II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 July 2002

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(COMP/37.730 — AuA/LH)

(notified under document number C(2002) 2502)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/746/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [1], as last amended by Regulation (EC) No 2410/92 [2], and in particular Article 5 thereof,

Having regard to the notice [3] published pursuant to Article 5(2) of Regulation (EEC) No 3975/87,

Having regard to the notice [4] published pursuant to Article 16(3) of Regulation (EEC) No 3975/87,

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas:

1. INTRODUCTION

(1) On 10 December 1999 Deutsche Lufthansa AG (Lufthansa) and Austrian Airlines (together hereinafter called the 'Parties') notified under Regulation (EEC) No 3975/87 a cooperation agreement concluded on 19 October 1999. The Parties aim to forge a lasting alliance by creating an integrated air traffic system built on close cooperation in commercial activities, marketing and operational activities. A framework agreement sets out the main features of the cooperation. In addition, the two companies have negotiated a number of more specific implementation agreements and a special prorate agreement defining their joint pricing policy. Under a 'neighbourhood agreement', they have created a joint venture for traffic between Germany and Austria, with profits and losses being shared.

(2) Pursuant to Article 5 of Regulation (EEC) No 3975/87, the Parties request an exemption under Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

(3) On 11 July 2000 a summary of the application for exemption was published in the *Official Journal of the European Communities* pursuant to Article 5(2) of Regulation (EEC) No 3975/87.

(4) On 4 October 2000, pursuant to Article 5(3) of Regulation (EEC) No 3975/87, the Commission notified the Parties by letter of its serious doubts about the compatibility of the agreement with the common market.

(5) On 10 May 2001 the Commission sent Austrian Airlines and Lufthansa its statement of objections, in which it notified the Parties of its preliminary assessment that the cooperation agreement between them could not be exempted under Regulation (EEC) No 3975/87.

[1] OJ L 374, 31.12.1987, p. 1.
[2] OJ L 240, 24.8.1992, p. 18.
[3] OJ C 193, 11.7.2000, p. 7.
[4] OJ C 356, 14.12.2000, p. 5.

(6) On 14 December 2001 the Commission published a notice in the *Official Journal of the European Communities* pursuant to Article 16(3) of Regulation (EEC) No 3975/87. It set out its intention to exempt the notified cooperation agreement for six years on the basis of the commitments given by the Parties and the declared intention of several competitors to enter the market. Interested third parties were given the opportunity to submit comments.

2. THE PARTIES

2.1. Lufthansa AG

(7) Lufthansa is the holding company of the Lufthansa group, which provides air transport for passengers and goods and is engaged in activities relating to air transport. It was fully privatised in 1997 and has some 350 000 shareholders.

(8) Lufthansa's main subsidiaries are: Lufthansa Cargo (100 %), Lufthansa Technik (100 %), LSG (100 %), Lufthansa City Line (100 %), Eurowings (25 %), British Midland (20 %), Air Dolomiti (26 %) and Luxair (13 %).

(9) In 2000 Lufthansa had a turnover of EUR 15,2 billion, of which EUR 7,926 billion was achieved in the Community as a whole and EUR 4,799 billion in Germany.

(10) In terms of revenue passenger-kilometres (RPKs) flown in Europe in 2000, Lufthansa ranked first with 18,0 billion, ahead of British Airways with 17,0 billion. Air France came third with 10,3 billion.

(11) In terms of world traffic, among Community carriers Lufthansa was second with 94,17 billion RPKs after British Airways with 118,89 billion and closely followed by Air France with 91,801 billion.

(12) In Europe Lufthansa operates 148 routes with more than 100 000 passengers a year, the main ones being Frankfurt-Berlin […] (*) and Frankfurt-Hamburg […] ([5]).

(13) In terms of fleet size, Lufthansa was in first place in Europe in 2000 with 327 aircraft in service and 48 on order. British Airways was in second place with 309 aircraft in service and 62 on order.

(14) In scheduled cargo transport, Lufthansa is the leading European airline, both for intra-European traffic and for intercontinental traffic.

(15) Lufthansa Cityline concentrates on domestic flights in Germany and regional flights within Europe. Its main routes are Bremen-Stuttgart (42 frequencies/week), Florence-Munich (28 frequencies/week) and Munich-Münster (42 frequencies/week).

(*) Business secret.
([5]) One direction, 1999 figures.

2.2. Austrian Airlines (AuA)

(16) AuA provides air transport for passengers and goods and is engaged in activities relating to air transport. It is controlled as follows: 39,7 % by the Austrian State, 10,6 % by institutional investors; 38,2 % by private investors; 10 % by Credit Suisse First Boston; and 1,5 % by Air France.

(17) In 2000 the AuA group (Austrian Airlines, Lauda Air and Tyrolean Airways) achieved a turnover of EUR 1,54 billion, of which EUR 850 million in the EU, EUR 393 million in Austria and EUR 199 million in Germany. AuA's main subsidiaries are: Tyrolean Airways (100 %), Lauda Air (99 %) and Rheintalflug (100 %). In terms of fleet size, AuA, Tyrolean and Lauda Air together had 92 aircraft in service in 2000.

(18) In terms of passenger-kilometres in Europe in 2000, AuA ranked 17th among member airlines of the Association of European Airlines with 2,4 billion, just after BMI British Midland (also 2,4 billion). In terms of world traffic in 2000, AuA was the 14th-largest European carrier with 8,8 billion passenger-kilometres. Worldwide, it came 67th. In Europe AuA operates 16 routes with more than 100 000 passengers per year, the main ones being Vienna-London […], Vienna-Frankfurt […] and Vienna-Paris […].

(19) Lauda Air (Lauda) provides air transport for passengers and goods and is engaged in activities relating to air transport. Its shares are held by AuA (99 %) and private investors (1 %).

(20) In 2000 Lauda achieved a turnover in the Community of EUR 158 million, of which EUR 73 million in Austria and EUR 37 million in Germany. In terms of passenger-kilometres worldwide in 2000, Lauda, with 4,6 billion, did not rank among the top 20 airlines in Europe.

(21) Lauda's main business is concentrated on charter flights within Europe (medium-haul routes) and long-haul routes toward Asian/Pacific destinations under AuA flight numbers. Its main route is Vienna-Sydney/Melbourne […].

(22) Tyrolean Airways (Tyrolean) provides air transport for passengers and goods and is engaged in activities relating to air transport. Tyrolean is 100 %-controlled by AuA. (after the latter acquired 42,85 % in 1994, 42,85 % in 1997 and the remainder in 1998).

(23) In 2000 Tyrolean had a turnover of EUR 231 million in the Community, EUR 106 million in Austria and EUR 77 million in Germany. In terms of revenue passenger-kilometres, Tyrolean ranked 176th in the world with 1,2 billion, well behind Crossair (118th with 3,5 billion RPKs) and Lufthansa City Line (116th with 3,6 billion RPKs).

(24) Tyrolean's air transport services are concentrated on domestic flights in Austria and regional flights in Europe with planes carrying up to 80 passengers. Its main routes are Innsbruck-Vienna […], Klagenfurt-Vienna […], Vienna-Budapest […] and Vienna-Stuttgart […]. Apart from further developing the domestic market, Tyrolean aims above all to increase the number of flights to central and eastern Europe and between Austria and Germany.

(25) Austrian Airlines acquired 100 % control of Rheintalflug in February 2001. In 2000 Rheintalflug carried a total of 250 000 passengers. It currently operates the following routes: Altenrhein–Vienna, Vienna–Geneva, Vienna–Tallinn, Vienna–Warsaw and Vienna-Milan under AuA flight numbers. Its turnover in 2000 was EUR 31 million.

