta**'), has used a slot on London – Boston and London – Dallas and Norwegian Air Shuttle ASA ('**Norwegian**') has used a slot on the London – Boston route). The London – New York commitment slot has never been made available because the number of daily competing services has never fallen below the 2010 levels. The SPAs have also been used by a number of competitor airlines operating on the routes of concern.

2.7. The US Department of Transportation (the '**DOT**') granted antitrust immunity ('**ATI**') in respect of the AJBA in July 2010.[7] At the date of this decision, the DOT is assessing whether this ATI should be extended to include Aer Lingus Group DAC which became a party to the AJBA in 2017, contingent upon DOT approval.[8]

**AA/US Airways merger decision and remedies on the London – Philadelphia route**

2.8. The London – Philadelphia route was not assessed as part of the Commission's investigation of the AJBA in 2009/10, as AA did not operate

[7] US DOT Final Order 2010-7-8, served on 20 July 2010, Docket DOT-OST-2008-0252.
[8] Joint Motion to Amend Order 2010-7-8 for Approval of and Antitrust Immunity for Amended Joint Business Agreement (DOT-OST-2008-0252).

on this route pre-2013. However, the AA/US Airways merger created an overlap between BA which operated on the route and AA (as US Airways operated on the route). On 5 August 2013 the Commission cleared AA's merger with US Airways after it accepted various commitments (the '**Merger Commitments**').[9]

2.9. The Merger Commitments sought to facilitate entry on the route between LHR and Philadelphia International Airport ('**PHL**') by including an agreement to make slots available to allow a prospective entrant to operate one daily frequency between LHR and PHL. Under the terms of the Merger Commitments, a prospective entrant could apply for grandfathering rights (to use the slots on any route subject to Commission approval) after having operated on the London – Philadelphia route for at least six IATA seasons. In addition, AA and US Airways committed to enter into: (i) an FCA across all classes of tickets with an airline which operates on the airport pair; (ii) an SPA for traffic with, and at the request of, an airline when part of the journey involves the airport pair; and (iii) an FFPA with, and at the request of, a new entrant who does not have a comparable FFP of its own.

2.10. AA released slots to Delta which used them to provide a competing non-stop service on the London – Philadelphia route for three years between Summer 2015 and the end of April 2018.[10] On 30 April 2018 the Commission approved Delta's application to use the slots to operate on other routes, determining that it had met the terms of the Merger Commitments (the '**Grandfathering Decision**').[11] When Delta stopped providing a competing service on the London – Philadelphia route, the AJB became the only provider of non-stop services on the route.

2.11. AA subsequently brought an action for annulment of the Grandfathering Decision under Article 263 of the TFEU, which is currently pending before the General Court.[12] If the Grandfathering Decision is annulled, there is a possibility that the Merger Commitments slots may once again be used to operate a service between LHR and PHL. The remainder of the Merger Commitments continue to be effective regardless of the outcome of AA's appeal.

[9] COMP/M.6607 - US Airways/American Airlines, Decision of the Commission dated 5 August 2013.
[10] The IATA Summer season runs from the last Sunday of March to the last Saturday of October and the IATA Winter season lasts from the last Sunday of October and ends on the last Saturday of March. In this document references to 'Summer' and 'Winter' when capitalised are to the relevant IATA seasons.
[11] Commission decision *US Airways/American Airlines*, COMP/M.6607, 30 April 2018.
[12] Case T-430/18 - *American Airlines* v *Commission*.

## B. The CMA's investigation

2.12. The CMA opened an investigation on 11 October 2018 into the AJBA to which the following airlines are a party: AA; members of IAG: BA, Iberia, and Aer Lingus Limited;[13] and Finnair OYJ ('**Finnair**') (the '**AJB Parties**').

2.13. As five of the six routes subject to the 2010 Commitments are between the UK and the US, and to prepare for a time when the Commission would no longer have responsibility for competition in the UK after the end of the EU Exit transition period, the CMA decided to review the competitive impact of the AJB in anticipation of the expiry of the 2010 Commitments.

2.14. In opening its investigation, the CMA had reasonable grounds for suspecting an infringement of the Chapter I prohibition of the Act and Article 101(1) of the TFEU in relation to the AJBA between the AJB Parties covering all passenger air transport services on routes between the UK and North America.

2.15. After launching the investigation, the CMA initially considered the competitive impact of the AJB on all seven routes where BA's and AA's non-stop services overlap between London and US cities (Boston, Chicago, Dallas, Los Angeles, Miami, New York and Philadelphia).

2.16. Having completed a review of these seven city-pair routes, the CMA decided not to prioritise further investigation of the London – Los Angeles and London – New York city pair routes, given the competitive constraints faced by the AJB on those routes. The CMA also decided not to prioritise further investigation of the Non-premium[14] market on the London – Chicago route.

## C. The CMA's consultation on Proposed Commitments

2.17. In May 2020, AA and IAG offered the Proposed Commitments aimed at addressing the CMA's competition concerns in this investigation. The CMA had, and continues to have, competition concerns arising from the operation of the AJBA in relation to the markets on five London to US city-pair routes: London – Boston, London – Chicago (Premium market only), London – Dallas, London – Miami and London – Philadelphia.

2.18. The CMA issued the NIAC[15] on 7 May 2020 and invited representations from interested third parties. The CMA received written representations on the NIAC consultation from the following third parties: Virgin Atlantic, Delta,

[13] Aer Lingus is not yet participating in the AJBA pending approval by the DOT, but, as a signatory since October 2017, is a party to the AJBA.
[14] See paragraph 4.3.b for the definition of Non-premium.
[15] Pursuant to paragraph 2 of Schedule 6A of the Act.

JetBlue Airways ('**JB**'), Norwegian, the JB Pilots Union, Unite the Union ('**Unite**'), Skyscanner, and Heathrow Airport Holdings Limited.

2.19. Most of the NIAC consultation respondents referred to the exceptional circumstances created by the impact of the COVID-19 pandemic on the airline industry. Some of the respondents requested that the CMA should, in some way, 'roll-over' the 2010 Commitments until the sector is in recovery. One respondent requested that the CMA should suspend any 'binding' decision until there is a clearer understanding of the longer-term market conditions.

## D. Exceptional circumstances affecting the airline industry

2.20. At the time of issuing the NIAC, the CMA recognised that, as a result of the challenges related to COVID-19, there was some uncertainty about future competition on routes covered by the AJBA and a risk that the Proposed Commitments may not address the CMA's competition concerns in the future.[16] However, its assessment, at that point, was that it was appropriate to consult on the Proposed Commitments.

2.21. Since the CMA issued the NIAC and consulted on the Proposed Commitments, the crisis facing the airline industry has worsened. Estimates issued by industry body, IATA,[17] on 13 May 2020 indicated that the transatlantic airline sector was unlikely to return to pre COVID-19 levels until 2023. IATA's July 2020 forecast is that global passenger traffic is unlikely to return to pre COVID-19 levels until 2024.[18]

2.22. In particular, the impact of the COVID-19 pandemic means that airlines are operating significantly reduced schedules and are likely to continue doing so while measures are in place to restrict the spread of the disease. Moreover, the COVID-19 pandemic will likely have a significant effect on the global economy (including the economies of the UK and the US) for a number of years. Future transatlantic schedules are, therefore, likely to be reduced until restrictions are substantially lifted and the UK and US economies have recovered from the impact of COVID-19.

