



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

Issued by the Department of Transportation
on the 26th day of January, 2001

Joint Application of

**UNITED AIR LINES, INC.,
AUSTRIAN AIRLINES, ÖSTERREICHISCHE
LUFTVERKEHRS AG,
LAUDA AIR LUFTFAHRT AG,
DEUTSCHE LUFTHANSA, AG,
and
SCANDINAVIAN AIRLINES SYSTEM**

**for approval of and Antitrust Immunity for an
Alliance Expansion Agreement and an amended
Coordination Agreement under 49 U.S.C. §§
41308 and 41309**

Docket OST-2000-7828 - 7

**ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY
FOR ALLIANCE AGREEMENTS**

By this order, we grant approval of and antitrust immunity for an Alliance Expansion Agreement¹ and an Amended Coordination Agreement² (collectively, the "Alliance Agreements") among United Air Lines, Inc. ("United"), Austrian Airlines, Österreichische Luftverkehrs AG ("Austrian") and Lauda Air Luftfahrt AG ("Lauda") (collectively, the "Austrian Group"), Deutsche Lufthansa, AG ("Lufthansa"), and Scandinavian Airlines System ("SAS"), and their respective affiliates³ (collectively, the "Joint Applicants"), pursuant to 49 U.S.C. §§ 41308 and 41309, subject to the conditions described below.

¹ For purposes of this application, the term "Alliance Expansion Agreement" shall include the arrangements identified in this application as Exhibit JA-1; Exhibit JA-2; Exhibit JA-3; any implementing agreements in furtherance of the foregoing agreements; and any transaction undertaken pursuant to the foregoing agreements.

² For purposes of this application, the term "Amended Coordination Agreement" shall include the arrangements identified in this application as Exhibit JA-4; Exhibit JA-5; any implementing agreements in furtherance of the foregoing agreements; and any transaction undertaken pursuant to the foregoing agreements.

³ For example, Tyrolean Airways ("Tyrolean"), a company organized under the laws of the Republic of Austria, is a wholly owned subsidiary of Austrian. Tyrolean conducts intra-Europe operations serving six destinations in Austria and 43 destinations in Europe, under a code-share relationship with Austrian.

I. Background

A. Delta-Austrian-Sabena-Swissair Alliance Agreements

By Order 96-6-33, issued June 14, 1996, the Department previously granted antitrust immunity to the business arrangements among Delta Air Lines, Inc. – Austrian – N.V. Sabena S.A. – Swissair, Swiss Air Transport Company, Ltd., providing for coordinated airline service.

On January 18, 2000, Austrian Airlines notified the Department that its alliance arrangement with Delta, including code sharing, would end on March 25, 2000.⁴

By notification dated February 17, 2000, Sabena and Swissair informed the Department that their cooperation with Delta would end on August 5, 2000. At that time, Sabena and Swissair also informed the Department that they would commence cooperative activities with American Airlines, Inc. on August 6, 2000.⁵

B. The Open-Skies Agreements

We exchanged diplomatic notes finalizing the Open-Skies accord with Austria on June 14, 1995. The predicate for our approval and grant of antitrust immunity for the United-Austrian-Lauda-Lufthansa-SAS Alliance Agreements is the existence of the expansive aviation agreement between the United States and Austria, the U.S. and Germany, and the U.S. and the Scandinavian countries. It allows any U.S. airline to serve any point in those countries (and open intermediate and beyond rights) from any point in the United States and allows any airline of those countries to do the same. These aviation regimes have encouraged more competitive service to the participating countries. Since market forces, not restrictive agreements, have disciplined the price and quality of airline service between the U.S. and Austria, Germany and Scandinavia, U.S. travelers have had an incentive to travel through these open-countries to points beyond, in competition with services offered through other European gateways.

II. The Alliance Agreements

The essential elements of this arrangement include coordination of routes and schedules; the establishment of joint marketing, advertising and distribution networks; co-branding and joint product development; code sharing; coordination of pricing, inventory and yield management; revenue sharing; joint procurement; uniform product and service standards; coordinated cargo

Austrian also has a 36 percent interest in Lauda, also organized under the laws of the Republic of Austria. See Joint Application at 7.

⁴ See Docket OST-2000-6803. The Joint Application of United and Austrian, fn. 1.

