



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

Issued by the Department of Transportation  
on the 10<sup>th</sup> Day of July, 2009

Joint Application of

**AIR CANADA  
THE AUSTRIAN GROUP  
BRITISH MIDLAND AIRWAYS LTD  
CONTINENTAL AIRLINES, INC.  
DEUTSCHE LUFTHANSA AG  
POLSKIE LINIE LOTNIECZE LOT S.A.  
SCANDINAVIAN AIRLINES SYSTEM  
SWISS INTERNATIONAL AIR LINES LTD.  
TAP AIR PORTUGAL  
UNITED AIR LINES, INC.**

**Docket OST-2008-0234**

to Amend Order 2007-2-16 under 49 U.S.C. §§  
41308 and 41309 so as to Approve and Confer  
Antitrust Immunity

**FINAL ORDER**

**I. SUMMARY**

By this Order, the Department makes final the tentative findings in Order 2009-4-5 and grants approval of alliance agreements that add Continental to the existing alliance involving Air Canada, Austrian, bmi, LOT, Lufthansa, SAS, Swiss, TAP, and United (collectively, the “Joint Applicants” or the “applicants”)<sup>1</sup> and, within that broader alliance, approval of an integrated joint venture agreement called Atlantic Plus-Plus (“A++”) involving Air Canada, Continental, Lufthansa, and United. We also grant immunity from the antitrust laws for both of these expanded agreements as they apply to foreign air transportation. The four participants to the A++ Agreement plan to operate a substantial portion of their international air services within the venture. The venture, as well as the broader alliance, will create substantial new service options and fare benefits for consumers.

Our action is subject to conditions. In addition to standard conditions regularly imposed in antitrust immunity cases, we will impose some special conditions: 1) new reporting

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<sup>1</sup> We refer to airlines and parties by their common names.

requirements that will enhance the Department's ability to monitor the competitive effects of the alliance; 2) the obligation to implement the A++ joint venture within 18 months, which will make the benefits of the alliance available to consumers as soon as possible; and 3) limitations on immunity, also known as "carve outs," to address potential concerns raised by the Department of Justice ("DOJ") about competition in certain overlapping markets.

## II. BACKGROUND

### A. Star Alliance History

In a series of decisions dating back to 1996, we have approved agreements among various members of the Star Alliance and have approved immunity from the antitrust laws for those alliance agreements.<sup>2</sup> The alliance members engage in close commercial cooperation on international routes in the areas of pricing, planning, revenue management, sales, and distribution. This proceeding involves the addition of a new carrier, Continental, to the alliance. Prior to this case, Continental was a non-immunized member of the SkyTeam alliance. Continental has announced its intention to withdraw its membership in SkyTeam and to end its association with Delta and Northwest, the latter of which is now a wholly owned subsidiary of Delta. Continental also announced its intention to join Star, to seek antitrust immunity for an alliance with certain Star carriers, and to establish a long-term, comprehensive commercial relationship with United to replace its relationships with Delta and Northwest.<sup>3</sup>

On July 23, 2008, Continental and the members of the existing Star immunized alliance submitted their agreements and asked for approval and antitrust immunity. Under the Department's established policy, the existence of an "open-skies" regulatory framework between the U.S. and the foreign carriers' homelands is a necessary predicate to our consideration of requests for antitrust immunity. Open-skies international aviation agreements encourage more competitive airline service because market forces, not restrictive agreements, discipline the price, frequency, capacity levels, and quality of airline service. We are willing to consider the present request because the United States has negotiated an "open-skies-plus" air transport agreement with the European Community and its Member States that includes as signatories the homelands of most of the foreign-carrier applicants – namely Austria, the United Kingdom, Germany, Poland, Sweden, Denmark, and Portugal.<sup>4</sup> The other three homelands involved – Canada, Norway, and Switzerland – are parties to bilateral open-skies agreements with the United States.<sup>5</sup>

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<sup>2</sup> See United/Lufthansa Case, Final Order 96-5-27 (Docket DOT-OST-1996-1116); United/Lufthansa/SAS Case, Final Order 96-11-1 (Docket DOT-OST-1996-1646); United/Lufthansa/SAS/Austrian Case, Final Order 2001-1-19 (Docket DOT-OST-2000-7828); United/Lufthansa/SAS/Austrian/bmi Case, Order 2003-6-39 and Order 2007-9-12 (Docket DOT-OST-2001-10575); United/Lufthansa/SAS/Austrian/bmi/Swiss/TAP/LOT/Air Canada, Final Order 2007-2-16 (Docket DOT-OST-2005-22922). See also United/Air Canada Case, Final Order 97-9-21 (Docket-DOT-OST-1996-1434).

<sup>3</sup> Star Alliance Joint Application to Amend Order 2007-2-16, at 2-3 (July 23, 2008).

<sup>4</sup> U.S.-EU Air Transport Agreement, signed April 30, 2007.

<sup>5</sup> Air Transport Agreement Between the Government of the United States of America and the Government of Canada, signed March 12, 2007; United States-Norway Air Transport Agreement of

## B. Statutory standards

Under 49 U.S.C §§ 41308-41309, we engage in a two-step analysis of foreign air transportation agreements submitted for our approval. We must first determine under § 41309 whether the agreements are adverse to the public interest because they would substantially reduce or eliminate competition (the “competitive analysis”). If so, we must determine whether they are nonetheless necessary to meet a serious transportation need or to achieve important public benefits. If we make that finding, we will approve the agreements, provided that these public benefits cannot be met or achieved by reasonably available and materially less anticompetitive alternatives; U.S. foreign policy goals are a key element of these benefits.<sup>6</sup> A party opposing approval has the burden of showing that the agreement or request would substantially reduce or eliminate competition and that less anticompetitive alternatives are available. On the other hand, the party seeking approval of the agreement or request must submit evidence establishing the transportation need or public benefits.

If we approve the agreements under the analysis outlined above, we next decide whether to grant immunity under 49 U.S.C. § 41308. Under § 41308(b), Congress has given the Department the authority to exempt airlines from the antitrust laws to the extent necessary to allow a proposed transaction to proceed, provided that the exemption is *required by* the public interest. While the public interest determination under both sections 41309(b) and 41308(b) entails a comparison of anti-competitive effects and public benefits, the standard in section 41308(b) (“required by” rather than “not adverse to”) is higher.<sup>7</sup> We grant immunity if the public interest requires it and the parties to such an agreement would not otherwise go forward with the transaction.<sup>8</sup>

If we determine that the transaction *would* substantially reduce or eliminate competition, yet meets the test for approval under section 41309(b)(1), then we *must* exempt the parties to the transaction, pursuant to 49 U.S.C. § 41308(c).

In this case, we have concluded that the transaction will not substantially reduce or eliminate competition, will not be adverse to the public interest, and will not otherwise violate the statute. We further conclude that the limited and carefully considered antitrust immunity (“ATI”) described below is required by the public interest and necessary to allow the applicants to proceed with the transaction.

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October 6, 1945, as amended; United States-Switzerland Air Transport Agreement, initialed July 18, 2008.

<sup>6</sup> We discuss public benefits findings below

<sup>7</sup> See Show Cause Order 96-5-12, at 2 (Docket OST-96-1116-20); Show Cause Order 2009-4-5, at 18 (Docket DOT-OST-2008-0234), *quoting* Northwest/KLM, Order 93-1-1, at 11. See, e.g., Order 2005-12-12, served December 22, 2005, at 32 (Show Cause Order in SkyTeam case); Order 2006-12-17, served December 18, 2006, at 15 (Show Cause Order in Star Alliance case).

<sup>8</sup> See Order 2009-4-5, at 17. See 2008-4-17, served April 9, 2008, at 13 (Show Cause Order in SkyTeam case); Order 2006-12-17, served December 18, 2006, at 8 (Show Cause Order in Star Alliance case).

### C. Show Cause Order

On April 7, we issued a Show Cause Order, Order 2009-4-5, that explained our proposed decision in the case, based on detailed competitive and public interest analyses and following the analytical requirements of the statute. In Part IV.A of that order, we described our competitive analysis. We assessed the effects of granting antitrust immunity at the regional, country-pair, and city-pair level. We also assessed the effects of the international alliance on competition in the U.S. domestic market. We now affirm those findings with certain changes as discussed below.

In the regional analysis, we tentatively found that the transaction “does not materially alter the competitive landscape or increase overall market share to any significant degree.”<sup>9</sup> We identified several country-pair markets where Continental’s services overlap those of existing alliance partners, but noted that “[w]ith Continental, Star becomes a more competitive alliance in markets where oneworld or SkyTeam have a strong presence.”<sup>10</sup> After examining the various markets, we found that “inter-alliance competition is either enhanced or unaffected by Continental’s inclusion” in countries where passenger volumes represent almost three-quarters of U.S.-EU origin-and-destination traffic.<sup>11</sup> In U.S.-Canada, U.S.-Asia, and U.S.-Middle East markets, we saw no significant market share shifts, and in several Western Hemisphere markets, we identified an improvement in inter-alliance competition.<sup>12</sup> We noted 14 city-pair markets in which Continental’s nonstop service overlaps that of other alliance partners, but tentatively found that “carve outs” of those markets from a grant of immunity would detract from the efficiencies that the alliance would otherwise create. Accordingly, we proposed no new carve outs.<sup>13</sup> Finally, with respect to domestic competition, we tentatively concluded that the benefits of the alliance “outweigh the comparatively small risk of harm that could occur in domestic markets.”<sup>14</sup> Except as modified below, we are making final those findings here.