## E. CMA decision not to accept commitments

2.23. As explained above, there remains considerable uncertainty about the extent and duration of the impact of COVID-19 on the transatlantic aviation sector.

[16] NIAC, paragraph 1.5.
[17] An IATA report issued on 13 May 2020 indicates that recovery in the airline sector is expected in 2023 (and is likely to lag two years behind a GDP recovery).
[18] A further IATA report issued on 28 July 2020 indicates that recovery in long-haul travel is now expected in 2024.

As set out in paragraph 2.19, most responses from third parties also referred to the exceptional circumstances created by the impact of the COVID-19 pandemic on the airline industry. Furthermore, some respondents suggested that it would not be appropriate to accept the Proposed Commitments during this period of uncertainty.

2.24. As is explained in the Notice of Decision Not to Accept Commitments issued on 17 September 2020, the CMA has concluded that, as a result of this uncertainty created by the COVID-19 pandemic, it cannot be confident that the competition concerns it has identified, or the Proposed Commitments, adequately take account of the impact of the pandemic on the state of competition. The CMA has therefore decided that it would not be appropriate to accept the Proposed Commitments in the current situation, as it cannot be confident that they would address the competition concerns arising from the operation of the AJBA.

2.25. As explained more fully in this decision, having decided not to accept the Proposed Commitments and thus being unable to conclude its investigation before the expiry of the 2010 Commitments, the CMA considers that it is now necessary to issue interim measures directions to the Parties for the purpose of protecting the public interest pending the conclusion of its investigation into the AJB.

## 3. LEGAL FRAMEWORK

3.1. The CMA has the power to issue interim measures pursuant to section 35 of the Act if:

a. the CMA has begun, but not completed, an investigation under section 25 of the Act (the '**section 25 requirement**'); and

b. the CMA considers that it is necessary for it to act as a matter of urgency for the purpose of:

i. preventing significant damage to a particular person or category of person; or

ii. protecting the public interest

(the '**urgency requirement**').

3.2. The CMA may not impose interim measures if a person has produced evidence to the CMA in connection with the investigation that satisfies the CMA, on the balance of probabilities, that, in the event of the CMA reaching an infringement conclusion under section 2 of the Act or Article 101(1), it would also reach the conclusion that the suspected agreement is exempt as a result of section 9(1) of the Act or Article 101(3) (the '**insufficient evidence of exemption requirement**').[19]

3.3. If the CMA considers that the test under section 35 of the Act is met, it may issue such directions as it considers appropriate for the purpose of preventing significant damage to a particular person or category of person or protecting the public interest. In exercising this discretion, the CMA will have regard to all relevant considerations, including the impact of issuing, or refusing to issue, interim measures on the person to whom the direction is proposed to be given and relevant third-party interests. The CMA will also have regard to its statutory duties and to its published guidance[20] when exercising this discretion.

[19] Sections 35(8) and 35(9) of the Act.
[20] In particular, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 Cases* (18 January 2019) ('**CMA8**').

## 4. THE SECTION 25 REQUIREMENT

4.1. As noted at paragraph 2.12, the CMA opened a formal investigation under the Act on 11 October 2018 on the basis that there were reasonable grounds for suspecting that the AJBA had infringed the Chapter I prohibition and/or Article 101 TFEU and, accordingly, that the legal test under section 25 of the Act was met.[21]

4.2. The CMA concludes that the test under section 25 of the Act continues to be met. In particular, as explained further below, the CMA continues to have a reasonable suspicion that, in relation to the Routes of Concern, the AJBA has as its object and effect, the prevention, restriction or distortion of competition.[22]

### A. Relevant market

4.3. In reaching its conclusion that the test under section 25 of the Act continues to be met, the CMA has considered market definition. The CMA's view, for the purpose of this decision, is that:

a. The relevant markets should be defined on the basis of the Point of Origin/Point of Destination ('**O&D**') approach, with each city-pair route considered a separate market, given that, from a demand-side perspective, different city pairs are generally not substitutable for each other.

b. A distinction should be drawn between passenger groups, with separate markets for: (i) Premium passengers, defined as all first class, business class and premium economy passengers as well as economy class passengers with the most flexible economy tickets ('**Premium**'); and (ii) Non-premium passengers, defined as those with restricted economy tickets ('**Non-premium'**).

c. The factors determining the constraint from one-stop services are likely to vary by route and, as such, should be considered at the route level in a competition assessment.

4.4. In relation to airport substitutability:

[21] In *Brannigan* v *OFT* the then President of the Competition Appeal Tribunal recognised the low bar to be met in respect of the test under section 25 of the Act, noting during a hearing that: '*It is about as low a test as you could have, I would have thought, a reasonable ground to suspect. It was deliberately drafted in a way that would give the OFT very wide powers to intervene as a number of senior OFT officials have stressed publicly more than once.*' (See Transcript of Hearing dated 28 April 2006, page 19, lines 25 – 28.)

[22] The CMA's concerns in relation to the Routes of Concern are without prejudice to any competition assessment of any other routes that the CMA or any other authority or court may carry out in the future.

a. The CMA has considered the constraint on the AJB's LHR services from competitors' LGW flights on a route-by-route basis in its competition assessment. The potential constraint from London airports other than LGW on the AJB's LHR services on the Routes of Concern appears to be weak. There are currently no non-stop flights operating on any of the Routes of Concern from London Luton, London Stansted or London City airports, and there are likely to be a number of barriers to launching financially sustainable services on the Routes of Concern from those airports. For the purposes of its assessment, the CMA has, where relevant, calculated market shares for non-stop passengers travelling to/from both LHR and LGW.[23] Passenger shares that include one-stop passengers, on the other hand, are based on those travelling to/from all five London area airports (LGW, LHR, London City, London Luton and London Stansted).

b. Regarding US airports, the CMA's view is that it is unnecessary to conclude as to whether Miami International and Fort Lauderdale airports[24] and Chicago O'Hare and Chicago Midway International airports[25] are in the same markets for the purposes of this investigation. In both cases, the CMA's competition assessment has taken into consideration the constraints on the AJB from one-stop and non-stop services that operate to/from Midway and Fort Lauderdale, respectively, in any case. The CMA's view is that PHL and Newark Liberty International Airport are unlikely to be in the same market for the purposes of this investigation.

