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**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 13th day of October, 2000

Joint Application of

SCANDINAVIAN AIRLINES SYSTEM

and

FLUGLEIDIR H.F. - ICELANDAIR

**for approval of and Antitrust Immunity for a
Cooperation Agreement under 49 U.S.C. 41308
and 41309**

Docket OST-2000-7248 - 8

**ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY
FOR A COOPERATIVE AGREEMENT**

By this order, we grant approval of and antitrust immunity for a Cooperation Agreement between Scandinavian Airlines System (SAS) and Flugleidir H.F. – Icelandair (Icelandair), and their respective affiliates, pursuant to 49 U.S.C. §§ 41308 and 41309, subject to the conditions described below.

In May 1995, the Governments of the United States and Iceland, and the Governments of the United States and Denmark, Norway, and Sweden (collectively referred to as Scandinavia) reached agreement on open-skies aviation relationships. The predicate for our approval and grant of antitrust immunity for the SAS-Icelandair Cooperative Agreement is the existence of these two expansive aviation accords. Both accords allow U.S. airlines to serve any point in Iceland and/or Scandinavia (and open intermediate and beyond rights) from any point in the United States and allow Iceland and Scandinavian airlines to do the same. Our evaluation indicates that open-skies initiatives encourage more competitive service, since market forces determine the price and quality of airline service, not restrictive government regulation.

I. The Cooperation Agreement

The essential elements of the Cooperation Agreement include coordination of flight schedules, route networks, and route planning; the establishment of joint marketing, advertising and distribution networks; code-sharing; the harmonization of existing internal information systems, including inventory, yield management, reservations, ticketing, accounting, maintenance, financial reporting, and distribution; revenue pooling and sharing; uniform product and service standards;

coordinated cargo programs; the parties will continue to coordinate their frequent flyer programs; and coordinated pricing and inventory control, where feasible. In summary, the Cooperation Agreement would allow the Joint Applicants effectively to operate much as a single company, while retaining their individual identities regarding ownership and control.¹

II. The Joint Application

On April 13, 2000, the Joint Applicants filed an application seeking approval of and antitrust immunity for their Cooperation Agreement, for at least a five-year term. They state that they have been code sharing on their transatlantic and intra-Europe operations since November 1999. They state that their Cooperation Agreement will allow them to broaden and deepen their transatlantic cooperation in order to improve the efficiency of their coordinated services, expand the benefits available to the traveling public, and enhance their ability to compete. They state that the objective of the Cooperation Agreement is to enable them to plan and coordinate service over their respective route networks as if they were a single entity. They also state that they will not go forward with their plans absent antitrust immunity.²

The Joint Applicants maintain that the granting of their request is supported by the many commercial benefits and efficiencies that will result from implementation of the Cooperation Agreement and by U.S. international aviation policy. They state that the alliance will create network synergies by (1) linking the U.S.-European hubs of the alliance partners, (2) producing cost efficiencies and savings through integration and coordination that can be passed on to consumers in the form of lower fares and improved service, and (3) increasing transatlantic competition. Conversely, they argue that denial of their requests will prevent consummation of the Cooperation Agreement and thereby deny these benefits to the public.

The Joint Applicants maintain that they cannot attain these public interest benefits individually, due to financial considerations; or through merger, since national ownership laws and bilateral aviation agreements with third countries make such a merger impossible.³ Therefore, they state that in the absence of a merger, the proposed joint venture requires that they craft business understandings that will expose them to the risk that these coordinated activities would be challenged on antitrust grounds. They state that the Cooperation Agreement will permit them to compete more effectively against competing global alliances. They further maintain that the Cooperation Agreement will allow them to develop mechanisms to enhance efficiencies, reduce costs and provide better service to the traveling and shipping public by providing for: increased frequencies and enhanced on-line services; expanded access to the alliance partners' beyond- and

¹ The Department previously granted antitrust immunity to a coordination agreement among SAS, Deutsche Lufthansa, A.G. (Lufthansa) and United Air Lines, Inc. (United). See Order 96-11-1. Icelandair states that it does not plan to join that 3-carrier immunized group, nor do SAS and Icelandair plan to coordinate the services subject to this application with Lufthansa and United. See Joint Application at 2, fn 3.

