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Order 2001-12-18  
Served: December 21, 2001



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

Issued by the Department of Transportation  
on the 21st day of December, 2001

Joint Application of

**DELTA AIR LINES, INC.  
SOCIÉTÉ AIR FRANCE  
ALITALIA-LINEE AEREE ITALIANE-S.p.A.  
CZECH AIRLINES**

under 49 U.S.C. §§ 41308 and 41309 for approval of  
and antitrust immunity for alliance agreements

Docket OST-2001-10429 - 32

**ORDER TO SHOW CAUSE**

We tentatively grant approval of and antitrust immunity for the Alliance Agreements<sup>1</sup> between (1) Delta Air Lines, Inc. ("Delta") and Société Air France ("Air France"); (2) Delta and Alitalia-Linee Aeree Italiane-S.p.A. ("Alitalia"); and (3) Delta and Czech Airlines ("CSA"), including their respective affiliates;<sup>2</sup> and (4) a coordination agreement among these four airlines, under 49 U.S.C. §§ 41308 and 41309, whereby the Joint Applicants will plan and coordinate service over their respective route networks as if there had been an operational merger among the partners.

We have, however, tentatively found it appropriate to condition our approval as explained below. We propose to withhold antitrust immunity with respect to services relating to fares and capacity for particular categories of U.S. point-of-sale local passengers in the Atlanta/Cincinnati-Paris markets. We propose to direct the Joint Applicants to file all subsidiary and/or subsequent agreements with the Department for prior approval and to resubmit for review their alliance agreements in five years. We also tentatively find it in the public interest to direct each of the foreign partners to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data ("O&D Survey") for all passenger itineraries that include a United States point

<sup>1</sup> For purposes of this application, the term "Alliance Agreements" shall include the arrangements identified in this application as Exhibit JA-1; Exhibit JA-2; Exhibit JA-3; Exhibit JA-4; any implementing agreements in furtherance of the foregoing agreements; and any transaction undertaken pursuant to the foregoing agreements.

<sup>2</sup> For purposes of this application, the term "respective affiliates" shall mean wholly-owned subsidiaries of either Delta, Air France, Alitalia, or CSA.

(similar to the O&D Survey data already reported by their partner Delta). By this Order, we are providing the Joint Applicants and other interested parties the opportunity to comment on our tentative findings.

We have the authority to approve an agreement on international aviation if we find that it is not adverse to the public interest, Section 41309. We also have the discretion to grant antitrust immunity to an agreement if we find that immunity is required by the public interest, Section 41308. In the past, we have used this authority to approve agreements and grant antitrust immunity in cases where the proposed arrangement would create an alliance that would not substantially reduce competition and would provide public benefits. As in this case, if our evaluation of a proposed alliance raises competitive concerns, we have imposed conditions on our grant of antitrust immunity where we have found it necessary to preserve competition.

We have determined that open-skies agreements are beneficial because they eliminate regulatory restrictions on competition. It is our policy to require an Open-Skies agreement as an essential predicate to any decision approving and granting antitrust immunity to an alliance application. The record analysis of the potential impact of the Alliance must assume the existence, *de jure* and *de facto*, of an Open-Skies agreement meeting U.S. objectives. Only in such markets can we be assured that immunity will be pro-competitive and pro-consumer. Moreover, the existence of an open-skies relationship in no way guarantees any grant of immunity. To the contrary, it is possible that immunity will not be found to be pro-competitive or pro-consumer in particular cases, notwithstanding an open national market, depending on such factors as relevant market concentration, potential future barriers, overall dominance and size of the applicants, among other things. In short, an Open-Skies agreement is a necessary, but not automatically sufficient, basis for the grant of antitrust immunity.

The Department has already approved several alliances between U.S. and European airlines.<sup>3</sup> Recently, the United States and France reached agreement on open skies. The flag airline of France has filed for immunity for an alliance with a U.S. airline. In this case, we are considering this alliance, which also includes two other foreign airlines (Alitalia and Czech Airlines).<sup>4</sup>

## I. Background

On December 8, 1995, the United States and the Czech Republic reached ad referendum agreement on an open-skies aviation relationship.<sup>5</sup> On November 11, 1998, the United States

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<sup>3</sup> For example, see American-Sabena-Swissair (Order 2000-5-13), Northwest-KLM (Order 93-1-11), and United-Austrian-Lauda-Lufthansa-SAS (Order 2001-1-19).

<sup>4</sup> We are also now considering similar proposals from British Airways and British Midland (Docket OST-2001-11029).

<sup>5</sup> The open-skies agreement formally entered into force on September 10, 1996.

and Italy initialed an open-skies agreement.<sup>6</sup> On October 19, 2001, the United States and France reached ad referendum agreement on open-skies.<sup>7</sup> One predicate for our approval and grant of antitrust immunity for the Alliance Agreements is the existence of these three open-skies agreements. These accords allow any U.S. airline to serve any point in the Czech Republic, France, and Italy (and open intermediate and beyond rights) and provide reciprocal rights to any Czech Republic, French, or Italian airline. Our evaluation indicates that open-skies initiatives usually encourage more competitive service, since market forces, not restrictive government regulation, determine the price and quality of airline service.

## II. The Delta-Air France-Alitalia-Czech Airlines Alliance Agreements

The Joint Applicants maintain that the proposed arrangement is comparable to the three existing transatlantic immunized alliances<sup>8</sup> in that it provides a contractual framework for cooperation in all major functional areas of the airlines' operations, while the Coordination Agreement provides for integration of all four airlines as a single operational entity.<sup>9</sup>

For example, the Alliance Agreements provide for route and schedule planning and coordination; establishment and management of marketing, advertising, sales and distribution networks, staffs, programs, policies, and systems; coordination and integration of frequent flyer programs; code sharing; coordinated pricing, inventory and yield management; revenue pooling and sharing; joint procurement of goods and services; coordinated cargo programs and distribution of cargo services; integration design, and development of information systems (including inventory control and yield management functions); coordination of revenue and cost accounting practices; sharing of facilities and services at airports; provision of aircraft and ground equipment and technical and maintenance services; and the establishment of Passenger Program management committees to administer coordination and to oversee and manage the partners' cooperative activities.

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<sup>6</sup> The Protocol between the Government of the United States and the Government of the Italian Republic, amending the Air Transport Agreement of June 22, 1970 (initialed, ad referendum, November 11, 1998, and provisionally applied as of December 6, 1999).