⁵ By Order 2000-5-13, issued May 11, 2000, the Department granted final approval and antitrust immunity for the Alliance Agreements among American, Sabena, and Swissair, effective August 6, 2000.

programs; coordination of existing information systems, to include reservations, ticketing, accounting, maintenance, financial reporting, and distribution; integration of their frequent flyer programs; harmonization of their financial reporting practices, including revenue and cost accounting practices; and the sharing of facilities and services at commonly served airports. In summary, while the partners state that they continue to be independent companies, the underlying objective of the Alliance Agreements is to enable the companies to plan and coordinate services over their respective route networks as if there had been an operational merger among them.⁶

III. The Joint Application

On August 18, 2000, the Joint Applicants filed for approval of and antitrust immunity for (1) an Alliance Expansion Agreement between United and the Austrian Group, and their respective affiliates; and (2) an amended Coordination Agreement among the Joint Applicants, for a five-year term.⁷ They state that their request is fully consistent with the U.S.-Austria open-skies agreement and with U.S. international aviation policy. Through their alliance, the Joint Applicants intend to expand the geographical scope of their on-line services, enhance the travel options they hold out to the public, and develop more competitive global networks. The record indicates that United and Austrian have been code sharing since April 2000, with United placing its code on Austrian's nonstop flights between Chicago, Washington, D.C. (Dulles Airport) and New York (JFK Airport) and Vienna, Austria.

They maintain that the proposed alliance will enable them to offer expanded and enhanced travel products to consumers. They state that the proposed integration of operations, planning, and marketing will better enable them to develop a fully integrated network of seamless transportation services, thereby enhancing customer convenience and satisfactions. The Joint Applicants also maintain that they anticipate that substantial economies can be achieved through closer coordination of their operations, marketing, planning, purchasing, and support services. They maintain that these efficiencies will allow the partners to offer more competitive fares and innovative service options. They also state that the expanded alliance will allow them to compete more effectively with their principal transatlantic competitors and their respective network operations.

They state that the Alliance Agreements will allow them to achieve additional operating efficiencies that will translate directly into greater value for the traveling and shipping public, and generate broad economic benefits for communities throughout the partners' regional route networks. They maintain that the various benefits obtainable through the proposed alliance cannot be fully achieved without antitrust immunity.

⁶ Application at 4-5.

⁷ By Order 96-5-27, issued May 20, 1996, the Department granted final approval of and antitrust immunity for an Alliance Expansion Agreement between United and Lufthansa.

By Order 96-11-1, issued November 1, 1996, the Department granted approval of and antitrust immunity for (1) an Alliance Expansion Agreement, between United and SAS, and their respective subsidiaries; and (2) a Coordination Agreement among United, Lufthansa, and SAS.

They contend that approval of their application will advance U.S. international aviation policy objectives by further encouraging the development of integrated global alliances, which the Joint Applicants maintain are the primary means for airlines to fully realize the potential benefits available under open-skies agreements. They maintain that approval of their request will provide a strong incentive for other countries to liberalize their air service relationships with the United States. They also assert that because of nationality limitations contained in most bilateral aviation agreements and limitations on foreign ownership and control in many countries, antitrust immunity is an essential tool in facilitating inter-airline arrangements that increase airlines' efficiency and competitiveness in the developing global marketplace.

In the global market, the Joint Applicants argue that providing antitrust immunity to the Alliance Agreements, enabling the Austrian Group to engage in joint operations with United and become an integral part of the existing United-Lufthansa-SAS alliance, will enhance global competition. They maintain that an immunized alliance will allow the partners jointly to provide fully coordinated connections, marketing and services that will stimulate competition with other competing airlines and alliances beyond what could be achieved through simple interlining or code sharing.⁸

In the U.S.-Europe market, they argue that the proposed alliance will not substantially reduce competition. They maintain that virtually all competitors in the transatlantic market are participating in alliances. Moreover, they state that their application demonstrates that there is no overlap between the Austrian Group's nonstop transatlantic services and those of the existing United-Lufthansa-SAS alliance.⁹ They also argue that most transatlantic city pairs in which on-line service is available are served by numerous airlines and alliances with nonstop, one-stop, or on-line connecting service.

In the U.S.-Austria market, the Joint Applicants maintain that the proposed alliance will have no adverse competitive effects. They note that neither United, nor Lufthansa, nor SAS operate nonstop service in this market.¹⁰ Therefore, they state that the proposed alliance constitutes primarily an end-to-end combination, comparable to the United-SAS alliance. Moreover, the Joint Applicants state that the U.S.-Austria open-skies regime, which permits open entry for nonstop services by U.S. airlines and ease of expansion by various European and U.S. airlines through code sharing or other cooperative arrangements over a variety of intermediate points, ensures that competition in this market is and will remain vigorous.