3. THE COOPERATION AGREEMENT BETWEEN AUSTRIAN AIRLINES AND LUFTHANSA

(26) The long-term objective of the cooperation agreement between Lufthansa and AuA is worldwide integration of their networks. The network arrangement was introduced in the summer of 2000. It comprises passenger transport, maintenance, airport facilities and groundhandling. On 1 January 2000 the companies introduced a joint pricing policy and began coordinating schedules for all flights.

(27) Their cooperation is closest as regards Austrian-German traffic, which is governed by a 'neighbourhood agreement'. This agreement provides for a joint venture for traffic between the two countries. The Parties pool revenues for trunk routes, excluding, however, feeder services to hubs. The conclusion of the cooperation agreement with Lufthansa marked the completion in 1999 of a switch from the Qualiflyer alliance to the Star alliance. AuA accordingly terminated its cooperation with the Qualiflyer partners at the end of December 1999.

(28) The cooperation agreement contains mainly declarations of intent. In all major areas, as described in greater detail below, the Parties have concluded implementation agreements.

The main elements of the cooperation agreement are:

3.1. Joint venture for Austrian-German traffic

(29) The neighbourhood agreement establishes a list of joint services covered by the terms of the agreement. It provides that, after an initial transition period, both Parties will share […] the revenues and costs derived from the joint services. An 'Alliance Steering Committee' supervises the development and performance of the joint services and may give binding instructions to the management of the joint services, the so-called Traffic Committee (Tracom). Tracom consists of an equal number of representatives of both Parties who remain on the payroll of the company they represent. It is responsible for administering the joint services, the business plan, the traffic system, etc. The neighbourhood agreement provides explicitly that the Parties remain autonomous and preserve their independent decision-making powers.

(30) The traffic plan consists of a joint route system, fare structure and flight schedule. The Parties are not allowed to enter into regular arrangements with third parties to provide scheduled services on a joint service route.

3.2. Worldwide cooperation

(31) AuA and Lufthansa aim to establish an integrated transport system worldwide, with joint network planning, a joint pricing policy and joint budgeting. This includes reciprocal access to frequent-flyer programmes, code sharing, harmonisation of service levels, and integration of data processing. In information technology the Parties combine their systems to some extent in areas such as flight data, reservation systems, ticketing, inventory, etc. By agreeing to joint use of airport facilities for passenger clearance, they hope to offer a smooth transfer to their customers.

(32) With a view to the joint development of their respective networks, the Parties intend to set fares jointly worldwide on the basis of a special prorate agreement covering all groups of tariffs. According to the Parties, a joint pricing policy is necessary where their networks are combined; for instance, where the outward flight is with AuA and the return flight with Lufthansa or where AuA carries out the first part of an indirect flight via a Lufthansa hub. On a route where one Party offers a direct and the other an indirect flight ([6]), the former is the price leader. Apart from setting prices jointly, the Parties also coordinate their frequencies in order to avoid overlaps.

([6]) For example, Lufthansa offers a direct flight from Frankfurt to Kiev, whereas the AuA Frankfurt-Kiev flight involves a transfer in Vienna.

(33) The aim of the code-sharing agreement is to provide a seamless product to passengers. Code-sharing implies that an aircraft of one airline operating a given flight carries its own flight number as well as that of the other airline. As a result, the code-sharing agreement allows the non-operating airline to sell the flight as its own. The Parties intend to coordinate their schedules in order to feed traffic to each other. They can add individual flights or routes at any time, provided that they notify the other Party in advance.

3.3. **A single marketing strategy**

(34) The sales departments of both companies continue to exist independently. In Austria AuA remains responsible for marketing and sales, while Lufthansa is responsible in Germany. However, they intend to cooperate in many areas, such as creating a joint representation in Austria and Germany, cooperating on third markets, with AuA leading sales in central and eastern Europe, and cooperating in e-ticketing (over the Internet).

(35) Each Party remains free to operate direct services between its domestic market and foreign destinations, where this is economically possible.

(36) As regards domestic traffic, each airline continues to operate in a completely independent manner.

3.4. **Subsidiaries and associated companies**

(37) The Parties include their respective subsidiaries and associated companies in the cooperation arrangements. One objective with regard to network development is to improve services provided by Lauda Air in Germany.

3.5. **Organisation of the hub system**

(38) Through the agreement, the Parties aim to improve the use of their respective hubs in Frankfurt, Munich and Vienna. Vienna and Munich are to become complementary hubs, with Vienna concentrating on central and eastern Europe and Munich on traffic from and to Germany, intra-European traffic and traffic between Europe and other continents. Hub development should take into consideration the objectives and respective networks of the Parties and should provide for reciprocal feeder services.

3.6. **Airport facilities and services**

(39) With regard to groundhandling services, the Parties had agreed to give preference to GlobeGround, a wholly-owned subsidiary of Lufthansa, as long as it offered competitive prices. At the end of May 2001 Lufthansa sold 51 % of its shares in GlobeGround to the French firm Penauille Polyservices. The remaining shares will be transferred to Penauille on 30 June 2002. The agreement relating to GlobeGround was therefore set aside by the Parties. Groundhandling services will thus not be considered in what follows.

3.7. **Freight transport**

(40) The Parties do not envisage integrating their freight transport operations. However, in order to increase efficiency, they plan to cooperate in the long term in the area of logistics.

4. **APPLICABLE PROVISIONS**

(41) The joint venture for traffic between Germany and Austria is run jointly and equally by the Parties. It does not have the necessary resources to carry on its economic activity on its own. It will remain permanently dependent on the Parties.

(42) The object and effect of the joint venture is to coordinate the competitive conduct of the two parent companies, which remain independent. The neighbourhood agreement establishes a cooperative joint venture and not a full-function joint venture as defined in the Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [7], It forms part of a much wider cooperation agreement that falls within the scope of Article 81 of the EC Treaty.

(43) Regulation (EEC) No 3975/87 lays down the procedure for applying Article 81 of the EC Treaty with regard to air transport between Community airports and Article 53 of the EEA Agreement with regard to air transport between member countries of the European Economic Area. It covers only air transport between EEA airports. Traffic between the EEA and third countries is not caught by Regulation (EEC) No 3975/87 and, as a result, is not covered by this Decision.

5. **THE RELEVANT MARKET**

5.1. **Services concerned**

(44) The activity affected by the agreement is the scheduled air transport of passengers and goods. The Parties offer scheduled flights, charter flights and freight transport.

[7] OJ C 66, 2.3.1998, p. 1.

(45) In the Commission's view, charter flights do not form an alternative to scheduled flights in this case, in particular since most of the customers involved are business customers. Unlike leisure travellers, business customers do not accept the uncertainties connected with charter flights. As the Parties do not envisage merging their cargo transport activities, apart from some technical cooperation, air cargo transport is also disregarded in what follows.

5.2. **Air transport markets**

(46) To demarcate the relevant market in air transport, the Commission has developed the point-of-origin/point-of-destination (O&D) pair approach in a number of decisions backed by case law ([8]). According to this approach, every combination of point of origin and point of destination should be considered to be a separate market from the customer's point of view. In order to establish whether there is competition on a given route, a bundle of services is looked at. They include:

(a) the direct flights between the two airports concerned;

(b) the direct flights between the airports whose catchment areas significantly overlap with the catchment areas of the airports concerned at each end;

(c) the indirect flights between the airports concerned in so far as these indirect flights are substitutable with the direct flights; substitutability of direct routes with indirect routes depends on a number of factors such as the flight time or the frequencies (and schedules) of routes;

(d) other available transport means (car and/or train) to the extent that these are substitutable with direct or indirect flights in terms of journey time and frequencies ([9]).