<sup>7</sup> The Memorandum of Consultations of October 19, 2001, with ad referendum agreement to amend the U.S.-France Agreement of June 16, 1998. The record shows that approval of this application is a precondition to implementation of the U.S.-France open-skies agreement. Joint Application at 4.

<sup>8</sup> See Northwest-KLM (Docket 48342), Order 93-1-11, issued on January 11, 1993; American-Sabena-Swissair (Docket OST-1999-6528), Order 2000-5-13, issued on May 11, 2000; and United-Austrian-Lauda-Lufthansa-SAS (Docket OST-2000-7828), Order 2001-1-19, issued on January 26, 2001.

<sup>9</sup> By Order 99-12-5, issued December 3, 1999, the Department previously granted antitrust immunity to the business arrangements among Northwest Airlines, Inc., KLM Royal Dutch Airlines, and Alitalia providing for certain coordinated airline service. On August 10, 2001, these airlines notified the Department that they had decided to terminate their alliance agreements and code-sharing arrangements involving Alitalia on October 28, 2001, with the following exception: Northwest will continue to code share on flights operated by Alitalia with respect to the carriage of U.S. mail. See Notification of Alitalia dated August 10, 2001, Dockets OST-2001-9665 and OST-1999-6501.

If approved, the proposed arrangements will allow the airline partners effectively to operate much as a single-firm, while retaining their individual identities, brands, ownership, and control.

### **III. The Application and Responsive Pleadings**

#### **A. The Application**

On August 15, 2001, the Joint Applicants filed an application seeking approval of and antitrust immunity for the Alliance Agreements, for a five-year term. They state that these arrangements are comparable to those the Department has approved and immunized in other proceedings, in that they provide a general framework for subsequent definitive agreements covering all major functional areas of the partners' operations, while permitting each of the four partners to retain its independent corporate and national identity.<sup>10</sup> While the arrangement does not involve any exchange of equity or other forms of cross-ownership,<sup>11</sup> they state that the objective of the arrangements is to enable the partners to plan and coordinate service over their respective route networks as if they were a single entity.<sup>12</sup> They state that the proposed cooperation and coordination activities contemplated by the arrangements would expose them to a risk of potential antitrust liability. Therefore, they state that they will not proceed with their proposed arrangement without antitrust immunity.<sup>13</sup>

The Joint Applicants assert that the public and commercial benefits promoted by the proposed arrangement and U.S. international aviation policy support granting their request. They represent that their alliance will produce significant efficiencies and provide a broader range of enhanced and more competitive passenger and cargo services. They state that the proposed alliance would enable the partners to create a new single network that would be comparable in size to those operated by the existing transatlantic immunized alliances. They assert that the expected benefits and efficiencies promoted by the alliance cannot be achieved absent antitrust immunity.

The Joint Applicants state that the proposed alliance will not substantially reduce or eliminate competition in any relevant market. Indeed, they argue that a fully implemented alliance will

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<sup>10</sup> Application at 3.

<sup>11</sup> However, Air France and Alitalia acknowledge that if and when in the future their respective government stockholders agree to it, there could be a very limited (less than 5 percent) exchange of stock between the two airlines. Moreover, Air France and Delta state that they have discussed participation in CSA as minority shareholders (less than 15 percent) in CSA's equity, if authorized by the Czech Government. Application at 36.

<sup>12</sup> While continuing to participate in the SkyTeam Alliance, the partners state that their relationships with non-immunized SkyTeam members will continue to be managed on an independent "arms-length" basis. Application at 36.

<sup>13</sup> Application at 19.

enable them to increase their competitiveness, creating additional consumer choice and enhanced competition in the international marketplace.

In the U.S.-Europe market, the Joint Applicants assert that in terms of its impact on U.S.-Europe competition, the alliance is comparable to the other three transatlantic immunized alliances. They argue that there is vigorous competition in the U.S.-Europe marketplace, with dozens of airlines operating hundreds of flights across the Atlantic. They maintain that, in terms of passenger market share, their arrangement could be classified as a mid-size alliance – slightly smaller than the United-Lufthansa immunized group – and somewhat larger than the American-Swissair-Sabena immunized alliance. They note that while their leading O&D city-pairs in the U.S.-Europe market will naturally include their respective European hubs (Paris, Milan, Rome and Prague), each airline will also generate substantial on-line traffic to and from cities across Europe, including cities in Austria, Belgium, Germany, the Netherlands, and Switzerland. Thus, they maintain that their proposed alliance will be directly competitive with each of the existing transatlantic immunized alliances in providing on-line service to and from many beyond-gateway points in Europe.

Regarding the country-pair markets, the Joint Applicants argue that many U.S. and other foreign airlines now provide nonstop and on-line connecting services in the U.S.-France and Italy markets.<sup>14</sup> In the U.S.-Czech Republic market, the partners state that Air France, Alitalia, and Delta do not operate nonstop service. Thus, they argue that the addition of CSA and its Prague hub into the proposed alliance is an end-to-end combination that will expand network service options, with no adverse competitive impacts. Moreover, the Joint Applicants maintain that the U.S.-Czech Republic, U.S.-France, and U.S.-Italy open-skies agreements should create unlimited opportunities for additional entry by U.S. airlines from any U.S. point.

Regarding the city-pair markets, the Joint Applicants note that the proposed alliance overlaps on four city-pair routes: Atlanta-Paris, and New York-Paris/Milan/Rome.<sup>15</sup> Nevertheless, they argue that the alliance's market presence in each of these four markets will be disciplined by several competitive factors. For example, they note that each of these city-pair markets is subject to nonstop entry at any time by another competing U.S. airline. In the Atlanta-Paris market, the Joint Applicants argue that flow traffic comprises the substantial majority of traffic on their flights, and that local passengers have many alternative connecting options.<sup>16</sup> With respect to the three New York markets, the applicants note that the Department has recognized

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<sup>14</sup> The application reflects that American Airlines (and TWA Airlines LLC), Continental Airlines, Northwest Airlines, United Airlines, US Airways, and Air Liberte provide scheduled, nonstop service in the U.S.-France market. American Airlines (and TWA Airlines LLC), Continental Airlines, Northwest Airlines, United Airlines, and US Airways provide scheduled, nonstop service in the U.S.-Italy market. Application 22-26.

