

# Anticipated acquisition by Korean Air Lines Co., Ltd of Asiana Airlines Inc.

## Decision that undertakings might be accepted

ME/6924/21

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

### Introduction

1. On 17 November 2020 Korean Air Lines Co. (**Korean Air**) and Asiana Airlines Inc. (**Asiana**) entered into a binding Share Subscription Agreement, pursuant to which Korean Air will subscribe for, and purchase from, Asiana shares representing 63.88% of the total issued and outstanding stock of Asiana (**the Merger**). Korean Air and Asiana are together referred to as the **Parties**, and for statements referring to the future, as the **Merged Entity**.
2. On 14 November 2022, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On the date of the SLC Decision, the CMA gave notice, pursuant to section 34ZA(1)(b) of the Act, to the Parties of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act (**UILs**).
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer UILs for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on 21 November 2022, Korean Air<sup>1</sup> offered UILs to the CMA for the purposes of section 73(2) of the Act.

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<sup>1</sup> While both Parties submitted the final merger notice 14 September 2022 (as amended on 29 September 2022) (**FMN**), only Korean Air is offering undertakings.

5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to Korean Air that it considers that there are reasonable grounds for believing that the UILs offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

### The UILs offered

6. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating, or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from the merger parties concerned UILs to take such action as the CMA considers appropriate.
7. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC as a result of:
- (a) horizontal unilateral effects in the supply of scheduled air passenger transport services (**air passenger services**) on the London-Seoul route;
  - (b) horizontal unilateral effects in the supply of air cargo transport services (**air cargo services**) on the Europe to South Korea route for customers transporting cargo from the UK to South Korea; and
  - (c) horizontal unilateral effects in the supply of air cargo services on the South Korea to Europe route for customers transporting cargo from South Korea to the UK.<sup>2</sup>
8. To address these SLCs, Korean Air has offered to give UILs to the CMA:
- (a) To enter into a binding framework agreement (the **Framework Agreement**) with Virgin Atlantic Airways Limited (**VAA**) to facilitate VAA's entry onto the Relevant Routes,<sup>3</sup> which includes:
    - (i) making available slots at London Heathrow Airport (**LHR**) and Incheon International Airport (**ICN**) near Seoul to allow VAA to operate a daily air passenger service between LHR and ICN; and
    - (ii) at the request of VAA, entering into certain related arrangements (described further in paragraph 12(c) to 12(j) below) intended to facilitate VAA's entry onto the Relevant Routes.<sup>i</sup>

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<sup>2</sup> In the remainder of this decision the supply of (i) air passenger services on the London-Seoul route and (ii) air cargo services on each of the Europe to South Korea route for customers transporting cargo from the UK to South Korea and the South Korea to Europe route for customers transporting cargo from South Korea to the UK (together, **the Relevant Cargo Routes**) are referred to collectively as the **Relevant Routes**.

<sup>3</sup> VAA does not currently supply air passenger services on the London-Seoul route or offer scheduled direct flights on the Relevant Cargo Routes.

### (The **Framework Agreement Commitment**)

- (b) In the event that VAA does not: (i) notify Korean Air by an agreed date that it will enter the Relevant routes by the target entry date;<sup>4ii</sup> or (ii) operate on the Relevant Routes for a minimum period of six full consecutive IATA seasons<sup>5</sup> after entry (the **Minimum Period**), to facilitate entry on the Relevant Routes by one or more alternative carriers other than VAA (an **Alternative Prospective Entrant**), including by:
- (i) making available slots at LHR and ICN to allow the Alternative Prospective Entrant to operate a daily air passenger service between LHR and ICN; and
  - (ii) at the request of the Alternative Prospective Entrant(s), entering into certain related arrangements (described further in paragraph 17 below) intended to facilitate the entry of the Alternative Prospective Entrant(s) onto the Relevant Routes.

### (The **Open Slot Commitment**)

9. The Framework Agreement Commitment and the Open Slot Commitment, as described in further detail below, together comprise the **Proposed Undertakings**.
10. The Proposed Undertakings are subject to the fast-track dispute resolution procedure and allow for the appointment of a Monitoring Trustee to monitor the Proposed Undertakings, as required by the CMA.
11. The Proposed Undertakings also require Korean Air to ensure that its slots at LHR and ICN that are or might reasonably be required to be made available to VAA and/or an Alternative Prospective Entrant under these undertakings are maintained and preserved and not disposed of, save as otherwise agreed in advance in writing by the CMA.

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<sup>4</sup> Meaning the later of any date during the IATA Summer Season 2024 or the date that is 12 months after closing of the Merger (the **Target Entry Date**). This may be extended to the later of any date during IATA Summer Season 2025 or the date that is 12 months after closing of the Merger if the Russian airspace will not be open to UK carriers during the course of IATA Summer Season 2024 (the **Extended Target Entry Date**). If VAA does not notify Korean Air (or notifies Korean Air that it will not enter) by the Target Entry Date (or Extended Target Entry Date, as applicable), VAA will remain able to apply for slots under the Framework Agreement Commitment only if no carrier has commenced operations under the Open Slot Commitment.