² Joint Application at 22-23.

³ Joint Application at 4.

behind-gateway markets; coordinated hubs and transatlantic segments; expansion of discount fares; availability of discount seats on transatlantic segments; inventory control; reduced sales, marketing and reservations costs; and more effective equipment utilization.

The Joint Applicants argue that approval of their application will advance U.S. international aviation policy objectives by serving as a catalyst for the liberalization of other international aviation markets where cooperation agreements exclusively between non-U.S. airlines are contemplated. Further, the Joint Applicants maintain that the Cooperation Agreement is fully consistent with the Department's policy of encouraging and facilitating the globalization and cross-networking of air transportation. They maintain that approval of the proposed Cooperation Agreement coupled with antitrust immunity will foster real economic and competitive pressures in the marketplace that will accelerate reform and transform aviation policy.

The Joint Applicants assert that their request is warranted by foreign policy considerations, fully consistent with U.S. international aviation policy, and is an envisioned outcome of the U.S.-Iceland and U.S.-Scandinavia open-skies accords. They maintain that their request for antitrust immunity is fully consistent with the U.S. Government's commitment to open-entry markets and free and fair international competition and to what they contend is the Department's assurance of comparable opportunities in exchange for open skies.⁴

The Joint Applicants argue that the Cooperation Agreement will not substantially reduce or eliminate competition between the United States and Europe. Indeed, they contend that a fully implemented Cooperation Agreement will enable them to increase their competitiveness, placing additional commercial pressure on rival European carriers and multinational alliances. They also maintain that virtually every transatlantic city pair in which on-line service is available is served by multiple U.S. and/or European airlines on either a nonstop, single-plane, or one-stop on-line connecting basis.⁵

Regarding the U.S.-Iceland market, the record indicates that it is small, accounting for just 0.2 percent of the total U.S.-Europe traffic. See Exhibit JA-8. Icelandair is the only carrier in this market. SAS does not currently serve U.S.-Iceland on a nonstop or connecting basis. See Exhibits JA-6 and JA-10. The Joint Applicants argue that their enhanced alliance will not have a negative impact on fares or service in the U.S.-Iceland market.

Regarding the U.S.-Scandinavia market, the record shows that SAS is the major nonstop competitor in this market, although Delta Air Lines, Inc. (Delta) and American Airlines, Inc.

⁴ Joint Application at 25-26.

⁵ The Joint Applicants assert that their combined market shares are not sufficient to enable the alliance to dominate the U.S.-Europe market, or to permit them to introduce supra-competitive pricing or to reduce service below competitive levels. They state that both SAS and Icelandair have modest shares of currently available transatlantic capacity. The Joint Applicants' exhibits indicate that SAS-Icelandair's share of the transatlantic market for departures and seat capacity is about 3.5 percent (Exhibit JA-12) and 2.5 percent (Exhibit JA-13), respectively.

(American) currently serve Stockholm, Sweden. See Exhibit JA-6.⁶ Icelandair is not a nonstop competitor in any of the three U.S.-Scandinavia markets. For these reasons, the Joint Applicants maintain that their alliance will not adversely affect competition in the U.S.-Scandinavia market.

The Joint Applicants argue that there will not be a substantial reduction in competition in air services in any city pair. They note that SAS and Icelandair do not compete on a nonstop basis in any U.S.-Iceland or U.S.-Scandinavia city-pair market. See Exhibit JA-6. Thus, they state that there will be no reductions of nonstop competition on any of the U.S.-Iceland routes as SAS does not compete in those markets, and no reduction of nonstop competition in any U.S.-Scandinavia city pairs served by SAS. Further, they assert that the Open-Skies Agreements between the U.S. and Iceland/Scandinavia will assure competitive discipline by providing for open entry and pricing and service freedom.