(47) The Commission further distinguishes 'time-sensitive' and 'non-time-sensitive' customers. The former wish to reach their destination in the shortest possible time, they are not flexible in terms of time of departure/arrival and they need to have the option of changing their reservation at short notice. Non-time-sensitive customers, on the other hand, are more price-sensitive and accept longer journey times ([10]).

([8]) See Commission Decision of 11 August 1999 in Case COMP/JV.19 — KLM-Alitalia: http://europa.eu.int/comm/competition/mergers/cases.

([9]) The Parties argue in this respect that high-speed trains and the car offer alternative transport modes in competition with air transport for distances of less than 600 km.

([10]) Generally speaking, business travellers are more time-sensitive than leisure travellers and tend to book fully flexible tickets. The second group of passengers are not time-sensitive but pay more attention to the price. These passengers accept longer journey times and may choose indirect flights if they are less expensive than direct ones.

(48) According to the Parties, business passengers have become more price-sensitive and often buy economy-class tickets for flights of less than six hours, where their schedule permits. Accordingly, the proportion of time-sensitive passengers is much higher than the proportion of business-class travellers.

(49) The Parties argue that, as a result of globalisation, airlines compete on the basis of their respective networks and hubs, rather than on individual routes. In their view, a route-by-route analysis would not therefore be justified.

(50) The Parties' approach is supply-based. Airlines may well feel that they are clearly competing with other networks. However, this is not decisive for the definition of the relevant market since it does not correspond to the consumer's point of view. A consumer wishes to fly from a specific point of origin to a specific point of destination. He or she benefits from competition only if there is a choice between airlines on that particular origin and destination O&D pair. From a demand point of view, therefore, there is justification for assessing the effects of the cooperation agreement using the O&D approach.

(51) For the purposes of the Commission's assessment of the Parties' cooperation, it is possible to distinguish three categories of passenger air transport service within the EEA which are affected by the agreement:

(a) services between Austria and Germany;

(b) services between Austria or Germany and a third EEA country (e.g. Frankfurt-Rome);

(c) services between two third EEA countries (e.g. London-Rome).

(52) As explained in Section 8, the neighbourhood agreement in particular raises concerns. The following assessment of the above aspects therefore focuses on bilateral traffic between Austria and Germany.

5.2.1. *Indirect flights*

(53) In principle, there is a correlation between the extra time a traveller is willing to spend by travelling via an intermediate airport and the overall travelling time. On short distances, with the resulting short travelling time, such as between Austria and Germany, it can be assumed that only very few non-time-sensitive travellers would consider replacing a direct by an indirect flight as a

result of a price increase for direct flights ([11]) and that the share of such passengers is therefore too small for indirect flights to exert competitive pressure on direct ones for traffic between Austria and Germany. Furthermore, only indirect flights offered by competitors of the Parties can be taken into account for competition policy purposes. However, such flights exist on only a limited number of routes. Indirect flights are therefore disregarded in the following assessment.

5.2.2. *Overlapping catchment areas*

(54) Passengers who begin or end their journey in a catchment area of two or more airports can choose from or to which airport they wish to fly. This increases competition if the choice between different airports also implies a wider choice between different airlines, to the extent that the latter are independent of each other (i.e. they are not alliance partners or franchisees). In this instance, however, this applies only to a few minor cases ([12]).

(55) There is a correlation between the extra time a traveller is willing to spend by travelling to an airport which is farther away and the overall travelling time. For flights within Europe, it can be assumed that the radius of an individual airport's catchment area is small, given the short travelling time. Overlapping catchment areas are therefore of little relevance for flights within the Community. Flights between Austria and Germany are among the shortest flights even within the Community. Given the short travelling times on these routes, the Commission assumes, bar a few exceptions ([13]), that for bilateral traffic the overlap between the catchment areas of two airports is too small to have any effect on the market.

(56) The Commission therefore concludes that overlapping catchment areas do not play an important role for traffic between Austria and Germany. This conclusion is confirmed by estimates provided by the Parties themselves, who assume that only about 2 to 3 % of the airline passengers who travel between Austria and Germany live in overlapping catchment areas.

5.2.3. *Alternative transport modes*

(57) The Parties have argued that on the Austrian-German market road and rail offer alternative transport options for distances of up to 600 km.

(58) The Commission, on the other hand, takes the view that, besides qualitative factors, total travelling time rather than distance is the decisive factor for consumers. For time-sensitive passengers, alternative means of transport are substitutable for air transport only where the travelling time is not significantly longer. This, of course, is less important for non-time-sensitive passengers, who are more interested in reducing travelling expenses.

(59) Table 1 shows a series of factors that are relevant for the routes involved in this case. According to these data, the travelling time from city centre to city centre by car or train is comparable to the time taken by air only for the Salzburg-Munich and Linz-Munich routes. For Vienna-Munich, the time difference is more than two hours and car or train travel increases the travelling time by more than 70 %. In the case of a return trip, the additional travelling time would be more than four hours. This does not seem to be an alternative for time-sensitive customers. It can be an alternative only for a limited number of non-time-sensitive travellers.

(60) A comparison of prices can also show the extent of competition between the different modes. A comparison of a business-class air ticket with a first-class rail ticket and an Air-PEX ticket with a second-class rail ticket reveals that air travel in general is more than twice as expensive as travelling by train (the difference in price is also significant if the comparison is between air travel and car travel). This conflicts with the Parties' assertion that alternative transport modes compete with air transport. If this were the case, one would expect prices to converge or, if prices of alternative transport modes were too low for airlines to match, no air transport to be offered. A price comparison does not, therefore, support the Parties' view that air transport and other means of transport form one and the same market.

([11]) This conclusion is generally backed up by the findings of the Commission's investigation in the KLM-Alitalia case. The Commission found that the proportion of travellers using indirect flights on the Amsterdam-Rome and Amsterdam-Milan routes was very low. This suggest that neither category of passenger (time-sensitive or non-time-sensitive) considers indirect flights to be substitutable for direct flights. See Commission decision of 11 August 1999 in KLM-Alitalia.

([12]) The Parties have claimed that passengers living in Voralberg (the westernmost part of Austria) would prefer Zürich airport to Innsbruck. At the time of the conclusion of the agreement, Swissair operated five flights daily from Zürich to Berlin. Such passengers would therefore have the choice between Swissair and AuA/LH.

([13]) Such an exception may exist for non-time-sensitive travellers living in the catchment areas for Innsbruck and Salzburg who wish to travel from Munich to other German destinations since competitors of Lufthansa operate on these routes.

(61) It can therefore be concluded that, as a rule, other means of transport do not offer an alternative for time-sensitive travellers on direct routes between Austria and Germany. Apart from considerations of journey time and comfort, however, they may do so for non-time-sensitive travellers ([14]).