<sup>5</sup> I.e 3 years. IATA Season means (i) the IATA Summer Season beginning on the last Sunday of March and ending on the Saturday before the last Sunday of October; or (ii) the IATA Winter Season beginning on the last Sunday of October and ending on the Saturday before the last Sunday of March.

## **Framework Agreement Commitment**

12. As indicated above, the Framework Agreement Commitment seeks to facilitate VAA's entry onto the Relevant Routes. This includes commitments by Korean Air to:<sup>6</sup>
- (a) make available slots at VAA's request at ICN to allow VAA to operate a service between LHR and ICN seven times per week, to the extent that any or all of these slots are not available to VAA through the General Slot Allocation Procedure<sup>7</sup> or the remedies imposed by the Korea Fair Trade Commission (**KFTC**) (the **KFTC Remedies**);<sup>8</sup>
  - (b) make available slots at VAA's request at LHR to allow VAA to operate a service between LHR and ICN seven times per week, to the extent any or all of these slots are not available to VAA through the General Slot Allocation Procedure;
  - (c) for air passenger services, enter into a unilateral codeshare agreement with VAA on the terms set out in the Framework Agreement (such terms to be fair and reasonable) allowing VAA to place its code on flights operated by Korean Air on the London-Seoul route until such time as VAA has commenced operations on the London-Seoul route. Such an agreement would take effect on or around the date the Proposed Undertakings are accepted by the CMA and to continue until VAA commences operations on the London-Seoul route;<sup>9</sup>
  - (d) for air passenger services, enter into a bilateral codeshare agreement with VAA (such terms to be fair and reasonable) allowing VAA to place its code on flights operated by Korean Air on the London-Seoul route and allowing Korean Air to place its code on flights operated by VAA on the London-Seoul route.

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<sup>6</sup> As noted in paragraph 8, these commitments are set out in a framework agreement between VAA and Korean Air. The CMA can request modifications to the framework agreement to ensure that it remedies the SLC (as described in paragraph 7).

<sup>7</sup> The Proposed Undertakings define the General Slot Allocation Procedure as the slot allocation procedure for ICN or LHR (as applicable) as set out in the IATA Worldwide Airport Slot Guidelines (including participation at the IATA Slot Conference to try to improve slots and allocation by the slot coordinator from the waitlist following the Slot Handback Deadline).

<sup>8</sup> In its decision of 22 February 2022, the KFTC concluded amongst others that the Merger raises concerns in relation to the provision of air passenger services on the London-Seoul route and cleared the Merger subject to remedies. The KFTC issued an order in relation to remedies (the **KFTC Remedies Order**) which is expected to be finalised before the completion of the Merger. As stated in paragraph 13 of the KFTC Remedies Order, 'the corrective order may be amended by a resolution of the KFTC's full committee to reflect the outcome of the review by the foreign competition authorities (omitted) currently reviewing the Business Combination'.

<sup>9</sup> Under the Framework Agreement Commitment VAA will enter the London-Seoul route by the Target Entry Date or Extended Target Entry Date (see footnote 4). Until then VAA will place its code on flights operated by Korean Air on the basis of a unilateral codeshare agreement to allow the VAA brand to gradually become known to Korean customers and enable VAA to build up demand for its own operated services.

Such an agreement would take effect from when VAA commences operations on the London-Seoul route;

- (e) for air passenger services, enter into a unilateral codeshare agreement with VAA on any Korean Air routes beyond ICN requested by VAA (including future routes launched by Korean Air for a period of time);<sup>10</sup>
- (f) for air passenger services, enter into a special prorate agreement with VAA (such terms to be fair and reasonable) to allow interlining by VAA on Korean Air's flights on the London-Seoul route and relevant Korean Air routes beyond ICN;
- (g) for air cargo services, enter into a unilateral agreement at VAA's request to provide VAA with capacity on Korean Air freighter flights<sup>iii</sup> between LHR and ICN (on fair and reasonable terms);
- (h) enter into relevant agreements to provide ground-handling services for VAA at ICN for air passenger services and, if requested by VAA, for air cargo services, (with such agreements to be on fair and reasonable terms);
- (i) to the extent required by VAA, enter into a lounge access agreement whereby certain passengers of VAA will be able to access Korean Air's lounges at ICN; and
- (j) to the extent required by VAA, enter into a frequent flyer programme cooperation agreement to allow VAA's frequent flyer members to use and obtain miles on Korean Air's flights on the London-Seoul route and certain Korean Air routes beyond ICN.