Finally, Icelandair states that it is prepared to join SAS and voluntarily withdraw from participation in any International Air Transport Association (IATA) traffic coordination activities that discuss any proposed through fares, rates or charges applicable between the U.S. and Denmark, Norway, Sweden, and Iceland, and the between the U.S. and any other countries designating an airline granted antitrust immunity for participation in similar alliance activities with a U.S. airline.⁷ Icelandair affirms that it is prepared to provide Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) data for all passenger itineraries that include a United States point.⁸

III. Decision Summary

Icelandair and SAS, and their respective subsidiaries, have applied for approval of and antitrust immunity for a Cooperation Agreement under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the partners. We find that the Cooperation Agreement should be approved and granted antitrust immunity, to the extent provided below.

The United States, Iceland, Denmark, Norway and Sweden are five of the growing number of nations that now support and promote international aviation liberalization. Liberalization has encouraged many open-skies agreements between the U.S. and European nations. Our decision in this case rests in large part on the substantial public benefits provided by our transatlantic open-skies agreements.

⁶ The record indicates that Delta operates daily nonstop roundtrip flights in the New York-Stockholm market, and American operates daily nonstop roundtrip flights in the Chicago-Stockholm market. In addition, Atlantis European Airlines operates a weekly nonstop roundtrip flight in the Los Angeles-Stockholm market. Other European airlines offer on-line services between the U.S. and Scandinavia on a one-stop basis. See Exhibit JA-33.

⁷ Joint Application at 27-28.

⁸ Joint Application at 28. SAS already provides such data. See Order 96-11-1 at 23.

One issue is whether it is in the public interest to consider this application, and whether the proposed alliance would substantially reduce competition in certain relevant markets. Both Icelandair and SAS are competitors in the U.S.-Scandinavia market. SAS carries more traffic between the U.S. and Scandinavia than any other airline. Icelandair carries more traffic in that market than any U.S. airline. Therefore, approval of the Icelandair-SAS proposal to integrate their transatlantic operations would reduce the number of competitors serving that market.

We have determined that the record in this case provides a solid basis for resolving these issues and for concluding that, on balance, it is in the public interest to grant the Joint Applicants' request for antitrust immunity, subject to conditions listed below. In reaching this conclusion, we have analyzed the competitive merits of this application for antitrust immunity by relying on the standards that we apply to applications for antitrust immunity.

The following factors are key to our decision.

First, the record supports a finding that approval of the Joint Applicants' request could enhance competition in the U.S.-transatlantic market. Second, the record shows that liberalization has created the framework for ensuring that the proposed arrangement would meet our standards for approval.

The United States has open-skies agreements with the Joint Applicants' homelands (Iceland, Denmark, Norway and Sweden). The United States also has open-skies agreements with 12 other European nations. Our transatlantic open-skies agreements have produced substantial public benefits, including new opportunities for airlines, new travel options for consumers, and effective competition in the overall market and in individual country-to-country markets.

It is in this context that the record supports findings that benefits and opportunities created by our open-skies agreements with the Joint Applicants' homelands and with other European nations (1) make it unlikely that the Cooperation Agreement -- subject to the conditions included here -- will substantially reduce competition in any relevant market at issue, and (2) make it likely that the Cooperation Agreement is otherwise in the public interest.

No carrier or other party has objected to the grant of the Joint Applicants' request for antitrust immunity, and there is no evidence in this record that their proposed operations will have an adverse impact on any U.S. airline's ability to compete in the relevant markets in this proceeding.

Against this background, we have determined that approval of this application should increase service options for consumers, that we can rely on the continued presence of effective competition from other airlines to discipline the integrated operations of Icelandair and SAS, and that the approval of the Cooperation Agreement is in the public interest.

We have therefore decided to approve the application subject to the following conditions. We will require the Joint Applicants (1) to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through prices between the United States and

Iceland, as well as between the United States and the homeland(s) of foreign airlines participating with U.S. airlines in other immunized alliances; (2) to file all subsidiary and or subsequent agreement(s) with the Department for prior approval; and (3) to resubmit for review on the merits their Cooperation Agreement within five years of issuance of this order. We also find it in the public interest to direct Icelandair to report full-itinerary O&D Survey data for all passengers to and from the United States (similar to the O&D Survey data reported by U.S. airlines and its partner SAS).