In the city-pair markets, the Joint Applicants maintain that there will not be a substantial reduction in competition in air services. They state that there are no city-pair markets where United and Austrian compete or United and Lauda compete on a nonstop basis. They thus assert that there

⁸ The record indicates that the proposed alliance will affect about 11,607 behind- and beyond-gateway city pairs where the alliance will create a new on-line alternative. See Application at 30.

⁹ See Exhibit JA-10.

¹⁰ See Exhibits JA-10 and JA-16.

will be no reductions of nonstop competition on any U.S.-Austria route. They argue that the U.S.-Austria open-skies' regime will assure competitive discipline by providing for open entry and pricing and service freedom.

Finally, the Joint Applicants maintain that this arrangement will allow them to operate their route networks more efficiently, establish a more integrated air transport system through improved network coordination, achieve economies of scope and scale, and enhance competition with other alliances. They state that these expected benefits will result in lower costs, enabling the partners to offer consumers a broader network of integrated services at a lower price. They assert that an immunized alliance will allow them to increase efficiencies, reduce costs, and provide better service to consumers through expanded on-line networks, improved service in behind- and beyond-gateway city pairs, coordinated networks, wider availability of discount fares, inventory control, and reduced sales and marketing costs.

The application is unopposed.

IV. Decision Summary

The Joint Applicants have applied for approval of and antitrust immunity for Alliance Agreements 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 Alliance Agreements should be approved and granted antitrust immunity, to the extent provided below.

In reaching this conclusion, we have carefully examined the impact of the proposed venture on competition in all relevant markets.

The United States is party to an open-skies agreement with Austria and party to open-skies agreements with 15 other European nations. Because of the opportunities provided by these agreements, virtually all major U.S. airlines offering transatlantic service now provide some type of service in the United States-Austria market, including service to Austria via a European intermediate point with one or more foreign airline partners.¹¹

As discussed below, we find that those services offer consumers attractive alternatives to the operations proposed by this transaction. We also find that the proposed transaction should neither prevent any U.S. airline from continuing to provide those services nor substantially reduce competition in any relevant market.

We have therefore determined that it is in the public interest to approve the Joint Application subject to the following conditions.

¹¹ See U.S.-Austria and U.S.-City-Pair Analysis, below.

In addition, 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 Austria, 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 agreements with the Department for prior approval; and (3) to resubmit for review the pertinent Alliance Agreements before May 20, 2001.¹² We also find it in the public interest to direct the Austrian Group 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 their alliance partners).

Finally, we have determined that it is 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. 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.

V. 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.

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.¹³ 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

¹² See Order 96-11-1 at 23, Dockets OST-96-1411 and OST-96-1646 (United-Lufthansa-SAS antitrust immunity cases). At that time, we directed the Austrian Group’s partners in this proposed arrangement to resubmit their Alliance Agreements before May 20, 2001.

¹³ Section 41309(b).

cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.¹⁴ The public benefits include international comity and foreign policy considerations.¹⁵

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.¹⁶ On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.¹⁷

VI. Approval of the Agreement

The Market Summary

The United States and Austria finalized an open-skies agreement in June 1995. In doing so, the two countries formally recognized that restrictive bilateral aviation relationships adversely affect important cultural and economic ties, and restrict the growth of trade between countries. The U.S.-Austria market is now governed by an open-skies agreement that has eliminated barriers to new entry, expansion and competition that were earlier created by restrictive government regulation. The United States is also party to open-skies agreements with 15 other European nations. All of these agreements maximize competitive opportunities, including the flexibility for all U.S. and affected foreign airlines to operate their own direct services, or joint services with another airline. By so doing, these agreements also recognize the value of airline networks and provide the opportunity for competing airlines and alliances to offer the services covered by the liberalized regime.

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.¹⁸ The purpose of the proposed transaction now before us is to create an expanded alliance involving these partners. It will allow the partners to achieve greater operational efficiencies and to continue the expansion of their route networks on a more integrated and coordinated basis.

As explained below, United does not now perform competitive nonstop service in the U.S.-Austria market, nor does Lufthansa or SAS. As a result, there would be no reduction in U.S.-Austria nonstop competition resulting from the integration of the Austrian Group into the existing United-Lufthansa-SAS immunized alliance.

¹⁴ Section 41309(b)(1)(A) and (B).

¹⁵ Section 41309(b)(1)(A).

¹⁶ Section 41309(c)(2).