13. The Proposed Undertakings also state that, under the Framework Agreement, VAA:

- (a) shall use reasonable endeavours to use the Slots to commence operations on the Relevant Routes<sup>11</sup> by the Target Entry Date;
- (b) shall, subject to the continued commercial viability of the route, use reasonable endeavours to use the slots to operate on the Relevant Routes<sup>12</sup> for the Minimum Period (ie at least six full consecutive IATA Seasons);
- (c) use the slots at ICN only to provide a service on the Relevant Routes for at least the Minimum Period. The slots at ICN cannot be used on another route unless VAA has operated the Relevant Routes<sup>13</sup> for the Minimum Period. If VAA does not use the ICN slots for at least the Minimum Period, VAA will be

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<sup>10</sup> This agreement would take effect on or around the date that the CMA accepts the UILs.

<sup>11</sup> Through operation of air passenger services and belly-hold air cargo services between London and Seoul.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

obligated to return the ICN slots to Korean Air, or, if Korean Air does not require these, to the ICN slot coordinator;<sup>iv</sup> and

- (d) undertakes that it has (and will take reasonable steps (insofar as they are within the Proposed Remedy Taker's control) to continue to have) the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and develop its operations on the Relevant Routes in competition with Korean Air and other competitors.
14. The Framework Agreement Commitment also provides that the CMA needs to approve VAA as the proposed remedy taker and the terms of its entry. The Proposed Undertakings set out that Korean Air must satisfy the CMA that VAA's entry would remedy, mitigate or prevent the SLCs or any adverse effect which has or may have resulted from them, or may be expected to result from them, in particular having regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLCs and any adverse effects resulting from them.
15. In particular, in keeping with the position that the identity and capability of a remedy-taker is of major importance in ensuring the success of any remedy,<sup>14</sup> the Proposed Undertakings set out that the CMA will be required to be satisfied that:
- (a) VAA is independent of and has no significant connection to Korean Air;
  - (b) VAA has the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and develop services on the Relevant Routes in competition with Korean Air and other competitors from the Target Entry Date (or Extended Target Entry Date, as applicable);
  - (c) VAA is reasonably to be expected to obtain all necessary approvals, licences and consents from any regulatory or other authority in order to operate as required; and
  - (d) VAA's entry does not create a realistic prospect of a substantial lessening of competition within any market or markets in the UK.

### ***Open Slot Commitment***

16. Insofar as the conditions to render the Framework Agreement Commitment applicable are not met (namely if VAA does not enter by the Target Entry Date (or Extended Target Entry Date, as applicable) or does not operate on the Relevant Routes for the Minimum Period<sup>v</sup>), the Open Slot Commitment becomes available to

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<sup>14</sup> See [Mergers remedies \(CMA87\)](#), December 2018, paragraph 5.21. The factors that the CMA will consider in this regard materially overlap with those for suitable purchasers for a divestiture remedy, as set out in the CMA's remedies guidance.

Alternative Prospective Entrants, subject in particular to any Alternative Prospective Entrant's approval by the CMA.

17. The Open Slot Commitment seeks to facilitate entry by one or more Alternative Prospective Entrants (ie carriers other than VAA) on the Relevant Routes. This includes commitments by Korean Air to:
- (a) make available slots at ICN to allow the Alternative Prospective Entrant(s) to offer an air passenger and belly-hold air cargo service<sup>15</sup> between London and Seoul seven times per week;<sup>16</sup>
  - (b) make available slots at LHR to allow the Alternative Prospective Entrant(s) to offer an air passenger and belly-hold air cargo service between London and Seoul seven times per week;
  - (c) for air passenger services, enter into a codeshare agreement<sup>17</sup> and an interline agreement or special prorate agreement regarding the London-Seoul route. The conditions for agreement will be such that the Alternative Prospective Entrant shall have equal treatment with Korean Air's SkyTeam airline alliance partners on the routes operated out of Seoul (in respect of any codeshare agreement) or on the London-Seoul route (in respect of any interline agreement or special prorate agreement). The settlement rate per coupon will be reasonable and at least as favourable or competitive in comparison to market prices at the date of the agreement or the date the rates are reviewed;
  - (d) for air passenger services, enter into a frequent flyer programme cooperation agreement. Any such agreement shall be on terms such that the Alternative Prospective Entrant shall have equal treatment vis-à-vis the accrual and redemption of frequent flier miles on the London-Seoul route as compared with other members of Korean Air's alliances;

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<sup>15</sup> Air cargo services for customers transporting air cargo between the UK and South Korea can be provided using space in the luggage hold of an air passenger service (referred to as **belly-hold cargo**) or via dedicated freight aircraft (referred to as **freighter cargo**).

<sup>16</sup> The prospective entrant(s) firstly have to apply for these slots under the General Slot Allocation Procedure to the extent required by the KFTC Remedies. Secondly, the prospective entrant(s) have to apply for any remaining ICN slots through the Slot allocation procedure to be decided by MOLIT and the KFTC in accordance with the KFTC Remedies.