## B. Object

4.5. As regards the object of the AJBA,[26] the CMA has considered the contractual terms of the AJBA itself; its objectives; and the economic and legal context in which it operates.[27] The reasonable suspicion which the CMA has identified relates to the potential for the AJBA by its very nature to

[23] For some Routes of Concern, where relevant, the market shares calculated by the CMA include passengers travelling on non-stop services from other London area airports where these operated in the past, for example, Primera Air's services from London Stansted airport.
[24] There are no longer any non-stop services between Fort Lauderdale and London, but the CMA's assessment includes market share data for the period (pre-Summer 2019) when Norwegian and BA operated services to Fort Lauderdale.
[25] No non-stop services operate to the UK from Midway nor have done so in the period covered by the CMA's investigation.
[26] The Court of Justice of the European Union (the '**CJEU**') has stated that object infringements are those forms of coordination between undertakings that '*can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.*' See C-67/13 P *Groupement des Cartes Bancaires* v *Commission*, EU:C:2014:2204 ('***Cartes Bancaires***'), paragraph 50; affirmed in C-373/14 P *Toshiba* v *Commission* EU:C:2016:26 ('***Toshiba***'), paragraph 26.
[27] In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition by object, the CJEU has stated that regard must be had to these three factors. See *Cartes Bancaires*, paragraph 53 and *Toshiba*, paragraph 27.

be harmful to the proper functioning of normal competition on the Routes of Concern.

4.6. The express object of the AJBA is to align the AJB Parties' economic incentives. To this end it provides for the co-ordination of (and the ongoing exchange of commercially sensitive information in relation to):

a. prices;

b. capacity and scheduling, i.e. output on the relevant market and how that output is shared between the AJB Parties; and

c. marketing (including policies on corporate discounting and co-ordination of FFPs).

4.7. Accordingly, the CMA has a reasonable suspicion that, in relation to the Routes of Concern, the AJBA substitutes practical cooperation between the AJB Parties for the risks of competition. In doing so, it is reasonable to suspect that the AJBA has the potential to change appreciably the structure of the market concerned through the withdrawal of potential competitors, an increase in concentration, and a reduction in the number of undertakings supplying the services on certain routes.

4.8. The CMA has also taken into consideration the context in which the AJBA operates across the Routes of Concern, including:

a. legal impediments to cross-jurisdictional airline mergers and restrictions on operating services within and between foreign jurisdictions which affect the real conditions of the functioning and structure of the market in question; and

b. the market power of BA and AA, given that BA and AA remain either the only airlines operating a non-stop passenger service on the Routes of Concern (London – Dallas and London – Philadelphia) or have the largest market share on the Routes of Concern (London – Boston (Premium market), London – Chicago (Premium market) and London – Miami).

4.9. In the light of the above, the CMA continues to have a reasonable suspicion that, in relation to the Routes of Concern, the AJBA infringes the Chapter I prohibition and/or Article 101 TFEU by object.

## C. Effect

4.10. As regards the effect of the AJBA,[28] the CMA has considered the potential for the AJBA to have an appreciable adverse effect on the parameters of competition, such as the price, quantity and quality of services, on the Routes of Concern. The CMA has considered on a route-by-route basis the actual context, as of early 2020, in which the AJBA operates, including what would have been likely to occur in the absence of the AJBA and the 2010 Commitments, and taking account of the Merger Commitments.

4.11. The CMA has considered various factors in its assessment:

a. **Barriers to entry**: The CMA considers that there are significant barriers to entry and expansion in relation to the provision of scheduled air passenger services on the Routes of Concern:

i. The lack of slots available to competitors and new entrants at LHR and LGW is likely to act as a significant barrier to entry and expansion. Slot availability is particularly limited at times suitable for the operation of transatlantic flights.

ii. Where a competitor or new airline is able to obtain the required slots, it may face a number of other barriers to entry or expansion due to the position of incumbents like BA and AA that benefit from advantages, such as: the increased flow of traffic that results from having hub operations at one or both ends of the route; frequency and scheduling advantages; better access to corporate customers; and loyalty from FFPs.

iii. The extent of barriers to entry and expansion may vary between airlines and routes. For example, United or Delta/Virgin Atlantic may have greater access to slots and feeder traffic at their own US hubs than a new entrant. As such, these airlines may face lower barriers to entry and expansion on routes where they have a hub location at least at one end of the route. Potential entrants and airlines seeking to expand on a route are also likely to differ in their ability to overcome any benefits enjoyed by the AJB as they

[28] For an agreement to have the effect of restricting competition the CJEU has stated that the agreement must be '*liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services*'. See C-382/12 P *MasterCard* v *Commission*, EU:C:2014:2201, paragraph 93.

will have differing FFPs, schedules and access to corporate customers.

b. **Competition for Non-premium and Premium passengers**: As at early 2020, the AJB enjoyed either a strong or very strong non-stop market share position on each of the Routes of Concern as set out in Tables 1 and 2 below.

*Table 1: Premium non-stop market shares on the Routes of Concern*

| | *AJB* | *Delta / Virgin* | *Norwegian* | *United* |
|---|---|---|---|---|
| *London – Boston* | [40-50]% | [30-40]% | [10-20]% | - |
| *London – Chicago* | [55-65]% | - | [5-15]% | [20-30]% |
| *London – Dallas* | 100% | - | - | - |
| *London – Miami* | [60-70]% | [15-25]% | [10-20]% | - |
| *London – Philadelphia* | 100% | - | - | - |

*Source: CMA analysis of AA-adjusted MIDT passenger data*

*Table 2: Non-Premium non-stop market shares on the Routes of Concern*

| | *AJB* | *Delta / Virgin* | *Norwegian* | *United* |
|---|---|---|---|---|
| *London – Boston* | [20-30]% | [40-50]% | [20-30]% | - |
| *London – Dallas* | 100% | - | - | - |
| *London – Miami* | [40-50]% | [20-30]% | [20-30]% | - |
| *London – Philadelphia* | 100% | - | - | - |

*Source: CMA analysis of AA-adjusted MIDT passenger data*

c. **Constraints from one-stop competition**: As at early 2020, on several Routes of Concern a relatively small percentage of passengers choose to travel on one-stop services; and, across all Routes of Concern, the CMA considers that non-stop competition is generally a stronger competitive constraint than one-stop competition.

d. **Econometric analysis of fares**: IAG and AA submitted econometric evidence which purported to show that fares had fallen on various Routes of Concern as a result of the AJB. However, the CMA has significant doubts about the robustness of this econometric evidence.[29] The CMA's econometric analysis (which adopted a different methodology)[30] did not robustly show that fares had fallen on any Route of Concern due to the AJB.[31]

e. **Impact of hubs and connecting traffic**: The AJB has a substantial feeder traffic advantage over other carriers on each of the Routes of Concern, as BA operates a major hub at LHR, while AA either operates a hub (Dallas, Philadelphia, Miami, and Chicago) or is a significant carrier (Boston) at an airport in each relevant US city.

4.12. In the light of the above, the CMA continues to have a reasonable suspicion that, in relation to the Routes of Concern, the AJBA infringes the Chapter I prohibition and/or Article 101 TFEU by effect.

## D. Conclusion on the section 25 requirement

4.13. For the reasons set out above, the CMA continues to have a reasonable suspicion that, in relation to the Routes of Concern, the AJBA has as its

[29] On the robustness of the underlying fare data, the CMA has a number of concerns, including the high level of dispersion of fares, with some unrealistically high and low values reported, and lack of representative information for non-US carriers, including BA. On the robustness of the Parties' methodology, the CMA's assessment indicates that the parallel trends assumption is not met, which may lead the difference-in-difference methodology to give biased and unreliable results.