¹⁷ *Id.*

¹⁸ See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999; and *International Aviation Developments: Transatlantic Deregulation, The Alliance Network Effect* (Second Report), U.S. Department of Transportation, Office of the Secretary, October 2000.

Austrian Airlines provides daily nonstop service between the United States and Vienna, Austria, from three U.S. gateways: Chicago (O'Hare Airport), New York (JFK Airport), and Washington, D.C. (Dulles Airport). United offers nonstop code-share service on flights operated by Austrian Airlines in each of these markets. No other U.S. airline offers nonstop service in the U.S.-Austria market. However, a number of them rely on partnerships with other foreign airlines to serve Austria via a number of European gateways.

Public Benefit Summary

We find that the proposed alliance would provide important public benefits. We have determined that the 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.¹⁹ Integrated alliances can offer a multitude of new on-line services to thousands of city-pair markets, on a global basis. In this case, the record shows that the United-Austrian alliance will link United's worldwide network (about 250 cities) with the 114 cities the Austrian Group serves, creating a combined network of almost 22,000 city pairs. The record also indicates that the Austrian Group serves 24 European points not served by the United-Lufthansa-SAS alliance.²⁰ Thus, the proposed arrangement will benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities beyond and behind major gateways. Our recent evaluations of international alliances show that they stimulate traffic in these connecting markets and thereby increase competition and service options in the overall international market and increase overall opportunities for the traveling public and the aviation industry.²¹ The proposed alliance would also allow the partners to improve the efficiency of their operations and to otherwise work together to improve service between the U.S. and Austria and between the U.S. and other international destinations.

Competitive Summary

We also find that the proposed arrangement would not substantially reduce or eliminate competition in any relevant market. Approval of the request will increase the presence and market share of the alliance partners in the U.S.-Europe market, and it will also increase concentration, but only slightly.²² More importantly, as explained the proposed alliance will face vigorous competition from other airlines and alliances in the U.S. Europe market.

We have reached the same conclusion with respect to the U.S.-Austria market and the affected city-pair markets. The record shows that there is no significant competitive overlap among the Joint Applicants in these markets, and although United is a potential competitor between Chicago

¹⁹ See Order 96-5-12 at 17-18.

²⁰ Application at 17.

²¹ See fn. 18, above.

²² See U.S.-Europe Analysis, below.

and Washington, D.C., on the one hand, and Vienna, on the other hand, approval of the arrangement will not substantially reduce competition in either relevant market.

A. Antitrust Issues

The Joint Applicants state that the proposed arrangement is intended to create to create a framework that will allow them to cooperate in order to improve efficiency, expand the benefits available to consumers, and enhance their ability to compete in the global marketplace. They state that they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Alliance Agreements' 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 mergers will substantially reduce competition in any relevant market.²³

The Clayton Act test requires the Department to consider whether the Alliance Agreements will substantially reduce competition by eliminating actual or potential competition among the Joint Applicants so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.²⁴ 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 or to reduce product and service quality below competitive levels for a significant period of time. 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.-Austria market; and third, the affected city-pair markets.

1. The U.S.-Europe Market²⁵

We find that the Alliance Agreements should not substantially reduce competition in the U.S.-Europe market. During the 12 months ended March 2000, the data show that the U.S.-Europe nonstop passenger market share for the United-Lufthansa-SAS immunized alliance was 17.8 percent. The proposed alliance nonstop passenger market share (including Austrian, 0.7 percent; and Lauda 0.2 percent) was 18.7 percent. In contrast, the American-Swissair-Sabena immunized alliance had a 13.4 percent nonstop passenger market share; and the Northwest-KLM-Alitalia

²³ Order 92-11-27, at 13.

²⁴ *Id.*

²⁵ Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended March 2000.

immunized alliance had an 11.5 percent nonstop passenger market share. British Airways had a 13.6 percent nonstop passenger market share.

We have determined that the U.S.-Europe market is highly competitive.²⁶ Eight U.S. airlines provide scheduled passenger service in this market from their hubs, either individually or in conjunction with an existing alliance. Among these U.S. airlines, Delta Air Lines (8.9 percent), Continental Airlines (6.1 percent), US Airways (2.6 percent), and Trans World Airlines (1.4 percent) had a combined nonstop passenger market share of 19 percent. The U.S.-Europe market is also served by more than thirty other foreign airlines, principally from hubs in their homelands.

2. The U.S.-Austria Market

We find that the Alliance Agreements should not substantially reduce competition in the U.S.-Austria market.