<sup>17</sup> The codeshare agreement would be offered in the form requested by the Alternative Prospective Entrant (ie free-flow or blocked-space). This would allow the Alternative Prospective Entrant to place its code on flights operated by Korean Air from Seoul for purposes of offering a service on the London-Seoul route or any connecting service to/from Seoul (including future routes launched by Korean Air) and, at the request of the Alternative Prospective Entrant, for Korean Air to place its code on flights operated by the Alternative Prospective Entrant for purposes of offering a service on the London-Seoul route for as long as the Alternative Prospective Entrant operates on the London-Seoul route.

- (e) for air passenger services, enter into a lounge access agreement to permit the Alternative Prospective Entrant to have access to Korean Air's lounges at ICN (on fair and reasonable terms);
  - (f) for air cargo services, enter into a unilateral agreement for air cargo services with the Alternative Prospective Entrant to provide capacity on freighter flights operated by Korean Air between LHR and ICN for as long as the Alternative Prospective Entrant operates on the Relevant Cargo Routes (on fair and reasonable terms); and
  - (g) enter into a ground-handling services agreement for the provision of ground-handling services at ICN for air passenger services and/or for air cargo services, if requested by the Alternative Prospective Entrant, on fair and reasonable terms.
18. All of the agreements set out at paragraphs 17(c) to 17(g) are subject to approval by the CMA.

### **The CMA's assessment**

19. The CMA has considered whether the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA.
20. When considering whether to accept UILs of a reference, the CMA has an obligation under the Act to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects.<sup>18</sup> Consistent with the SLCs identified in this case (which relate to markets in the UK), the CMA's assessment of remedies is based on the specific circumstances of the UK markets at issue.
21. As set out in the Remedies Guidance, UILs are appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut.<sup>19</sup> This means that there should not be material doubts about the overall effectiveness of the remedies, and that their complexity should be such that their implementation is feasible within the constraints of the Phase 1 timetable.<sup>20</sup> The CMA's guidance also notes that UILs should be capable of ready implementation.<sup>21</sup>

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<sup>18</sup> [Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.3.

<sup>19</sup> [Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.27.

<sup>20</sup> [Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.28.

<sup>21</sup> [Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.29.



22. The CMA's starting point when assessing UILs is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC.<sup>22</sup>

### ***Air passenger services on the London-Seoul route***

23. The CMA has considered whether the Proposed Undertakings, or a modified version of them, might be a clear-cut remedy to the SLC identified by the CMA in relation to air passenger services.

### ***The scope of the Proposed Undertakings***

24. The purpose of the Proposed Undertakings is to facilitate the entry of VAA (under the Framework Agreement Commitment) or an Alternative Prospective Entrant (under the Open Slot Commitment) in the supply of air passenger services on the London-Seoul route in a way that would replicate the competitive constraint that Asiana would exert on Korean Air absent the Merger<sup>23</sup> within the relevant market (as described in paragraph 7 above).
25. As noted in the CMA's SLC Decision, Korean Air and Asiana are currently the only carriers on the London-Seoul route.<sup>24</sup> As set out in the SLC Decision, British Airways exited the route in IATA Winter Season 2020/2021,<sup>25</sup> there has been no new entry on the route for a number of years,<sup>26</sup> and barriers to entry mean that the CMA does not believe that entry or expansion would be timely, likely or sufficient to prevent an SLC within the relevant market.<sup>27</sup>
26. The CMA notes that:
- (a) The Proposed Undertakings include slots at ICN and LHR that enable VAA under the Framework Agreement Commitment, or an Alternative Prospective Entrant under the Open Slot Commitment, to offer an air passenger service on the London-Seoul route seven times per week – that is, with the same frequency as Asiana's flights on the London-Seoul route before the COVID-19 pandemic.<sup>28</sup> As set out in the SLC Decision, the CMA has received evidence

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<sup>22</sup> [Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.30.

<sup>23</sup> The CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC ([Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.30). The objective is to ensure that competition following the implementation of the remedy is as effective as pre-merger competition ([Mergers remedies \(CMA87\)](#), December 2018, paragraph 3.30).

<sup>24</sup> SLC Decision, paragraph 82(a).

<sup>25</sup> SLC Decision, footnote 90.

<sup>26</sup> SLC Decision, paragraph 163.

<sup>27</sup> SLC Decision, paragraphs 163-164.

<sup>28</sup> Given the COVID-19 pandemic Asiana has reduced the number of air passenger flights on the London-Seoul route from seven per week to one per week. This has increased gradually to three flights per week in Summer 2022. The CMA expects the frequency to further increase because the Korean Government has recently lifted the monthly restrictions on the number of flights in South Korea. See FMN, paragraph 12.22, and footnote 53.

that LHR and ICN are slot congested, that it is difficult to obtain slots at either airport, and that this represents one of the most significant barriers to entry.<sup>29</sup> This aspect of the Proposed Undertakings therefore addresses this barrier to entry.