We have also determined it appropriate and consistent with the public interest to issue a final decision in this case. Interested parties have had full opportunity to comment on these matters. The application is unopposed on the merits.⁹ We also have determined that the proposed alliance presents no significant competitive issues requiring further consideration. We therefore will dispense with the issuance of an Order to Show Cause and issue a final order approving this unopposed application.

As a final matter, Northwest and MAS have urged us not to act on this application until their request for similar authority has been "approved." While we understand the Northwest-MAS interest in attaining approval for their pending request, we can assure the parties that the Department will act expeditiously on their request consistent with the public interest.

IV. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

A. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws to the extent necessary to allow the person to proceed with the transaction, provided that the Department determines that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that the public interest requires that we grant antitrust immunity.

⁹ On July 21, 2000, the Joint Applicants filed a reply urging the Department to grant their request no later than October 1.

On July 27, 2000, Northwest Airlines, Inc. (Northwest) and Malaysia Airlines (MAS) filed a joint surreply and a motion for leave to file. We will grant the motion to file an otherwise unauthorized document. Northwest-MAS ask that the Department not act on the SAS-Icelandair application until it has issued a final order granting their request for approval of and antitrust immunity for a Coordination Agreement. Docket OST-2000-6791.

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.¹⁰ The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.¹¹ The public benefits include international comity and foreign policy considerations.¹²

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.¹³ On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.¹⁴

V. Approval of the Agreement

The Market Summary

The U.S.-Iceland and Scandinavia markets are important international aviation markets. Iceland, Scandinavia, and the U.S. have long recognized that restrictive bilateral aviation relationships adversely affect important cultural and economic ties, and restricted the growth of trade among the five countries. For these reasons, there are now U.S.-Iceland and U.S.-Scandinavia open-skies aviation agreements. These agreements eliminate all existing barriers to new entry, expansion and competition created by government regulation of the market. The agreements provide for unrestricted competitive opportunities, including the flexibility for all U.S.-Iceland-Scandinavia airlines to operate their own direct or joint services. The U.S.-Iceland and U.S.-Scandinavia open-skies agreements recognize the value of airline networks and provide the opportunity for competing carriers and alliances to offer the services covered by these liberalized regimes.

The Department has examined and found substantial consumer and competitive benefits ensuing from open-skies agreements and from the structural changes that have occurred in the global airline system, such as alliances.¹⁵ The proposed alliance will allow the partners to broaden and deepen their existing code-share arrangement to achieve greater operational efficiencies and to continue the expansion of their route networks on a more integrated and coordinated basis.

¹⁰ Section 41309(b).

¹¹ Section 41309(b)(1)(A) and (B).

¹² Section 41309(b)(1)(A).

¹³ Section 41309(c)(2).

¹⁴ *Id.*

¹⁵ See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999.

Icelandair is the only provider of U.S.-Iceland nonstop scheduled passenger service. It provides daily nonstop roundtrip flights between Reykjavik and Boston, Baltimore, New York, Minneapolis/St. Paul. Icelandair code shares on certain Scandinavia-Reykjavik and Scandinavia-Europe flights operated by SAS.

SAS offers nonstop service between Copenhagen and Chicago, Newark, and Seattle; between Oslo and Newark; and between Stockholm and Newark and Chicago. SAS code shares on certain U.S.-Reykjavik and Reykjavik-Scandinavia flights operated by Icelandair.