Table 1:

Distance, prices and travelling time on different routes between Austria and Germany (Source: OAG/ January 1999)

Route	Approximate travelling time from city centre to city centre (one way)				Travel expenses for a two-way journey (in euros)				
	Distance in km (by road)	Air ([1])	Rail	Car	Air Business-Class ([2])	Air-PEX and Sunday rule	Rail First Class	Rail Second Class	Car ([3])
Vienna-Frankfurt	715	3:15h	8:37h	8:30h	853	518	292	194	319
Vienna-München	450	2:45h	4:51h	5h	550	358	164	112	201
Vienna-Düsseldorf	927	3:25h	12:20h	11h	1 027	617	403	267	414
Graz-Frankfurt	730	3:15h	9:20h	9h	853	517	302	205	326
Salzburg-Frankfurt	543	3:45h	5:34h	6:30h	584	365	238	158	242
Salzburg-Munich	140	2:50h	1:30h	1:30h	—	398	65	43	62
Vienna-Berlin	634	3:05h	11:11h	8h	837	501	248	163	283
Vienna-Stuttgart	682	3:30h	7:28h	8h	768	464	272	179	304
Linz-Frankfurt	554	2:55h	6:12h	6:30h	685	418	245	162	247
Innsbruck-Frankfurt	517	3:05h	6:15h	6h	636	312	254	167	231
Linz-Munich	276	2:35h	2:55h	3:15h	—	425	122	79	123

([1]) Times include actual flying time, servicing time (45 mins) and travelling time from the city centre to the airport (one hour).
([2]) Lufthansa and AuA offer the same prices on these routes. The full price for economy class is the same as the business-class rate.
([3]) A rate of EUR 0,22 per km was used for the calculation.

6. **THE PARTIES' POSITION ON THE RELEVANT MARKET**

(62) In Section 5.2 three categories of air transport service were identified. As will be shown in detail in Section 8, competition concerns arise principally in connection with the first category, i.e. services between Austria and Germany. The following assessment will therefore focus on the Parties' position on this market.

(63) In 1999 there were 33 routes between Austria and Germany. Only one route was not operated by the Parties ([15]). In terms of both the total number of direct flights and total passenger numbers on direct flights, the Parties have a combined market share of 100 % on 27 of these 33 routes. These 27 routes account for more than 90 % of total traffic between the two countries. Thus, the Parties are by far the strongest competitors on the Austrian-German air transport market.

([14]) For example, on the Munich-Salzburg, Munich-Linz and Munich-Vienna routes.
([15]) Rheintalflug operated 86 flights between Vienna and Friedrichshafen in 1998. However, Rheintalflug was taken over by AuA in 2001.

Table 2:

Number of flights per week on individual routes between Austria and Germany

Route	Flights per week (winter 1999/2000)				Lufthansa/AuA (including Lauda) combined market share for direct flights (%)
	AuA	Lufthansa	Lauda	Total	
Vienna-Frankfurt	28	34	0	62	100
Vienna-Munich	14	26	13	53	100
Vienna-Düsseldorf	14	21	0	35	100
Graz-Frankfurt	7 (*)	20	0	27	100
Salzburg-Frankfurt	0	28	0	28	100
Vienna-Berlin	14	21	0	35	100
Vienna-Hamburg	0	20	14	34	100
Vienna-Stuttgart	20 (*)	10	0	30	100
Linz-Frankfurt	0	28	0	28	100

(*) Tyrolean Airways.

(64) In order to determine the Parties' market position, in addition to considering the number of direct flights and total passenger numbers on direct flights it is also necessary to distinguish between different passenger categories. Even though, with the conclusion of the cooperation agreement, the Parties together had a market share of 100 % in the case of direct flights on all routes of importance in terms of passenger numbers, they nevertheless continued to face competition in respect of the important category of transfer passengers.

(65) Generally speaking, a distinction can be drawn between O&D (point-to-point) passengers and transfer passengers, who take connecting flights. Unlike O&D passengers, transfer passengers have a wider choice of flights, with the result that there is greater competitive pressure on the Parties as regards such customers ([16]).

(66) This means that each flight combines passengers with very different point-of-origin/point-of-destination pairs. Long-haul travellers, for example, have the choice of various European hubs and may therefore benefit from competition. When the cooperation agreement was concluded, this was not the case for O&D passengers and regional transfer passengers flying locally between Austria and Germany ([17]). Thus, the different passenger groups form separate markets.

(67) For an overall competition assessment of the cooperation or alliance between airlines, it has to be established therefore whether the category of O&D passengers and regional transfer passengers forms a significant customer market. This is the case at least for all the major routes between Austria and Germany shown in Table 3, even though the proportion differs considerably from route to route. On other routes between the two countries that do not involve a hub, the share will be even higher still. The effects of the cooperation between the Parties on this category of travellers must therefore be considered.

([16]) For example, to fly from Vienna to the United States, a passenger may fly direct, or indirect via Frankfurt, Amsterdam, Paris, London, etc. He or she would thus have the choice of several competing airlines.

([17]) Regional transfer passengers take a regional flight before or after flying on an Austrian-German route (regional transfer). A passenger who wishes to travel from Klagenfurt to Leipzig may do so via Frankfurt, for example. However, such passengers, like direct travellers, depend as a rule on one of the Parties for at least one section of their journey.

Table 3:

Number of passengers on the main routes between Austria and Germany

Route	Number of passengers (1998((both directions)	Share of business class passengers	Share of O&D and regional transfer passengers
Vienna-Frankfurt	560 000	[...]	[...]
Vienna-München	290 000	[...]	[...]
Vienna-Düsseldorf	214 000	[...]	[...]
Graz-Frankfurt	140 000	[...]	[...]
Salzburg-Frankfurt	138 000	[...]	[...]
Vienna-Berlin	135 000	[...]	[...]
Vienna-Hamburg	116 000	[...]	[...]
Vienna-Stuttgart	104 000	[...]	[...]
Linz-Frankfurt	91 000	[...]	[...]

Example of the Vienna-Frankfurt route

(68) The Parties' position on the market for traffic between Austria and Germany can be illustrated on the basis of the main Austrian-German route. The Vienna-Frankfurt route links the AuA and Lufthansa hubs.

(69) Indirect flights and alternative modes of transport are of secondary importance on this route and can be disregarded. As pointed out above, indirect flights cannot be considered to be substitutes on short-haul routes. If the '600 km rule' is applied, as suggested by the Parties, the train and the car cannot be considered to be alternative transport modes since the distance between the two cities exceeds 600 km. This is valid at least for time-sensitive passengers. Non-time-sensitive travellers may choose to travel by train or car despite the distance. However, as indicated in Section 5.2.3, the significant price differences between air transport and other modes of transport lead to the conclusion that they form separate markets. Some travellers may choose other transport modes on the basis of quality criteria. For example, the car offers greater independence and more flexibility at the place of destination. It is therefore assumed that for most non-time-sensitive air passengers too transport by land does not offer an alternative.

(70) The Parties have not argued that there is competition on this route by virtue of overlapping catchment areas for various airports. This means that only the direct flights offered can be considered for this route. The AuA/Lufthansa joint venture therefore has a 100 % market share on this route.

(71) As shown in Table 3, about […] of all passengers in 1999 were either point-to-point passengers or regional transfer passengers. These passengers have no choice but to fly on this route with the Parties.

Other bilateral routes

(72) The above analysis for the most important route (in passenger terms) between Austria and Germany also applies to those that carry less traffic. As indicated in Section 5.2, on most of the 33 existing routes, neither indirect flights nor other modes of transport are relevant. On these routes, the share of direct and regional transfer passengers is even higher than on the Vienna-Frankfurt route, which links two hubs. Thus, the share of passengers who depend exclusively on the Parties for travel on these routes is also higher.