- (b) The Proposed Undertakings also make provision for VAA, or an Alternative Prospective Entrant, to have access to certain other services that support the provision of an air passenger service on the London-Seoul route: access to Korean Air's passenger lounge facilities at ICN; access to frequent flyer programme cooperation agreements with Korean Air; and access to Korean Air's ground-handling services at ICN for the provision of air passenger services. These aspects of the Proposed Undertakings therefore address any barriers to entry that may exist from a lack of access to these supporting services.
- (c) The Proposed Undertakings also make provision for VAA, or an Alternative Prospective Entrant, to have access to codeshare and special prorate/interline agreements with Korean Air. These arrangements will enable interlining on Korean Air's air passenger flights on the London-Seoul route and any Korean Air routes beyond ICN, supporting the ability of VAA or an Alternative Prospective Entrant secure additional passenger numbers and to increase their visibility and popularity with Korean customers.<sup>30</sup> These aspects of the Proposed Undertakings therefore address any barriers to entry that may exist as a result of the entrant's ability to offer a network of flights beyond ICN or its lack of an existing presence with Korean customers.

- 27. Further, under the Proposed Undertakings both VAA and the Alternative Prospective Entrant(s) are required to operate services on the London – Seoul route for the Minimum Period (subject to grandfathering rights, see paragraphs 34 to 36 below).
- 28. The CMA currently considers that the scope of potential divestitures (ie slots at ICN and LHR) and supporting enabling measures available under the Proposed Undertakings, are – in the specific circumstances of this case – sufficient to restore competition in respect of air passenger services to the level that would have prevailed absent the Merger. The CMA notes, in particular, that the competition concerns identified relate to only a single route (within the context of an industry in which airlines typically organise their operations across multiple routes). Moreover, as noted elsewhere in this decision, the CMA will assess whether the remedy-taker has the necessary ability and incentives to compete as part of its assessment of the suitability of VAA or an Alternative Prospective Entrant. While the CMA has carefully

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<sup>29</sup> SLC Decision, paragraphs 163 and 164.

<sup>30</sup> The Parties submitted that on the London-Seoul route flown by Korean Air, [X] or more of all passengers had a Korean nationality. See Parties' submission of 20 October 2022.

considered whether the divestiture of other assets currently used by Asiana to operate on the London-Seoul route would be required to facilitate entry, it currently considers that the Proposed Undertakings will enable VAA or an Alternative Prospective Entrant to effectively replace the daily Asiana air passenger service on the London-Seoul route.

*The timing of entry and arrangements prior to entry*

29. The CMA understands that, under the Framework Agreement Commitment, VAA currently intends to start offering its own service on the London-Seoul route before the end of IATA Summer Season 2024.<sup>31</sup> Before then, VAA will, to facilitate advanced sales, initially enter into a unilateral codeshare agreement with Korean Air for air passenger services on the London-Seoul route.
30. Based on information provided by VAA, the CMA understands that the timing of VAA's entry on the relevant route and the unilateral codeshare agreement will (i) [X],<sup>32</sup> (ii) provide an opportunity for Korean customers to become more familiar with the VAA brand, and (iii) [X].<sup>33</sup>
31. The CMA notes that the profitability of the air passenger London-Seoul route, as a long-haul route, has been significantly impacted by the COVID-19 pandemic. The CMA also notes that air carriers are not currently allowed to fly over Russian airspace, resulting in airlines operating on the route incurring additional costs.<sup>34</sup> The information available to the CMA also indicates that most of the tickets sold for direct flights on the London-Seoul route were sold to South Korea-based customers, and VAA submitted that brand awareness amongst Korean customers was therefore important to be able to successfully provide air passenger services.<sup>35</sup>
32. The CMA therefore currently believes, in the specific circumstances of this case, that a delay in VAA's entry using its own aircraft until 2024 does not undermine the effectiveness of the Framework Agreement Commitment (or the Proposed Undertakings more generally).<sup>36</sup> Moreover, the unilateral codeshare agreement

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<sup>31</sup> The deadline for entry can be extended. See footnote 4.

<sup>32</sup> VAA submitted that in order to ensure a successful launch of operations on the London-Seoul route, VAA needs to [X]. See VAA presentation on proposed remedy package submitted on 28 October 2022.

<sup>33</sup> IATA's current projections as at March 2022 are that air passenger demand will recover to 2019 levels in 2024. See <https://www.iata.org/en/pressroom/2022-releases/2022-03-01-01/>.

<sup>34</sup> VAA's response to CMA request for information of 2 November 2022, question 4.

<sup>35</sup> See Parties' submission of 20 October 2022 and VAA presentation on proposed remedy package submitted on 28 October 2022.