SAS and Icelandair both serve the U.S.-Scandinavia market. SAS provides almost 50 nonstop flights a week in the U.S.-Denmark/Norway/Sweden markets. Thirty-five of those flights serve Denmark and Norway. Icelandair provides almost 80 flights a week in those markets. Fifty-six of those flights serve Denmark and Norway. All of Icelandair's flights are one-stop via Reykjavik, Iceland. The Joint Applicants' Scandinavia services overlap at one important gateway, New York City. SAS provides 28 nonstop flights a week from New York's Newark Airport to Scandinavia, including 21 to Denmark and Norway. Icelandair provides 21 one-stop flights from New York's JFK Airport to Scandinavia, including 14 to Denmark and Norway. United offers nonstop code-share service on flights operated by SAS in the Chicago/Newark/Seattle-Copenhagen, Newark-Oslo, and Chicago/Newark-Stockholm markets. Other U.S. airlines rely on partnerships with European airlines to serve Denmark and Norway via European gateways, and several foreign airlines operate connecting services between the United States and Scandinavia.

Public Benefit Summary

We find that the proposed alliance would provide important public benefits. The Joint Applicants contend that the proposed arrangement is pro-competitive and pro-consumer, and will offer the traveling public a greater choice of destinations and competitive routings through on-line service. We have previously determined that an important pro-competitive effect of global alliances is particularly evident in the case of the behind- and beyond-markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere interlining.¹⁶ Integrated alliances can offer a multitude of new on-line services, on a global basis. In this case, the alliance's increased ability to compete with other services in the region should enhance its ability to extend such services in the future.

In this case, the record indicates that the Icelandair-SAS alliance will bring on-line service to over 500 new city-pair markets affecting thousands of passengers.¹⁷ The alliance should also increase service opportunities for passengers traveling in Icelandair's U.S. gateway markets to points throughout Europe (served via SAS' Scandinavia hubs) and beyond, and enhance service competition between airlines for traffic in the affected markets.¹⁸ As a result, the proposed

¹⁶ See Order 96-5-12 at 17-18.

¹⁷ See Application at 21-22.

¹⁸ See International Aviation Developments: Global Deregulation Takes Off (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999.

arrangement should increase competition between the Joint Applicants and other alliances such as Northwest-KLM-Alitalia, Delta-Air France, and American-Swissair-SABENA, competing alliances that are serving points in the U.S.-Scandinavia market as part of their global networks.

The proposed alliance would also allow the partners to improve the efficiency of their operations and to otherwise work together to improve service not only in the U.S.-Iceland and U.S.-Scandinavia markets, but also in the U.S.-Europe market.

Competitive Summary

We also find that it is unlikely that the Cooperation Agreement as conditioned would substantially reduce or eliminate competition in any relevant market.

A. Antitrust Issues

The Joint Applicants state that through the Cooperation Agreement they intend to broaden and deepen their cooperation in order to improve efficiency, expand various benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Cooperation Agreement's intended commercial and business effects are equivalent to those resulting from a merger. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether transactions will substantially reduce competition in any relevant market.¹⁹

The Clayton Act test requires the Department to consider whether the Cooperation Agreement will substantially reduce competition by eliminating actual or potential competition between Icelandair and SAS so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.²⁰ To determine whether a transaction is likely to violate the Clayton Act, the Department considers whether the transaction is likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive levels). To determine whether a proposed transaction is likely to create or enhance market power, we primarily consider whether the transaction would significantly increase concentration in the relevant markets, whether the transaction raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed transaction's potential for harm.

The relevant markets requiring a competitive analysis are: first, the U.S.-Europe market; second, the U.S.-Iceland and U.S.-Scandinavia markets; and third, the city-pair markets.

¹⁹ Order 92-11-27, at 13.

²⁰ *Id.*

1. The U.S.-Europe Market²¹

We find that the Cooperation Agreement should not diminish competition in the U.S.-Europe marketplace. During the 12 months ended December 1999, our analysis show that the U.S.-Europe nonstop passenger market shares for Icelandair and SAS were 0.9 percent and 1.5 percent, respectively (the airlines' combined share of the market was 2.4 percent).²² In contrast, British Airways had a 13.9 percent passenger market share; Delta had an 8.9 percent passenger market share; American had an 8.2 percent passenger market share; Continental had a 5.9 percent passenger market share; and Northwest Airlines had a 4.9 percent passenger market share.