Because we tentatively found that the proposed addition of Continental to the alliance would not substantially reduce competition,<sup>15</sup> we proceeded to examine whether the alliance would create public benefits sufficient to justify a grant of antitrust immunity. We tentatively determined that the proposed alliance was likely to create substantial public benefits, and that a

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<sup>9</sup> See Order 2009-4-5, at 8.

<sup>10</sup> *Id.* at 8, 9.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.* at 10-13.

<sup>14</sup> *Id.* at 14. We also tentatively found that adequate safeguards addressed any problems arising from Lufthansa’s interest in JetBlue, *id.* at 15-16, and that it would be unnecessary to require Continental and United to maintain their existing transatlantic services at Newark and Dulles, *id.* at 16-17.

<sup>15</sup> *Id.* at 17. Our tentative conclusion that the alliance would not substantially reduce competition included as a prerequisite the existence of a regional open skies agreement, such as the current U.S.-EU Air Transport Agreement, that promotes new entry regardless of national borders. See Order 2009-4-5 at 17. We included the same prerequisite in the recent SkyTeam case. See Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Show Cause Order 2008-4-17 at 13 (Docket DOT-OST-2007-28644).

grant of antitrust immunity was necessary to realize those benefits.<sup>16</sup> We tentatively found that the Alliance Agreements would likely achieve efficiencies that would facilitate the introduction of new capacity, give consumers more travel options and shorter travel times, and reduce fares.<sup>17</sup> We further tentatively found that it was necessary for the members of the alliance to incorporate sales and distribution cooperation into the agreements to allow the applicants to pursue the full range of efficiencies possible under the venture, which would enhance the overall consumer benefits of the alliance.<sup>18</sup> Accordingly, we tentatively found that a grant of antitrust immunity was required by the public interest. We have not been persuaded to change those findings.

Our proposed decision included several conditions designed to preserve competition and ensure the realization of public benefits. We limited the scope of the antitrust immunity to foreign air transportation, in accordance with our statutory authority. To the extent that the applicants cooperate in domestic air transportation, the antitrust laws will be fully applicable to their conduct. We proposed to require certain applicants to adhere to competition guidelines that they negotiated with the U.S. Department of Justice (“DOJ” or “Justice Department”) to preserve domestic competition. To ensure that public benefits were realized and that antitrust immunity was justified, we proposed to require the Joint Applicants to implement the A++ joint venture completely within 18 months, as planned by the applicants. The antitrust immunity would cease to be effective if the applicants did not complete this step. We also proposed to require the Joint Applicants to submit annual reports to the Department regarding the status of their cooperation and efforts to implement their alliance agreements. Finally, we proposed to retain existing “carve outs”<sup>19</sup> as follows: carve outs in the Chicago-Frankfurt and Washington-Frankfurt markets, until the Joint Applicants completely implement the A++ joint venture<sup>20</sup>; and carve outs in the Chicago-Toronto and San Francisco-Toronto markets, pursuant to previous orders that remain unchanged.

We invited comments on the proposed decision, and permitted a second round of comments after the DOJ filed late comments on June 26.<sup>21</sup> We address the concerns raised by all comments below and, except as provided, adopt the tentative findings in the Show Cause order.

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<sup>16</sup> See Order 2009-4-5, at 17-18. “We believe that the applicants make a strong showing that substantial public benefits are likely to result from immunized cooperation. . . . The carriers are not likely to achieve the efficiencies and cost savings on their own . . . .” *Id.* at 19.

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *Id.* at 21.

<sup>19</sup> Carve outs are exceptions to the antitrust immunity granted. Thus, the antitrust laws would be applicable to conduct in markets that are carved out of the grant of immunity.

<sup>20</sup> In the Show Cause Order, the Department incorrectly stated that the Chicago-Frankfurt and Washington-Frankfurt carve-out conditions apply to fare classes for time-sensitive passengers. Order 2009-4-5 at 11. The original language of the carve-out conditions, which is not being changed in this proceeding, applies more broadly to all “local U.S.-point-of-sale passengers flying nonstop”. Order 96-5-27, Appendix A at 1 (Docket DOT-OST-1996-1116).

<sup>21</sup> With its comments, DOJ filed a motion for a leave to file a late pleading. We will grant the motion and accept the pleading.

### III. RESPONSIVE PLEADINGS

#### A. Comments to Tentative Decision

The **Association of Retail Travel Agents & the Law Office of Alexander Anolik** (“ARTA and Anolik”) filed objections.<sup>22</sup> ARTA and Anolik state that many of the carriers who wish to partake in antitrust immunity will charge a travel agent significantly more for an airline seat than the true out-of-pocket cost. ARTA and Anolik are concerned about the growing influence and “omnipotence” of the major carriers and the potential reduction in competition in the North Atlantic market.<sup>23</sup> If the additional antitrust immunity is granted to the Star carriers, ARTA and Anolik contend that the ability of travel agents to sell seats will be restricted, to the detriment of the consumer. ARTA and Anolik suggest that higher prices, not reduced costs, are the likely result of granting antitrust immunity in this case.<sup>24</sup>

The **City of Houston** and the **Greater Houston Partnership** (“the Houston Parties”) filed a reply.<sup>25</sup> The Houston parties state that the proposed alliance will strengthen Continental as a global competitor and provide benefits to the greater Houston area, a principal hub for Continental. The Houston parties argue that nothing in the objections of ITSA/ASTA merits a change in the proposed decision. Therefore, the Department should issue a decision promptly to allow consumers and communities such as Houston to begin benefiting from the alliance.

The **Interactive Travel Services Association** (“ITSA”) and the **American Society of Travel Agents** (“ASTA”) filed an objection, accompanied by a report by Professor David Sibley.<sup>26</sup> ITSA/ASTA’s main contention, echoing the report, is that the alliance will reduce compensation for travel agents, thereby reducing airline competition and increasing consumer air fares, if the alliance members are allowed to cooperate in the areas of distribution and sales. ITSA/ASTA accordingly renew a request made in their earlier pleadings – and in two prior cases – to impose a “carve out” that would prevent members of the proposed alliance from cooperating on an immunized basis to distribute and sell their services through travel agencies. ITSA/ASTA also argue that the Department’s proposed decision is unsupported in the record.

The **Joint Applicants** filed a reply that addresses ITSA/ASTA’s objection and urged prompt final approval of the proposed alliance so that Continental can effect its transition to the Star Alliance and compete effectively with other airlines.<sup>27</sup> The applicants state that ITSA/ASTA has failed to show any error in law or fact in the Department’s proposed decision or make any

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<sup>22</sup> Objections of the Association of Retail Travel Agents & The Law Office of Alexander Anolik (undated). The pleading appears in the docket on May 18, 2009. Although the pleading was served on Department staff and counsel for interested parties and observers, there is no certificate of service or motion to accept a late filing. Nevertheless, in the interest of a more complete record, we accept the pleading.

<sup>23</sup> *Id.* at 3-4.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> Answer of the City of Houston and the Greater Houston Partnership (May 7, 2009).

<sup>26</sup> Objections of ITSA and ASTA to Order 2009-4-5 (April 28, 2009).

<sup>27</sup> Answer of the Joint Applicants to Objections to Order 2009-4-5 (May 7, 2009).

persuasive arguments justifying the imposition of a carve out affecting distribution and sales. The applicants argue that, after extensive review, the Department properly found that the proposed alliance would generate substantial benefits for consumers, and that those consumer benefits are contingent upon the applicants' ability to integrate and achieve efficiencies in the areas of sales and distribution. Thus, the Department's tentative decision to reject ITSA/ASTA's request for a special carve out was justified, according to the Joint Applicants. The applicants contend that ITSA/ASTA's only new argument in asking for a carve out is not to preserve competition, but instead to protect travel agents.<sup>28</sup> Additionally, the applicants criticize Professor Sibley's report as relying on unsupported and internally contradictory statements, on a flawed model, and on erroneous assumptions.<sup>29</sup>

The **U.S. Department of Justice** Antitrust Division ("DOJ" or "Justice Department") filed comments to the show cause order.<sup>30</sup> DOJ argues that the applicants "failed to demonstrate the required elements for the broad immunity sought – immunity encompassing transborder, transatlantic and transpacific markets without regard to the planned level of integration among Applicants – and that "the immunity granted should be more narrowly tailored to minimize anticompetitive effects."<sup>31</sup> The DOJ urged DOT to take into account a number of its conclusions, including the effect on competition in the non-transatlantic markets, transborder Canadian markets, transatlantic overlapping markets, overlapping A++ routes between Chicago-Frankfurt and Washington-Frankfurt, and domestic markets. In many of these markets, DOJ is requesting that the Department impose carve outs. The DOJ comments are more fully summarized in the Decision section below.

## **B. Replies to Department of Justice**

**American Airlines** filed a response to comments of the Justice Department.<sup>32</sup> American argues that adoption of DOJ's position would result in inconsistent regulatory decisions and significant changes in aviation policy that could harm competition and unnecessarily disrupt aviation relations and the operations of the three major global alliances. American argues that DOJ's recommendation that we limit the scope of immunity to transatlantic service would have adverse implications for U.S. aviation policy and relations with foreign countries. American asserts that the Department's open-skies policy, in tandem with the development of immunized alliances, has enhanced global competition and liberalized markets. American argues that DOJ should not seek to change the Department's aviation policy, and that DOJ's view of Open Skies is short-sighted because major markets remain closed, alliances could help to open them, and "antitrust immunized alliances play a key role in advancing [the Open Skies] policy."<sup>33</sup>

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<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> Comments of the Department of Justice on the Show Cause Order (June 26, 2009). We granted DOJ's motion for leave to file late in our Notice establishing a deadline for supplemental comments on that filing.