<sup>36</sup> Korean Air submitted that Korean Air and Asiana will be managed [X]. Korean Air further submitted that for operational and fiscal reasons, Korean Air needs to [X]. Accordingly, Korean Air submitted it would not be possible to conclude that the Merged Entity forms a single business unit during this time and therefore there is a risk they would breach competition law if Asiana would not be managed separately from Korean Air. Korean Air provided details of its integration plans in this regard. (See Remedies Form submitted on 21 November 2022). The CMA has, however, not put any weight on this consideration in its decision as regards the Proposed Undertakings. This is because the Parties' integration plans, and the consequent legality of managing the Parties together under Korean antitrust law, is a matter within the control of the Parties. Whilst Korean Air's current view is that the integration required [X].

between VAA and Korean Air facilitates advanced sales to passengers as it provides for VAA to sell tickets to passengers on the London-Seoul route, albeit on flights operated by Korean Air. As a result, it is a preparatory step to facilitate VAA's successful entry.

#### *Grandfathering rights*

33. The CMA notes that under the Proposed Undertakings both VAA and the Alternative Prospective Entrant(s) are required to operate air passenger services on the London-Seoul route for at least the Minimum Period. Following the Minimum Period, VAA or the Alternative Prospective Entrant(s) will secure grandfathering rights and, if it wishes, will be entitled to use the slots obtained under the Proposed Undertakings to operate services on any route from the airport(s) at which it has secured grandfathering rights. Any such grandfathering rights would be subject to the approval of the CMA, advised by the Monitoring Trustee.
34. Remedies are generally one-off measures that seek to restore or maintain the competitive structure of the market and the CMA does not typically impose restrictions on how a remedy-taker might use any assets acquired in the longer term. The CMA will, however, carefully consider the remedy-taker's commitment to compete in the relevant market. Moreover, as noted below, the CMA will carefully consider the ability and incentive of VAA/the Alternative Prospective Entrant) to enter the supply of air passenger services on the London-Seoul route, including an assessment of the length of time that an entrant is committed to, and capable of, competing on the route, as part of its assessment of whether the Proposed Undertakings should be finally accepted.
35. On this basis, the CMA at this stage considers that the grandfathering rights contained in the Proposed Undertakings are an appropriate part of a package intended to provide VAA/the Alternative Prospective Entrant with the incentive to enter the route. Notwithstanding the grandfathering rights, the Proposed Undertakings will require that a continuous direct service operates on the London-Seoul route for at least six IATA seasons.

#### *The ability and incentive of VAA (or the Alternative Prospective Entrant) to enter*

36. In respect of the Framework Agreement Commitment, the CMA notes that VAA has already been identified as an entrant and, before the Proposed Undertakings are finally accepted, would have entered into a binding framework agreement with Korean Air to enter the supply of air passenger services on the London-Seoul route.
37. The Proposed Undertakings make provision for the CMA to approve VAA as the proposed remedy-taker and the terms of its entry under the Framework Agreement Commitment and to approve any Prospective Alternative Entrant under the Open Slot Commitment. The CMA notes that establishing the remedy-taker's ability and incentive to enter the route will be carefully considered by the CMA.

38. Accordingly, as noted above, in the case of VAA (which is identified in the Proposed Undertakings as the entrant under the Framework Agreement Commitment), the CMA will, before deciding whether to ultimately accept the Proposed Undertakings or refer the Merger to Phase 2, conduct a detailed assessment of the ability and incentive of VAA to enter the relevant market. This will include a detailed assessment of whether VAA has the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and develop services on the Relevant Routes in competition with Korean Air and other competitors from the Target Entry Date.
39. In assessing the overall effectiveness of the Proposed Undertakings, the CMA has also taken into account that VAA is not the only potential remedy-taker. Where VAA does not enter the Relevant Routes (including the air passenger London-Seoul route) by the Target Entry Date or does not operate on the route for the Minimum Period, the Open Slot Commitment applies. As described in paragraphs 16 and 17 above, under the Open Slot Commitment, the Alternative Prospective Entrant(s) can make use of ICN and LHR slots in order to provide daily air passenger services on the London-Seoul route, as well as a range of agreements to support entry, such that it could enter the route and replicate the competitive constraint exerted by Asiana absent the Merger. The CMA would similarly conduct a detailed assessment of the ability and incentive of the Alternative Prospective Entrant(s) to enter the relevant market.

*Conclusion on the Proposed Undertakings in relation to air passenger services on the London-Seoul route*

40. For the reasons set out above, the CMA currently has reasonable grounds to believe that the Proposed Undertakings, or a modified version of them, may be capable of amounting to a sufficiently clear-cut resolution of the CMA's competition concerns in relation to the provision of air passenger services on the London-Seoul route.

***Air cargo services on the Europe to South Korea and South Korea to Europe routes for customers transporting cargo from the UK to South Korea and from South Korea to the UK***

41. The CMA has considered whether the Proposed Undertakings, or a modified version of them, might be a clear-cut remedy to the SLCs identified by the CMA in relation to air cargo services.