(73) With the conclusion of the cooperation agreement, around half of all air passengers travelling between the two countries depend exclusively on AuA/Lufthansa.

7. **COMMENTS BY THIRD PARTIES**

(74) In response to the notices published in the *Official Journal of the European Communities* pursuant to Article 5(2) and Article 16(3) of Regulation (EEC) No 3975/87, the Commission received comments from third parties that essentially made the following points:

(a) The cooperation agreement between AuA and Lufthansa will significantly restrict competition on the market for traffic between Austria and Germany;

(b) The cooperation agreement enables the members of the Star alliance to build on their already strong position in Europe;

(c) The very high prices applied by the Parties on Austrian-German routes are a burden on consumers;

(d) An exemption should be granted only subject to extensive conditions. In particular, barriers to entry, such as the shortage of slots, should be reduced;

(e) Their cooperation gives both Parties a very strong position on the German-Austrian market. Smaller competitors should be protected from anticompetitive behaviour, such as price dumping and keeping overcapacities in reserve;

(f) A process of concentration is taking place in Europe's air transport industry. It is vital for AuA to join the Star alliance in order to preserve its independence;

(g) (Large) customers will share in the savings that result from the cooperation. They will also benefit from the wider network of routes and the more extensive range of flights on offer within the alliance.

8. **ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT**

8.1. **The agreement between the undertakings**

(75) The cooperation agreement between Lufthansa and AuA is an agreement between undertakings within the meaning of Article 81(1) of the EC Treaty ([18]).

8.2. **Restriction of competition**

(76) Under the cooperation agreement, the two former competitors cooperate as regards all traffic within the EEA. Such cooperation includes in particular a joint pricing policy and the sharing of markets through the coordination of schedules, frequencies and capacity. Thus, the agreement therefore restricts actual and potential competition between the Parties.

8.2.1. *Traffic between Austria and Germany (both directions)*

(77) On all routes for local traffic between Austria and Germany, the Parties have coordinated their activity with regard to capacity, frequencies, fares and marketing policy by setting up a joint venture. Costs and revenues are shared between them equally. The Parties thus exclude any competition between themselves on this market.

(78) Their cooperation increases the Parties' market power even further by raising additional entry barriers for other suppliers as a result of the coordination of resources, networks and frequencies. The same applies to the joint frequent-flyer programme as a large proportion of customers are business customers. The latter prefer airlines with a joint frequent-flyer programme allowing them to collect airmiles more easily. A joint frequent-flyer programme can therefore represent a significant entry barrier for airlines not offering a similar programme. The Parties' position is further strengthened by their share of slots at the main airports in Germany and Austria and by the relatively high number of services which they already operate on the routes in question.

(79) By excluding any actual and potential competition between the Parties and given their position on the market, the joint venture appreciably restricts competition for air transport between Austria and Germany.

8.2.2. *Other routes within the EEA*

(80) As mentioned in Section 5.2, apart from the bilateral traffic between Germany and Austria, the agreement affects traffic between Germany or Austria and a third EEA country and between two third EEA countries. AuA and Lufthansa cooperate on these routes in particular with regard to joint network planning, a joint pricing policy and the harmonisation of service levels. The Parties apply a joint pricing policy on all routes which allow them to combine their networks, i.e. where a passenger can fly out with Lufthansa and fly back with AuA. This applies, in principle, to all routes within the EEA. AuA and Lufthansa also coordinate their frequencies in order to avoid overlapping flights.

(81) To the extent that there is competition on these routes between direct and indirect flights, competition between one Party's direct services and the other Party's indirect services is restricted or eliminated for services between Austria or Germany and another EEA country ([19]). However, with regard to flights between two other EEA countries, e.g. London-Rome, the cooperation agreement probably does not restrict competition significantly. While the Parties might have been actual or potential competitors by offering indirect services on some of these routes, their respective market position on these routes is presumed not to be significant.

([18]) Article 53 of the EEA Agreement contains the same provision as Article 81 of the EC Treaty. All references to Article 81 of the EC Treaty should be understood to extend automatically to Article 53 of the EEA Agreement.

([19]) For instance, a non-time-sensitive passenger travelling from Hamburg to Rome could have chosen either to fly direct with Lufthansa or indirect with AuA via Innsbruck.

(82) The agreement therefore has the effect of restricting competition between the Parties on routes between Austria or Germany and another member country of the EEA.

8.3. **Effect on trade between Member States**

(83) The cooperation agreement between AuA and Lufthansa covers passenger and freight transport within the EEA and therefore affects trade between Member States.

9. **ARTICLE 81(3) OF THE EC TREATY**

(84) According to Article 81(3) of the EC Treaty, the provisions of Article 81(1) may be declared inapplicable in the case of an agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

9.1. **The cooperation agreement's contribution to economic progress**

(85) The Parties have argued that the cooperation agreement contributes in a number of ways to economic progress. In particular, passengers will benefit from improved possibilities for transfers and connections.

(86) Except as regards bilateral traffic, the Parties' networks largely complement one another. While AuA has focused on medium-haul routes in Europe, especially central and eastern Europe, Lufthansa has focused much more on long-haul services. The merger of these complementary networks results in important synergistic effects and attractive connections for consumers. The coordination and extension of the Parties' scheduled networks will create a more efficient network and, in particular, improve connections with eastern European cities.

(87) The establishment of a more comprehensive European network will produce cost savings for the Parties through an increase in traffic throughout the network, improved network connection, better planning of frequencies, a higher load factor and improved organisation of sales systems and groundhandling services. The Parties also expect to make cost savings by jointly developing new sales channels (e-ticketing).

(88) In concluding a cooperation agreement with Lufthansa, AuA has switched from the Qualiflyer to the Star alliance. In AuA's case, the cost savings resulting from the cooperation can be calculated only in relation to the change of alliance. AuA's supervisory board put a figure of some […] million on the potential synergy to be gained from joining the Star alliance as opposed to remaining in the Qualiflyer alliance. Since the cost savings described must also have applied to some extent in the Qualiflyer alliance, it can be assumed that the synergistic effects of the cooperation agreement would be even greater compared with a situation in which AuA did not belong to any alliance.

(89) The Commission accordingly considers that the agreement will contribute to economic progress within the meaning of Article 81(3) of the EC Treaty.

9.2. **Benefits for consumers**

(90) The linking of the two scheduled networks means coordinated schedules, shorter waiting times, no moving between terminals and harmonised in-flight service quality. Consumers also benefit from a wider choice of direct flights between the two countries and connections to eastern European destinations in particular. As a result of the cooperation agreement, frequencies have increased in bilateral traffic on the Frankfurt-Klagenfurt, Munich-Graz, Frankfurt-Innsbruck and Vienna-Nürnberg routes and new connections have been added between Graz-Stuttgart and Vienna-Friedrichshafen.

(91) The extension of their respective hub connections has also opened up the possibility of more feeder services from regional airports. It is expected that, for consumers, these benefits of a shared network will also lead to an increase in traffic overall and thus to better capacity utilisation for the Parties.

(92) Consumers are also benefiting from the introduction of transit services and the extension of reciprocal codesharing on services to third countries beyond hub-to-hub flights. The partners' networks have thus become accessible to passengers of both airlines, increasing the number of available destinations and the choice of times for outward and return flights.

(93) However, the Commission is not convinced that the cooperation agreement ensures that consumers will share in the benefits of the expected cost savings, e.g. through lower prices. This is to be ensured by the conditions set out below.

