

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

4 April 2022

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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, ensuring that the remedies made available by the same parties under the Interim Measures of 17 September 2020 (the '**2020 Interim Measures**') remain available until the Winter 25/26 IATA season. The 2022 Interim Measures directions (the '**2022 Interim Measures**') are effective from the date of publication of this decision and govern the operation of the remedies available as result of the extension between the Summer 2024 and Winter 25/26 IATA seasons. The 2020 Interim Measures remain effective and will continue to govern the operation of remedies awarded pursuant to those measures until the end of the Winter 23/24 IATA season.
- 1.3. In making its decision, the CMA has also considered representations from the Parties received on 28 March 2022.¹

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 (Premium² 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

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 23 March 2022 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.

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 suspected agreement satisfies the conditions for exemption under section 9(1) of the Act.

- 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. In September 2020, as a result of the exceptional circumstances created by the impact of the COVID-19 pandemic on the airline industry and the considerable uncertainty about the extent and duration of this impact on the sector, the CMA decided that it would not be appropriate to accept commitments under section 31A of the Act. Furthermore, as at that time, the CMA was unable to complete its investigation before the expiry of various agreements in place pursuant to the 2010 Commitments decision, the CMA decided to impose the 2020 Interim Measures. In doing so, the CMA acted on an interim basis for the purpose of urgently protecting the public interest in preserving competition on the Routes of Concern.
- e. As a result of the imposition of the 2020 Interim Measures, airlines which are competitors to the AJBA airlines have either continued to operate, or been awarded, slots to operate four services on three Routes of Concern.
- f. Due to the continued impact of the COVID-19 pandemic and the fact that material recovery is taking longer than was anticipated in 2020, the CMA considers that remedies made available under the 2020 Interim Measures should continue to be available for two additional years. In particular, in 2021, national restrictions on passenger air travel continued (the US-UK air corridor only re-opening on 8 November 2021) and new variants of the COVID-19 disease (Delta and Omicron) in 2021 and 2022 have severely affected passenger confidence and

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.

travel patterns leading to reduced demand. Furthermore, since March 2020, waivers of UK slot usage requirements have been in place. These have allowed airlines either to reduce frequencies or temporarily cease operations on transatlantic city pairs including the Routes of Concern.

- g. As a result of these unprecedented circumstances, the CMA is not in a position to complete its investigation in advance of the 2020 Interim Measures coming to an end in March 2024. With the lifting of all travel restrictions in the UK in March 2022⁴ and the reintroduction of UK minimum (70:30) slot usage requirements from March 2022,⁵ it is anticipated that recovery will accelerate and become more sustained from the IATA Summer 2022 season and during 2023, thereby allowing the CMA by early 2024 to have sufficient data and certainty regarding the structure of the market to analyse the relevant markets and the likely ongoing impact of the AJBA on the Routes of Concern.⁶ This assumes that no further travel restrictions will result from new variants of COVID-19 or other causes which significantly impact the transatlantic airline sector.
- h. As the CMA considers that at least two additional years will be needed to complete its investigation and address any competition concerns, in order to avoid a foreseeable enforcement gap, the CMA has decided that the 2020 Interim Measures should be extended by an additional four seasons (two years) with a possible tender process to be held in autumn 2023 in relation to the remedy slots. As was the case with the 2020 Interim Measures, a tender process will only be held if more than one airline meeting the relevant independence criteria and slot exhaustion applies. This provision will provide an opportunity for a new entrant or other competitor to apply for the slots, allowing competition between airlines for the award of each of the remedy slots.
- i. 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

⁴ [All COVID-19 travel restrictions removed in the UK - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/all-covid-19-travel-restrictions-removed-in-the-uk).

⁵ [The Airports Slot Allocation \(Alleviation of Usage Requirements\) Regulations 2022](https://www.gov.uk/government/consultations/the-airports-slot-allocation-alleviation-of-usage-requirements-regulations-2022).

⁶ The majority of airlines operating on the Routes of Concern anticipate that recovery in corporate and premium travel is expected to lag the recovery in non-premium travel.

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.