The U.S.-Europe marketplace is highly competitive. Eight U.S. airlines provide scheduled passenger service in this market from their hubs, either individually or in conjunction with an existing alliance. The U.S.-Europe market is also served by more than thirty foreign airlines, principally from hubs in their homelands. In these circumstances, the proposed integration of transatlantic operations by Icelandair and SAS could enhance competition in that market by increasing the ability of two relatively small airlines to compete with larger airlines.

2. The U.S.-Iceland and Scandinavia Markets

The proposed transaction should not have an adverse impact on competition in the U.S.-Iceland market because SAS cannot provide U.S.-Iceland nonstop service and is not a significant competitor in that market in any other respect.

Regarding the U.S.-Scandinavia market, we have determined that it is competitive, both as to nonstop and connecting service options. Order 96-11-1 at 14-15. Nonetheless, Icelandair is a major player in the U.S.-Scandinavia markets. Icelandair operates more U.S.-Scandinavia one-stop single-plane service than any U.S. airline. However, we note that British Airways via London, the Northwest-KLM alliance via Amsterdam, and the American-Sabena-Swissair alliance via Brussels and Zurich, among others, also offer a wide array of connecting or one-stop service between the U.S. and Scandinavia. We also note that Icelandair and SAS serve no common nonstop markets and no common nonstop European gateways.

American and Delta operate nonstop service between the U.S. and Sweden. The evidence is that we can rely on the continued presence of U.S. airline service (including nonstop service) between the U.S. and Sweden to maintain competition in that market. While no U.S. airline operates either nonstop or its own single-plane service between the United States and Denmark and the United States and Norway, the record in this proceeding shows that the opportunities for improved service and competition made possible by our open-skies agreements with Denmark, Norway, Sweden and

²¹ Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended December 1999.

²² We note that seventeen other airlines had U.S.-Europe nonstop passenger market shares larger than either of the Joint Applicants.

other European countries respond effectively to any competitive concerns in the U.S.-Denmark and U.S.-Norway markets. As a result of those agreements, eight of the ten major U.S. airlines now operate between the United States and Europe and have been able to develop innovative and effective methods for providing those operations. Those methods include nonstop service, one-stop service, service over their own systems, and/or service over aviation networks operated by a U.S. airline and one or more foreign airline partners.

This case demonstrates the substantial public benefits resulting from those opportunities. Five U.S. airlines now serve Scandinavia. Two U.S. airlines provide nonstop service to Sweden. Although no U.S. airline provides either nonstop or single-plane service to either Denmark or Norway, U.S. airlines collectively have managed to achieve a strong share of and presence in all U.S.-Scandinavian aviation markets. The evidence is that U.S. airlines are using their international aviation alliances and partnerships to carry a large volume of traffic between the U.S. and Scandinavia via European gateways. These European gateways include major traffic gathering and distribution points like Amsterdam, Brussels, Paris and Zurich. These joint services have produced a wide array of travel options for consumers, and those options have resulted in competitive U.S.-Scandinavia markets. We believe that these joint services will continue to provide an effective alternative to the Joint Applicants' proposed operations. This is particularly true in discretionary markets, where we believe that the proposed alliance could have its greatest impact.

3. The City-Pair Markets

We also find that the proposed arrangement should not substantially reduce competition in any city-pair market at issue in this proceeding. Icelandair provides one-stop service via Reykjavik between Boston, Baltimore, Minneapolis/St. Paul, New York's JFK Airport and Scandinavia. SAS provides nonstop service between Newark and Copenhagen/Oslo/Stockholm; between Chicago and Copenhagen/ Stockholm; and between Seattle and Copenhagen.²³ Both airlines serve the New York-Scandinavia market and, as noted above, both maintain an important presence in this market. Therefore, their proposal to combine their New York-Scandinavia operations raised some initial questions about the impact of the transaction on competition in this market.