[30] The CMA adopted a 'synthetic control' methodology which identifies a set of comparator routes which have a similar trend in the pre-AJB period in order to provide an appropriate counterfactual against which the effect of the AJB on fares on each Route of Concern can be compared.

[31] In respect of the Routes of Concern, the CMA's econometric analysis was as follows:

- **London – Boston**: The CMA's econometric analysis found some evidence of economy fares having fallen on the route since 2010. However, the CMA's view is that the econometric analysis of fares is unlikely to identify robustly the effect of the AJB on competition as opposed to the effect of the entry facilitated by the 2010 Commitments.
- **London – Chicago**: The CMA's econometric analysis (which adopted a different methodology) found no statistically significant effect on fares from the AJB.
- **London – Dallas**: The CMA's econometric analysis (which adopted a different methodology) found that business fares are likely to have increased since the formation of the AJB, while finding no statistically significant effect on economy fares. Given that the 2010 Slot Commitments have been in place since 2011 and the CMA's econometric analysis points towards business fares increasing, this would tend to support the CMA's competition concerns in relation to the route.
- **London – Miami**: The CMA's econometric analysis (which adopted a different methodology) did not find any statistically significant effect on fares on the route. In any case, given that there were the 2010 Slot Commitments in place from Summer 2011 onwards, the econometric analysis of fares is unlikely to identify robustly the effect of the AJB on competition as opposed to the effect of the entry facilitated by the 2010 Commitments.
- **London – Philadelphia**: Data availability and consistency issues meant that the CMA did not consider it appropriate to conduct its own econometric study for the London – Philadelphia route.

object and effect, the prevention, restriction or distortion of competition.[32] The CMA, therefore, concludes that the section 25 requirement is met.

4.14. For the avoidance of doubt, the CMA's conclusion is that the test under section 25 of the Act continues to be met and not that the AJBA infringes the Chapter I prohibition and/or Article 101 TFEU. Therefore, no assumption should be made on the basis of this decision that the AJBA infringes competition law.

[32] The CMA's concerns in relation to the Routes of Concern are without prejudice to any competition assessment of any other routes that the CMA or any other authority or court may carry out in the future.

## 5. THE URGENCY REQUIREMENT

### A. Urgency

5.1. In order for the CMA to issue interim measures directions it must consider that it is necessary to act as a matter of urgency to prevent significant damage to a person or a category of persons and/or to protect the public interest.

5.2. Such damage to persons, or need to protect the public interest, must be likely to occur in the near future and could not be prevented by action that the CMA could take in the main investigation (e.g. through an infringement decision and a final direction to address the conduct).

5.3. The 2010 Commitments expired on 14 July 2020 and a number of agreements entered into pursuant to the 2010 Commitments between the Parties and third-party airlines are due to come to an end in the near future. In particular:

a. Slot Release Agreements ('**SRAs**') are due to terminate in March 2021:

i. between BA and Virgin Atlantic in relation to the London – Miami route;

ii. between AA and Delta in relation to the London – Dallas route; and

iii. between BA and Delta in relation to the London – Boston route.

b. SPAs are due to terminate in 2020 and 2021:

i. between BA and United Airlines applicable on London – Chicago due to terminate on 14 October 2020;

ii. between Iberia and Virgin Atlantic applicable on London – Miami due to terminate on 9 March 2021; and

iii. between AA and Virgin Atlantic due to terminate on 1 December 2021.

5.4. As described in Section 4, the CMA considers that there are reasonable grounds to suspect that the AJBA infringes competition law.

5.5. However, the CMA is currently unable to complete its investigation or accept commitments due to the exceptional circumstances arising from the COVID-19 pandemic in the aviation sector. As explained at Section 2.D. above,

there is considerable uncertainty about the extent and duration of the impact of COVID-19 on the transatlantic aviation sector and current industry estimates suggest that it may be a number of years (i.e. until 2023/2024) before the sector recovers.

5.6. As a result of this uncertainty, the CMA cannot be confident that the competition concerns it has identified, and any measures it might take for the purpose of addressing them, including by accepting commitments under section 31A of the Act, would adequately reflect the impact of the pandemic on the state of competition. For example, due to the impact of the pandemic there may be significant changes to the number of competitors on some Routes of Concern and/or to the number of frequencies airlines active on the Routes of Concern operate. Such matters are relevant, for example, to both the CMA's assessment of the impact of the AJBA on competition and on the appropriateness of any remedies that may be required. As noted above, it may be a number of years (perhaps not until 2023/2024) before the sector recovers and the longer-term state of competition on the Routes of Concern becomes clearer.

5.7. Accordingly, the CMA will not be able to complete its investigation before the agreements outlined at paragraph 5.3 come to an end. This means that an 'enforcement gap' (i.e. a situation whereby there are no remedies in place to address the competition concerns arising from the AJBA) will arise if action is not taken urgently on an interim basis to protect the public interest in preserving competition on the Routes of Concern.

5.8. Moreover, merely taking action at any point before the expiry of the SRAs outlined at paragraph 5.3, in particular, is not adequate. Third-party airlines have made clear that they plan their schedules significantly in advance of the start of an IATA Season; for example, in order to have sufficient time to market services on the route, sell tickets and ensure sufficient aircraft, crew, and other required resources are in place. There are approximately seven months before the start of IATA Summer Season 2021; most airlines would usually finalise their schedules around 11-12 months before the start of an IATA Season. Therefore, the CMA considers that action is required now to ensure that any SRAs to be extended or entered into in order to address the enforcement gap are entered into in sufficient time to allow competitors to operate services using them effectively.

5.9. It is also important to note that, while travel has reduced on the Routes of Concern due to the COVID-19 pandemic, flights are still operating and some consumers are still purchasing tickets for travel, subject to COVID-19 governmental restrictions. The impact of any enforcement gap on at least

some consumers will, therefore, arise immediately rather than at some point in the future. The way in which the industry will recover is uncertain, but the enforcement gap will increase as recovery begins and it is important that consumers are protected during the recovery period and that airlines and consumers know what options are available to them.

5.10. In these circumstances, the CMA considers that there is now an urgent need to address the enforcement gap described above. The next section considers whether this need to address the enforcement gap represents an urgent need to protect the public interest.

## B. Need to protect the public interest

5.11. The CMA may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry, to consumers, or to competition more generally as a result of the suspected infringement.[33] In determining whether interim measures may be appropriate in order to protect the public interest, the CMA will have particular regard to the effect or potential effect that the relevant conduct is having, or is likely to have, on consumers or categories of consumers.[34]

5.12. As explained above, the CMA has a reasonable suspicion that the AJBA has the object and effect of restricting competition on the Routes of Concern. Accordingly, the CMA considers that the potential negative impact of the AJBA on competition on the Routes of Concern, absent the remedies contained in the 2010 Commitments (i.e. the enforcement gap described above), would be significant.