As noted, Austrian Airlines and United conduct joint code-share operations in the U.S.-Austrian aviation market. However, the code-share agreement does not provide for guaranteed block-space reservations. Accordingly, neither United nor Austrian purchases or guarantees the seats allocated to it by the other. Seats are allocated only for purposes of inventory management. The operating airline maintains control over inventory on the code-share flights. See Exhibit JA-3 at 2 and 14. In these circumstances, the partners do not incur a risk incentive to price compete in this market. Furthermore, no U.S. airline operates either nonstop or its own-single-plane service between the United States and Austria. In these circumstances, the proposed transaction would not result in any significant loss of competition in the U.S.-Austria market.

As we noted above, this market is governed by an open-skies agreement that eliminates all barriers to entry and provides the opportunity for other airlines to freely enter and meet the needs of consumers in this market. We see no reason why U.S. airlines could not begin new service to Austria if the applicants charge supra-competitive fares or lower service below competitive levels. Moreover, virtually all U.S. airlines operating in the transatlantic market have capitalized on the opportunities offered by U.S.-Europe open-skies regimes to form partnerships with European airlines and to rely on those partnerships to serve Austria. American, Delta, Continental and Northwest now serve Austria in this fashion via European gateways. These European gateways include Amsterdam, Brussels, Paris and Zurich – gateways that are both attractive destinations and major traffic gathering and distribution points. These joint services have produced a wide array of travel options for consumers and a competitive U.S.-Austria market. We believe that these joint services will continue to provide an effective alternative to the Joint Applicants' proposed operations.

²⁶ For example, see Orders 2000-4-22 at 11 and 2000-10-13 at 10.

3. The City-Pair Markets

We have reached the same conclusion with respect to the city-pair markets at issue in this proceeding.

As noted before, the record shows that United and the Austrian Group do not compete on a nonstop basis in any city-pair market. Austrian offers nonstop service in the Vienna-Chicago (O'Hare Airport), Vienna-New York (JFK Airport), and Vienna-Washington, DC (Dulles Airport) city-pair markets.²⁷ We note the Joint Applicants potential hub-to-hub strength in two of these city-pair markets -- Chicago/Washington, D.C.-Vienna.

However, one or more U.S. airlines and their airline partners offer competitive service in each of the nonstop markets now served by the Austrian Group. The Delta-Air France partnership and the Northwest-KLM immunized alliance serve the New York (JFK Airport)-Vienna market over Paris and Amsterdam, respectively. The Continental-Air France partnership serves the Newark-Vienna market over Paris. The Northwest-KLM and the American-Sabena-Swissair immunized alliances serve the Washington, D.C. (Dulles Airport)-Vienna market over Amsterdam and Brussels/Zurich, respectively. Finally, the American-Sabena-Swissair immunized alliance serves the Chicago (O'Hare Airport)-Vienna market over Brussels and Zurich.

These services offer consumers an effective choice, and this choice should effectively discipline the proposed operations of the Joint Applicants.

B. Public Interest Issues

Under Section 41309, we must determine whether the Alliance Agreements would be adverse to the public interest. Section 41308 requires a similar public interest examination. We find that approval of the Alliance Agreements 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.²⁸

For the reasons explained above, we have found that approving the Alliance Agreements 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.

²⁷ Application at 8.

²⁸ Order 92-8-13, August 5, 1992.

VII. Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to alliance 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 the Joint Applicants are unlikely to proceed with the Alliance Agreements without antitrust immunity.²⁹ 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 maintain that the proposed integration of services will assuredly 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 point out that full operational integration will necessarily mean that they will coordinate all of their U.S.-Europe business activities, including scheduling, route planning, prices, marketing, sales, and inventory control.

Since the antitrust laws let competitors engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services would be found to violate the antitrust laws. Nevertheless, the record suggests that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant their request. The record also persuades us that they will not proceed without it.

While concluding that we should approve and give immunity to the alliance, we find, as discussed next, that certain conditions are necessary to allow us to find that our actions in these matters are in the public interest.

VIII. IATA Tariff Coordination Issue

Consistent with our earlier decisions, 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 Alliance Agreements by requiring the Joint Applicants 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 Austria, or between the United States and any other countries designating an airline that has been or is subsequently granted antitrust immunity by the Department for participation in similar alliances.³⁰

²⁹ Application at 41-42. Also, see Article 7.1.2 of the Alliance Expansion Agreement (Exhibit JA-1).