- j. Accordingly, the CMA has decided, for the reasons given in this decision, to issue new interim measures directions, contained in the Appendix to this decision.

2. BACKGROUND

2.1. This section sets out a summary of the Commission's previous investigations, the CMA's investigation to date, the CMA's consultation on Proposed Commitments and its decision not to accept commitments, an overview of the exceptional circumstances created by the impact of the COVID-19 pandemic on the airline industry which led to the 2020 Interim Measures and the current status of the airline industry which necessitates the CMA's decision to extend the 2020 Interim Measures.

A. The 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 Treaty on the Functioning of the European Union ('**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 2020.⁷ These 2010 Commitments were primarily aimed at enabling competing airlines to start operating or increase their 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 were 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'**) used a slot to operate a service on the London – Miami Route, Delta used a slot on London – Boston and London-Dallas and Norwegian has used a slot on the London – Boston route). The London – New York commitment slot was never made available because the number of daily competing services never fell below the 2010 levels. The SPAs were also 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 2010⁸ and subsequently extended it in December 2020 to include Aer Lingus Group DAC (which had been a party to the AJBA since 2017, contingent upon DOT approval).

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 on this route pre-2013. However, the AA/US Airways merger created an

⁷ Case COMP/F-1/39.596 - BA/AA/IB European Commission Commitments decision dated 14 July 2010.

⁸ US DOT Final Order 2010-7-8, served on 20 July 2010, Docket DOT-OST-2008-0252.

overlap between BA which operated on the route and AA (which, as US Airways, also 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 the General Court dismissed in its entirety.¹² AA has appealed the General Court's judgment to the Court of Justice of the European Union ('**CJEU**').¹³ If the Grandfathering Decision had been annulled, there was a possibility that the Merger Commitments slots were once again used to operate a service between LHR and PHL. The CJEU has not yet ruled as of the date of this decision, and it remains possible that the CJEU will overturn the General Court judgment. 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*, judgment of the General Court of 16 December 2020.

¹³ Case [C-127/21P](#) – *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 currently a party: AA; members of IAG: BA, Iberia, and Aer Lingus Limited; 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 in relation to the AJBA between the 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 at that time. The CMA also decided not to prioritise further investigation of the Non-premium¹⁴ market on the London – Chicago route.

C. The CMA's consultation on Proposed Commitments and decision not to accept commitments

- 2.17. In May 2020, AA and IAG offered commitments aimed at addressing the CMA's competition concerns in this investigation (the **'Proposed Commitments'**). 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.

¹⁴ See paragraph 4.3.b for the definition of Non-premium.

- 2.18. The CMA issued the NIAC¹⁵ on 7 May 2020 and invited representations from interested third parties. The CMA received written representations on the NIAC consultation from a number of interested third parties including airlines operating services on the remedy slots. Most of the 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 either ‘roll-over’ the 2010 Commitments or suspend any ‘binding’ decision until the sector is in recovery.
- 2.19. As was explained in the Notice of Decision Not to Accept Commitments, the CMA concluded that, as a result of the considerable uncertainty created by the COVID-19 pandemic, it could not be confident that the competition concerns it had identified, or the Proposed Commitments, adequately took account of the impact of the pandemic on the state of competition. The CMA therefore decided that it would not be appropriate to accept the Proposed Commitments at that time, as it could not be confident that they would address the competition concerns arising from the operation of the AJBA.¹⁶

D. CMA imposition of 2020 Interim Measures

- 2.20. In September 2020, the CMA concluded that it was 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. At that time, the airline industry was facing exceptional circumstances due to COVID-19. Airlines were operating significantly reduced schedules and were likely to continue doing so while measures are in place to restrict the spread of the disease. Future transatlantic schedules were likely to be reduced until restrictions were substantially lifted and until the UK and US economies had, at least partially, recovered from the impact of COVID-19.
- 2.21. At that time there was considerable uncertainty about the extent and duration of the impact of COVID-19 on the sector. In September 2020, industry estimates suggested that it may be several years before the sector recovered (e.g. IATA estimated recovery was unlikely before 2023/2024).¹⁷
- 2.22. As a result of this uncertainty, the CMA could not be confident that the competition concerns it had identified, and any measures it might take for the purpose of addressing them, including by accepting commitments under

¹⁵ Pursuant to paragraph 2 of Schedule 6A of the Act.