<sup>15</sup> Air France notes that it discontinued Cincinnati-Paris service, in June 2001. Application at 27, fn. 7.

<sup>16</sup> Application at 27.

the unique and highly competitive nature of the New York gateway for service to Europe.<sup>17</sup> Moreover, they state that American and TWA Airlines LLC offer three daily nonstop flights in the New York-Paris market, and that Continental provides double-daily nonstop service on the Newark-Paris route. In the case of New York-Rome and New York-Milan, they state that Continental operates daily nonstop service from Newark. Additionally, they note that US Airways operates nonstop flights to Paris and Rome from Philadelphia, less than 90 miles from New York.<sup>18</sup>

The Joint Applicants also maintain that approval of their application will promote aviation liberalization, development of competitive airline networks and provide other public benefits including increased trade ties and job opportunities.

Finally, the Joint Applicants state that the grant of antitrust immunity here should also cover the coordination of (1) the presentation and sale of the carriers' airline services in computer reservations systems; and (2) the operations of their respective international reservations systems. The applicants state that they are prepared to consent to the imposition of the condition prohibiting participation in certain IATA tariff coordination activities. They are also prepared to consent to a condition restricting the use of a common service name or brand absent separate approval by the Department, and they agree to accept the O&D Survey data-reporting requirement, consistent with the Department's actions in other antitrust immunity cases.<sup>19</sup>

## **B. Responsive Pleadings**

By Notice dated August 21, 2001, the Department provided interested parties interim access to the non-public record of this case. By notice dated September 7, 2001, we established procedural dates requiring that answers to the application be filed no later than October 3, and that replies be filed no later than October 10.

On October 3, 2001, the Air Carrier Association of America ("ACAA"),<sup>20</sup> American Airlines, Inc. ("American"),<sup>21</sup> and United Air Lines, Inc. ("United") filed answers.

American does not oppose the application, provided that its joint application with British Airways for antitrust immunity is granted contemporaneously (see Docket OST-2001-11029). American states that each of the arguments offered by the joint applicants in support of this application applies equally to the American-British Airways request for antitrust immunity.

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<sup>17</sup> They note that there are 38 airlines operating 700 weekly nonstop flights between New York and points in Europe. See Exhibit JA-20.

<sup>18</sup> Application at 27-29.

<sup>19</sup> Application at 32-34.

<sup>20</sup> The ACAA also filed a motion for leave to file late. We note that its answer was filed on time and thus will dismiss its motion as moot.

<sup>21</sup> American also filed a motion for confidential treatment. We grant the motion.

American maintains that the Delta-Air France-Alitalia-CSA and American-British Airways alliances are comparable in size and scope; that open skies in the U.S.-U.K. market will yield greater public benefits than open skies in the U.S.-France market; and that prompt approval of both applications is required to enhance the carriers' viability in the global marketplace.

United supports the approval of and grant of antitrust immunity to the proposed alliance provided that a U.S.-France open-skies agreement is concluded, appropriate conditions are imposed, and the proposed United-British Midland-Austrian Group-Lufthansa-SAS application for antitrust immunity is approved contemporaneously (see Docket OST-2001-11029).

The ACAA, a trade association for low-fare airlines, states that it supports the Department's initiatives to open markets and to expand opportunities for all U.S. airlines, and that it does not oppose the formation of alliances. However, it maintains that before any decision is made on this request, the Department must ensure that domestic competition will be strengthened. The ACAA argues that granting this application is contrary to the public interest, until the Department takes action to "eliminate barriers to entry" in the domestic market. To achieve this end, the ACAA asserts that the Department needs to (1) open all domestic markets to those competing with Delta, (2) complete review of all complaints submitted by airlines competing against Delta, and (3) complete its CRS rulemaking, including the suspension of 14 CFR § 255.10(a). Finally, the ACAA states that due to the events of September 11, the Department should review the state of international competition and determine whether the granting of these alliances remains consistent with the public interest.

On October 10, 2001, the Joint Applicants filed a consolidated joint reply. They maintain that no party has raised any substantive objection to their application. They note that both American and United concur that the proposed alliance is in the public interest. They argue that there is no merit in a position that would require the Department to approve contemporaneously the American-British Airways and United-British Midland applications. They state that all the requirements for the immediate approval of this request are complete (Italy and the Czech Republic have open-skies agreements with the United States, and the United States and France initialed an open-skies agreement on October 19). They note that the U.S.-United Kingdom have not yet achieved open skies. They maintain that any delay in approving their proposed alliance would be inconsistent with the public interest and would frustrate the implementation of their new alliance services. They state that ACAA's answer was intended to promote unrelated matters and that it does not offer substantive opposition. Finally, the Joint Applicants contend that the ACAA is inappropriately using this case to raise issues that are the subject of extensive and ongoing consideration in other Department of Transportation and Federal Aviation Administration dockets.

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

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.

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 in 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 grant immunity, if the parties to such an agreement would not otherwise go forward without it, and if we find that the public interest requires that we grant antitrust immunity.

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.<sup>22</sup> 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.<sup>23</sup> The public benefits include international comity and foreign policy considerations.<sup>24</sup>

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.<sup>25</sup> If the record shows that the agreement will substantially reduce, or eliminate competition, the party defending the agreement or request has the burden of proving the transportation need or public benefits.<sup>26</sup>

#### V. Tentative Decision

We tentatively find that the Alliance Agreements should be approved and granted antitrust immunity, to the extent provided below. In reaching this tentative finding, we have carefully examined the impact of the proposed business arrangement on competition in all relevant markets.

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<sup>22</sup> Section 41309(b).

<sup>23</sup> Section 41309(b)(1)(A) and (B).

<sup>24</sup> Section 41309(b)(1)(A).

<sup>25</sup> Section 41309(c)(2).

<sup>26</sup> *Id.*

The U.S.-Czech Republic, U.S.-France, and U.S.-Italy markets are the subjects of open-skies agreements that have eliminated, or in the case of France will eliminate, all regulatory barriers to entry. These agreements should promote increased service by U.S. airlines. We also note that nothing in the record indicates other doing-business problems, such as the unavailability of airport facilities at Milan, Paris, Prague, or Rome. We have tentatively determined that a substantial amount of competitive nonstop or code-share service exists in the U.S.-France/Italy markets, and that the proposed alliance will not eliminate any nonstop competition in the U.S.-Czech Republic market.

