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Order 2002-1-6
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 18th day of January, 2002

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-** 36

FINAL ORDER

By this Order, we make final our tentative findings in Order 2001-12-18, dated December 21, 2001, and grant final approval of and antitrust immunity for the Alliance Agreements[1] 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;[2] and (4) a coordination agreement among these four airlines, under 49 U.S.C. §§ 41308 and 41309. Our action here is subject to the various terms, conditions, provisions and limitations proposed in Order 2001-12-18.

I. Background

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

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1 For purposes of this order, the term "Alliance Agreements" shall include the arrangements identified in the application in 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.

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

functional areas of the partners' operations, while permitting each of the four partners to retain its independent corporate and national identity.[3] Even though the arrangement does not involve any exchange of equity or other forms of cross-ownership,[4] 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.[5] They also state that they will not proceed with their proposed alliance without antitrust immunity.[6]

On December 8, 1995, the United States and the Czech Republic reached ad referendum agreement on an open-skies aviation relationship.[7] On November 11, 1998, the United States and Italy initialed an open-skies agreement.[8] On October 19, 2001, the United States and France reached ad referendum agreement on open-skies.[9] 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.

B. Order to Show Cause

On December 21, 2001, the Department issued an Order to Show Cause (Order 2001-12-18). We tentatively determined to grant approval of and antitrust immunity for the proposed Alliance Agreements, subject to certain conditions and limitations. We tentatively decided 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 tentatively directed the Joint Applicants to resubmit to the Department for review their Alliance Agreements five years from the date of issuance of this Order. We also tentatively determined

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3 Application at 3.

4 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.

5 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.

6 Application at 19.

7 The open-skies agreement formally entered into force on September 10, 1996.

8 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).

9 The Memorandum of Consultations of October 19, 2001, with ad referendum agreement to amend the U.S.-France Agreement of June 16, 1998.

that if the partners decide to operate under a common name or brand, they would have to seek prior approval before implementing the change.

Moreover, we tentatively directed the Joint Applicants to withdraw from participation in International Air Transport Association tariff conference activities, as set forth below; and file all subsidiary and/or subsequent agreements with the Department for prior approval. We also tentatively directed the foreign applicant partners to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic ("O&D Survey") data for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by their partner Delta).

We provided the Joint Applicants and any interested parties the opportunity to comment on our tentative findings and conclusions.

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

The Joint Applicants 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.[10] The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[11] The public benefits include international comity and foreign policy considerations.[12]

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[10] Section 41309(b).

[11] Section 41309(b)(1)(A) and (B).

[12] Section 41309(b)(1)(A).

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[13] 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.[14]

III. Responsive Pleadings

On January 4, 2002, the Air Carrier Association of America ("ACAA") and the American Society of Travel Agents, Inc. ("ASTA") filed comments.

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 again argues that before any decision is made on this request, the Department must ensure that domestic competition will be strengthened. To achieve this end, the ACAA has asserted 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). The ACAA also disputes the Department's finding that it is dealing with these concerns in other proceedings, and that these issues are more appropriately resolved in these other fora. The ACAA urges the Department to consider its concerns prior to making a decision in this case.

The ASTA asks, for the first time in this proceeding, that the Department confer immunity on travel agencies who will be affected necessarily by these proposed arrangements. It states that one of the effects from granting immunity to an alliance partnership has been to allow the affected airlines to coordinate with each other on marketing strategies and tactics and to agree on the commissions that they will pay travel agencies and other third parties who book their services, among other things. The ASTA maintains that the immunizing process creates market power relationships among the airline partners that enable them to dictate terms to agents and compel agents to adhere to the airlines' policies and practices. The ASTA maintains that the relief it seeks for travel agents would permit them to respond collectively to joint actions of the immunized airlines that are directly detrimental to the interests of those agents.

On January 11, 2002, the Joint Applicants filed a reply. They state that neither party disputes the factual, policy, or legal findings set forth in Order 2001-12-18. They state that the answers filed by the ACAA and ASTA focus on extraneous issues and that their comments merely seek to promote the agendas of their constituents, which are unrelated to the subject matter of this proceeding. The Joint Applicants state that the ACAA's answer is a misdirected motion for expedition with respect to various unrelated domestic aviation proceedings. The Joint Applicants maintain that there is no basis for the Department to consider ASTA's request for

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13 Section 41309(c)(2).