9.3. **Indispensability**

(94) The Commission accepts that the envisaged cost reductions could materialise only if the Parties cooperated closely on their respective business strategies. The benefits of an improved range of services as a result of joint route planning and network development in particular can be obtained only through close cooperation. This is particularly true of routes linking the hubs of the two companies. The Commission therefore recognises that the extent of the integration envisaged in the cooperation agreement is necessary to achieve the objectives set.

(95) The Commission considers, however, that conditions must be imposed to ensure that the restrictions of competition do not go beyond what is necessary and that competitors are present on the market.

9.4. **Elimination of competition**

(96) As to whether the cooperation agreement eliminates competition, a distinction must be made, as explained in Section 5.2, between the German-Austrian market and services to other EEA countries. In the former case, the establishment of a joint venture means that cooperation between the Parties is much closer and their market position especially strong (see Section 6.2.1).

9.4.1. *The German-Austrian market*

(97) As can be seen from Table 2, the Parties were not subject on any main Austrian-German routes to competition from other airlines in the case of direct flights when the joint venture was set up. The cooperation thus eliminated actual competition on a large number of individual routes.

(98) By establishing the joint venture, the Parties have ensured that there is no longer any actual or potential competition between them on routes between Austria and Germany. Although the liberalisation of air transport in the Community has removed legal barriers to market entry, the Parties cooperation creates new entry barriers and enhances the difficulties for third carriers to enter the market. This eliminates competition on a substantial part of the market, as illustrated below taking the Vienna-Frankfurt route as an example. The situation on other routes between the two countries is comparable.

Vienna-Frankfurt

(99) As explained in Section 6, the Parties have, by setting up a joint venture, eliminated actual competition in respect of O&D passengers on this route. It can be assumed that potential competition has also been at least severely restricted by barriers to entry. The reasons are as follows:

(a) at least the main airport in Frankfurt is very congested and new entrants find it very difficult to obtain slots at peak times;

(b) together, the Parties operate a relatively high number of frequencies. This makes it more difficult for new entrants to establish themselves on the market with additional flights;

(c) more than half of all passengers are transfer passengers. New entrants on routes between Austrian and German hubs must therefore attract regional and international transfer passengers in order to fill capacity. However, as the Parties develop a joint network, their flights fill most slots which feed flights from and to their hubs;

(d) the Parties' market power will increase as a result of the agreement since they will coordinate resources, create a larger European fleet, exploit the scope for interlining, and coordinate networks and frequencies;

(e) the pooling of frequent-flyer programmes will strengthen the Parties' position on the market, in particular on the market segment for business customers. A joint frequent-flyer programme constitutes an important entry barrier for airlines which do not have comparable programmes;

(f) a large proportion of total tickets sold on a specific route are tied to a specific airline because of corporate customer deals ([20]) and other reasons. Thus, new entrants can actually compete on price for only a small proportion of customers, at least in the short run. Small carriers would probably find it difficult to offer similar deals to potential large customers as they cannot offer a similar range of network services (high frequencies, well-connected flights at hub airports, etc.);

(g) the Parties operate with relatively low load factors on routes between Austria and Germany. They thus have sufficient capacity on these routes to react quickly to price changes which could result from a new competitor entering the market.

(100) Since, following the cooperation agreement, only the joint venture has offered direct flights on this route and in view of the high barriers to entry, the Parties have eliminated competition on this route as regards the market for time-sensitive and non-time-sensitive O&D passengers and regional transfer passengers.

([20]) For example, on routes between Austria and Germany some 38 % of all AuA customers fly under a 'corporate customer deal'.

Other bilateral routes

(101) As explained in Section 6, the Parties' starting point on other bilateral routes is the same as on the Vienna-Frankfurt route. This also applies to the barriers to market entry. However, on routes with fewer passengers, these have even greater weight. As demand for flights on these routes is lower, an entrant is obliged to obtain a higher share of total passengers on the route in order to break even.

(102) While it might be accepted that competition is not eliminated on some routes this only holds for routes of secondary importance. Thus, given the dominant position on the market for time-sensitive customers (point-to-point and regional transfer) and the strong position on the market for non-time-sensitive customers, the cooperation agreement affords the Parties the possibility of eliminating competition for a substantial number of services for time-sensitive and non-time-sensitive customers.

Potential competition

(103) The Parties have argued that all European airlines can be considered potential competitors. However, the Commission has carried out a market test and, on the basis of its findings, it considers that the extent to which there is potential competition from other airlines is small. Although the legal entry barriers have been dismantled, the entry of other airlines onto the market is not actually guaranteed. Large airlines endeavour to develop their networks around their respective hubs. Consequently, other major European airlines would probably operate on the Austrian-German routes only if they developed a second hub to which these routes could be connected. This, however, does not seem to be an option for the foreseeable future. Moreover, the numerous barriers to entry make it difficult for low-cost and regional airlines to enter the market. It is therefore essential to reduce or remove these barriers to entry in order to enable such competitors to enter the market.

9.4.2. *Routes involving other EEA countries*

(104) As pointed out in Section 6.2.2, the cooperation agreement may restrict competition on certain routes between Austria or Germany and another EEA country. However, the Commission does not have any indication that, with regard to these routes, the cooperation agreement would eliminate competition on any of the aforementioned markets.

10. **CONDITIONS AND OBLIGATIONS**

(105) In the light of the considerations in Section 9.4, it can be concluded that the cooperation agreement has eliminated competition on a substantial part of the market in bilateral traffic between Germany and Austria. According to the Commission, the cooperation agreement can only be accepted on the basis of conditions which significantly reduce the barriers to market entry.

(106) On the basis of the reservations expressed by the Commission in its statement of objections, the Parties gave extensive commitments which were published on 14 December 2001 in the *Official Journal of the European Communities*. Following comments by third parties, these commitments were extended. They are set out in detail in the Annex to this Decision. The Annex forms an integral part of this Decision, and the exemption is subject to the conditions set out therein.

(107) The main purpose of the conditions contained in the Annex is to ensure that there can be viable new competition by removing existing entry barriers for potential competitors. In addition, they should ensure that consumers share in the benefits resulting from cooperation. The main aspects are summarised below.

(108) New competitors depend on obtaining appropriate slots at each airport. However, a number of airports are full at peak times. The Parties are therefore required to make slots available to a new entrant for a route chosen by it up to a maximum of 40 % of the slots the Parties operated on the route in question at the time of the notification. In addition, they must make 'technical slots' available to a new entrant from a third country to position aircraft at the beginning or end of operations.

(109) In view of the economic weight of the Parties and their strong presence on the routes concerned, the Commission considers it necessary that their daily frequencies on new entrant city pairs be frozen for two years. This is to prevent them from increasing their frequencies as a means of forcing out new entrants.

(110) In the light of experience and the information it possesses on the relevant market, the Commission assumes that no one will enter the market quickly on a number of Austrian-German routes. Many of the lighter routes (in terms of passenger numbers) are of limited attraction to potential competitors. The interests of consumers using such routes must also be taken into account. The Parties are thus required to apply any price cuts that they introduce on routes subject to competition to three other Austrian-German routes on

which they do not face competition. The Parties have some discretion when it comes to choosing these three other routes. By making the costs of price dumping significantly higher for the Parties, this condition affords new entrants some protection from predatory pricing by the Parties.

(111) In order to utilise their capacity sufficiently, new entrants depend on making an attractive offer to the various customer segments. To enable them to do so for business customers, the Parties are required to reserve for new entrants up to 15 % of the seats offered on a service. This blocked space can be used by the new entrant in order to offer customers greater flexibility as regards outward and return flights. The option for competitors to take part in the Lufthansa/AuA frequent flyer programme is also designed to make it easier for them to attract business customers.