Considering the open-entry nature of the U.S.-Czech Republic/France/Italy markets in open-skies regimes, we tentatively find that the likelihood of competitive discipline afforded by potential competing hubs and existing competition from nonstop, one-stop, and connecting services should provide competitive discipline for each of these transatlantic markets, if the partners should charge supra-competitive fares or lower service below competitive levels, except as to certain time-sensitive passengers in the Atlanta/Cincinnati-Paris markets.

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

If made final, we propose to withhold antitrust immunity with respect to services relating to fares and capacity for particular categories of U.S. point-of-sale local passengers in the Atlanta/Cincinnati-Paris markets. Furthermore, we will require the Joint Applicants to withdraw from all IATA tariff conference activities relating to through prices between the United States and the Czech Republic, France, and Italy, as well as between the United States and the homelands of foreign airlines participating with U.S. airlines in other immunized alliances; to file all subsidiary and subsequent agreements with the Department for prior approval; and to resubmit their Alliance Agreements to the Department for review within five years of the issuance of a final decision in this case. We also direct the foreign airline applicants to report full-itinerary O&D Survey data for all passenger itineraries that contain a point in the United States (similar to the O&D data already reported by Delta).

Our evaluation of this case indicates that the pro-consumer and pro-competitive effects of this alliance should be particularly evident in the so-called "behind- and beyond-gateway" markets and that a significant number of travelers and shippers should benefit from the proposed arrangement.

## **VI. Tentative Approval of the Alliance Agreements**

### **Joint Applicants' Current U.S.-Czech Republic/France/Italy Nonstop Service**

#### **Air France**

Air France is currently operating three daily nonstop flights in the New York (JFK Airport)-Paris market. It operates daily nonstop flights in the Atlanta/Boston/Chicago/Houston/Newark/Philadelphia/San Francisco/Washington, D.C. (Dulles Airport)-Paris markets. It also operates ten weekly nonstop flights in the Miami/Los Angeles-Paris markets, and five weekly nonstop flights in the Dallas-Ft. Worth-Paris market. Also, Air France has a blocked-space code-share arrangement on flights operated by Delta in the Atlanta/Cincinnati/New York (JFK Airport)-Paris and New York (JFK Airport)-Nice markets.<sup>27</sup>

#### **Alitalia**

Alitalia is currently operating daily nonstop flights in the Boston/Chicago (O'Hare Airport)/Los Angeles/Miami/New York (JFK Airport)-Milan markets, and the New York (JFK Airport)/Newark-Rome markets. Also, Alitalia code shares on flights operated by Delta in the Atlanta-Rome and the New York (JFK Airport)-Rome/Milan/Venice markets.<sup>28</sup>

#### **CSA**

CSA is currently operating four weekly nonstop flights in the New York (JFK Airport)-Prague market.

#### **Delta**

In the U.S.-France market, Delta is currently operating two daily nonstop flights in the Atlanta-Paris market, daily nonstop flights in the Cincinnati/New York (JFK Airport)-Paris markets, and five weekly nonstop flights in the New York (JFK Airport)-Nice market. Also, Delta has a blocked-space code-share arrangement on flights operated by Air France in the Atlanta/Boston/Chicago/Dallas-Ft. Worth/Los Angeles/Miami/New York (JFK Airport)/Philadelphia/San Francisco/Washington, D.C. (Dulles Airport)-Paris markets.

In the U.S.-Italy market, Delta is currently operating daily nonstop flights in the Atlanta/New York (JFK Airport)-Rome markets, five weekly nonstop flights in the New York (JFK Airport)-

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<sup>27</sup> Schedule Information Source: BACK Information Services Division, OAG Schedules for December 2001.

<sup>28</sup> The Alitalia-Delta code-share agreement provides that the operating carrier will retain ultimate control over the opening, closing and other management of seat inventory availability on code-share flights.

Milan market, and four weekly nonstop flights in the New York (JFK Airport)-Venice market. Also, Delta code shares on flights operated by Alitalia in the Boston/Chicago/Los Angeles/Miami/New York (JFK Airport)-Milan markets and the Newark/New York (JFK Airport)-Rome markets.

In the U.S.-Czech Republic market, Delta code shares on flights operated by CSA in the New York (JFK Airport)-Prague market.<sup>29</sup>

### **Competing U.S.-Czech Republic/France/Italy Nonstop Service<sup>30</sup>**

Several other U.S. airlines and a French airline provide service between several U.S. gateways and Paris. American is currently operating two daily nonstop flights in the New York (JFK Airport)-Paris market; and daily nonstop flights in the Boston/Chicago/Dallas-Ft. Worth/Miami-Paris markets. Continental Airlines is currently operating daily nonstop flights in the Newark/Houston-Paris markets.<sup>31</sup> Northwest Airlines is currently operating five weekly nonstop flights in the Detroit-Paris market. United Airlines is currently operating daily nonstop flights in the Chicago/San Francisco/Washington, D.C. (Dulles Airport)-Paris markets. US Airways is currently operating daily nonstop flights in the Philadelphia -Paris market, and a weekly nonstop flight in the Pittsburgh-Paris market. AOM French Airlines is currently operating four weekly nonstop flights in the Los Angeles-Paris market.

Several other U.S. airlines provide service between several U.S. gateways and Milan/Rome. Continental Airlines is currently operating five weekly nonstop flights in the Newark-Milan/Rome markets. United Airlines is currently operating daily nonstop flights in the Washington, D.C. (Dulles Airport)-Milan market. US Airways is also currently operating daily nonstop flights in the Philadelphia-Rome market.

#### **A. Antitrust Issues**

Since the Joint Applicants' proposed arrangement is intended to create a framework that will allow them to cooperate so the airlines can create a seamless air transport system, the Alliance Agreements' intended commercial and business effects are equivalent to those resulting from a merger of the applicants. In determining whether the proposed transaction would violate the

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<sup>29</sup> The Czech Airlines-Delta code-share agreement provides that the operating carrier will retain ultimate control over the opening, closing and other management of seat inventory availability on code-share flights.

<sup>30</sup> Schedule Information Source: BACK Information Services Division, OAG Schedules for December 2001.