¹⁶ [Notice of decision not to accept commitments offered by International Consolidated Airlines Group S.A. and American Airlines Inc. \(publishing.service.gov.uk\)](#), issued on 17 September 2020.

¹⁷ IATA's [report](#) issued in May 2020 initially forecast recovery (to pre-pandemic levels) in 2023, but in July 2020 IATA revised this forecast to 2024 (see [IATA - Recovery Delayed as International Travel Remains Locked Down](#)).

section 31A of the Act, would adequately reflect the impact of the pandemic on the state of competition.

- 2.23. The CMA could not complete its investigation before the expiry of various agreements in place pursuant to the 2010 Commitments decision. An ‘enforcement gap’ would have arisen if action was not taken on an interim basis for the purpose of urgently protecting the public interest in preserving competition on the Routes of Concern, in relation to the passengers who were at that time still able to travel between the UK and the US.
- 2.24. The CMA took the decision to impose interim measures for a period of three years because, it was hoped, that this would allow sufficient time for initial market recovery in 2021 and for the CMA’s investigation to be completed in 2023, in sufficient time to avoid a future enforcement gap. As noted above, at that time industry forecasts suggested that recovery to pre-pandemic levels would be unlikely before 2023/24 and therefore it was considered that this would be a proportionate period for interim measures.
- 2.25. The key terms under the 2020 IM Directions involved the continued obligation on the AJB Parties to release four remedy slots on three London to US city pairs (London – Boston, London – Dallas and London – Miami) (the ‘**Interim Remedy Slots**’) and have been met as follows:
- a. Boston remedy slot 1 was unused in 2020, so a tender process was held in autumn 2020 with the CMA awarding the slot to United Airlines, enabling it to enter and operate a competitive service on the route for up to three years (from S21 to W23/24).¹⁸
 - b. In relation to the three remaining remedy slots being operated by competitor airlines under the terms of the 2010 Commitments:
 - i. The agreements were initially extended by two IATA seasons (S21 to W21/22). Boston remedy slot 2 continued to be used by Delta to operate a non-stop service direct, the Miami remedy slot continued to be used by Virgin Atlantic (to operate a direct service in the winter seasons and one-stop service via Atlanta in the summer seasons) and the Dallas remedy slot was used by Delta (to operate a one-stop service via Atlanta year round).

¹⁸ This London-Boston slot had been previously operated by Norwegian but was handed back in early 2020. Norwegian subsequently exited the transatlantic market.

- ii. To allow the possibility of new entry, a tender process for the remaining two years of usage was held in summer 2021, if eligible prospective entrants applied:
 1. Delta and Virgin retained the Boston and Miami remedy slots, respectively, without a tender process as no eligible prospective entrants applied and the SRAs were extended by two years.
 2. Two prospective entrants applied for the Dallas remedy slot. The CMA ranked the business plans, decided in November 2021 that Delta would provide the stronger constraint on the AJBA Parties, and re-awarded it the slot, extending the SRA for two years.

E. Continued impact of COVID-19 on the transatlantic airline sector in 2021 and 2022 and the necessity to extend the 2020 Interim Measures

- 2.26. As explained above in paragraph 2.24, the CMA expected that issuing the 2020 Interim Measures would provide sufficient time for it to complete its investigation in advance of the expiry of remedies, ensuring that an enforcement gap did not arise. It was anticipated that the CMA would be able to conclude its assessment of the impact of the AJB on competition during the intervening years, allowing *inter alia* for the possibility of longer term remedies by way of commitments or an infringement decision and directions.
- 2.27. In 2021 and 2022 to date, the transatlantic airline sector has continued to be severely impacted by the COVID-19 pandemic:
 - a. for over 18 months (from early 2020 until November 2021) the US-UK air corridor was completely closed to UK visitors. During this time transatlantic passenger flights operated between London and only a small number of US cities, for US citizens only. On 8 November 2021 the air corridor re-opened allowing fully-vaccinated UK citizens to travel to the US;¹⁹
 - b. new variants of the COVID-19 disease (Delta and Omicron) in 2021 and 2022 have severely affected passenger confidence and travel patterns, leading to reduced demand; and

¹⁹ Fully vaccinated UK citizens must also have a negative COVID test result (a PCR test or a rapid antigen test), which must have been taken within 24 hours of the departing flight to the United States.