14 *Id.*

travel agent immunity in this case. They urge the Department to proceed with the issuance of a final decision, since they argue that no party has raised a substantive objection to Order 2001-12-18.

IV. Decision

By Order 2001-12-18, we tentatively found that the proposed arrangement should be approved and granted antitrust immunity. We carefully examined the impact of the proposed business arrangement on competition in all relevant markets.

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. We tentatively found that these agreements should promote increased service by U.S. airlines. We also noted that nothing in the record indicated other doing-business problems, such as the unavailability of airport facilities at Milan, Paris, Prague, or Rome. We 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.

We tentatively found, considering the open-entry nature of the U.S.-Czech Republic/France/Italy markets in open-skies regimes, 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.

The opposing parties have contested none of our tentative findings, and we therefore adopt each of them here.

We are unwilling to grant ASTA's request that travel agencies be granted immunity so that they can jointly respond to the alliance partners' efforts to develop a joint marketing program when that injures travel agencies. We are granting antitrust immunity to the alliance because we have found that the alliance, subject to the conditions imposed by this order, will not substantially reduce competition in any market. ASTA has not attempted to show that we erred in making this finding. The alliance partners, like the partners in any joint venture, may well wish to develop joint marketing strategies to further their common venture. ASTA has not attempted to show that any of the alliances approved by us have led to joint decisions on matters such as travel agency commission rates that would violate the antitrust laws. In these circumstances, we see no basis for granting the relief sought by ASTA.

We are also not granting the requests of the ACAA that we take action in this proceeding to promote competition in domestic airline markets. This proceeding concerns the applicants' request for approval and antitrust immunity for an alliance agreement that will enable them to coordinate their services in international markets. Neither LaGuardia nor Washington Reagan

National is a gateway for intercontinental service, and none of the Czech Republic, French, and Italian airlines that are forming the alliance with Delta serve either airport.

We have been investigating the complaints of anti-competitive behavior submitted by ACAA members, and no action need be taken in this proceeding on that issue. Finally, we are aware of the low-fare airlines' requests for changes to our rules on airline computer reservations systems (CRSs). We are working to complete our pending CRS rulemaking and are considering ACAA's proposals in that rulemaking.

Neither party has provided sufficient bases for the Department to delay finalizing its tentative decisions in these matters. In these circumstances, we make final our tentative findings in Order 2001-12-18, and we grant approval and antitrust immunity to the proposed Alliance Agreements, subject to the limits and conditions imposed below and specified in Appendix A to this Order.

ACCORDINGLY:

1. We approve and grant antitrust immunity to the Alliance Agreements among Delta Air Lines, Inc., Alitalia-Linee Aeree Italiane-S.p.A., and Czech Airlines, and their wholly-owned affiliates, in so far as the Alliance Agreements relate to foreign air transportation,[15] and subject to the provisions 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, and subject to the limits and conditions imposed in the Atlanta/Cincinnati-Paris markets as indicated in Appendix A;

2. We approve and grant antitrust immunity to the Alliance Agreements between Delta Air Lines, Inc. and Société Air France, and their wholly-owned affiliates, effective upon signature of the open-skies provisions of the agreement between France and the United States, in so far as the Alliance Agreements relate to foreign air transportation,[16] and subject to the provisions 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, and subject to the limits and conditions imposed in the Atlanta/Cincinnati-Paris markets as indicated in Appendix A;

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[15] The immunity that we 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 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.

[16] *Id.*

3. We 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 this Order;

4. We direct 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 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 airlines participate in similar agreements with U.S. airlines that either have been or are subsequently granted antitrust immunity by the Department;

5. We 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.). The full itinerary record is defined as the passenger's complete itinerary from origin to destination as opposed to the abbreviated gateway record reported under T100(f);

6. We 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;[17]

7. We 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";

8. 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 previously described;

9. This order is effective immediately;

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[17] 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. Any appropriate documents shall be submitted to the Director, Office of Aviation Analysis, Room 6401.

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:

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

(SEAL)

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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 between Atlanta/Cincinnati and Paris 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.