

Anticipated acquisition between Korean Air Lines Co., Ltd and Asiana Airlines Inc

Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act

ME/6980/21

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**). The text of the SLC Decision is available on the CMA's webpages.¹
3. On 21 November 2022, Korean Air offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 28 November 2022, the CMA gave notice to Korean Air, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable

¹ See [Korean Air / Asiana Airlines merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/korean-air-asiana-airlines-merger-inquiry)

grounds for believing that the undertakings 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 Parties' offer (the **UIL Provisional Acceptance Decision**).

The undertakings offered

8. As set out in the SLC Decision, the CMA 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.²
9. To address these SLCs, as set out in detail in the UIL Provisional Acceptance Decision,³ 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,⁴ 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 intended to facilitate VAA's entry onto the Relevant Routes.

(The **Framework Agreement Commitment**)

² 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**.

³ UIL Provisional Acceptance Decision, paragraphs 6-18.

⁴ VAA does not currently supply air passenger services on the London-Seoul route or offer scheduled direct flights on the Relevant Cargo Routes.

- (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;⁵ or (ii) operate on the Relevant Routes for a minimum period of six full consecutive IATA seasons⁶ 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 intended to facilitate the entry of the Alternative Prospective Entrant(s) onto the Relevant Routes.

(The **Open Slot Commitment**)

10. The Framework Agreement Commitment and the Open Slot Commitment, as described in further detail below, together comprise the **Proposed Undertakings**.
11. 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.
12. 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.

CMA assessment

13. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the

⁵ 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**).

⁶ ie 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.

Proposed Undertakings or concerns about their implementation.⁷ As set out in detail in the UIL Provisional Acceptance Decision,⁸ this is because the Proposed Undertakings facilitate the entry of VAA or an Alternative Prospective Entrant in the supply of both air passenger and cargo services on the relevant markets described at paragraph 8 above in a way that would replicate the competitive constraint that Asiana would exert on Korean Air absent the Merger.

14. The CMA also currently considers that the Proposed Undertakings would be capable of ready implementation. This is 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;
 - (b) Under the Framework Agreement Commitment, prior to entry onto the route using its own services, VAA will benefit from a unilateral codeshare agreement for air passenger services and, at VAA's request, 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.
 - (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.

Suitability of the remedy taker

11. The Framework Agreement Commitment also provides that the CMA needs to approve VAA as the proposed remedy-taker and the terms of its entry.

⁷ *Merger remedies* (CMA87), 13 December 2018 (**CMA87**), paragraph 3.28.

⁸ UIL Provisional Acceptance Decision, paragraphs 19-54.

12. 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,⁹ 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.
13. 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 consider all of the matters set out above. This will include 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 the terms of the Framework Agreement. Provided that we are satisfied on all these matters, we intend to accept the Proposed Undertakings. Of course, the CMA will take into account, as part of its assessment of VAA as the remedy-taker, relevant submissions made in response to this consultation.

Proposed decision and next steps

14. For the reasons set out above, the CMA currently considers that the Proposed Undertakings are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.

⁹ See CMA87, paragraph 5.21. The factors that the CMA will consider in under the Proposed Undertakings materially overlap with those for suitable purchasers for a divestiture remedy, as set out in the CMA's remedies guidance.

15. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The text of the Proposed Undertaking is available on the CMA web pages.¹⁰
16. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.¹¹
17. Representations should be made in writing to the CMA and be addressed to:

Liana Sandulescu
Mergers Group
Competition and Markets Authority
The Cabot
25 Cabot Square
London
E14 4QZ

Email: liana.sandulescu@cma.gov.uk
Telephone: 020 3738 6603

Deadline for comments: Friday 23rd December 2022

¹⁰ See [Korean Air / Asiana Airlines merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk).

¹¹ Under paragraph 2(4) of Schedule 10 to the Act.