- c. since March 2020, waivers of UK slot usage requirements have been in place. These have allowed airlines either to reduce frequencies or temporarily cease operations on transatlantic city pairs, including the Routes of Concern.
- 2.28. As a result of the circumstances described above, during winter 2021 the CMA considered whether it would be necessary to extend the availability of the slots and agreements made available under the 2020 Interim Directions to reflect the CMA's inability to complete its investigation, prior to the expiry of the 2020 Interim Measures. The CMA discussed its concerns regarding the ongoing impact of COVID-19 on the transatlantic sector and the possibility of extending the 2020 Interim Measures with, amongst others, the Parties and slot remedy holders (Delta, Virgin, and United) and airlines which are eligible to apply for remedies and have previously indicated an interest in applying for such remedy slots. The case team also discussed the possibility of extending the 2020 Interim Measures with the DOT.
- 2.29. The AJB Parties and other airlines suggested that the medium-to long-term impact of the COVID-19 pandemic remains highly uncertain and this uncertainty may continue for two to three years, with some referring to the following factors:
- a. [REDACTED]
 - b. [REDACTED]
 - c. [REDACTED]
 - d. [REDACTED]
- 2.30. On the basis of the continued impact of the COVID-19 pandemic, most airlines suggested that the 2020 Interim Measures should be extended by at least 18 months or two years. Some argued that an extended period of interim measures would allow the industry to reach a sufficient degree of stability and for reliable market data to be available to demonstrate underlying competitive trends on transatlantic routes post COVID-19. The CMA also consulted with the DOT regarding its decision to extend the 2020 Interim Measures.
- 2.31. As explained more fully in this decision, due to the continued impact of the COVID-19 pandemic and the fact that material recovery is taking longer than was anticipated in 2020, the CMA considers that the remedies made available under the 2020 Interim Measures should continue to be made available for two additional years.

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, it would also reach the conclusion that the suspected agreement is exempt as a result of section 9(1) of the Act (the '**insufficient evidence of exemption requirement**').²⁰
- 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 guidance²¹ when exercising this discretion.

²⁰ Sections 35(8) and 35(9) of the Act.

²¹ In particular, [Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 Cases](#) (31 January 2022) ('**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, accordingly, that the legal test under section 25 of the Act was met.²²

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.²³

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:

²² 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.)

²³ 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.²⁴ 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 airports²⁵ and Chicago O'Hare and Chicago Midway International airports²⁶ 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,²⁷ the CMA has considered the contractual terms of the AJBA itself; its objectives; and the economic and legal context in which it operates.²⁸ The reasonable suspicion which the CMA has identified relates to the potential for the AJBA by its very nature to

²⁴ 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.

²⁵ 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.

²⁶ No non-stop services operate to the UK from Midway nor have done so in the period covered by the CMA's investigation.

²⁷ 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.

²⁸ 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 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 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 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 by object.

C. Effect

4.10. As regards the effect of the AJBA,²⁹ 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. Given the significant disruption to the transatlantic airline sector caused by the COVID-19 pandemic since early 2020, for the purposes of this assessment, the CMA refers to data collected prior to 2020.

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

²⁹ 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

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

Source: CMA analysis of AA-adjusted MIDT passenger data

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

	<i>AJB</i>	<i>Delta / Virgin</i>	<i>Norwegian</i>	<i>United</i>
<i>London – Boston</i>	[20-30]%	[40-50]%	[20-30]%	-
<i>London – Dallas</i>	100%	-	-	-
<i>London – Miami</i>	[40-50]%	[20-30]%	[20-30]%	-
<i>London – Philadelphia</i>	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.³⁰ The CMA's econometric analysis (which adopted a different methodology)³¹ did not robustly show that fares had fallen on any Route of Concern due to the AJB.³²

- 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 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 object and effect, the prevention, restriction or distortion of competition.³³ 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

³⁰ 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.