<sup>31</sup> *Id.* at 2, 39.

<sup>32</sup> Response of American Airlines, Inc. to Comments of the Department of Justice (July 6, 2009).

<sup>33</sup> *Id.* at 3.

Moreover, American notes that the U.S.-EU Open Skies Agreement “is not etched in stone,”<sup>34</sup> and could be adversely affected were DOJ’s policy proposals adopted.

American also argues that DOJ’s narrowly focused analysis is inadequate to support its proposed approach. Accepting DOJ’s recommendations would lead to the application of different decisional standards to each global alliance and deny consumers the maximum benefits of inter-alliance competition. American takes exception to DOJ’s statement that the oneworld alliance, of which American is a member, can function effectively without antitrust immunity. American insists that antitrust immunity is necessary to achieve maximum consumer benefits, because without immunity it currently does not fully implement codesharing, frequent flyer benefits, fare combinability, or joint corporate dealing. Additionally, American states that DOJ’s proposed carve-out remedies are inconsistent with the efficient functioning of an integrated joint venture, given the nature of airline networks. American believes that DOJ’s justification for imposing carve outs is based on flawed assumptions, and that the carve outs themselves would harm consumers by impeding the incentives for carriers to maximize the efficiency of their networks. American states that, if the Department imposes carve outs in response to DOJ’s comments, the carve outs should be limited to routes where one of the nonstop carriers is outside the scope of a benefit-sharing arrangement.

The **Houston Parties** also filed supplemental comments in response to the Department of Justice.<sup>35</sup> The Houston Parties state that DOJ’s comments were unconvincing and, in various instances, unsupported. The Houston Parties urge the Department to finalize the tentative decision promptly, granting antitrust immunity without any substantial changes in the form of either scope restrictions or carve outs. An unrestricted grant of “global immunity” is necessary, the Houston Parties argue, to ensure that Continental’s Houston gateway remains significant and effective in the years ahead. The Houston Parties believe that allowing Continental to cooperate in global markets facilitates feed and directly benefits Continental’s customers and the citizens of Houston.

The **Joint Applicants** also filed a response to the Justice Department.<sup>36</sup> The Joint Applicants urge the Department to expedite final approval of the alliance. The Joint Applicants characterize DOJ’s comments as calling for a reversal of the Department’s long-standing international aviation policy. The Joint Applicants argue that imposing the unprecedented scope restrictions advocated by DOJ, which would limit the global scope of the alliance, would harm competition and consumers, particularly given the lack of competitive overlap between Continental and the other members of the immunized Star Alliance. The purported risks to competition from granting unrestricted “global” scope are insignificant and unsubstantiated, according to the Joint Applicants. Further, DOJ’s prediction of adverse price effects is flawed and contradicted by previous empirical analysis. The Joint Applicants assert that the subject markets discussed by DOJ – namely the U.S.–Beijing and U.S.–Hong Kong markets – will show little incremental change in the competitive landscape after the transaction, and present no substantial competitive issue, given the number of U.S. and foreign competitors, the ability of

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<sup>34</sup> *Id.* at 4.

<sup>35</sup> Supplemental Comments of the City of Houston and the Greater Houston Partnership (July 6, 2009).

<sup>36</sup> Response of the Joint Applicants to Comments of the Department of Justice (July 6, 2009).

passengers to connect at hubs in the U.S. and around the world, and the market share of the airlines currently serving the market. The Joint Applicants also argue that DOJ has failed to justify its request for new carve outs, relying on faulty analysis and seeking to impose unnecessarily broad carve outs that were not imposed on other alliances. The Joint Applicants stress that carve outs are not necessary in any transatlantic or transborder markets in this case, particularly where there will be more than three competitors remaining in the nonstop market or where the U.S. end point is New York/Newark, which is a robust hub for multiple U.S. carriers and a leading destination for numerous foreign airlines.<sup>37</sup> The Joint Applicants conclude that DOJ has failed to justify new remedies or show any errors in the show cause order. Accordingly, the Joint Applicants urge the Department to reject DOJ's requests and promptly issue a final order.

A coalition of parties from **New Jersey** (the "New Jersey Parties") filed a response to the Justice Department.<sup>38</sup> The New Jersey Parties urge the Department to move swiftly to allow Continental to participate in the Star Alliance with an unrestricted grant of global immunity. The New Jersey Parties point out that DOJ's basis for objecting to global immunity is limited to China and Hong Kong routes, neither of which the parties believe would present competitive problems given the amount of U.S. and foreign carrier service. The New Jersey Parties emphasize that a grant of global immunity is extremely important for the Newark region and for the airport community, to provide more online service, to make Continental more competitive versus SkyTeam carriers, and to support the local economy. The New Jersey Parties also argue that there is no basis for the Department to impose any of the carve outs suggested by DOJ affecting New York, particularly not New York-Halifax or New York-Zurich where there is ample competing service. The New Jersey Parties emphasize that both American and Delta operate competing hubs in the New York area.

The **United Master Executive Council** ("MEC"), which is affiliated with the Air Line Pilots Association, International, filed comments.<sup>39</sup> In the main, the MEC supports the application, but asks the Department to impose conditions on the alliance to mitigate its potentially negative effects on wages and working conditions for United pilots. The MEC is concerned that the revenue sharing formula in the A++ joint venture, once it is negotiated, will adversely affect the amount of flying by United, and consequently, the number of scheduled block hours and opportunities for United pilots. Such an outcome would be contrary to the public interest, according to the MEC. As a result, the MEC proposes that approval of the A++ joint venture be conditioned upon the adoption of a revenue sharing formula in which the revenue accrued by parties is in "close correlation" to the parties' share of capacity in the venture. Further, the MEC believes the final revenue sharing formula should be subject to further Departmental approval, with an additional opportunity for interested parties to comment.

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<sup>37</sup> Should the Department include any carve outs in a final order, the Joint Applicants state that the carve outs should terminate automatically upon the affected carriers becoming party to the A++ agreement.

<sup>38</sup> Response of the New Jersey Parties to the Department of Justice Comments (July 6, 2009).

<sup>39</sup> Comments of the United Master Executive Council of the Air Line Pilots Association, International (July 6, 2009).

#### IV. DECISION

We have decided to grant final approval of, and antitrust immunity for, the alliance, subject to conditions. As described above, we have reached our final decision by applying the decisional standards set forth in 49 U.S.C. §§ 41308 and 41309 to the particular facts of this case.

After careful consideration of DOJ's and other parties' arguments, we confirm our tentative decision that this application is not anti-competitive. While DOJ has suggested that less anticompetitive measures are available and that immunity does not benefit consumers, we are not persuaded to alter our fundamental initial assessment of the Joint Applicants' request. First, the public benefits possible through an immunized alliance are not available through other means. Ownership restrictions preclude truly integrated joint ventures or mergers, similar to those pursued in other industries, among U.S. and foreign air carriers, and the Joint Applicants have demonstrated that they will not proceed without immunity. Second, immunity enables the Joint Applicants to coordinate fares, services, and schedules so that consumers are offered a broader array of choices within the alliance than could be offered without immunity. Third, when alliances offer broader mixes of products, supporting the objective of offering service "from anywhere to everywhere," an alliance faces competitive pressure both from other carriers in particular city-pair markets and from other alliances offering global network connectivity. Finally, the vast majority of transatlantic passengers use connecting services and benefit from the improved connecting products at lower fares that integrated alliances provide. Even for those passengers who choose nonstop travel, the existence of coordinated connecting services offered by integrated alliances disciplines fares on nonstop routes.

Since 1938, the statutory scheme governing the airline industry has provided for immunity from the antitrust laws, in limited cases, where no substantial reduction in competition would result and when required by the public interest. Under our precedent, the public interest analysis entails examination of consumer benefits and foreign transportation policy objectives not otherwise obtainable without such immunity.<sup>40</sup> The DOJ contests our tentative findings that the public benefits warrant approval of these agreements under the statute. It argues that exemptions from the antitrust laws "should be strongly disfavored."<sup>41</sup> In 1978, when Congress overhauled the statutory scheme for airline regulation, it continued DOT's limited statutory authority to grant antitrust immunity for such cooperative agreements in foreign air transportation. The statutory scheme recognizes that, in international markets, the economics of airline operations are different from those of other industries because they are still subject to regulations that fundamentally limit the manner in which airlines can adapt to the dynamic needs of passengers and shippers. Unlike many other global industries for which there is no statutory authority for exemption from the antitrust laws, airlines are prohibited from merging with their foreign partners because airlines are subject to ownership and control laws that prohibit cross-border mergers. In addition, they are governed by a system of air service agreements that often circumscribe their ability to serve an inherently global market as efficiently as possible. In light of these factors, we have the authority to grant the appropriate antitrust immunity for cooperative

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<sup>40</sup> Order 2009-4-5, at 18-19. *See* Order 93-1-1, at 12; Order 2007-2-16, at 4 (Final Order in Star Alliance case).

<sup>41</sup> Comments of DOJ, at 1.

agreements between U.S. and foreign carriers in order to obtain important public benefits not otherwise attainable. We summarize the results of our analysis below.

### **A. Foreign Air Transportation Policy and Open Skies Agreements**

The United States considers Open Skies agreements with other nations to be in the public interest.<sup>42</sup> In order to take the greatest advantage of the opportunities made possible by these agreements, U.S. and foreign carriers seek alliances that involve significant integration of their international operations to serve consumer demand. In turn, these carriers seek antitrust immunity to permit the coordination that this requires.