(112) Given the high share of transfer passengers, it is also important for a new entrant to obtain access to the market in transfer passengers. To this end, it can conclude an interline agreement with Lufthansa/AuA that, at its request, includes a special prorate agreement. The terms of such special prorate agreements must correspond to the terms entered into by the Parties with their alliance partners or other carriers in connection with the route concerned.

(113) On short-haul routes between Austria and Germany, competition can also be promoted to a limited extent by intermodal services. At the request of a railway or other surface transport company, the Parties must enter into an intermodal agreement whereby they provide passenger air transport on their services between Austria and Germany as part of an intermodal service.

(114) The Commission has established that, on the basis of these undertakings, there are several competitors who are seriously interested in entering the market on major routes and are able to obtain the necessary traffic rights. This is an important factor that allows the Commission to exempt the cooperation under Article 81(3) of the EC Treaty. Should this situation change, the Commission might be obliged to revoke or amend the exemption pursuant to Article 6(3)(a) of Regulation (EEC) No 3975/87.

(115) On their own initiative, the Parties announced that they would keep to the conditions described above vis-à-vis potential competitors even before the Commission granted an exemption. On this basis, other firms have since entered the market. Since 2001 Adria Airways has been flying twice daily between Vienna and Frankfurt, while Air Alps has operated the Vienna-Stuttgart route. Two other airlines from central and eastern Europe have expressed a serious interest in entering the market on two major Austrian-German routes once the exemption has been granted. On the basis of the Parties' commitments, a new Austrian airline has been created with a view to starting operating on several routes between Austria and Germany in autumn 2002.

(116) Given the various conditions and the duration of the exemption, the Parties must provide the Commission with information on a regular basis to show that they are complying with the conditions,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are hereby declared inapplicable to the cooperation agreement concluded on 10 December 1999 between Deutsche Lufthansa AG (Lufthansa) and Austrian Airlines Österreichische Luftverkehrs AG (AuA) for the period from 10 December 1999 to 31 December 2005.

Article 2

The exemption granted pursuant to Article 1 shall be subject to the conditions listed in the Annex. These conditions shall apply to all routes operated by the Parties between Germany and Austria. They shall be binding on the Parties, their subsidiaries, legal successors and authorised representatives. The Parties shall ensure that their subsidiaries, legal successors and authorised representatives comply with them.

Article 3

1. Until termination of the exemption granted pursuant to Article 1, AuA and Lufthansa shall provide the Commission with the following information:

(a) detailed information on the tariffs applied on all routes between Austria and Germany on which the Parties offer direct flights in competition with other airlines;

(b) detailed information on how they comply with the requirement to apply tariff reductions on three other Austrian-German routes;

(c) a list of all contracts and agreements that the Parties have entered into with competitors on the Austrian-German market with regard to slots, frequent flyer programmes, blocked space, interlining and intermodal traffic;

(d) information on tariff developments on all routes between Austria and Germany;

(e) a list of the daily frequencies applied and total capacity offered per month by AuA and Lufthansa on the ten most important routes in passenger terms;

(f) information on the Parties' progress in implementing their cost-cutting plans.

2. Information under paragraph 1, points (a) and (b) shall reach the Commission within a week of publication of the tariffs. Information under paragraph 1, points (c) to (f) shall be sent to the Commission at the end of each summer scheduling period.

Article 4

This Decision is addressed to:

Austrian Airlines Österreichische Luftverkehrs AG
Fontanastr. 1
PO Box 50
A-1107 Vienna

Deutsche Lufthansa Aktiengesellschaft
Von-Gablenz-Straße 2-6
D-50679 Cologne

Done at Brussels, 5 July 2002.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

CONDITIONS

1. **Conditions pertaining to slots**

If an airline which did not operate air transport services between Austria and Germany on the date of notification (a new entrant) and which is independent of Austrian Airlines and Lufthansa (the Parties) wishes to commence a new non-stop service on one or more Austria-Germany city pairs (the 'new entrant city pair or pairs'), the Parties shall make slots available subject to the conditions described below. For the purposes of these conditions, a non-stop service includes a multi-stop service using a single aircraft that begins and/or terminates in Austria, Germany or a third country and has at least one non-stop segment between Austria and Germany.

The parties are obliged to make available to a new entrant for a particular new entrant city pair (the 'new entrant slots') at least one pair of slots and, to the totality of new entrants, up to a maximum of 40 % of the slots the parties operated on the city pair in question at the time of notification. However, any voluntary advance slot release by the Parties shall count towards the 40 %.

The new entrant slots shall be within 45 minutes of the time requested by the new entrant and shall permit, in the case of one-stop services, a transit-groundtime of the aircraft of not more than 90 minutes, provided that the Parties hold slots within the relevant time period.

The new entrant shall make a clear written request to the Parties concerning the intended service at least six weeks prior to the IATA slot conference for the traffic season in which the new entrant intends to commence service. A new entrant shall be eligible to receive slots pursuant to these commitments only provided that it can demonstrate that all reasonable efforts to obtain slots for the new entrant city pair through the normal workings of the slot allocation procedure at the subsequent slot conference (including allocation of slots by the coordinator following the slot-return deadline) have failed. During the entire period (between the written request and the end of the respective IATA scheduling period) the new entrant shall maintain an 'open book' policy for the respective airports. Any slots obtained by the new entrant through the regular slot allocation procedure shall count towards the total number of slots the new entrant is entitled to receive pursuant to these commitments unless the Parties have a share of total frequencies on the city pair concerned that is in excess of 60 %. Requests for slots pursuant to this section are valid only for a specific scheduling season. Where, on the route in question, a new entrant has not commenced service, has commenced service at a lower frequency than planned or wishes to operate an additional frequency, the requirements of this section shall apply to any request for additional slots in a subsequent scheduling season.

On all routes between Austria and Germany which involve at one end Vienna or Frankfurt airports, new entrant slots shall be used exclusively to operate services on the new entrant pairs with aircraft having a capacity of 46 or more seats. This condition shall not apply to other routes between the two Member States or where a new entrant has commenced service prior to the date of publication of the exemption decision in the *Official Journal of the European Communities*.

Where a new entrant wishes to use for services on a route between Austria and Germany an aircraft that is stationed at an airport in a third country, it can obtain slots pursuant to these provisions (including limitations on the number of slots available to support service on a city pair) for services to or from that third country to position the aircraft at the beginning or end of operations (technical slots). The Parties shall be required to provide technical slots only where the new entrant requesting such slots and/or its franchiser operate fewer than three daily frequencies to/from third countries from the airport concerned at the time that the request is made. Furthermore, the Parties shall make technical slots available within 180 minutes of the time requested by the new entrant, provided that they hold slots within the relevant time period.

Where the new entrant operates a service involving a third country and one of the airports included in the new entrant city pairs (a third-country service) and reduces frequencies on or ceases to operate the third-country service, it shall be required to use the slots previously assigned to the third-country service for service on the new entrant city pairs. It shall return the same number of new entrant slots to the Parties as were previously assigned to the third-country service.