<sup>31</sup> Continental and Air France code share on flights in the Newark/Houston-Paris markets. We note that Continental has reported that its code-share arrangement with Air France will terminate effective March 31, 2002. Continental plans to continue daily Newark/Houston-Paris nonstop operations. See U.S. Securities and Exchange Commission report dated October 10, 2001, and filed by Continental on October 23, 2001 (Form 8-K).

antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.<sup>32</sup>

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 produce supra-competitive pricing or reduce service below competitive levels.<sup>33</sup> 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.-Czech Republic-France-Italy markets; and third, specific city-pair markets.

#### 1. U.S.-Europe Market Analysis<sup>34</sup>

We tentatively find that the Alliance Agreements should not diminish competition in the U.S.-Europe marketplace; no party has argued otherwise. During the 12 months ended December 2000, Delta's U.S.-Europe nonstop passenger market share was 8.9 percent. The proposed alliance nonstop passenger market share (including Air France, 5.8 percent; Alitalia, 2.5 percent; and CSA, 0.2 percent) was 17.4 percent. In contrast, the United-Lufthansa-SAS-Austrian Group immunized alliance had an 18.5 percent nonstop passenger market share;<sup>35</sup> the American-Swissair-Sabena immunized alliance had a 13 percent nonstop passenger market share;<sup>36</sup> <sup>37</sup> and the Northwest-KLM immunized alliance had a 9 percent nonstop passenger market share. British Airways had a 12.7 percent nonstop passenger market share.

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<sup>32</sup> Order 92-11-27 at 13.

<sup>33</sup> *Id.*

<sup>34</sup> Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended December 2000.

<sup>35</sup> Including Icelandair (0.85 percent) that has an immunized alliance with SAS; and Air New Zealand (0.62 percent) that has an immunized alliance with United, this alliance had a 20 percent nonstop passenger market share. See Orders 2000-10-13 (Docket OST-2000-7248) and 2001-4-2 (Docket OST-1999-6680), respectively.

<sup>36</sup> Including American's wholly-owned subsidiary TWA Airlines LLC (1 percent), this alliance had a 14 percent nonstop passenger market share.

We have tentatively determined that the U.S.-Europe market is highly competitive.<sup>38</sup> Eight U.S. airlines provide scheduled passenger service in this market from their hubs, either alone or in conjunction with an existing alliance. Among the non-aligned U.S. airlines, Continental Airlines had 6.1 percent, and US Airways had 3 percent or a total nonstop passenger market share for non-aligned U.S. airlines of 9.1 percent. The U.S.-Europe market is also served by more than forty foreign airlines, principally from hubs in their homelands.

## **2. U.S.-Czech Republic, France and Italy Market Analysis**

In the U.S.-France market, Air France had the largest nonstop passenger market share with 47.2 percent. By comparison, American had 11.8 percent; United had 11.7 percent; Delta had 9.7 percent; Continental had 7.5 percent; US Airways had 5.4 percent; TWA had 2.9 percent; Northwest had 2.6 percent; and AOM-Minerve had 1.2 percent.<sup>39</sup>

In the U.S.-Italy market, Alitalia had the largest market share with 42.3 percent. By comparison, both Continental and Delta each had about 15.4 percent; American/TWA had 9.3 percent; Northwest had 6.9 percent; and both United and US Airways each had about 4.6 percent.

In the U.S.-Czech Republic market, CSA is the only airline offering nonstop service. Finnair (via Helsinki), British Airways (via London), LOT (via Warsaw), Malev (via Budapest), Northwest (via Amsterdam), and United (via Copenhagen/Düsseldorf/ Munich/Vienna) all offer service, or are parties to immunized alliances that offer competitive code-share options between the U.S. and Prague.

In these circumstances, the proposed Delta-Air France-Alitalia-CSA alliance will have a large share of the U.S.-Czech Republic/France/Italy markets. Nonetheless, considering the competitive nonstop service offered and the open-market conditions, we tentatively find that the proposed alliance will not allow the Joint Applicants to charge supra-competitive prices or to reduce service below competitive levels in these three country-to-country markets. No party has presented contrary evidence.

As we noted above, these three markets are governed by open-skies agreements that eliminate all regulatory barriers to entry and provide the opportunity for other airlines to freely enter and meet the needs of consumers in these markets. U.S. airlines competing with Delta (and Air

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<sup>37</sup> American notified the Department that it had terminated its business arrangement with Swissair on November 8, 2001 (Docket OST-1999-5944). However, our evaluation indicates that Swissair's U.S.-Europe nonstop passenger market share was only about 3 percent. Therefore, the termination of the American-Swissair alliance does not substantially affect our analysis of the U.S.-Europe market.

<sup>38</sup> For example, see Orders 2000-4-22 at 11 and 2000-10-13 at 10.

<sup>39</sup> Source: T100 and T100(f) nonstop segment and market data, for the 12 months ended December 2000.

France and Alitalia) offer a substantial amount of service between the United States and France and Italy, and alliances including U.S. airlines offer competitive service between the United States and the Czech Republic. Currently, two U.S. airlines besides Delta operate nonstop flights to Rome (Continental and US Airways) and Milan (Continental and United). In the U.S.-France market, five U.S. airlines besides Delta operate nonstop flights to Paris (American, Continental, Northwest, United, and US Airways). Moreover, competing U.S. airlines are parties to airline alliances that offer additional competitive options in the U.S.-France, U.S.-Italy, and U.S.-Czech Republic markets over their networks, such as the Northwest-KLM, and United-Austrian Group-Lufthansa-Scandinavia immunized alliances. We are aware of no barriers to entry in the U.S.-France/Italy/Czech Republic markets. There is no indication, for example, that an airline wanting to increase service or begin new service at Paris, Rome, Milan, or Prague will be unable to obtain the gates and other facilities needed for such service. If the applicants began charging supra-competitive fares (or lowered service below competitive levels), other airlines could enter the market or add flights in response and thereby provide competitive discipline.

These considerations support a tentative finding that it is likely that the services of the proposed alliance will be disciplined effectively by competition provided by other airline services in these markets.

### **3. The City-Pair Markets<sup>40</sup>**

A third relevant class of market requiring competitive analysis is the city pair. There are six local markets that raise competitive concerns: the Atlanta/Cincinnati-Paris markets because Delta and Air France are dominant in their hubs in those cities; the New York-Paris market because Delta and Air France now provide head-to-head nonstop competing service; the New York-Nice market because Delta and Air France provide competing blocked-space code-share service;<sup>41</sup> and the New York-Milan/Rome markets because Delta and Alitalia now provide head-to-head nonstop competing service.