However, our analysis indicates that, as in the case of the country-to-country markets, our European open-skies agreements have created the opportunity for effective U.S. airline competition between New York and Scandinavia. U.S. airlines operate nonstop service in the New York-Sweden market and one-stop code-share and network services in the other two New York-Scandinavia markets. As to the latter, we note that American and its alliance partners SABENA and Swissair, Continental/Delta and their partner Air France, and Northwest and its partner KLM, offer multiple on-line connecting flights each day via various European gateways in the New York-Denmark/Norway markets. The code-share and network services offered by these U.S. airlines under our transatlantic open-skies agreements in the New York-Scandinavia market

²³ Joint Application at 19-20.

provide an alternative to services of the proposed alliance and should effectively discipline its operations.

B. Public Interest Issues

Under Section 41309, we must determine whether the Cooperation Agreement would be adverse to the public interest. Section 41308 requires a similar public interest examination. We find that approval of the Cooperation Agreement will promote the public interest.

Open-Skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so wishes. These agreements place no limits on the number of flights that carriers can operate, and carriers can charge any fare unless both countries disapprove it.²⁴

For the reasons explained above, we have found that approving the Cooperation Agreement will benefit the traveling public, taking into account the conditions imposed by the Department, and is unlikely to reduce competition significantly in any relevant markets, and is otherwise in the public interest.

VI. Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that the public interest requires immunity. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that the public interest requires the grant of antitrust immunity.

The record shows that Icelandair and SAS will not proceed with the Cooperation Agreement without antitrust immunity.²⁵ The Joint Applicants claim that they cannot accomplish the public benefits that they seek to achieve through the formation of this alliance absent antitrust immunity. They state that the proposed integration of services will surely expose them to antitrust risk, since they fully intend to establish a common financial objective, permitting them to compete more effectively with other strategic alliances. Additionally, they indicate that full operational integration will necessarily mean that they will coordinate all of their U.S.-Europe business activities, including scheduling, route planning, pricing, marketing, and sales.²⁶

Since the antitrust laws allow competitors to engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services violates the antitrust laws.

²⁴ Order 92-8-13, August 5, 1992.

²⁵ Joint Application at 22-23.

²⁶ Joint Application at 22-23.

Nevertheless, the record suggests that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant immunity. The record also persuades us that they will not proceed without it.

To the extent discussed above, we find that we should grant antitrust immunity to the Cooperation Agreement. We also intend to review and monitor the Joint Applicants' progress in implementing the alliance in order to ensure that they are carrying out the arrangement's pro-competitive aims. We will also require them to resubmit the Cooperation Agreement for review in five years.

While we conclude that the alliance should be approved and given immunity, we find, as discussed next, that certain conditions appear necessary to allow us to find that our actions in these matters are in the public interest.

VII. IATA Tariff Coordination Issue

Consistent with our decision in Order 96-5-27, it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore have decided to condition our approval and grant of antitrust immunity to the Cooperation Agreement by requiring Icelandair and SAS to withdraw from participation in any IATA tariff conference activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and Iceland, between the United States and Scandinavia, or between the United States and any other countries designating a carrier that has been or is subsequently granted antitrust immunity or renewal thereof by the Department for participation in similar alliances.²⁷

Under this condition, the Joint Applicants may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Iceland, the United States and Scandinavia, and between the United States and the homeland(s) of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.²⁸

²⁷ This condition currently applies to prices between the United States and the Netherlands; between the United States and Germany (see Order 96-5-27 at 17); between the United States and Denmark, Norway, and Sweden (see Order 96-11-1 at 23); between the United States and Chile (see Order 99-9-9 at 21); between the United States and Italy (see Order 99-12-5 at 3); and between the United States and Belgium and Switzerland (see Order 2000-5-13 at 3-4). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (see Dockets OST-96-1116 and OST-95-618).

²⁸ Under this condition, the partners could not participate in IATA discussions of the total ("through") price (see 14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in Belgium, Chile, Denmark, Germany, Iceland, Italy, Norway, Sweden, Switzerland, and the Netherlands, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including

We find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities between the Joint Applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we find supports immunity for the proposed activities is the potential for increased price competition between the partners and other carriers, particularly other international alliances. We have found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the Joint Applicants to continue tariff coordination within IATA undermines such competition.

VIII. O&D Survey Data Reporting Requirement²⁹

We have access to market data where U.S. carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for certain large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make on international air service.