5.13. In particular, in the event of such an enforcement gap, competitors and prospective entrants would face the significant barriers to entry or expansion outlined at paragraph 4.11.a above, without recourse to remedies which have previously assisted entrants to overcome such barriers. In particular, airlines have indicated that there is a risk that they would not be able to access slots to continue to operate on the Routes of Concern without the CMA's intervention. While it is plausible that slots may become available at both LHR and/or LGW airports as a result of some airlines reducing their scheduled services, this is not automatically the case as airlines can

[33] CMA8, paragraph 8.16.
[34] CMA8, paragraph 8.16.

currently maintain their slots without having to operate the scheduled service.[35]

5.14. A reduction in competition on the Routes of Concern due to the lack of appropriate remedies would, in turn, negatively impact consumers' ability to benefit from the key parameters of airline competition (such as the price, quantity and quality of services) on the Routes of Concern both now and as the sector recovers.

5.15. As outlined above at Section 2.A, however, there are additional relevant factors to be taken into account in respect of the London – Philadelphia route. As noted at 2.9, under the Merger Commitments, SPA, FCA, and FFPA commitments continue to be available on the route. Moreover, as explained at paragraphs 2.10-2.11, due to AA's appeal against the Grandfathering Decision there is a possibility that the slots available under the Merger Commitments may once again be used to operate a service between LHR and PHL. Accordingly, equivalents of the remedies contained in the 2010 Commitments are either immediately available (SPAs, FCAs, and FFPAs) or may be available in the near future (slots) on this Route of Concern.

5.16. Moreover, as explained at paragraph 2.10, no slot commitments have been actively used on London – Philadelphia since the end of April 2018. In such circumstances, it is questionable whether an urgent need to act has arisen now.

5.17. In these circumstances the CMA considers that the public interest (i.e. the interests of protecting competition and, by extension, consumers) would be significantly negatively impacted in the absence of interim action by the CMA on all the Routes of Concern with the exception of London – Philadelphia.

### C. Need to prevent significant damage to a person or category of person

5.18. The test set out in section 35(2) is alternative rather than cumulative. Therefore, in the light of the CMA's conclusion regarding the public interest at paragraph 5.17 above, there is no need to consider whether there is an urgent need to prevent significant damage to a person or persons.

[35] As a result of the COVID-19 pandemic, in March 2020 the Commission approved a temporary suspension of the rules requiring airlines to use 80% of their slots or risk losing them (this is known in the industry as the '80-20' rule or 'use it or lose it' rule). The suspension is operating during the Summer 2020 IATA season and may be extended into future IATA seasons.

## D. Conclusion on the urgency requirement

5.19. As explained at paragraphs 5.1 – 5.9, there is an urgent need to act now to avoid an enforcement gap arising on the Routes of Concern. As explained at paragraphs 5.11 – 5.17, allowing that enforcement gap would significantly negatively impact the public interest on all the Routes of Concern bar London – Philadelphia.

5.20. Accordingly, the CMA concludes that, on the balance of probabilities, it is necessary for it to act as a matter of urgency to protect the public interest at this time.

## 6. INSUFFICIENT EVIDENCE OF EXEMPTION REQUIREMENT

6.1. Section 35(8) and 35(9) of the Act provide that interim measures are not available if a person has produced evidence to the CMA in connection with the investigation that satisfies the CMA on the balance of probabilities that, in reaching the basic infringement conclusion (under the Chapter I prohibition or Article 101(1) TFEU), it would also reach the conclusion that the suspected agreement satisfies the conditions for exemption under section 9(1) of the Act or Article 101(3) TFEU.

### A. The Parties' arguments

6.2. In the course of the investigation, the Parties have argued that the AJBA has generated substantial benefits to consumers, including to those travelling on the Routes of Concern. In particular, they have submitted quantified estimates of such benefits, based on data from a number of sources, which they argued supported three categories of benefits:

a. scheduling benefits on the Routes of Concern, leading to more convenient schedule options for AJB passengers;

b. the elimination of double marginalisation on connecting services, leading to lower fares for AJB connecting passengers; and

c. the introduction of new non-stop AJB services on a number of US-UK routes that previously had no direct flights, leading to benefits for AJB passengers.

### B. The CMA's assessment

6.3. The CMA has assessed whether these claimed benefits are sufficient to meet the conditions for an individual exemption under section 9(1) of the Act and Article 101(3) TFEU, namely that an agreement:

a. contributes to improving production or distribution, or promoting technical or economic progress;

b. while allowing consumers a fair share of the resulting benefit;

c. but does not:

i. impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

ii. afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

6.4. The Parties bear the burden of satisfying the CMA on the balance of probabilities that the conditions for an individual exemption under section 9(1) of the Act and Article 101(3) TFEU are met.[36] Robust analysis and cogent evidence are required to establish, on the balance of probabilities, that a restrictive agreement in fact and in the real world (as opposed to in theory) gives rise to pro-competitive effects.[37]

6.5. The CMA has assessed the evidence advanced by the Parties in support of the claimed efficiencies identified above. While the CMA accepts that categories of benefits identified by the Parties (described at paragraph 6.2 above) are, in principle, relevant for the purposes of section 9(1) of the Act and Article 101(3) TFEU, it considers that the claimed benefits have not been sufficiently evidenced in respect of any Route of Concern.

## C. Conclusion on the insufficient evidence of exemption requirement

6.6. In the light of the above, the CMA concludes that the Parties have not produced evidence to the CMA in connection with the investigation that satisfies the CMA, on the balance of probabilities, that it would reach the conclusion that the suspected agreement satisfies the conditions for exemption under section 9(1) of the Act and Article 101(3) TFEU. The CMA, therefore, concludes that the insufficient evidence of exemption requirement is met.

[36] Section 35(8) of the Act. See also section 9(2) of the Act and Article 2 of Regulation 1/2003.
[37] *Sainsbury's Supermarkets Ltd* v *Visa Europe Services LLC* [2017] EWHC 3047 (Comm), paragraph 24 (adopted by the Court of Appeal in *Sainsbury's Supermarkets Ltd* v *Mastercard Inc* [2018] EWCA Civ 1536, paragraph 79; with the Court of Appeal's judgment, in turn, being upheld by the Supreme Court in *Sainsbury's Supermarkets Ltd* v *Mastercard Inc* [2020] UKSC 24).

## 7. EXERCISE OF THE CMA'S DISCRETION

7.1. Where the CMA considers that it is necessary for it to act as a matter of urgency for the purpose of protecting the public interest, the CMA may issue such interim measures directions as it considers appropriate for that purpose.[38] In exercising its discretion in this case, as to whether or not to issue interim measures, the CMA has had regard to the relevant circumstances, including:

a. the relevant statutory purpose of interim measures; and

b. whether the interim measures sought would be appropriate and proportionate for the purpose of preventing the significant damage identified.

### A. Statutory purpose of interim measures

7.2. The purpose of the CMA's interim measures power in section 35 of the Act is to prevent significant damage to persons and to protect the public interest while the CMA investigates the suspected anti-competitive behaviour and to ensure the effectiveness of any decision that it might make requiring the Parties (and any other relevant undertakings) to bring to an end any infringements that it may find to exist.

7.3. The CMA considers that, in the light of all the circumstances, exercising its discretion to impose interim measures in this case aligns with the statutory purpose of its interim measures power. As explained at paragraphs 5.19 – 5.20 above, the CMA has concluded that there is an urgent need to protect the public interest in this case (aligning with the statutory purpose of its interim measures power).