While Delta and Air France provide blocked-space code-share operations in twelve U.S.-France nonstop markets, all but Atlanta/Cincinnati-Paris and New York-Nice provide the traveling and shipping public with competing nonstop services by other airlines. As to the nine remaining U.S.-France blocked-space code-share markets: in the Boston/Dallas-Ft. Worth/Miami-Paris markets, American Airlines provides competing nonstop service; in the Chicago-Paris market, American Airlines and United Airlines provide competing nonstop service; in the Los Angeles-Paris market, AOM French Airlines provides competing nonstop service; in the Philadelphia-Paris market, US Airways provides competing nonstop service; and in the San Francisco/Washington, D.C. (Dulles Airport)-Paris markets, United Airlines provides competing nonstop service. (Our

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<sup>40</sup> Source: T100 and T100(f) nonstop segment and market data, for the 12 months ended December 2000.

<sup>41</sup> Under the Delta-Air France blocked-space arrangement, the marketing airline acquires seat capacity on the operating airline's flights and the operating airline sells such capacity to the marketing airline on terms and conditions agreed to by the partners.

evaluation of the New York-Paris market is discussed below). Based on the above, we find that the proposed transaction will not result in a substantial loss of competition in these described markets.

Delta is the hub-dominant airline in both Atlanta and Cincinnati, as is Air France at Paris and the Joint Applicants may therefore have some power over prices and capacity in these two markets. For the twelve months ended December 2000, in the Atlanta-Europe market, Delta-Air France operated about 76 percent of the total departures from Atlanta, and carried about 77 percent of the passengers from Atlanta. In Cincinnati, Delta-Air France provided about 96 percent of total departures and passengers.

We also note that other competing airlines offer on-line connecting service to Paris via other gateways. Atlanta-Paris passengers can travel on American via its Chicago and Miami hubs, on Continental via its Newark hub, on Northwest via its Detroit hub, on United via its Chicago and Washington D.C. (Dulles Airport) hubs, on US Airways via its Philadelphia and Pittsburgh hubs, and on British Airways via London. Cincinnati-Paris passengers can travel on American via its Chicago hub; on Continental via its Newark hub; on Northwest via its Detroit hub; on United via its Chicago hub; and on US Airways via its Philadelphia and Pittsburgh hubs. These connecting services should provide a competitive alternative for the bulk of passengers whose greater flexibility in time of travel permits them readily to take advantage of competing one-stop and connecting fares on other airlines.<sup>42</sup>

However, we cannot reach the same conclusion with respect to time-sensitive travelers in these two markets. They are most at risk in this case because many of these passengers depend on nonstop service to meet their travel needs, and would lose the benefit of competitive nonstop service upon implementation of the proposed alliance. Therefore, consistent with previous determinations on routes similar to these, we tentatively find it appropriate to exclude certain local passengers as described in Appendix A.<sup>43</sup>

In the New York-Milan/Paris/Rome markets, there will remain a significant competitor to the alliance for non-stop travel,<sup>44</sup> <sup>45</sup>and in each of these three markets and the New York-Nice market there will remain a number of competitive one-stop and connecting services.<sup>46</sup>

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<sup>42</sup> See Order 2000-4-22 at 13 (Docket OST 1999-6528, American-Swissair-Sabena request for antitrust immunity).

<sup>43</sup> See Order 2000-4-22 at 12-13.

<sup>44</sup> In the New York-Milan market, Continental's nonstop passenger market share was 25 percent. In the New York-Paris market, Continental's nonstop passenger market share was 19.8 percent, and the American/TWA nonstop passenger market share was 18.7 percent (a combined market share of 38.5 percent). In the New York-Rome market, Continental's nonstop passenger market share was 35.5 percent.

<sup>45</sup> Source: T100 and T100(f) nonstop segment and market data, for the 12 months ended December 2000.

<sup>46</sup> For example, New York-Milan/Paris passengers can travel on British Airways via London, on the Northwest-KLM immunized alliance via Amsterdam, and on the United-SAS immunized alliance via Copenhagen. New York-Rome passengers can travel on British Airways or Virgin Atlantic via London,

In reaching this tentative decision, we tentatively find that the loss of competition in these New York-Europe markets should not result in substantial competitive harm to passengers for several reasons.

The New York metropolitan area is the largest air traffic market in the United States. It is also the largest traffic generating point in the United States-Europe market. Consequently, the New York markets are most attractive to new airline entry in open-skies markets in the event of supra-competitive fare levels.

Unlike the situation in Cincinnati and Atlanta, a potential new entrant in the New York market would not be required to overcome a Delta-dominated hub. For the twelve months ended December 2000, in the New York-Europe market, Delta and its foreign alliance members operated about 22 percent of the departures from New York, and carried about 21 percent of the passengers from New York, less than the market share normally considered necessary to achieve hub dominance. By comparison, Continental Airlines operated about 16 percent of total departures, and carried about 15 percent of the passengers; American-TWA and its immunized foreign alliance members operated about 17 percent of total departures, and carried about 14 percent of the passengers; United and its immunized foreign alliance carriers' share of the market was about 13 percent for both departures and traffic; and British Airways' share of the market was about 9 percent for both departures and traffic.

Again, unlike at its Cincinnati and Atlanta hubs, Delta does not dominate U.S. domestic feed traffic at New York's JFK Airport. For the twelve months ended June 2001, Delta operated 16.9 percent of domestic departures and 19 percent of domestic seats. In comparison, American-TWA operated 28 percent of domestic departures and 35.6 percent of domestic seats, and United operated 7 percent of domestic departures and 9.7 percent of domestic seats.

## **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. Except as noted, we tentatively find that approval of the Alliance Agreements will promote the public interest.

We tentatively 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.<sup>47</sup> Integrated

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on the Northwest-KLM immunized alliance via Amsterdam, and on the United-Lufthansa-SAS immunized alliance via Copenhagen and Düsseldorf. New York-Nice passengers can travel on British Airways and United/BMI via London, on the Northwest-KLM immunized alliance via Amsterdam, and on the United-SAS immunized alliance via Copenhagen.