We must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. Consistent with determinations in similar cases,³⁰ we have decided to require Icelandair (SAS already reports O&D Survey data) to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by U.S. airlines and its partner SAS).³¹

both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

²⁹ We will provide confidentiality protection for these data, as we do for international O&D data submitted by U.S. airlines. Although we will use these data for internal monitoring purposes, we will not disclose it to any other airlines.

³⁰ For example, see Order 96-6-33 at 21.

³¹ Consistent with our determinations in Orders 96-7-21, 96-11-1, and 99-9-9 we intend to request other foreign carrier members of immunized international alliances to submit O&D Survey data and condition any further grants or renewals of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow Icelandair-SAS or other foreign carriers any access to U.S. carrier O&D Survey data.

To prevent this reporting requirement from having any anticompetitive consequences, we have decided to grant confidentiality to the Icelandair/SAS Origin-Destination reports and special report on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign airlines that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international O&D Survey data to air carriers directly participating in and contributing to the O&D Survey. While we have found it appropriate to direct the Joint Applicants to provide certain limited Origin-Destination data to the O&D Survey, the Joint Applicants are not air carriers within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as “[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation.” The Joint Applicants accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making the Joint Applicants’ submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

IX. Operation under a Common Name/Consumer Issues

Since operation of the Cooperation Agreement could raise important consumer issues and “holding out” questions, if the Joint Applicants choose to operate under a common name or use “common brands,” they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more airlines to be unfair and deceptive and in violation of the Act unless the airlines give reasonable and timely notice to passengers of the actual operator of the aircraft.³²

X. Summary

We grant approval and antitrust immunity to the Cooperation Agreement. We also direct the Joint Applicants to resubmit the Cooperation Agreement within five years of the issuance of this Order. However, the Department is not authorizing Icelandair-SAS to operate under a common name. If they decide to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also direct the Joint Applicants to withdraw from all IATA tariff conference activities relating to through fares, rates or charges between the United States and Iceland-Scandinavia, as well as between the United States and the homeland of any other foreign airline granted antitrust immunity or renewal thereof by the Department for participation in similar alliance activities; and

³² See 14 C.F.R. 399.88.

file all subsidiary and/or subsequent agreement(s) with the Department for prior approval.³³ We also direct Icelandair to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by U.S. airlines and its partner SAS).

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Cooperation Agreement between Flugleidir H.F. – Icelandair and Scandinavian Airlines System, and their subsidiaries, insofar as it relates to foreign air transportation;
2. We direct Flugleidir H.F. – Icelandair and Scandinavian Airlines System to resubmit their Cooperation Agreement five years from the date of issuance of this Order;
3. We condition our grant of approval and immunity to require Flugleidir H.F. – Icelandair and Scandinavian Airlines System to withdraw from participation in any International Air Transport Association tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Iceland-Scandinavia, and/or between the United States and any other countries whose designated airlines participate in similar agreements that either have been or are subsequently granted antitrust immunity or renewal thereof by the Department;
4. We direct Flugleidir H.F. – Icelandair to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner Scandinavian Airlines System and other U.S. air carriers);
5. We direct Flugleidir H.F. – Icelandair and Scandinavian Airlines System, and their subsidiaries, to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use “common brands”;
6. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3, and further described in footnote 28, to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as heretofore described;
7. We direct Flugleidir H.F. – Icelandair and Scandinavian Airlines System, and their subsidiaries, to submit any subsequent subsidiary agreements(s) implementing the Cooperation Agreement for prior approval;

³³ Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all contractual instruments that may materially alter, modify, or amend the Cooperation Agreement.

8. We grant all motions to file unauthorized documents;
9. We defer action on the motions filed by Flugleidir H.F. – Icelandair and Scandinavian Airlines System for confidential treatment of certain data and information;
10. We may amend, modify, or revoke this authority at any time without hearing;
11. This order is effective immediately; and
12. We shall serve this order on all persons on the service list in this docket.

By:

FRANCISCO J. SANCHEZ
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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