³¹ 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.

³² 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.

³³ 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.

Chapter I prohibition. Therefore, no assumption should be made on the basis of this decision that the AJBA infringes competition law.

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. As described in Section 4, the CMA considers that there are reasonable grounds to suspect that the AJBA infringes competition law.
- 5.4. As described in Section 2, following the expiry of the 2010 Commitments in July 2020 and the considerable uncertainty created by the COVID-19 pandemic, the CMA decided that it could neither accept the Proposed Commitments nor complete its investigation, and imposed interim measures on the AJB Parties in order to maintain competition on the Routes of Concern for at least another three years. At that time, it was hoped, that this would allow sufficient time for initial market recovery in 2021 and for the CMA's investigation to be completed in sufficient time in 2023 to avoid a future enforcement gap.
- 5.5. The key terms under the 2020 Interim Measures Directions involved the continued obligation on the AJB Parties to release four remedy slots on three London to US city pairs (two remedy slots available on London – Boston, and one remedy slot in relation to each of London – Dallas and London – Miami) and, as described in paragraph 2.25 above, have been met by the Parties. The 2020 Interim Measures will continue to be effective until March 2024.
- 5.6. As a result of the ongoing impact of the COVID-19 pandemic, particularly the impact of the extended closure of the US border and the unforeseen impact of new variants including Delta and Omicron which have restricted travel, recovery in the transatlantic sector is at a very early stage (the UK-US travel corridor only reopened on 8 November 2021) and considerable uncertainty about the timing and nature of recovery remains.

- 5.7. The CMA has considered the views of airlines operating on the Routes of Concern and other transatlantic routes from London airports which can be summarised as follows:
- a. [✂]
 - b. [✂]
 - c. [✂]
 - d. [✂]
- 5.8. IATA forecasts that international airline traffic will not recover to near 2019 levels until 2024.³⁴
- 5.9. Due to the ongoing impact of the pandemic on transatlantic travel and the recovery process which is both uncertain and taking longer than expected, the CMA considers that an extension of the 2020 Interim Measures is necessary.
- 5.10. As a result of the continued uncertainty regarding the recovery of the transatlantic airline sector, 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. It remains the case that, due to the impact of the pandemic there may be 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. On the basis of publicly available forecasts and the CMA's recent discussions with airlines operating on transatlantic routes, the CMA considers that material recovery is likely to take longer than initially anticipated in September 2020. Until such material recovery has taken place the CMA may not be able to complete its assessment of the impact of the AJBA on competition and the appropriateness of any remedies required. In the context of this case, the CMA is concerned that it would not be able to reach conclusions as to the likely medium to long term effects of the COVID-19 pandemic on the transatlantic airline sector, that are of material importance to its overall decision, without having the necessary evidence from which it could properly draw those conclusions.

³⁴ As at 1 March 2022, IATA indicated that in 2021, international traveller numbers were 27% of 2019 levels. IATA considers that this is expected to improve to 69% in 2022, 82% in 2023 and 92% in 2024. See further [IATA - Air Passenger Numbers to Recover in 2024](#).

- 5.11. Accordingly, the CMA anticipates that it will not be able to complete its investigation before the agreements imposed under the 2020 Interim Measures 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.
- 5.12. Moreover, merely taking action at any point before the expiry of the SRAs currently in effect, 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.
- 5.13. In these circumstances, the CMA considers that there is now an urgent need to address the foreseeable 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

- 5.14. 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.³⁵ 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.³⁶
- 5.15. 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 imposed pursuant to the 2020 Interim Measures (i.e. the foreseeable enforcement gap described above), would be significant.
- 5.16. 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 4.11.a above, without recourse to remedies which have previously assisted entrants to overcome such barriers.

³⁵ CMA8, paragraph 8.16.

³⁶ CMA8, paragraph 8.16.