<sup>47</sup> See Order 96-5-12 at 17-18.

alliances can thus offer a multitude of new on-line services to thousands of city-pair markets, on a global basis. In this case, the Joint Applicants maintain that their proposed alliance has the potential to offer on-line service in nearly 40,000 city-pairs worldwide.<sup>48</sup> We find that the arrangement could result in enhanced on-line connecting opportunities in over 10,000 new city-pair markets from 191 U.S. cities to 284 cities in Europe and beyond; and that over 30,000,000 passengers worldwide could benefit from increased competition as a result of the proposed alliance.<sup>49</sup> Thus, we tentatively find that the proposed alliance would 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 evaluation of international alliances shows that they can stimulate traffic in these connecting markets and thereby increase competition and service options in the overall international market, thus enhancing overall opportunities for the traveling public and the aviation industry.<sup>50</sup> The proposed alliance should also allow the Joint Applicants to improve the efficiency of their operations and to otherwise work together to improve service between the U.S. and the Czech Republic-France-Italy and between the U.S. and other international destinations.

Moreover, approval of the proposed alliance would facilitate the implementation of the open-skies agreements with the foreign applicants' homeland governments and allow the Joint Applicants to implement the proposed coordinated activities so as to use more efficiently the opportunities that are available to them by these accords.

## VII. Other Issues

The ACAA notes that the events of September 11 have compelled U.S. airlines to make many organizational and operational changes in both their international and domestic operations and therefore the ACAA questions whether these proposed alliance arrangements are now in the best interest of the public. As our tentative evaluation shows, the proposed alliance should be pro-consumer and not substantially reduce competition, as limited and conditioned.

The ACAA also maintains that prior to approving this application, the Department should "open" all domestic markets to those airlines competing with Delta, review all complaints submitted concerning Delta behavior in the domestic market, and complete its computer reservation system rulemaking. As to these domestic competition issues, we will not address them in this proceeding. The Department is currently dealing with these concerns in other proceedings, and we find that the issues raised by the ACAA are more appropriately considered in these other fora.

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<sup>48</sup> Application at 11.

<sup>49</sup> Our evaluation of these issues were derived from the Department's Origin-Destination Survey of Airline Passenger Traffic data and T-100 and T100(f) nonstop segment and market data, for the 12 months ended December 2000.

<sup>50</sup> *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.

Finally, American and United ask the Department to grant this application contemporaneously with the American-British Airways and United-British Midland-Austrian Group-Lufthansa-SAS applications (see Docket OST-2001-11029). It is our normal practice to process applications of this kind on a case-by-case basis, unless we find grounds to consolidate the proceedings. Such grounds are not present here and this application is now ripe for action. We find that it would be inconsistent with the public interest to frustrate the implementation of these new and important pro-competitive alliance services.

### **VIII. Tentative Grant of Antitrust Immunity**

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that immunity 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. 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 will not proceed with the Alliance Agreements without antitrust immunity.<sup>51</sup> 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 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, pricing, marketing, sales, and inventory control.<sup>52</sup>

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, subject to the conditions being imposed here by us. 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 tentatively concluding that we should approve and give immunity to the alliance,<sup>53</sup> we tentatively 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.

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<sup>51</sup> Application at 4.

<sup>52</sup> Application at 5.

<sup>53</sup> The immunity that we propose to grant here would apply solely with respect to transactions between the Joint Applicants and their wholly-owned affiliates. The immunity would not extend to code-share

As a final matter, while the Joint Applicants note that they will continue to participate in the SkyTeam global alliance, they state that their business relationships with non-immunized SkyTeam members will continue to be managed on an independent “arms-length basis.”<sup>54</sup> Therefore, if our tentative decisions here are finalized, we will direct the Joint Applicants to file, for prior approval by the Department, a copy of any agreements created for the purpose of linking the proposed arrangement with SkyTeam.<sup>55</sup>

#### **IX. 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 tentatively 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 the foreign applicants’ homelands, 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 immunized alliances.<sup>56</sup>

Under this condition, the Joint Applicants may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and the Czech Republic-France-Italy, and between the United States and the homelands 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.<sup>57</sup>

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operations or other coordinated activities involved in such transactions to the extent applying to airlines other than the Joint Applicants and their wholly-owned affiliates.

<sup>54</sup> Application at 36.

<sup>55</sup> In addition to the Joint Applicants, SkyTeam includes Aeromexico and Korean Air.

<sup>56</sup> 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 Austria (see Order 2001-1-19 at 16); between the United States and Chile (see Order 99-9-9 at 21); between the United States and Belgium (see Order 2000-5-13 at 3-4); between the United States and Malaysia (see Order 2000-10-12 at 14); between the United States and Iceland (see Order 2000-10-13 at 16); between the United States and Panama (see Order 2001-2-5 at 14); and between the United States and New Zealand (see Order 2001-4-2 at 3). 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).

<sup>57</sup> In addition to the foreign applicants’ homelands, 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 Austria, Belgium, Chile, Denmark, Germany, Iceland, Malaysia, the Netherlands, New Zealand, Norway, Panama, and Sweden, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service.

We tentatively 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 tentatively find supports immunity for the proposed activities is the potential for increased price competition between the partners and other airlines, particularly other international alliances. We have tentatively 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. We have previously found in similar cases that competition is undermined if the Joint Applicants are permitted to continue tariff coordination within IATA.

#### **X. O&D Survey Data Reporting Requirement**

We have access to market data where our 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 from several 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,<sup>58</sup> we have therefore tentatively decided to direct Air France and CSA, and to continue requiring Alitalia, 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 Delta Air Lines).<sup>59</sup>

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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.

<sup>58</sup> For example, see Order 2001-1-19 at 16.

<sup>59</sup> 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

To prevent this reporting requirement from having any anticompetitive consequences, we have tentatively decided to grant confidentiality to the foreign applicants' 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 Origin-Destination data to air carriers directly participating in and contributing to the O&D Survey. While we have tentatively found it appropriate to direct the foreign partners to provide certain limited Origin-Destination data to the O&D Survey, the foreign partners 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 "any 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 foreign partners accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making the foreign partners submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

## **XI. Computer Reservations System (CRS) Issues**

Another competitive issue concerns ownership interests that the Joint Applicants have in competing CRSs. Except CSA, the Joint Applicants have ownership and marketing ties with Amadeus, Galileo, and Worldspan, competing CRS firms. Therefore, as with 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 tentatively 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 their management of any interest they may have in individual CRSs.<sup>60</sup>

## **XII. 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," we have tentatively determined that 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

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allow the foreign partners in this case or other foreign airlines any access to U.S. carrier O&D Survey data. We will use these data only for internal analytical purposes.