DOJ suggests that, because the U.S. now has an Open Skies agreement with the EU, U.S. foreign policy goals would no longer be furthered by immunity in this case. An Open Skies relationship with the participants' homelands is a necessary predicate for seeking antitrust immunity, but the linkage does not end with the establishment of Open Skies. Rather, the liberalized operational environment established and maintained by an ongoing Open Skies relationship and the integrated operations enabled by antitrust immunity together promote competition, both among alliances and among individual carriers. Increased competition in turn translates to consumer benefits. The value of Open Skies agreements in our foreign air transportation policy has been enhanced by prudent grants of antitrust immunity. Moreover, we strive not only to reach Open Skies agreements, but also to maintain them. Were we to suddenly change our antitrust immunity and public interest approach, as DOJ suggests, the credibility of the U.S. Government with its international aviation partners would be significantly compromised and our ability not only to reach new Open-Skies agreements but also to maintain those agreements that we have already achieved would be undermined.

DOJ argues that "achieving balance in the market success of differing alliances is not a legitimate goal of sound competition policy."<sup>43</sup> That is not, however, the U.S. policy objective, as American notes. The policy objective is to support a level operating environment to compete in the international marketplace. In addition, many of our bilateral relationships remain subject to restrictive agreement provisions, and we continue to find that the ability of alliances and individual carriers to compete effectively in this global market enhances our ability to negotiate further Open Skies agreements.

### **B. The Need for Antitrust Immunity**

DOJ argues that the applicants do not adequately demonstrate why immunity is required to achieve the claimed public benefits from the alliance agreements, and maintain that it is not convinced by the Applicants' assertion that entering into the proposed arrangements would entail "significant litigation risks" absent immunity.

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<sup>42</sup> See 49 U.S.C. § 40101(e).

<sup>43</sup> Comments of DOJ, at 34.

We agree with DOJ that “[a]ll prudent businesses devote some concern to antitrust liability . . . .”<sup>44</sup> We also find, however, that the significant cooperation proposed in the joint agreements, such as common pricing, capacity planning and management, inventory management, joint sales and marketing activities, and jointly negotiated corporate contracts are the very types of agreements that could, and likely would, be challenged under the antitrust laws. DOJ itself asserts, in discussing potential domestic impacts, that “United and Continental will be discussing the most sensitive competitive subjects.”<sup>45</sup> Indeed, DOJ has long asserted broad jurisdiction to enforce these laws. Carriers – U.S. and foreign - are understandably reluctant to engage in such cooperation, particularly in these functional areas in which airlines typically compete with each other, without antitrust immunity.<sup>46</sup> Although DOJ states that it “is aware of no legal challenge to the actions taken by carriers within and in furtherance of a legitimate airline alliance,”<sup>47</sup> it is not willing to opine that such activities would otherwise comply with U.S. antitrust laws, nor that DOJ, competitors or consumers would not challenge these activities if undertaken without antitrust immunity.

DOJ also argues that there are less anticompetitive measures available to the Joint Applicants than a grant of antitrust immunity and questions the applicants’ claim that immunity would lead to reduced fares through the elimination of double marginalization.<sup>48</sup> It cites United’s statements that code sharing can reduce double marginalization<sup>49</sup> as evidence that immunity is not necessary to obtain these benefits. The Joint Applicants point out that, while code-sharing reduces double marginalization to some extent, implementing a revenue-sharing agreement like A++ produces significantly larger decreases in double marginalization.<sup>50</sup> Code-sharing is much less effective than a “metal-neutral” benefit-sharing arrangement in reducing double marginalization, because each carrier in a simple code-sharing arrangement still has the incentive to optimize its own margins. With revenue sharing, the airlines aim to maximize joint revenues. In addition, joint venture agreements give passengers access to certain fares or itinerary routing options not previously offered.<sup>51</sup>

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<sup>44</sup> *Id.* at 13.

<sup>45</sup> *Id.* at 29.

<sup>46</sup> Order 2009-4-5. *See* Order 93-1-1; Order 2007-2-16 (Final Order in Star Alliance case).

<sup>47</sup> Comments of DOJ, at 33.

<sup>48</sup> Double marginalization, also called multiple mark-ups, occur when two airlines have basic interline or code share arrangements to handle multiple segments but are unwilling to cooperatively price the combined itinerary for the consumer. Thus, for example, Airline A is not willing to accept a cooperative price for the segment it operates because it risks losing revenue to Airline B, which might operate the longer, more profitable segment in the itinerary. The consumer is ultimately not offered the most competitive fare or optimal routing. However, in a “metal-neutral” sales environment, with revenue- or benefit-sharing, the airlines can balance risks and benefits for the benefit of the consumer and alliance as a whole. The airlines are willing to cooperatively price itineraries because they share the same incentive to make the sale and share the revenues. *See generally* W. Tom Whalen, *A panel data analysis of code-sharing, antitrust immunity, and open skies treaties in international aviation markets*, 30 REV. IND. ORGAN 30 (2007).

<sup>49</sup> Comments of DOJ, at 36 and footnote 98.

<sup>50</sup> Response of the Joint Applicants to DOJ, at 17, footnote 24.

<sup>51</sup> *Id.* at 17, footnote 24.

To determine whether immunized alliances reduce double marginalization and pass those savings on to consumers, DOJ evaluates fares on U.S.-EU routes that do not include nonstop flights, and then concludes that connecting fares offered by immunized alliances are higher than fares for online<sup>52</sup> service or fares offered by non-immunized alliances. While DOJ acknowledges that “[t]hese alliances include multiple members that make available a large number of single-connect and double-connect travel itineraries to passengers across the sample routes”<sup>53</sup>, the sample does not incorporate U.S.-EU routes that include nonstop flights. DOJ has thus excluded from its analysis some city-pair markets, and the connecting fares charged, in which immunized alliance partners may be able to jointly provide connecting service to compete with foreign carriers’ nonstop service.<sup>54</sup>

DOJ further argues that non-immunized alliances’ fares are lower than same-airline fares or immunized alliance fares, suggesting that immunity is not necessary to generate reductions in double marginalization.<sup>55</sup> However, DOJ’s analysis also shows that, while immunized alliances fares are 2.1 percent higher than same-airline fares, interline fares are 6.3 percent higher than online fares. These data thus suggest that immunity conveys greater benefits to consumers than does interlining. Same-airline tickets are less likely to be offered across multiple connecting markets,<sup>56</sup> thus resulting in more competition between interline and immunized alliance fares than with same-airline fares.

The Joint Applicants argue that “*DOJ’s opaque methodology raises serious issues of reliability*” (emphasis in original).<sup>57</sup> The Joint Applicants<sup>58</sup> and American<sup>59</sup> both argue that the methodology suggested by DOJ is not consistent with multiple peer-reviewed empirical studies, which use different variables, employ different models, and reach different conclusions from those used by DOJ. Furthermore, the Applicants outline significant concerns with the methodological and sample selection bias. Specifically, they point to the omission of several critical variables that may be related both to the number of competitors and the average fare on a particular route, the exclusion of tickets by foreign carriers in itineraries where no U.S. airline operates, and the use of data from only one time period.

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<sup>52</sup> Because alliance and interline fares are separately measured, we assume that, in DOJ’s analysis, “online” means same-airline service.

<sup>53</sup> Comments of DOJ, at 48.

<sup>54</sup> *Id.* at 50 and footnote 127; DOJ excludes from its analysis “routes from U.S. cities where foreign carriers offer at least one nonstop flight per business day to Europe.”

<sup>55</sup> *Id.* at 49.

<sup>56</sup> Online tickets, which represent approximately 68 percent of the total tickets in DOJ’s sample (p.50) are for service operated by a single carrier. Because U.S. carriers typically cannot provide behind service in foreign countries (and foreign carriers typically cannot provide behind service in the U.S.), these online itineraries, by definition, do not represent behind-to-beyond travel (for example, Des Moines-to-Dresden), which benefit from access to an immunized alliance network. DOJ also does not calculate price differentials for all tickets – particularly for higher fare-paying passengers.

<sup>57</sup> Response of the Joint Applicants to DOJ, at 14, and footnotes 17 and 18.

<sup>58</sup> *Id.* at 13.

<sup>59</sup> Response of American to DOJ, at 6.

After reviewing DOJ's analysis, as well as the comments of the Joint Applicants and American, the Department is not persuaded to change our tentative conclusion that immunity is necessary to achieve the benefits of this alliance, and that there are no less anticompetitive means to realize these benefits.

We thus affirm our tentative finding in the Show Cause Order that there is sufficient risk of antitrust exposure to accept the Joint Applicants' statement that they would not proceed with the joint venture agreements without antitrust immunity. While some of these benefits can be obtained without antitrust immunity, realizing the full depth and breadth of consumer benefits that are predicated on the more thorough alliance cooperation proposed in this case requires antitrust immunity as contemplated by the statute.

### **C. Public Benefits to Consumers**

Past experience with other integrated and immunized alliances (such as that between United/Lufthansa, Delta/Air France, and Northwest/KLM) shows that benefits from new direct routes, increased frequencies, greater capacity on hub-to-hub and other routes linking the airlines' networks, and associated increases in passenger volumes may be expected to develop over time<sup>60</sup> as synergies from the integrated joint venture are facilitated. Based on the evidence in the record,<sup>61</sup> we affirm our tentative findings that the prospective benefits are likely to occur in this case.