- 5.17. 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 as the sector recovers. As noted earlier in this decision, as the UK-US corridor has been open since November 2021 and passenger numbers, particularly leisure travellers, are now significantly increasing, the urgency is, in some respects, now more acute than in September 2020 (when there were only very limited numbers of passengers travelling on transatlantic routes).
- 5.18. As outlined above at 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 2.10-2.11 subject to AA's appeal against the General Court's judgment regarding the Commission's Grandfathering Decision there remains 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 FFPA) or may be available in the near future (slots) on this Route of Concern.
- 5.19. Moreover, as explained at 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.
- 5.20. 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

- 5.21. 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 5.20 above, there is no need to consider whether there is an urgent need to prevent significant damage to a person or persons.

D. Conclusion on the urgency requirement

- 5.22. As explained at 5.1 - 5.13, there is an urgent need to act now to avoid an enforcement gap arising on the Routes of Concern. As explained at 5.14 -

5.20, allowing that enforcement gap would significantly negatively impact the public interest on all the Routes of Concern except London – Philadelphia.

- 5.23. 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), it would also reach the conclusion that the suspected agreement satisfies the conditions for exemption under section 9(1) of the Act.

A. The Parties' arguments

6.2. In the course of the CMA's investigation up until the 2020 Interim Measures were issued, the Parties 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, 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 are met.³⁷ 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.³⁸

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 6.2 above) are, in principle, relevant for the purposes of section 9(1) of the Act, 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. The CMA, therefore, concludes that the insufficient evidence of exemption requirement is met.

³⁷ Section 35(8) of the Act. See also section 9(2) of the Act.

³⁸ *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.³⁹ 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/or 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 5.22 – 5.23 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 2022 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 ensure that the competitive constraint imposed on the AJB by the 2010 Commitments and the 2020 Interim Measures will not come to an end in March 2024.

7.5. As explained at 5.22 – 5.23 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 can complete its

³⁹ Section 35(2) of the Act.

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 ongoing global pandemic. The CMA considers that an effective continuation of the 2010 Commitments and the 2020 Interim Measures will achieve this. In particular, continuing to make 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 continue to 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 certain remedies under the 2010 Commitments and the 2020 Interim Measures, as explained at 7.4 above is the best way to achieve this for a number of reasons:
- a. The CMA considers that it would not be appropriate to guarantee automatically that the existing airline beneficiaries of SRAs will have their SRAs effectively extended for the period of four IATA seasons. The CMA recognises that this process will create commercial uncertainty for the airlines operating the four SRAs as they will only be able to plan with certainty for operating services using these slots until March 2024. At that point it is possible the slots may be re-tendered and awarded to another airline.
 - b. However, on balance, the CMA considers that the public interest would be best protected by giving an opportunity for a new or alternative competitor to request a slot under the directions at an appropriate point during the further four 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. DOT also supported this approach.
 - c. Furthermore, the CMA considers that undertaking a slot re-allocation process for the four IATA seasons on these Routes of Concern is appropriate. If such a new competitor wished 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 2024.

- d. As was the case in relation to the 2020 Interim Measures, 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. 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 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.
 - e. 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 and slot exhaustion (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 process under the 2010 Commitments has been effectively used previously and is well understood by industry participants.
 - f. The FCA, FFPA, and, in particular, the SPA commitments made under the 2010 Commitments and extended pursuant to the 2020 Interim Measures 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 2022 Interim Measures and any existing SPAs should be effectively extended, at the choice of the relevant counterparty, for a period of up to four IATA seasons (ending before the start of IATA Summer Season 2026 at the latest).
- 7.8. In determining the process for implementing the interim measures, the CMA considered whether the existing Slot Release Agreements between the AJB Parties and existing remedy holder airlines should be extended by way of a 'roll-over', i.e. without a tender process.
- 7.9. However, the CMA considers that it is appropriate for a slot allocation tender procedure to be held in autumn 2023 to allow for potential new entrants or other airlines to operate the slots if they are able to demonstrate that they are eligible and able to offer the strongest competitive constraint to the AJB Parties operating on the specific Route of Concern.