<sup>60</sup> Application at 32-33.

violation of the Act unless they give reasonable and timely notice to passengers of the actual operator of the aircraft.<sup>61</sup>

### **XIII. Summary**

We tentatively grant approval and antitrust immunity to the Alliance Agreements, subject to the conditions and limitations in Appendix A, and as described in this order. We also tentatively direct the Joint Applicants to resubmit the Alliance Agreements five years from the date of the issuance of the final order in this case. However, the Department is not authorizing Delta-Air France-Alitalia-CSA to operate under a common name. If they choose to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also tentatively direct them to withdraw from participation in any 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 agreements with the Department for prior approval. We also tentatively direct the foreign airline applicants to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by Delta Air Lines).

Objections or comments to our tentative findings are due no later than 14 calendar days from the service date of this order. Answers to objections shall be due no later than 7 calendar days thereafter.

### **ACCORDINGLY:**

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting approval and antitrust immunity, as discussed by this order, to the Alliance Agreements between and among Delta Air Lines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, in so far as it relates to foreign air transportation. The tentative approval granted here would be subject to the proposed limits and conditions indicated in Appendix A; and the condition that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of Amadeus, Galileo, and Worldspan computer reservation systems businesses;
2. We tentatively direct Delta Air Lines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, to resubmit their Alliance Agreements for review five years from the date of issuance of the final order in this case;

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<sup>61</sup> See 14 C.F.R. Part 257.

3. We tentatively direct Delta Air Lines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, to submit any subsequent subsidiary agreements implementing the Alliance Agreements for prior approval;<sup>62</sup>
4. We tentatively direct interested persons to show cause why we should not further condition our grant of approval and immunity to require Delta Air Lines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, 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 Czech Republic, France, and Italy, and/or between the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity by the Department;
5. We tentatively direct Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, 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 Delta Air Lines, Inc.);
6. We tentatively direct Delta Air Lines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, 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 tentatively 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 previously described;
8. We defer action on the motions filed by Delta Air Lines, Inc., Société Air France, Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, for confidential treatment of certain data and information;
9. We direct interested persons wishing to comment on our tentative findings and conclusions, or objecting to the issuance of this order to file an original and five copies in Docket OST-2001-10429 and to serve a statement of objections or comments together with any supporting evidence the commenter wishes the Department to notice on all persons on the

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<sup>62</sup> 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.

service list in this docket no later than 14 calendar days from the service date of this order. Answers to objections shall be due no later than 7 calendar days thereafter;<sup>63</sup>

10. If the parties file timely and properly supported objections, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived;

11. We grant all motions for leave to file otherwise unauthorized documents; and

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

By:

**READ C. VAN DE WATER**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:  
<http://dms.dot.gov/search>*

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<sup>63</sup> Service should be by hand delivery or telefax. The original filing should be on 8½" by 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system. In the alternative, filers are encouraged to use the electronic submission capability through the Dockets DMS Internet site (<http://dms.dot.gov>) by following the instructions at the web site. For the convenience of the parties, service by facsimile is authorized. Parties should include their fax numbers and Email addresses on their submissions and should indicate the method of service on their certificates of services.

**PROPOSED CONDITIONS  
GOVERNING THE ANTITRUST IMMUNITY FOR THE  
ALLIANCE AGREEMENTS AMONG  
DELTA AIR LINES, INC., SOCIÉTÉ AIR FRANCE,  
ALITALIA-LINEE AEREE ITALIANE-S.p.A. and CZECH AIRLINES**

**Grant of Immunity**

The Department grants immunity from the antitrust laws to Delta, Air France, Alitalia, and CSA, and their affiliates, for their Alliance Agreements, as defined by this order, between and among Delta, Air France, Alitalia, and CSA and for any agreement insofar as it applies between those parties incorporated in or pursuant to the Alliance Agreements.

**Limitations on Immunity**

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or yield management coordination, or pooling of revenues, with respect to unrestricted coach-class fares or any business or first-class fares for local U.S.-point-of-sale passengers flying nonstop between Atlanta/Cincinnati and Paris; or the provision by one party to the other of more information concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

**Exceptions to Limitations on Immunity**

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion or sale by the parties of the following discounted fare products with respect to local U.S.-point-of-sale passengers flying nonstop between Atlanta/Cincinnati and Paris: corporate fare products; consolidator/wholesaler fare products; promotional fare products; group fare products; and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code. For immunity to apply, however: (1) in the case of corporate fare products and group fare products, local U.S. point-of-sale non-stop traffic shall constitute no more than 25 percent of a corporation's or group's anticipated travel (measured in flight segments) under its contract with Delta-Air France-Alitalia-CSA; and (2) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar types of fares for travel in at least 25 city-pair markets in addition to Atlanta/Cincinnati and Paris.

**Definitions for Purposes of this Order**

"Corporate fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to corporations or other entities for authorized travel, these discounts may be stated as percentage discounts from specified published fares, net prices, volume discounts, or other forms of discount.

"Consolidator/wholesaler fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to (1) consolidators for sale by such consolidators to members of the general public either directly, or through travel agents or other intermediaries, at prices to be decided by the consolidator, or (2) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, these discounts, in either case, may be stated either as net prices due the parties on sales by such consolidator or wholesaler, or as percentage commissions due the consolidator or wholesaler on such sales.

"Promotional fare products" means published fares that offer directly to the general public for a limited time discounts from previously published fares having similar travel restrictions.

"Group fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices for the members of an organization or group to travel from multiple origination points to a single destination to attend an identified special event, these discounts may be stated either as percentage discounts from specified published fares or net prices.

**Clarification of Scope of Limitation on Immunity**

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Agreements other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number frequencies and types of aircraft to operate on the Atlanta/Cincinnati-Paris routes, and the configuration of such aircraft; coordination of pricing, inventory and yield management and pooling of revenues, with respect to non-local passengers traveling on nonstop flights on the Atlanta/Cincinnati-Paris routes; and the provision by one party to the other of access to its internal reservations system to the extent necessary for use exclusively in checking-in passengers or making sales to or reservations for the general public at ticketing or reservations facilities.

**Review of Limitations on Immunity**

Upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current competitive conditions in the Atlanta/Cincinnati-Paris markets; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.