The current business model used in the global airline industry is predicated on a "from anywhere to everywhere" consumer proposition. However, no airline can serve every destination around the globe. Some airlines have therefore formed alliances to expand and link their networks to provide the worldwide product and service benefits that consumers demand. These benefits include a comprehensive route network with the convenience of coordinated schedules, single on-line prices over multiple itineraries between any given city pair, single point check-in, coordinated service and product standards and policies, and reciprocal frequent flyer programs.

The inability of a single carrier to provide a global network of connecting services has been one of the major drivers of alliance formation. The consumer benefits of fare combinability, and the reduction in double marginalization, are substantially enhanced when carriers share revenues on all international alliance itineraries so that they obtain a share of the revenue regardless of which alliance carrier or carriers actually transported the passenger. This cooperation provides consumers with more seat availability throughout the fare structure over more routings between any given city pair. The consumer is therefore more likely to find a fare at his/her desired travel time.

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<sup>60</sup> W. Tom Whalen, *A panel data analysis of code-sharing, antitrust immunity, and open skies treaties in international aviation markets*, 30 REV. IND. ORGAN 30 (2007).

<sup>61</sup> Star Alliance Joint Application, at 15-19.

By implementing an economic benefit-sharing agreement, carriers within the alliance are motivated to perform alliance-focused network planning, sales, and management, thereby benefiting a broad range of consumers seeking a better, seamless transportation product. To ensure that these merger-like efficiencies - which cannot be realized by merger given U.S. airline ownership/citizenship rules - are obtained and passed on as benefits to consumers, DOT tentatively approved this application, conditioned upon the implementation of a revenue-sharing agreement that is structured to create “metal neutrality”<sup>62</sup> – a commercial environment in which joint venture partners share common economic incentives to promote the success of the alliance over their individual corporate interests. We affirm that tentative finding. By pooling resources to improve the overall service offering, and by sharing financial gains and losses, we find that the partners are able to harmonize the global network and become indifferent as to which of them collects the revenue or operates the aircraft over a given itinerary. They are thus able to focus their efforts on gaining the customer’s business by providing the best available fare, schedule, and routing between two cities. We therefore affirm our tentative finding that granting antitrust immunity in this case is necessary to enable carriers to achieve merger-like efficiencies and deliver public benefits that would not otherwise be possible.

We tentatively found in the Show Cause Order that the agreements presented by the Joint Applicants document plans for advanced alliance cooperation that will lead to efficiency-enhancing integration and metal neutrality, with resulting consumer benefits. No party, except DOJ, contested our finding that the following consumer benefits are likely if the agreements are implemented:

- Fare combinability: the ability to put itineraries together using one carrier for the outbound transatlantic segment and another carrier for the return;
- Significant reduction of double marginalization (a condition in which two or more carriers operate different segments of a combined itinerary and each airline prices its own service at a level necessary to obtain a desired level of margin on the individual segment it operates), exerting downward pressure on fares and providing a wider range of fares to consumers;
- Economies of density (volume discounting) from carrying more passengers per flight, and increasing utilization of equipment, facilities, and personnel, thereby reducing per passenger handling costs and permitting a ticket price reduction without having an impact on current airline profits;
- Revenue management synergies to improve capacity allocation (availability) at a wider range of fares (business and leisure) over many more itineraries (routings);
- Reduced costs through shared sales, marketing, distribution, procurement, fleet assignment, frequent flier program management, and other value chain activities;
- Monetary benefits for frequent flyers, due to frequent flyer reciprocity resulting in lower switching costs (travelers no longer facing the conflict of time and/or fare

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<sup>62</sup> Metal neutrality, which we defined in the Show Cause Order at 4, is an industry term meaning that the partners to an alliance agreement are indifferent as to which of them operates the aircraft when they jointly market services. Without a “metal-neutral” sales environment, the partners have a strong economic incentive to book passengers on their own aircraft and retain a larger share of the revenue for themselves, which may not be in the best interest of the consumer or the alliance as a whole.

- savings versus mileage accrual), reduced waiting time for preferred flights, greater recognition, and harmonized product standards; and
- Sharing of best practices and commercially sensitive data to enhance efficiencies.

We agree with the Joint Applicants that, based on the experience of United and Lufthansa within Atlantic Plus, substantial public benefits are likely to result from immunized cooperation. For example, the implementation of Atlantic Plus provided United and Lufthansa with the necessary economic incentives to invest in joint facilities, resulting in reduced costs and enhancements to the consumer experience. The applicants explain in detail how they will expand the existing immunized alliance to incorporate the largely complementary services of Continental. We find that the existing Atlantic Plus arrangement between Lufthansa and United provides a base for launching an expanded, integrated joint venture at the core of the proposed alliance. A++ includes plans to pool resources to achieve substantial efficiencies and cost savings that will help Continental and the other participants manage cyclical changes in the industry to preserve existing services, with a view towards increasing capacity and enhancing competition between carriers and alliances. Following the implementation of the Atlantic Plus revenue share, United and Lufthansa began operating hub-to-hub flights outside of the traditional transatlantic departure time cluster to provide consumers with a broader range of schedule options to more destinations throughout the network. Pooling of revenues on all flights – sharing risks and rewards, *i.e.*, metal neutrality – made the economics favorable for such schedule adjustments and other consumer benefits.

#### **D. Competitive Environment**

We assess the competitive effects of the proposed alliance at multiple levels: city pairs, countries, and regions. The critical issue is whether the overall consumer benefits of ATI will outweigh the potential competitive harm in some markets. This multi-level analysis is particularly important, given the nearly 70,000 transatlantic city-pair markets.<sup>63</sup> The record shows that adding Continental to the existing Star alliance results in approximately three percent of total transatlantic passengers (and transatlantic markets) and approximately two percent of all international passengers to/from the United States (and less than three percent of total markets) being affected by a change in the number of nonstop competitors from three to two or from two to one.<sup>64</sup>

DOJ claims that nonstop service is a separate and distinct product from connecting service, and claims that 73 percent of coach class passengers fly nonstop in its sample of markets where nonstop service is available.<sup>65</sup> We find that, when all transatlantic markets having nonstop service are considered (unlike the limited sample of markets used by DOJ<sup>66</sup>), only 63 percent of

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<sup>63</sup> The markets include both nonstop and connecting service.

<sup>64</sup> MIDT data YE 2008q2 using a 5 percent standard.

<sup>65</sup> Comments of DOJ, at 17 and 21. DOJ's empirical analysis only finds statistically significant fare effects when the number of nonstop competitors decreases from two to one. DOJ's model also does not explicitly take into account the effect of connecting service on nonstop fares.

<sup>66</sup> *Id.* at 49 and footnote 123. DOJ reports results from 65 narrowly-defined markets; it claims similar results from a broader sample but does not report those results.

passengers traveled nonstop,<sup>67</sup> meaning that over one-third of the passengers in these markets used connecting service. Regardless, we do not see evidence in the record that, because 63 percent<sup>68</sup> of passengers travel nonstop where nonstop services are available, these passengers pay supra-competitive prices. Increased cooperation and fare combinability mean more schedule (time-of-day) options for business passengers and others who use connecting service. Alliances compete with each other based on connecting services, seeking to minimize connecting times and to provide greater scheduling and other “alliance” product features to attract passengers to their networks. We thus are not persuaded to limit our analysis to nonstop service, given that connecting services can discipline prices on nonstop routes for a significant percentage of nonstop passengers. As American points out, “DOJ’s claim that connecting itineraries do not compete with nonstop flights is directly contradicted by empirical evidence.”<sup>69</sup>

We also examined the changes in inter-alliance competition. The greater the choices within an alliance, the more options are available for business travelers. Similarly, leisure passengers can choose from the increased networks and multiple coordinated connecting paths of competing alliances. We found that immunized alliance members can jointly utilize their combined resources at airports that serve as hubs for other alliances, thereby increasing the ability of one alliance to compete at the hub airports of another alliance. The ability of the “non-hub” alliance members to compete at that hub can benefit both business and leisure passengers. For all of the above reasons, we make final our tentative findings with respect to the effects of immunity on connecting fares and the effects of a reduction in nonstop competitors.<sup>70</sup>

Finally, with regard to domestic competition, DOJ notes that United and Continental, as the third- and fourth-largest domestic carriers, compete on several domestic nonstop routes, as well as in many connecting markets. DOJ acknowledges that guidelines have been developed, and protocols agreed by DOJ and the Joint Applicants, to address any “spillover” potential that might affect competition on domestic routes,<sup>71</sup> but claims that “no guidelines can completely eliminate the risk of domestic spillover.”<sup>72</sup> We addressed this issue in the *SkyTeam* case and found that the relevant protocols were adequate, noting that such safeguards are routine for

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<sup>67</sup> O&D data YE 2008q3 based on markets identified with YE2008q3 OAG; at least 2 flights per week.

<sup>68</sup> Using a different set of markets, DOJ identified 73 percent of coach-class passengers as nonstop (Comments of DOJ, at 49). Our conclusions remain.

<sup>69</sup> American Response to DOJ, at 10.

<sup>70</sup> We note that multiple studies of the effects of immunized alliances have been published in peer-reviewed empirical journals and prepared as working papers; a number of these conclude that immunized alliances are, in fact, beneficial for consumers. Lee, D., *An Assessment of Some Recent Criticism of the U.S. Airline Industry*, REV. OF NETWORK ECONOMICS 2(1) (2003); Strober, A., *Who Soars in Open Skies: A Review of the Impacts of Anti-Trust Immunity and International Market Deregulation on Global Alliances, Consumers, and Policy Makers*, JOURNAL OF AIR TRANSPORTATION 8(1): 111-113 (2003); W. Tom Whalen, *A panel data analysis of code-sharing, antitrust immunity, and open skies treaties in international aviation markets*, 30 REV. IND. ORGAN 30 (2007).