7.10. Overall, the CMA considers that it is appropriate to choose an option which allows the effective implementation of the 2022 Interim Measures in the most timely and proportionate manner, providing consumers with access to a competitive service to the AJB on the routes in questions during the four additional IATA seasons while the 2022 Interim Measures will be in effect.

B. Whether interim measures are appropriate and proportionate

7.11. 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.⁴⁰ Accordingly, the CMA will generally select the least intrusive measure that will be effective in achieving that purpose.

7.12. 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,⁴¹ the need to have regard to the 'balance of interests' or 'least risk of injustice' test employed in the High Court proceedings for interim injunctions⁴² 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.⁴³

7.13. 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

7.14. In summary, the CMA has decided to issue interim measures that require IAG (including specifically BA and Iberia) and AA to:

⁴⁰ CMA 8, paragraph 8.12.

⁴¹ 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.

⁴² 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'.

⁴³ 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).

- a. Offer Slot Release Agreements for the Interim Remedy Slots to a Prospective Entrant nominated by the CMA for a duration of four (4) consecutive IATA Seasons (from Summer 2024 to and including Winter 25/26). The CMA will determine in Autumn 2023 which airline to nominate, in accordance with the tender process prescribed in the 2022 Interim Measures directions;
- b. Provide for the ongoing availability to third party airlines of Special Prorate Agreements, Fare Combinability Agreements and Frequent Flyer Programme Agreements in relation to the Interim Remedy Slots;
- c. Offer any airline which would have been eligible under the 2010 Commitments a SPA, FCA or FFPA on the terms outlined in the 2010 Commitments;
- d. Offer the relevant Interim Remedy Slot until the end of IATA Season Winter 25/26 to any Prospective Entrant nominated by the CMA following the tender process prescribed in these directions if a holder of an Interim Remedy Slot relinquishes, ceases to operate, or loses the right to operate, an Interim Remedy Slot; and
- e. Provide for the effective monitoring of, and compliance with, the 2022 Directions.

7.15. For completeness, the CMA will continue to have oversight of all agreements entered into or extended pursuant to the 2022 Interim Measures.

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

7.16. 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 an additional four IATA Seasons (i.e. two years). The CMA recognises that such slots are valuable assets. However, BA and AA have been required to release up to four slots to competitors for much of the period during which the 2010 Commitments were and the 2020 Interim Measures continue to be 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 very significant. Moreover, IAG and AA cumulatively enjoy a very significant slot holding at LHR, with IAG holding over 700 slots and AA holding over 40 slots (out of c.1,400),⁴⁴ and a

⁴⁴ ACL confirmed by email dated 22 March 2022 that for LHR in Summer 2022: IAG will hold 56% of all slots at LHR, while IAG and AA combined will hold 59%.

significant slot holding at LGW, with IAG holding 170 slots (out of c.900).⁴⁵ In the context of that wider slot holding, a requirement to continue to release four slots is unlikely to have a very significant effect on their business.

- 7.17. 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 2025/26 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 duration of the 2010 Commitments and the 2020 Interim Measures and their business has remained robust despite this requirement. This suggests that the impact on their business will not be very significant.
- 7.18. Moreover, as outlined at 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 an additional two years (i.e. until the end of the Winter 2025/26 IATA season) is unlikely to have a significant effect on their business.
- 7.19. 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. Accordingly, the CMA has made provision in the 2022 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 the relevant party'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.⁴⁶

Effect on public interest if the interim measures were not imposed

- 7.20. The CMA considers that the public interest will suffer significant harm if the interim measures were not imposed.

⁴⁵ ACL confirmed by email dated 22 March 2022 that for LGW in Summer 2022: IAG will hold 18% of LGW slots, while AA holds no slots.

⁴⁶ See clause 3.a of the interim measures directions.

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 2020 Interim Measures and these further 2022 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 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.

Balancing the effect

7.22. Given the relatively limited scale of the impact on each of the Parties 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 written representations from the Parties received on 28 March 2022 regarding the interim measures directions.
- 8.2. 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 interim measures directions as set out in draft in the Appendix to this decision.

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