³⁰ 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); between the United States and Belgium and

Under this condition, the Joint Applicants may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Austria, 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.³¹

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 among 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.

IX. O&D Survey Data Reporting Requirement³²

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.

Switzerland (see Order 2000-5-13 at 3-4); between the United States and Malaysia (see Order 2000-10-12 at 14); and between the United States and Iceland (see Order 2000-10-13 at 16). 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).

³¹ 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, Malaysia, the Netherlands, Norway, Sweden, and Switzerland, 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 both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

³² 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.

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,³³ we have decided to require the Austrian Group 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 United, Lufthansa, and SAS).³⁴

To prevent this reporting requirement from having any anticompetitive consequences, we have decided to grant confidentiality to the Austrian Group Origin-Destination reports and special reports 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 Austrian Group to provide certain limited Origin-Destination data to the O&D Survey, Austrian and Lauda 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 Austrian Group accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making the Austrian Group’s submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

X. Computer Reservations System (CRS) Issues

Another competitive issue concerns ownership interests that the Joint Applicants have in competing CRSs. Except SAS, the Joint Applicants have ownership and marketing ties with Amadeus and Galileo, competing CRS firms. Therefore, as with the Delta Air Lines-Austrian-

³³ For example, see Order 2000-10-12 at 14.

³⁴ Consistent with our determinations in similar cases (see Orders 96-7-21, 96-11-1, and 99-9-9) we intend to request other foreign airline partners of immunized international alliances to submit O&D Survey data and condition any further grants of antitrust immunity on provision of such data. We will treat the foreign airlines’ O&D data as confidential, will not allow U.S. airlines any access to the data, and will not allow the Austrian Group or other foreign airlines any access to U.S. airline O&D Survey data.

Sabena-Swissair arrangement (see Order 96-5-26 at 31-32) and the American Airlines-Sabena-Swissair arrangement (see Order 2000-4-22 at 18), the proposed integration of marketing operations of the Joint Applicants presents a risk that CRS competition may be reduced. In view of these factors, we find that any grant of antitrust immunity for the Alliance Agreements should exclude the Joint Applicants' CRS interests and operations. We note that the Joint Applicants recognize that immunity will not extend to the Joint Applicants' management of any interest they may have in individual CRSs.³⁵

XI. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreements 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.³⁶

XII. Summary

We grant approval and antitrust immunity to the Alliance Agreements. We also direct the Joint Applicants to resubmit the pertinent Alliance Agreements before May 20, 2001. However, the Department is not authorizing the Joint Applicants 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 participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and the foreign partners' homelands, and/or between the United States and any other countries whose designated airlines participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity by the Department; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval.³⁷ We also direct the Austrian Group 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 their alliance partners).

³⁵ Application at 45.

³⁶ See 14 C.F.R. 399.88.

³⁷ 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 Alliance Agreements.

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Alliance Agreements among United Air Lines, Inc., Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, and Scandinavian Airlines System, and their subsidiaries, subject to the terms, limitations, and conditions set forth in Order 96-5-27 and Order 96-11-1, and also subject to the provision that the antitrust immunity will not cover any activities of the Joint Applicants as owners of Amadeus and Galileo computer reservation systems businesses;
2. We direct United Air Lines, Inc., Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, and Scandinavian Airlines System, and their subsidiaries, to resubmit for review their Alliance Agreements before May 20, 2001;
3. We direct United Air Lines, Inc., Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, and Scandinavian Airlines System, and their subsidiaries, or any other airline involved in such arrangements, to file for prior approval a copy of any agreement(s) that may affect the United-Austrian-Lauda-Lufthansa-SAS alliance services (including, but not limited to, the Star Alliance);
4. We condition our grant of approval and immunity to require United Air Lines, Inc., Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, and Scandinavian Airlines System, and their subsidiaries, to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and the foreign partners' homelands, and/or between the United States and any other countries whose designated airlines participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity by the Department;
5. We direct Austrian Airlines, Österreichische Luftverkehrs AG, and Lauda Air Luftfahrt AG 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 their alliance partners);
6. We direct United Air Lines, Inc., Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, 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";
7. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 4 to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as heretofore described;

8. We defer action on the motions filed by United Air Lines, Inc., Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, AG, and Scandinavian Airlines System, and their subsidiaries, for confidential treatment of certain data and information;

9. This order is effective immediately;

10. We may amend, modify, or revoke this authority at any time without hearing; and

11. We shall serve this order on all persons on the service list in this docket.

By:

SUSAN E. McDERMOTT
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

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