<sup>71</sup> As noted by DOJ, our Show Cause Order states that the adoption of antitrust protocols by United and Continental is critical to our decision.

<sup>72</sup> Comments of DOJ, at 28.

participants in a joint venture.<sup>73</sup> Therefore, we affirm our tentative conclusion that the safeguards that DOJ itself has negotiated with the applicants, as they have in prior cases, will prove adequate.

## **E. Carve Outs**

We affirm our tentative decision in the Show Cause Order concerning carve outs in four city-pair markets.<sup>74</sup> Specifically, we tentatively found that “a narrowly defined group of passengers, particularly time-sensitive travelers . . . are more likely to rely on nonstop flights and premium service options and . . . are the most likely to feel the effects of reduced competition.”<sup>75</sup> As such, we retained existing carve outs in those markets in which such passengers may be affected by a reduction in competition as a result of a grant of antitrust immunity, but we also acknowledged the benefits that may be obtained by this subset of passengers as a result of an integrated “metal-neutral” joint venture like the A++ Agreement.<sup>76</sup>

DOJ has identified<sup>77</sup> additional nonstop and connecting city-pair markets between the United States and Canada, Europe, and China, in which it believes some consumers may be harmed by a reduction in competition as a result of granting immunity to the alliance and the Joint Venture (“JV”). In reviewing the record in light of DOJ’s concerns, the Department has decided that certain additional carve outs are appropriate, in the particular circumstances of this case, to render the grant of immunity no broader than necessary to achieve substantial public benefits. Therefore, as explained below, we will further carve out certain city-pair markets that will be reduced from two to one nonstop competitors, with respect to all fares in the cabin. We also emphasize that these carve outs are anticipated to be temporary, lasting only until new entry introduces further competition. However, we will not so condition other “two-to-one” markets, because we regard their inclusion in the scope of immunity as essential to achieving the public benefits discussed here. Moreover, we will not impose carve outs in markets that only shift from four to three, or from three to two, nonstop competitors, as we are not convinced that these pose a risk of substantial reduction in competition.<sup>78</sup>

### **1. Transatlantic**

DOJ is concerned that the proposed immunity would significantly reduce, or in some cases completely eliminate, nonstop competition on five nonstop overlap transatlantic markets in which Continental currently competes against other Star ATI members.<sup>79</sup> As we noted in the Show Cause Order, the affected city pairs are subject to close cooperation under a

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<sup>73</sup> See Order 2008-4-17, April 9, 2008, at 11.

<sup>74</sup> See Order 2008-4-17, April 9, 2008, at 22 (tentatively affirming carve outs in the Washington-Frankfurt, Chicago-Frankfurt, San Francisco-Toronto, and Chicago-Toronto markets).

<sup>75</sup> See Order 2009-4-5, at 11.

<sup>76</sup> *Id.* at 11.

<sup>77</sup> Comments of DOJ, at 39.

<sup>78</sup> *Id.* at 52, Table 1. DOJ’s own empirical analysis did not find statistically significant fare effects for nonstop passengers in these markets.

<sup>79</sup> *Id.* at 22-24.

comprehensive joint venture, which covers all transatlantic routes, regardless of whether those routes are served nonstop or on a connecting basis. We tentatively found that the efficiencies that could be achieved by bringing all the capacity within the JV, including additional cost savings for consumers, would be unlikely with carve outs.<sup>80</sup> We also tentatively found these routes affect comparatively few passengers, so any potential competitive harm, relative to the corresponding benefits described above, will be minimal. After review of both DOJ's analysis and the Joint Applicant's response, we find that, on balance and in this case, with respect to four of these routes,<sup>81</sup> there could be some potential for adverse consumer consequences from the elimination of competition. Therefore, we now add carve outs in the following transatlantic markets, excluding A++ cooperation on these routes: New York-Copenhagen, New York-Geneva, New York-Lisbon, and New York-Stockholm.<sup>82</sup> However, should a new entrant enter a "carved-out" market with nonstop service, with at least five roundtrips per week for nine consecutive months, the Joint Applicants may notify the Department of the new service and, if the Department concurs that these conditions have been met, the carve-out provision for that market will cease to apply.

With regard to the current carve outs in the Washington-Frankfurt and Chicago-Frankfurt markets, DOJ states that "other than the fact that these two routes fall within the scope of A++, the Order cites no evidence to support revoking the carve outs."<sup>83</sup>

The Joint Applicants state that the two routes – Chicago-Frankfurt and Washington-Frankfurt – are integral to the A++ Agreement and note that "the Department should finalize its tentative decision to remove those carve outs. Such a decision would be consistent with the Department precedent in the *SkyTeam II* case, where the Department provided for the removal of pre-existing carve outs on the Atlanta/Cincinnati-Paris routes upon implementation of the SkyTeam joint venture."<sup>84</sup>

American adds that carve outs can alter the financial incentives of the operating carrier, leading it to place more emphasis on capturing gateway-to-gateway passengers to the detriment of flow passengers (gateway-to-beyond or behind-to-gateway). For flow passengers to supplant local passengers in a carve-out market, American contends that yields for flow passengers would have to increase. "The inherent inefficiency of such a structure would inevitably lead to distorted incentives for supply and pricing . . ." American describes how carve outs also inhibit the ability or willingness of the carriers to expand overall frequencies or the range of departure times in shared markets, since each carrier is determined to maintain the most attractive departure time for local passengers. These consequences of carve outs led American to explain

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<sup>80</sup> See Order 2009-4-5, at 12.

<sup>81</sup> The Department does not believe that any carve out in the New York-Zurich market is warranted, because two other U.S. carriers from two other competing alliances provide service in the market – Delta (SkyTeam) and American (oneworld) both serve New York JFK-Zurich daily.

<sup>82</sup> See Appendix A.

<sup>83</sup> Comments of DOJ, at 39.

<sup>84</sup> Response of the Joint Applicants to DOJ, at 46.

that “carve-outs destroy metal neutrality . . . and unnecessarily deny[ing] consumers the benefits of the overall alliance.”<sup>85</sup>

We find that the broad public benefits of metal-neutral cooperation on these key, trunk routes would go unrealized without immunity. We have consistently found that where an integrated “metal-neutral” joint venture is present, carve outs inhibit the realization of efficiencies and thereby the consumer benefits resulting from those efficiencies.<sup>86</sup> Moreover, because of the potential for antitrust exposure (absent the grant of immunity) as described above, we believe that the proposed transaction would not proceed if these essential hub-to-hub routes were excluded from immunity, thereby sacrificing significant public benefits. Therefore, as we tentatively concluded in the Show Cause Order,<sup>87</sup> the existing Washington-Frankfurt and Chicago-Frankfurt carve outs, which are covered by the JV, will be removed when the JV is implemented.

## 2. U.S.-Canada

DOJ addresses potential shortfalls in transborder competition, but we do not agree that “entry is unlikely”<sup>88</sup> on certain transborder routes. While “DOJ agrees with the Order that the competitive structure of transborder routes is very similar to U.S. domestic routes,” we are not persuaded that “there is substantial evidence that a reduction in the number of nonstop competitors from three to two, or two to one, in domestic markets leads to significant fare increases.”<sup>89</sup> The Department and others have found strong empirical evidence over the years that the number of carriers in a market is far less important to fare levels than the type of carriers in a market, specifically “legacy” versus low-cost carriers (LCCs).<sup>90</sup> In fact, as low-cost carriers continue to flourish in North America, their entrance into markets lacking low-fare competition, including transborder markets, is more likely, particularly in markets where fares may be higher than average. LCCs can potentially enter all types of city pairs, including legacy hub-to-hub markets, markets with secondary airports, and even “thin” markets – those with fewer O&D passengers. However, the prospect of timely new entry may be too remote to deter non-competitive fares in certain U.S.-Canada markets at this time. We therefore will modify our tentative findings and impose carve outs for nonstop traffic in the Cleveland-Toronto, Houston-Calgary, Houston-Toronto, and New York-Ottawa markets in which competition will be reduced from two carriers to one. Existing carve outs in Chicago-Toronto and San Francisco-Toronto will also remain, as proposed in the Show Cause Order.<sup>91</sup> As with the transatlantic markets, should a new entrant enter a “carved-out” market with nonstop service, with at least five roundtrips per week for nine consecutive months, the JAs may notify the Department of the

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<sup>85</sup> Response of American to DOJ, at 11-13.

<sup>86</sup> See Order 2008-5-32, at 3-4.

<sup>87</sup> See Order 2009-4-5, at 2.

<sup>88</sup> Comments of DOJ, at 3.

<sup>89</sup> *Id.* at 27.

<sup>90</sup> See, e.g. *A Competitive Analysis of an Industry in Transition*, Gerchick-Murphy Associates, LLC at 78-90 (July 2007).

<sup>91</sup> See Order 2009-4-5, at 13.

existence of the new service and, if the Department concurs that these conditions have been met, the carve-out provision for that market will cease to apply. The Department does not believe that a carve out in the New York-Halifax market is warranted, as oneworld member American and SkyTeam's Delta (seasonally – June through September) serve Halifax from JFK.