7.4. The CMA considers that the interim measures directions are appropriate in the circumstances and reflect the statutory purpose of interim measures (i.e. in the current case, to protect the public interest while the CMA concludes an investigation). In particular, the interim measures will effectively extend the key terms of the 2010 Commitments for six IATA seasons; as opposed to allowing existing SRAs and SPAs to expire.

7.5. As explained at paragraphs 5.19 – 5.20 above, the CMA has concluded that there is an urgent need to protect the public interest in this case. Accordingly, it is appropriate for the CMA to act as expeditiously as possible to ensure that the public interest is protected until such a time as the CMA

[38] Section 35(2) of the Act.

can complete its investigation into the AJBA and put in place any longer term remedies that may be appropriate.

7.6. In terms of the effectiveness of the interim measures, the CMA has considered the most appropriate way of ensuring that competition can be maintained on the Routes of Concern to the extent possible given the global pandemic. The CMA considers that an effective continuation of the 2010 Commitments will achieve this. In particular, making available four pairs of daily slots (one on each of the London – Dallas and London – Miami routes and two on the London – Boston route) will mean it is possible that, to the extent airlines are able to operate, consumers can benefit from alternative services to those offered by the AJB on these Routes of Concern in the interim.

7.7. Requiring the effective extension of the key terms of the 2010 Commitments, as explained at paragraph 7.4 above is the best way to achieve this for a number of reasons:

a. The airlines which hold the existing SRAs are capable of offering competing services on the relevant Routes of Concern, as they have been doing so for a number of years.

b. As explained at paragraph 5.8 above, third-party airlines have made clear that they plan their schedules significantly in advance of the start of an IATA Season; for example, in order to have sufficient time to market services on the route, sell tickets and ensure sufficient aircraft, crew, and other required resources are in place. It is, therefore, important, where possible, to provide certainty as soon as possible to airlines able to compete against the AJB on the relevant Routes of Concern that they will have access to relevant slots in order to do so.

c. As a corollary of this, an approach based on extending SRAs where possible means that consumers will have certainty as early as possible that competing services are available on the Routes of Concern. By contrast, where slots need to be allocated using the slot allocation process set out in the interim measures directions, SRAs would likely not be finalised until December 2020/January 2021.

d. There is limited time available to undertake the slot allocation process set out in interim measures directions before the start of IATA Summer Season 2021. Already, the CMA has needed to reduce the amount of time allowed for the process by five weeks.[39] It is expected that further

[39] See sub-clause 3(b)(i) of the interim measures directions.

amendments to the timescales contained in the tender process may be required and the interim measures directions make provision for this to be done.[40] The interim measures grant the Monitoring Trustee the ability to make reasonable amendments to deadlines in order to allow slot releases for the Summer 2021 IATA Season; the CMA considers that such flexibility is appropriate given the limited time available. Under the terms of the interim measures, this process will only be required before IATA Summer Season 2021 for the allocation of one London – Boston slot. The greater the number of slots which need to be allocated using this process before IATA Summer Season 2021, the higher the risk that the process will not be completed in time. The CMA appreciates that the timescales contained in the tender process may be challenging for the Parties and any applicant airlines, but the limited time available makes this unavoidable.

e. In the light of the above factors, the CMA considers that requiring the effective extension of existing SRAs, where possible, for two IATA seasons, is an appropriate way to ensure that consumers can benefit from alternative services to those offered by the AJB on these Routes of Concern in the short term.

f. The CMA considers, however, that it would not be appropriate to guarantee automatically that the existing beneficiaries of SRAs will have their SRAs effectively extended for the full period of six IATA seasons. The CMA recognises that this process will create commercial uncertainty for the airlines operating the three SRAs as they will only be able to plan with certainty for operating services using these slots until March 2022. At that point it is possible the slots may be re-tendered and awarded to other airlines. However, on balance, the CMA considers that the public interest would be best protected by giving an opportunity for a new competitor to request a slot under the directions at an appropriate point during the six IATA season period. Such new competition would potentially be beneficial for consumers on the relevant Routes of Concern (and, therefore, protect the public interest); for example, if it could provide the most effective competitive constraint to the AJB.

g. On balance, taking into account the time pressures ahead of IATA Summer Season 2021 outlined above, the need for a reasonable degree of certainty for existing SRA beneficiaries in operating their services over the next year or so and the need for a reasonable amount

[40] See sub-clause 3(b)(ii) of the interim measures directions.

of time for any new competitor to operate services using the slots, the CMA considers that undertaking a slot re-allocation process for the final four IATA seasons on these Routes of Concern is appropriate. If such a new competitor wishes to enter a relevant Route of Concern using a slot available under the directions, it would have the opportunity to do so from IATA Summer Season 2022. Naturally, the existing SRA beneficiaries would also have the opportunity to request the slot be re-allocated to them for the remaining four IATA seasons and (if more than one airline is eligible to receive a slot) the CMA would rank their bids and give preference to the applicant which it considered would provide the most effective competitive constraint to the AJB.[41] However, if no such new competitor wishes to enter a relevant Route of Concern, or a prospective new competitor who wished to enter would be ineligible to receive a slot under the terms of the interim measures directions,[42] the CMA considers that it is appropriate to have a simple process to allow the existing SRA beneficiary to extend the SRA on that Route of Concern for the remaining four IATA seasons. As noted above, these airlines are clearly capable of offering competing services on the relevant Routes of Concern, as they have been doing so for a number of years.

h. The position is different as regards one of the London – Boston slots, which is not currently allocated to any airline.[43] In respect of that slot, a new slot allocation procedure before IATA Summer Season 2021 is necessary.

i. Where the interim measures provide for a slot allocation process, the CMA considers that it is appropriate to use, with amendments where necessary, the slot allocation process set out in the 2010 Commitments. The CMA has considered whether the terms which determine both eligibility (ensuring compliance with the requirements for a Prospective Entrant) and, more generally, the selection procedure set out under clause 1.3 of the 2010 Commitments should be amended or updated. The CMA considers that the definitions and procedure should retain the same fundamental features: the slot allocation

[41] See sub-clause 4 of the interim measures directions (incorporating and amending by reference clause 1.3.10 of the 2010 Commitments).
[42] See sub-clause 4.a.i – iii, which, in summary, provides that the CMA shall consider whether any new entrant meets the definition of Prospective Entrant and, if it does not, inform the counterparty to the relevant SRAs concluded under clause 1 of the interim measures that they can extend those agreements on the same terms for a duration (at the choice of the respective counterparty) of up to four consecutive IATA Seasons commencing with the Summer 2022 IATA Season.
[43] A slot between LGW – Boston was previously used by Norwegian. However, it surrendered this slot earlier this year and the slot is now available for allocation from IATA summer season 2021.

process under the 2010 Commitments has been effectively used previously and is well understood by industry participants.

j. The FCA, FFPA, and, in particular, the SPA commitments made under the 2010 Commitments are important in supporting competitors to the AJB on the relevant Routes of Concern. Accordingly, the CMA considers that these should be retained for the period of the interim measures and any existing SPAs should be effectively extended, at the choice of the relevant counterparty, for a period of up to six IATA seasons (ending before the start of IATA Summer Season 2024 at the latest).