### *The scope of the Proposed Undertakings*

42. The purpose of the Proposed Undertakings is to facilitate entry in air cargo services that will replicate the competitive constraint that Asiana would exert on Korean Air absent the Merger<sup>37</sup> on the relevant markets (as described in paragraph 7 above).
43. As set out in footnote 15, air cargo services for customers transporting air cargo between the UK and South Korea can be provided as belly-hold cargo or as freighter cargo. In its SLC decision, the CMA found that customers transporting cargo between the UK and South Korea generally did not distinguish between carriers operating dedicated freight aircraft only as compared to carriers operating belly-hold cargo services.<sup>38</sup>
44. Under the Proposed Undertakings, the entry of VAA or of an Alternative Prospective Entrant on the Relevant Cargo Routes through the operation of non-stop air cargo services between London and Seoul would restore the pre-Merger market structure, in particular because:
  - (a) Two airlines (ie the Merged Entity and the remedy-taker) would continue to independently offer direct scheduled air cargo services between London and Seoul (with, as explained further below, the remedy-taker replacing the capacity currently provided by Asiana);
  - (b) The Proposed Undertakings enable VAA or the Alternative Prospective Entrant to offer seven flights per week (ie the same number of frequencies that Asiana offered before the COVID-19 pandemic); and
  - (c) Both the Framework Agreement Commitment and the Open Slot Commitment provide for a unilateral agreement for air cargo services with, respectively, VAA or an Alternative Prospective Entrant to provide capacity on Korean Air freighter flights between LHR and ICN.
45. With regard to the Framework Agreement Commitment, the CMA further notes that:
  - (a) As noted in paragraph 29 above in respect of air passenger services, VAA has been identified as an entrant and will have entered into a binding framework agreement at the point any UILs are finally accepted.
  - (b) The Parties submit that VAA's available cargo capacity should match or exceed Asiana's estimated cargo volumes shipped to South Korea on its services between LHR and ICN.

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<sup>37</sup> See footnote 23.

<sup>38</sup> SLC Decision, paragraphs 58-60. The CMA has not received any third-party evidence to suggest belly hold cargo services are distinct from those provided by freight aircraft.

- (c) VAA has a strong brand in the UK and therefore will be a strong competitor for UK cargo customers.<sup>39</sup>
- (d) In addition to the belly-hold cargo capacity that VAA envisages it will have upon entry, Korean Air's commitment to enter into a unilateral agreement for cargo services provides VAA with the ability to offer cargo services in the interim, pending its entry on the route and subsequently allows VAA to access freighter cargo capacity on Korean Air freighter flights between LHR and ICN. Similar to the equivalent provision made in respect of air passenger services described at paragraph 30 above, this provision is available to VAA ahead of the commencement of its own services. This enables VAA to prepare the launch of its services, whilst also providing services to air cargo services customers (via this agreement) before its own entry.

46. Additionally, with regard to the Open Slot Commitment, the CMA notes that:

- (a) Like VAA, the Parties submit that any Alternative Prospective Entrant's available cargo capacity should match or exceed Asiana's estimated cargo volumes shipped to South Korea on its services between LHR and ICN because large aircraft are required to operate on the London-Seoul route.
- (b) In addition to the belly-hold cargo that an Alternative Prospective Entrant is likely to have, Korean Air's commitment to enter into a unilateral agreement for air cargo services with an Alternative Prospective Entrant would provide the remedy-taker with access to freighter cargo capacity on Korean Air freighter flights between LHR and ICN.

47. Further, as explained in paragraph 33 above, under the Proposed Undertakings both VAA and the Alternative Prospective Entrant(s) are required to operate services on the Relevant Cargo Routes for the Minimum Period (subject to grandfathering rights, which the CMA at this stage considers are appropriate in the context of this case).

48. For the reasons set out above, the CMA currently considers that the scope of potential divestitures and supporting enabling measures available under the Proposed Undertakings, are – in the specific circumstances of this case – sufficient to restore competition in respect of air cargo services to the level that would have prevailed absent the Merger.

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<sup>39</sup> VAA has already operated [redacted] non-scheduled cargo flights to South Korea in 2021. See Parties submission of 21 October 2022.

*The timing of entry and arrangements prior to entry*

49. The CMA understands that, under the Framework Agreement Commitment, VAA currently intends to start offering its own service on the Relevant Cargo Routes before the end of IATA Summer Season 2024.
50. As noted at paragraph 32 above, the CMA at this stage believes, in the specific circumstances of this case, that a delay in VAA's entry using its own aircraft until 2024 does not undermine the effectiveness of the Framework Agreement Commitment (or the Proposed Undertakings more generally).<sup>40</sup> Given the link between the provision of air passenger and air cargo services between London and Seoul, the CMA at this stage believes that the same position applies in relation to the aspects of the Proposed Undertakings which seek to address the SLCs identified on the Relevant Cargo Routes.
51. Moreover, as noted at paragraph 45(d) above, the unilateral agreement for cargo services provides VAA with the ability to offer cargo services in the interim, pending its entry on the route (ie as a preparatory step to facilitate VAA's successful entry).