Where a new entrant which has obtained slots pursuant to this procedure decides not to commence services on the new entrant city-pair or to operate a lower number of services, it shall inform the Parties immediately and return the slots to them. If a new entrant ceases to operate services on the new entrant city pair or has to cease operations for other reasons (e.g. misuse), it shall inform the Parties immediately and shall return the slots to them. For the purposes of this section, a new entrant and its subsidiaries will be deemed to have ceased operating on a new entrant city pair where it or they, as the case may be, have not used at least 80 % of their slots during the scheduling season for which they had been allocated for the city pair in question, unless this non-use of the slots is justified on one of the grounds referred to in Article 10(5) of Regulation (EEC) No 95/93 or in any other regulation that amends or supersedes it.

Should the new entrant notify the Parties too late in a scheduling season for them to use the returned slots pursuant to Article 10(3) of Regulation (EEC) No 95/93 with immediate effect or after the deadline provided for in Article 10(4) of that Regulation and before the effective start of the scheduling season, the Parties shall be entitled to require that the new entrant transfers to the Parties a comparable slot. If for any reason the new entrant is unable to transfer to the Parties a comparable slot, they may seek to justify the non-use of the surrendered slot on the basis of Article 10(5) of Regulation (EEC) No 95/93.

To ensure that the slots provided by the Parties are used in a manner consistent with these conditions, a mechanism shall be agreed between the Parties and the new entrant that will allow the Parties to monitor how the slots are being used. The Parties shall inform the Commission about the agreed mechanism.

Slots made available by the Parties under these commitments shall be offered without any *quid pro quo*.

2. **Conditions pertaining to frequencies**

The Parties shall not add any frequencies on a particular new entrant city pair for a minimum of four consecutive IATA traffic seasons including the traffic season in which the new entrant commences service on the new entrant city pair.

3. **Conditions pertaining to fares**

If the Parties reduce a published fare on a new entrant city pair, they shall apply an equivalent fare reduction (in percent) on three other Austria-Germany city pairs on which they do not face any competition. This requirement shall apply only as long as the fare reduction on the new entrant city pair remains effective. For the purposes of this requirement, a published fare shall include applicable IATA fares, carrier fares that are distributed to computerised reservation systems via the public tariff data base of ATPCO (Airline Tariffs' Publishing Corporation) and fares marketed to the general public on the Internet.

The three comparable Austria-Germany city pairs where the Parties must apply equivalent fare reductions will be determined as follows: the Parties will choose two city pairs out of the next five largest Austria-Germany city pairs by passenger volume on which they do not face any competition. The only condition to be met when selecting the third Austria-Germany city pair is that it must be operated solely by the Parties.

This condition shall not apply in those exceptional cases where the Parties can demonstrate to the Commission that a fare reduction on a specific city pair is attributable to factors, such as a reduction in costs, that are independent of the competitive activities of the new entrant.

4. **Conditions pertaining to blocked space agreements**

At the request of a new entrant, the Parties shall enter into a blocked space agreement pertaining to the new entrant city pair(s) operated by it if the number of frequencies offered by it is lower than the number operated by the Parties.

Any such agreement shall be based on a fixed number of seats (hard block basis) and apply for at least one entire IATA traffic season. The number of seats covered by such an agreement shall be a maximum of 15 % of the seats offered on a particular frequency and in any event not less than 12 seats and not more than 25 seats in a particular aircraft. The new entrant shall carry the full commercial risk attaching to the seats covered by the blocked space agreement.

5. **Conditions pertaining to interlining**

At the request of a new entrant, the Parties shall enter into an interline agreement concerning the new entrant city pair(s) operated by it if it does not have an existing interline agreement with the Parties.

Such an interline agreement shall be subject to the following restrictions:

(a) it shall apply to the first class, business class and leisure travel categories only;

(b) it shall provide for interlining on the basis of the Parties' published one-way fares when a one-way ticket is issued or half of the Parties' published round-trip fares when a round-trip ticket is issued;

(c) it shall be limited to true origin and destination traffic operated by the new entrant;

(d) it shall be subject to the MITA rules and/or normal commercial conditions;

(e) it shall include the possibility for the new entrant, or travel agents, to offer a return trip comprising services provided one-way by the Parties and one-way by the new entrant.

Subject to seat availability in the relevant fare category, the Parties shall carry a passenger holding a coupon issued by a new entrant for travel on a new entrant city pair. However, to avoid abuse, the Parties may require that the new entrant or the passenger, where appropriate, pay the positive difference between the fare charged by the Parties and the fare charged by the new entrant. In cases where the new entrant's fare is lower than the value of the coupon issued by them, the Parties may endorse their coupon only up to the value of the fare charged by the new entrant. A new entrant shall enjoy the same protection in cases where the Parties' fare is lower than the value of the coupon issued by it.

All interline agreements entered into pursuant to this section for a particular new entrant city pair shall lapse as soon as the new entrant ceases to operate that city pair.

At the request of a new entrant, the Parties shall enter into a special prorate agreement with it for traffic with a true origin and destination in either Germany or Austria and/or beyond Austria or Germany. The conditions shall be comparable to those entered into with third non-alliance/other alliance carriers in connection with such route. In the case of a special prorate agreement covering international transfer traffic, this commitment shall apply only to routes where international transfer traffic exceeds 35 % of the total traffic volume on the new entrant city pair.

6. **Conditions pertaining to frequent flyer programmes (FFPs)**

If a new entrant does not participate in one of the Parties' FFPs or does not have its own comparable FFP, the Parties shall allow it on request to participate in their joint FFP for the new entrant city pairs operated by it. The agreement with the new entrant shall be concluded on reasonable and non-discriminatory conditions, including compensation for any costs incurred by the Parties.

Any agreement relating to a particular new entrant city pair and entered into pursuant to this section shall lapse if the new entrant ceases to operate that city pair.

7. **Conditions pertaining to intermodal services**

At the request of a railway or other surface transport company operating between Austria and Germany (an intermodal partner), the Parties shall enter into an intermodal agreement whereby they provide passenger air transport on their services between Austria and Germany as part of an itinerary that included surface transportation by the intermodal partner (an intermodal service).

Any intermodal agreement entered into pursuant to this section shall be based on the MITA principles (including the Intermodal Interline Traffic Agreement — Passenger and IATA Recommended Practice 1780e) and normal commercial conditions.

The Parties shall accept full pro-rating according to the terms applied by MITA members, including on routes where only rail services are provided. Where the rail operator requires notification of a sector mileage, a location identifier or an add-on fare, the Parties shall make such a request to IATA under normal IATA procedures.

At the request of a potential intermodal partner, the Parties shall make efforts in good faith to reach an agreement on conditions comparable to those granted to other intermodal partners, provided that the necessary requirements are met especially with regard to safety, quality of service, insurance coverage and liability limits. The conditions of such an agreement shall override the general obligations arising pursuant to this section.

8. **Duration of exemption and conditions**

The conditions shall apply from the date on which the Commission has adopted the exemption decision under Article 5(4) of Regulation (EEC) No 3975/87. They shall lapse on the date on which the Article 81(3) exemption no longer applies.

Should the Commission revoke the Article 81(3) exemption of the cooperation agreement pursuant to Article 6 of Regulation (EEC) No 3975/87 or an equivalent provision in any subsequent regulation, should the Article 81(3) exemption be annulled, or the Parties terminate the notified cooperation agreements, the conditions shall be null and void as from the date of revocation, the date of the annulment or the date of termination. In such a case, the Parties shall have the right to demand the return of any slots provided under these commitments to an airline which, at the time of the revocation, annulment or termination, is operating services on routes between Austria and Germany using those slots. They shall also have the right to terminate any blocked space, interlining, FFP, or intermodal agreements entered into pursuant to these commitments.