7.8. In determining the process for implementing the interim measures, the CMA considered undertaking a tender process for all four sets of slot pairs in autumn 2020 to commence in spring 2021. However, at the date of this decision there is insufficient time to conduct four tender processes (as explained at paragraph 7.7.d). Furthermore, the CMA considered that the objective of ensuring that there is competition to the AJB Parties could in the short term be best served by providing consumers with access to a competitive service to the AJB on the routes in question.

7.9. Overall, the CMA considers that it is appropriate to choose an option which allows the effective implementation of the interim measures in the most timely and proportionate manner, while potentially allowing new competitors the opportunity to be allocated slots during the six IATA seasons during which the interim measures will be in effect.

## B. Whether interim measures are appropriate and proportionate

7.10. In deciding whether the imposition of an interim measures direction is appropriate in the circumstances, the CMA must ensure that the interim measures sought are proportionate for the purpose of preventing, limiting or remedying the harm to the public interest identified.[44] Accordingly, the CMA will generally select the least intrusive measure that will be effective in achieving that purpose.

7.11. In assessing proportionality and whether to exercise its discretion to issue interim measures, the CMA has taken into account all relevant considerations. These include the need to consider the public interest,[45] the need to have regard to the 'balance of interests' or 'least risk of injustice' test

[44] CMA 8, paragraph 8.12.
[45] For example, see *Napp Pharmaceuticals* v *The Director General of Fair Trading*, 1000/1/1/01 (IR), Judgment (Request for interim relief), 22 May 2001, paragraph 39.

employed in the High Court proceedings for interim injunctions[46] and the need to have regard to the principles applied by the Competition Appeal Tribunal in proceedings under Rule 24 of the Competition Appeal Tribunal's Rules in relation to interim orders and measures.[47]

7.12. In reaching a decision the CMA has, therefore, considered the balance of interests of the parties that would be affected by the interim measures directions, including the Parties and other airlines and industry participants. The CMA has also considered the effect on competition and consumers.

**The interim measures**

7.13. In summary, the CMA has decided to issue interim measures that require the Parties to:

a. replace, at the request of the relevant counterparties, the SRAs which were entered into under the 2010 Commitments and which will expire before the start of the IATA Summer 2021 Season so as to extend the allocations for up to two IATA Seasons from IATA Summer Season 2021 with new SRAs on the same terms;

b. write to their counterparties offering new SRAs on the same terms as the existing SRAs for up to two IATA Seasons in accordance with the CMA's interim measures directions and promptly to execute any such extensions that are accepted;

c. offer the slots which are currently subject to those existing SRAs to an eligible competitor or new entrant for up to four IATA Seasons from IATA Summer Season 2022, allocated on the terms outlined in the 2010 Commitments;

d. if no new entrant is able to take up the slots via the process outlined at 7.13c above, extend, at the request of the relevant counterparties, the SRAs which were entered into prior to IATA Summer Season 2021 pursuant to the interim measures directions;

[46] For example, see *Chemistree Homecare Limited* v *Abbvie Limited* [2013] EWHC 264 (Ch), paragraph 23 where Roth J states (referring to the judgment of Lord Hoffman in *National Commercial Bank Jamaica* v *Olint Corporation* [2009] UKPC 16) that '[*s]ince this is a claim for interim relief, the test the claimant has to fulfil is … that the grant, as opposed to the refusal of an interim injunction carries the least risk of injustice as between the parties*'.

[47] Under Rule 24(3) of the Competition Appeal Tribunal's Rules the Competition Appeal Tribunal is required to exercise its power taking into account all the relevant circumstances, including the effect on the party making the request if it is not granted and the effect on competition if relief is granted. Note also that the Competition Appeal Tribunal now has power to make an order for an interim injunction (sections 47A and 47D of the Act and Rule 68 of the Competition Appeal Tribunal's Rules) and, in deciding whether to grant an injunction, is required to apply the principles that the High Court would apply (section 47D(2) of the Act).

e. offer one further set of slots to an eligible competitor or new entrant on London – Boston for up to six IATA Seasons from IATA Summer Season 2021 allocated on the terms outlined in the 2010 Commitments;

f. replace, at the request of the relevant counterparties, SPAs which were entered into under the 2010 Commitments for up to six IATA Seasons from IATA Summer Season 2021 with SPAs on the same terms;

g. offer any airline which would have been eligible under the 2010 Commitments an SPA, FCA or FFPA on the terms outlined in the 2010 Commitments;

h. include a fast track dispute resolution process in any new agreements that are entered into pursuant to the interim measures directions;

i. appoint a Monitoring Trustee to oversee the implementation of the interim measures directions; and

j. provide the CMA information required to ascertain compliance with the interim measures directions.

7.14. The interim measures outlined at paragraphs 7.13.a and 7.13.f above require the replacement of existing SRAs and SPAs entered into pursuant the 2010 Commitments with new SRAs and SPAs on the same terms, to ensure there is a clear demarcation of oversight between the CMA and the Commission. Under clause 8.5 of the 2010 Commitments, any extension of agreements entered into pursuant to the 2010 Commitments would mean that the relevant provisions of the 2010 Commitments themselves would continue to apply and the Commission would continue to have oversight via those provisions.[48] Accordingly, the CMA considers that directing extensions of existing SRAs and SPAs, which were entered into pursuant to the 2010 Commitments, in the interim measures could lead to confusion as to the legal oversight of the agreements. By contrast, the approach outlined above, whereby existing agreements are allowed to expire but are replaced with new agreements pursuant to the interim measures, means the Commission's role will clearly come to end at the expiry of the existing agreements with the

[48] Clause 8.5 of the 2010 Commitments is as follows (with **bold emphasis** added): '*For the avoidance of doubt, the expiry of these Commitments (e.g. as a result of the expiry or review of the Commitment Decision or as a result of Clauses 8.1 or 8.2 above) shall not affect the validity of the Slot Release Agreements, Special Prorate Agreements, fare combinability agreements and FFP agreements already concluded, unless the Commission's review results in a decision explicitly ending such agreements.* ***As long as such agreements continue to apply beyond the expiry of the Commitments, the provisions in these Commitments that concern these agreements also continue to apply.*** *However, the expiry of these Commitments shall end the Parties' obligation to renew those agreements*'.

CMA having oversight of all new agreements entered into pursuant to the interim measures.

**Effects on IAG/BA/Iberia and AA as a result of the interim measures being imposed**

7.15. In imposing interim measures, IAG (specifically, BA) and AA will be required temporarily to release to competitors up to four slots, at LHR or LGW, for a period of up to six IATA Seasons (i.e. three years). The CMA recognises that such slots are valuable assets. However, BA and AA have been required to release 3 – 4 slots to competitors for much of the period during which the 2010 Commitments were in operation and their business has remained robust despite being deprived of these assets; which suggests that the impact on IAG and AA will not be significant. Moreover, IAG and AA cumulatively enjoy a very significant slot holding at LHR, with IAG holding over 700 slots and AA holding just under 40 slots (out of c.1,300),[49] and a significant slot holding at LGW, with IAG holding just under 170 slots (out of c.700).[50] In the context of that wider slot holding, a requirement to release 3 – 4 slots is unlikely to have a significant effect of their business.