*The ability and incentive of VAA (or the Alternative Prospective Entrant) to enter*

52. In respect of the Framework Agreement Commitment, the CMA notes that VAA has already been identified as an entrant and, before the Proposed Undertakings are finally accepted, would have entered into a binding framework agreement with Korean Air to enter the supply of air cargo services on the Relevant Cargo Routes.
53. Moreover, as noted at paragraphs 38 and 39 above, the CMA will also, before deciding whether to ultimately accept the Proposed Undertakings or refer the Merger to Phase 2, include a consideration of VAA's/the Alternative Prospective Entrant's ability and incentives as regards air cargo services.

*Conclusion on the Proposed Undertakings in relation to Air cargo services on the Europe to South Korea and South Korea to Europe routes for customers transporting cargo from the UK to South Korea and from South Korea to the UK*

54. For the reasons set out above, the CMA currently has reasonable grounds to believe that the Proposed Undertakings, or a modified version of them, may be capable of amounting to a sufficiently clear-cut resolution of the CMA's competition concerns in relation to the provision of air cargo services on the Relevant Cargo Routes.

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<sup>40</sup> See footnote 36.



### ***The implementation of the Proposed Undertakings***

55. The CMA believes at this stage that the Proposed Undertakings are capable of ready implementation because:
- (a) As regards the Framework Agreement Commitment, VAA has already been identified as an entrant and, before any UILs are finally accepted, will have entered into a binding framework agreement with Korean Air to enter the London-Seoul route in relation to air passenger services and air cargo services, as noted in paragraph 8(a) above;
  - (b) Under the Framework Agreement Commitment, as explained in more detail at paragraphs 30 and 45(d) above, prior to entry onto the route using its own services, VAA will benefit from a unilateral codeshare agreement for air passenger services and a unilateral agreement for air cargo services with Korean Air. These agreements would be available to VAA from the point the UILs are accepted and would, in particular, enable VAA to prepare the launch of its services whilst also allowing VAA to provide services to air passengers and air cargo services customers via these agreements before its own entry; and
  - (c) The Proposed Undertakings contain clear mechanisms, overseen by a Monitoring Trustee, for either VAA (under the Framework Agreement Commitment) or an Alternative Prospective Entrant (under the Open Slot Commitment) to access slots and the additional range of commercial terms and access rights available under the Proposed Undertakings on clear terms and to clear timescales.

### ***CMA's conclusion***

56. For the reasons set out above, the CMA at this stage believes that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.
57. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third-party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA. In particular, before deciding whether to ultimately accept the Proposed Undertakings, as VAA has been identified as the entrant under the Framework Agreement Commitment, the CMA will carefully consider all of the matters set out at paragraph 14 above, including whether VAA has the incentive and intention to maintain and develop services on the relevant routes in competition with Korean Air and other competitors from the Target Entry Date, and also, carefully scrutinise the Framework Agreement before deciding whether to ultimately accept the Proposed Undertakings.

## Consultation process

58. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.<sup>41</sup>

## Decision

59. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by Korean Air, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 26 January 2023 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 23 March 2023 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

**Colin Raftery**

**Senior Director, Mergers**

**Competition and Markets Authority**

**28 November 2022**

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<sup>i</sup> Such related arrangements may not necessarily be part of the Framework Agreement (but are part of the Framework Agreement Commitment, which describes the undertakings offered by Korean Air to facilitate VAA's entry onto the Relevant Routes, including through the Framework Agreement).'

<sup>ii</sup> VAA will remain able to obtain and receive slots under the Framework Agreement Commitment in the circumstances set out in footnote 4 only until the end of IATA Winter Season 2025 / 2026.

<sup>iii</sup> By way of clarification with respect to paragraphs 12(g), 44(c) and 45(d): the unilateral cargo agreement between Korean Air and VAA (to be entered into at VAA's request) may provide VAA with air cargo freighter or belly hold capacity.

<sup>iv</sup> By way of clarification with respect to paragraph 13(c), the CMA notes that (due to the requirements of Korean law) if VAA does not use the ICN slots for at least the Minimum Period, VAA will be obligated to return the ICN slots to the ICN slot coordinator. Korean Air shall then liaise with the KFTC and ICN slot coordinator and use its best efforts to ensure that the Slots are redeployed to an Alternative Prospective Entrant.

<sup>v</sup> Specifically, as set out in paragraph 8(b), the Open Slot Commitment becomes available if VAA: (i) does not notify Korean Air (or notifies Korean Air that it will not enter) by the Target Entry Date (or Extended Target Entry Date, as applicable); or (ii) enters by the Target Entry Date (or Extended Target Entry Date, as applicable), but fails to operate for the Minimum Period.

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<sup>41</sup> [CMA2](#), paragraph 8.29.