### **3. U.S.-China**

As DOJ has noted, United and Continental have no nonstop overlaps on non-transatlantic city pairs. DOJ nonetheless raises competitive concerns about certain U.S.-China markets involving connections in the United States, because no other U.S. carriers operate nonstop service from the U.S. to either Beijing or Hong Kong.<sup>92</sup> While both Delta and US Airways currently are authorized to serve Beijing nonstop from the United States, neither has chosen to enter the market yet, each having requested delays due to the global economic situation. Unlike Beijing, which is a limited-entry market, the U.S.-Hong Kong market has no entry restrictions on flights between the United States and Hong Kong. Given the number of connecting service options available involving both U.S. and foreign carriers, we do not believe that a reduction in the number of competitors in relatively small connecting markets will significantly affect consumers.

As outlined in the Show Cause Order, the Department has consistently allowed immunized cooperation in third-country markets, even in the absence of an open-skies relationship between the United States and the third country, as a means of enhancing competitive forces and encouraging additional liberalization.<sup>93</sup> We recognize the potential scarcity of entry opportunities in some markets, but without stronger evidence of competitive harm, we have been reluctant to jeopardize network benefits by limiting the points served.<sup>94</sup> The Department believes that the necessary competitive forces should be available, in the form of new nonstop U.S.-China service, should fares increase. In considering DOJ's arguments about potential competition in certain markets in this case, however, the Department is modifying its tentative conclusions and imposing a carve out in the U.S.-Beijing market, in the particular circumstances of this case, until additional competing service is introduced. The Department will place this limitation on immunity until a U.S. carrier that does not have antitrust immunity with any applicant in this proceeding initiates nonstop service between a point in the U.S. and Beijing, and sustains that service with a minimum of five weekly roundtrip flights for more than nine months, subject to the Department's concurrence that these conditions have been met. In contrast, the Department does not believe a carve out is necessary in the Hong Kong market, as entry there is not restricted.

### **4. Potential Joint Venture Expansion**

Finally, as the Joint Applicants<sup>95</sup> and American<sup>96</sup> both suggest, upon the implementation of any integrated joint venture agreement(s) that includes any of the carved-out city pairs in

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<sup>92</sup> Comments of DOJ, at 18-19.

<sup>93</sup> See Order 2009-4-5, at 20.

<sup>94</sup> *Id.* at 20.

<sup>95</sup> Response of the Joint Applicants to DOJ, at 47.

<sup>96</sup> Response of American to DOJ, at 14.

Canada, Europe, or China, the JAs may file a docketed petition with the Department to terminate that carve out. We continue to believe that, where an integrated “metal-neutral” joint venture is present, carve outs inhibit efficiencies and thereby the consumer benefits resulting from those efficiencies.<sup>97</sup>

## F. Global Scope of Immunity

As noted in the Show Cause Order, DOT examined the global impact of adding Continental to the immunized core of Star and tentatively concluded that granting the immunity in question would not substantially reduce competition in any relevant market. Indeed, in some cases, DOT found that a grant of immunity would actually increase the ability of Star to compete with other alliances and airlines, particularly SkyTeam which currently has global antitrust immunity.<sup>98</sup> The Joint Applicants also added that “[t]he guidelines and commitments are global in scope; hence, a grant of global immunity will facilitate their efficient and effective implementation. By contrast, if the carriers had to develop different geographic-specific protocols, each tailored to a different scope of immunity granted for activities in different regions, the implementation and compliance challenges for the carriers would be unnecessarily complex and burdensome.”<sup>99</sup>

DOJ argues, however, that, “the Applicants present no evidence that immunity for non-transatlantic operations is required by the public interest: they do not describe how they will integrate their operations in these markets, what new routes they will serve, or what public benefits will flow from non-transatlantic immunity.”<sup>100</sup> The Joint Applicants argue that “[t]he ability to compete effectively in the global arena . . . is critical to [its] business model and long-term survival. At the same time, enhancing Continental’s global competitive posture in this way will not adversely affect competition on domestic or international routes because Continental’s geographically-distinct domestic and international networks are highly complementary to those of the existing Star ATI Alliance members. There is not a single international nonstop overlap between Continental and United, and . . . the overlap between Continental and the foreign Joint Applicants is *de minimis*.”<sup>101</sup> The Department concludes that by sharing risks and optimizing the joint network, the alliance members will give consumers more travel options, shorter travel times, reduced fares at the margin, and will likely accelerate the introduction of new capacity worldwide,<sup>102</sup> placing pressure on competing alliances and non-aligned carriers to add capacity as well. Thus, we find that granting immunity beyond transatlantic markets will enhance the ability of immunized Star carriers to cooperate globally outside of the joint venture and will assist the Joint Applicants in their efforts to formulate joint ventures in other regions of their combined networks, thereby promoting greater service benefits to consumers. However, in light of DOJ’s concerns, we have reconsidered granting immunity in those markets for which DOJ has provided some substantive evidence, and have adopted as already described above, with modifications, some of DOJ’s proposed remedies.

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<sup>97</sup> See Order 2008-5-32, at 3-4.

<sup>98</sup> Show Cause Order, at 10.

<sup>99</sup> Joint Applicants Response to DOJ, at 12.

<sup>100</sup> Comments of DOJ, at 40.

<sup>101</sup> Response of the Joint Applicants to DOJ, at 10-11.

<sup>102</sup> See, for example, Whalen, 2007, at 2.

## G. Distribution and Sales Issues

ITSA/ASTA claim that the Department has ignored their contention that travel agents will be harmed by the alliance. ITSA/ASTA allege that the applicants would gain “increased monopsony power” by virtue of the airlines’ ability to cooperate in distribution and sales.<sup>103</sup> Cooperation in these areas would, ITSA/ASTA believe, enable airlines to reduce compensation to travel agents and put travel agents out of business, reduce price transparency, restrict access to fares, and ultimately raise prices for consumers. ITSA/ASTA discount the Department’s finding that the alliance will create efficiencies that could lower prices or improve service options. Instead, ITSA/ASTA suggest that a grant of immunity would allow the airlines to internalize the costs savings without passing them on to consumers.

The burden of proving anticompetitive effects rests with opposing parties.<sup>104</sup> ITSA/ASTA have not met their burden. They have not shown that any cognizable harm will occur, and more importantly, that a causal link exists between the alleged harm and the granting of antitrust immunity. The logic of ITSA/ASTA’s argument – that the alliance will give the applicants increased market power, which will be used to lower compensation to travel agents, which will reduce output, which will increase ticket prices<sup>105</sup> – is flawed. The applicants will not be able, with 31.7 percent of the broadly defined transatlantic market, to exercise market power over competitors or suppliers. Travel agents will not necessarily suffer detrimental effects from the alliance. There is no persuasive evidence in the record to support the claim that a reduction in travel agent commissions will result in lower output or higher fares. Neither ITSA/ASTA’s pleadings nor its expert report establish this or present a convincing argument for it.

Furthermore, the recent reductions in travel agent commissions are not attributable to immunized alliances, as ITSA/ASTA suggest. Rather, they are attributable to revolutionary changes in travel distribution precipitated by the Internet and its impact on airline consumer behavior. These technological changes, combined with market forces that require airlines to reduce their costs to remain competitive with carriers who develop Internet-based distribution models, have dramatically accelerated competition in airline distribution. Today, travel agents are increasingly charging fees to consumers for their services, which represents a more direct alignment of incentives between the travel agent and the consumer. We agree with ITSA/ASTA that travel agents and other intermediaries can play an important role in providing consumers with neutral information on airline services. As the Joint Applicants point out, however, travel agents are not the only source of information about airline fares and flights, as new business models using Internet-based technologies have sought to address this consumer need in different ways.<sup>106</sup>

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<sup>103</sup> ITSA/ASTA Objection, at 7 (April 28, 2009).

<sup>104</sup> 49 U.S.C. § 41309(c)(2).

<sup>105</sup> Objections of ITSA/ASTA, at 7 (April 28, 2009).

<sup>106</sup> As noted above, ITSA/ASTA argue that the cost savings targeted by the applicants in distribution and sales are not efficiencies, but rather anticompetitive effects. They claim that the airlines will internalize these cost savings, resulting in higher administrative costs and reductions in service quality. ITSA/ASTA Objection at 8 (April 28, 2009). We do not agree. The Show Cause Order found that the alliance would

ITSA/ASTA also assert that the Department has failed to explain why it is necessary for the airlines to cooperate in distribution and sales to achieve “metal neutrality.” As explained above, achieving “metal neutrality,” or sales without preference, requires that carriers are indifferent as to how they price, market, revenue-manage, promote, distribute, and sell any international passenger itinerary traveling over the alliance network, irrespective of the airline operating the flights. Metal neutrality is a prerequisite for eliminating multiple mark ups and passing on benefits to consumers such as the increased availability of discount fares across the joint network.<sup>107</sup> Metal neutrality is also a prerequisite for many cost benefits and synergies obtainable through immunized alliances, such as those obtained by combining sales forces, achieving sales targets for airline representatives for all flights operated by the alliance members, and combining sales, reservation, and distribution infrastructure to reduce costs. Moreover, cooperation will allow the airlines to offer travel agents or corporate travel departments one contract to maximize the network-wide discounts or incentives.