7.16. BA, Iberia and AA may also be required to extend a number of existing SPAs; and potentially offer new SPAs, FCAs, and FFPAs to competitors/prospective entrants up until the end of the Winter 2023/24 IATA Season. Again, the CMA recognises that requiring BA, Iberia and AA to contract with competitors on terms they would not otherwise offer will have an effect on them. However, as with the requirement to release slots, BA, Iberia and AA have been required to enter into such contracts with their competitors for the period during which the 2010 Commitments were in operation and their business has remained robust despite this requirement; which suggests that the impact of their business will not be significant.

7.17. Moreover, as outlined at paragraph 4.11.a.ii above, BA and AA enjoy considerable advantages as incumbents such as: the increased flow of traffic that results from having hub operations at one or both ends of the route; frequency and scheduling advantages; better access to corporate customers; and customer loyalty as a result of FFPs. Requiring BA and AA to enter into agreements to reduce these significant advantages for just over three years (i.e. between the date of the directions becoming effective and

[49] Based on ACL's Start of Season report for LHR in Winter 2019: IAG had 55% of all slots at LHR, while IAG and AA combined had 58%.
[50] Based on ACL's Start of Season report for LGW in Winter 2019: IAG had 23% of LGW slots, while AA held no slots; for comparison easyJet was the largest slot holder at LGW with 38%.

the end of the Winter 2023/24 IATA season) is unlikely to have a significant effect on their business.

7.18. The CMA recognises that there is the possibility of disruption to BA and AA's operations in being required to offer potentially differently timed slots to those which are currently subject to existing SRAs (see paragraph 7.3.c above).[51] Accordingly, the CMA has made provision in the interim measures that, while BA and AA undertake to make available slots within +/- sixty minutes of the time requested by the Prospective Entrant, they may, alternatively, require the Prospective Entrant to accept the time of the equivalent slots made available under the existing SRA if offering a different time would create significant disruption to BA or AA's operations. The CMA, advised by the Monitoring Trustee, having consulted BA/AA and the Prospective Entrant, will decide whether such significant disruption will arise.[52]

7.19. The CMA has also made consequential provision to ensure that the 'Misuse' provision contained in clause 1.2.8(c) of the 2010 Commitments applies appropriately if the CMA determines that such significant disruption will arise and that, therefore, the Prospective Entrant is required to accept the time of the equivalent slots made available under the existing SRA rather than a time +/- sixty minutes of the time requested.[53]

**Effect on public interest if the interim measures were not imposed**

7.20. The CMA considers that the public interest would suffer significant harm if the envisaged interim measures are not imposed.

7.21. In the light of its reasonable suspicion as to the object and effect of the AJBA, the CMA considers that the potential negative impact of the AJBA on competition on the Routes of Concern, absent the remedies contained in the 2010 Commitments and extended by the interim measures, would be significant. In particular, as the airline sector recovers, competitors and prospective entrants would face the significant barriers to entry or expansion, outlined at paragraph 4.11a above, without recourse to remedies which have previously assisted entrants to overcome such barriers. A reduction in competition on the Routes of Concern due to the lack of appropriate remedies would, in turn, negatively impact consumers' ability to benefit from the key parameters of airline competition (such as the price, quantity and quality of services) on the Routes of Concern.

[51] See clauses 4 and 5 of the interim measures commitments.
[52] See clause 4.b.iv and 5.b.iv of the interim measures directions.
[53] See clause 4.b.v and 5.b.v of the interim measures directions.

**Balancing the effect**

7.22. Given the relatively limited scale of the impact on IAG, BA, Iberia and AA weighed against the risk of ongoing and anticipated future significant harm to the public interest, the CMA concludes that it is appropriate and proportionate to adopt the interim measures (as set out in the Appendix) in the present case.

## 8. THE PARTIES' REPRESENTATIONS

8.1. In making its decision, the CMA has considered representations from the Parties received on 15 September 2020 regarding the detailed drafting of three aspects of the interim measures directions:

a. The Parties submitted that, as a consequence of the provision outlined at paragraph 7.18 above, if clause 1.2.8(c) of the 2010 Commitments applied in unamended form to SRAs entered into under clauses 4 and 5 of the interim measures directions, there was a risk that (in certain scenarios) the slots which were subject to those SRAs could be permanently swapped by the counterparty to the SRA for slots which were at very different times of the day to the original slots. The Parties submitted that a consequence of this could be that the slot returned to the Parties at the end of an SRA was of a significantly lower value than the slot which was originally released to the counterparty. The Parties submitted that such an outcome would be disproportionate to the purpose of the interim measures directions. As outlined at paragraph 7.19 above, the CMA recognises that it is appropriate to make consequential changes to ensure that the 'Misuse' provision contained in clause 1.2.8(c) of the 2010 Commitments applies appropriately in all scenarios which may arise under the interim measures directions.

b. The Parties submitted that where an airline which is currently a counterparty to an existing SRA applies for a slot pursuant to clause 4 or 5 of the interim measure directions, that airline should be deemed to have requested the same slot timings as originally requested pursuant to the 2010 Commitments and be required to accept the time of the slots made available under the existing SRA. The CMA does not agree that this is appropriate. As outlined at 7.18 above, the CMA has already made provision in the interim measures directions to deal with the possibility of significant disruption to BA's and AA's operations in potentially being required to offer differently timed slots to those which are currently subject to existing SRAs. The CMA considers that making such additional provision in the interim measures directions would reduce the options available to existing slot counterparties and may put them at an unfair disadvantage to a new entrant in the event of a slot release process with multiple applicants.

c. The Parties noted that clause 3.12(a) of the 2010 Commitments should be applied to SPAs entered into pursuant to clause 6 of the interim measures directions. As explained in this decision, including at

paragraph 7.4 above, the CMA's intention is effectively to extend the key terms of the 2010 Commitments for six IATA seasons. On that basis, the CMA agrees that clause 3.12(a) should apply to SPAs entered into pursuant to clause 6 of the interim measures directions (as it does to SPAs entered into pursuant to clause 8 of the interim measures directions).

8.2. In the course of engagement between the Parties and the CMA in relation to this decision, the Parties have also made representations to the effect that their position on the CMA's issuing of these interim measures is without prejudice to their position: (i) during the CMA's ongoing investigation and in particular as the CMA updates its ongoing investigation; and/or (ii) should any third party, other authority, or the CMA in the future, commence or conduct any proceedings or legal action against the Parties in respect of the AJB or any similar cooperation agreement. The Parties have also made representations to the effect that their position on the issuing of these interim measures should not be construed as implying that the Parties agree with any preliminary concerns identified by the CMA in its ongoing investigation.

8.3. The CMA has concluded that these representations do not have a bearing on the decision to impose interim measures directions.

## 9. THE CMA'S ACTION

9.1. For the reasons set out above, the CMA concludes that it is necessary for it to act under section 35 of the Act as a matter of urgency for the purpose of preventing harm to the public interest.

9.2. Accordingly, the CMA adopts the interim measures directions as set out in the Appendix to this decision.

**Ann Pope**
**Senior Responsible Officer**
**For and on behalf of the Competition and Markets Authority**