The record clearly reflects that cooperation in sales and distribution of the joint products and services is critical to achieving metal neutrality, and therefore critical to achieving the public benefits described in the tentative decision.<sup>108</sup>

ITSA/ASTA also object to the Department’s analysis of competitive effects in the transatlantic market. ITSA/ASTA believe there are two flaws: first, that a grant of immunity would create a highly concentrated market that would facilitate collusion among the alliances, contrary to our findings in the tentative decision, and second, that the Department should account for the consolidation that would occur if the pending oneworld application were approved.<sup>109</sup>

As noted in the tentative decision, however, there will be approximately 40 airlines operating in the transatlantic market post-transaction. The table of market shares in Order 2009-4-5, at 8, demonstrates that the market is fragmented and generally competitive. Given the number of independent and alliance competitors remaining, as well as the intensity of the competition between the alliances, there is no basis to conclude that the alliance transaction before us will facilitate collusion among the alliances. The share shift that will occur as Continental moves into the Star Alliance is relatively small at 8.5 percentage points, and in fact it does not materially alter the competitive landscape of the U.S.-Europe market. The application concerning the oneworld alliance is pending in another docket and will be decided on the record in that case.

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not substantially reduce competition, and that transatlantic markets would remain competitive. *See* Order 2009-4-5 at 7, 17. In a competitive market, firms have a strong incentive to pass on cost savings to consumers in order to offer a better product at a more affordable price than their competitors.

<sup>107</sup> ITSA/ASTA state that we have ignored their argument that multiple mark ups, or the double-marginalization problem as it is known in economic literature, will not be eliminated by a grant of antitrust immunity and will not reduce prices. ITSA/ASTA Objections at 11 (April 28, 2009).

ITSA/ASTA’s argument appears in footnote 24 of its Confidential Answer (Nov. 26, 2008) and merely refers to *some* of the studies on this issue that have been submitted in prior alliance cases. ITSA/ASTA draw no conclusions and thus do not provide any persuasive evidence that we should alter our findings.

<sup>108</sup> *See* Order 2009-4-5, at 21.

<sup>109</sup> *See* American/British Airways/Iberia/Finnair/Royal Jordanian Case (oneworld), Docket DOT-OST-2008-0252.

Contrary to ITSA/ASTA's contentions, the Department made its tentative conclusions directly from record evidence – namely the Alliance Agreements, exhibits, and data – to explain and analyze the likely competitive effects of the alliance.<sup>110</sup> We tentatively found that the applicants had made a strong showing on the record that they were likely to achieve significant efficiencies and cost savings through the integration provided for in the Alliance Agreements, and that none of the efficiencies and costs savings would be possible without a grant of antitrust immunity.<sup>111</sup> The applicants provided estimates of the efficiencies and cost savings on the record and we determined, after analyzing the issue, that many of the public benefits of the alliance depended upon the applicants' ability to achieve efficiencies and cost savings in the core areas of distribution and sales.<sup>112</sup>

For the reasons stated above, the Department affirms its tentative decision not to impose a carve out for distribution and sales. However, the Department agrees with ITSA/ASTA that it would be useful to have more information about distribution practices and antitrust compliance. We clarify below that the applicants will be expected to give a complete status report in their annual filings, which should include these issues.

#### **H. United-MEC**

The MEC asks us to impose a condition that would require "a revenue sharing formula under which the revenue taken by any U.S. carrier . . . must be in close correlation to that carrier's share of the pooled capacity . . . ." <sup>113</sup> The notice allowing replies to DOJ stated "that the substance of any new filings must be limited to the issues raised by the Justice Department." The Notice did not allow further pleadings to address any new issues, such as those raised by the MEC. While we understand the MEC's concerns regarding recent developments in the industry, because its filing makes new points that other parties have had no opportunity to address, it would not be appropriate for us to consider it now. Moreover, had we considered the merits, we would have had to question whether the MEC's arguments justified the constraint on revenue-sharing that it suggested. As a general matter, we perceive flexibility in revenue-sharing, including the accommodation of a "metal-neutral" policy, as intrinsic to the efficiencies and benefits promoted by a grant of antitrust immunity, and would therefore have been reluctant to impose a formula of the kind MEC apparently contemplates.

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<sup>110</sup> See Order 2009-4-5, at 3, 7, 18-20.

<sup>111</sup> *Id.* at 18-19.

<sup>112</sup> *Id.* at 3-4 (establishing the principle of metal neutrality in the A++ agreement); *Id.* at 5 (recognizing ITSA/ASTA's concerns about distribution and sales); Order 2009-4-5 at 16 (describing how the integrative benefits of the alliance will improve services for consumers); *Id.* at 18 (explaining that A++'s emphasis on metal neutrality makes a grant of antitrust immunity necessary); Order 2009-4-5 at 19 (listing the substantial benefits offered by the alliance, noting that the A++ agreement will make substantial efficiencies and cost savings possible, and explaining that antitrust immunity is necessary to realize these efficiencies and cost savings); *Id.* at 21 (concluding that many of the public benefits of the analysis depend upon efficiencies in distribution and sales).

<sup>113</sup> Comments of the United MEC, at 6.

## **V. ANNUAL REPORTING**

In the tentative decision, we tentatively found that additional reporting is necessary to monitor commercial developments and ensure that public benefits are being realized. No party has objected to these reporting requirements. ITSA/ASTA has suggested that we augment the requirements to address sales and distribution issues, as well as compliance with antitrust protocols. We agree with this suggestion. The Department intends that additional reporting should cover all core airline activities undertaken to achieve the full range of public benefits, which includes cooperation in sales and distribution and joint negotiations with travel agents, as well as efforts to preserve competition, which include antitrust compliance. All interested parties had the opportunity to reply to ITSA/ASTA's suggestions, and there were no further comments on this issue.

Therefore, we make final our tentative finding that the airlines should submit annual reports. The reports should focus on the progress made by the applicants towards achieving their stated goals for operating an alliance with antitrust immunity, the specific actions they have taken to implement each of their alliance agreements (including especially joint venture agreements), the present or future planned cooperation among the alliance partners in all core airline functions, and a discussion of the public benefits that are being realized by the immunized alliance.

## **VI. CONCLUSION**

Having reviewed all pleadings, we have determined that, other than the DOJ, no party submitted any persuasive evidence showing that the findings and conclusions in the tentative decision require amendment. No other party challenged the proposed conditions that were designed to ensure the realization of public benefits. DOJ questioned the need for ATI as well as the benefits from ATI, outlined a series of competitive concerns, and suggested a variety of remedies. The Department reviewed all comments and adopted the findings, conclusions, and conditions as stated in the Show Cause Order with some adjustments to address certain concerns raised by DOJ.

We reserve the right to amend, modify, or revoke this authority at any time without a hearing. We will also require the Joint Applicants to resubmit their alliance agreements within five years of the issuance of this Order, submit annual progress reports, and submit on an ongoing basis all substantive subsidiary agreements and protocols.

### **ACCORDINGLY:**

1. We approve and grant antitrust immunity to the Alliance Agreements between and among Air Canada, The Austrian Group, British Midland Airways, Ltd., Continental Airlines, Inc., Deutsche Lufthansa AG, Polskie Linie Lotnicze LOT S.A., Scandinavian Airlines System, Swiss International Air Lines Ltd., TAP Air Portugal,

and United Air Lines, Inc., and the majority-owned affiliates of the aforementioned carriers in so far as such agreements relate to foreign air transportation;<sup>114</sup>

2. We direct the Joint Applicants, within eighteen months of the date of issuance of this order, to file with the Director of the Office of Aviation Analysis the following as evidence that the four-way joint venture has been implemented:
  - a. A verified statement in Docket OST-2008-0234 attesting that the Atlantic Plus-Plus joint venture has been executed and implemented pursuant to the terms described in the Joint Application, Exhibit JA-1 (Transatlantic Joint Venture Agreement); and
  - b. A complete and unredacted execution copy of the Atlantic Plus-Plus joint venture agreement with appendices.
3. Unless the Joint Applicants make the filings described in Ordering Paragraph 2, above, the authority herein shall expire and the grant of antitrust immunity shall be automatically withdrawn;
4. We determine that, if the conditions of Ordering Paragraph 2, above, are met, our approval and grant of immunity will remain in effect indefinitely, provided that the Joint Applicants:
  - a. Submit for prior approval any confidentiality guidelines or subsequent subsidiary agreements implementing their Alliance Agreements;<sup>115</sup>
  - b. Resubmit the Alliance Agreements before five years from the date of issuance of the final order in this case; and
  - c. Obtain prior approval if they choose to operate or hold out service under a common name or use common brands;
5. We determine that our approval and grant of immunity should be limited in transatlantic markets as follows:
  - a. The Department places limitations on immunity in the Chicago-Frankfurt and Washington-Frankfurt markets, until the JV is implemented, as described in Appendix A to Order 96-5-27, and the New York-Copenhagen, New York-

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<sup>114</sup> Alliance Agreements shall mean those agreements referred to on page 2, Footnote 2, and Exhibit JA-1, of the Joint Application filed on July 23, 2008.

<sup>115</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 unredacted contractual instruments that may materially alter, modify, or amend the cooperation agreements, joint ventures, or confidentiality guidelines. Any appropriate documents shall be submitted to the Director, Office of Aviation Analysis.

Geneva, New York-Lisbon, and New York-Stockholm markets, as described in Appendix A to this Order;

- b. The Joint Applicants may notify the Director of the Office of Aviation Analysis in writing if a new entrant initiates nonstop service in any of the subject markets and sustains that service with a minimum of five weekly roundtrip flights for more than nine months;
  - c. If the Joint Applicants provide notification as set forth in Ordering Paragraph 5(b), above, the limitations on immunity in the subject markets in which the new entry has occurred are automatically withdrawn 60 days from the date of notification, unless the Department objects in writing;
  - d. If limitations on immunity are withdrawn in any subject market, the Department shall place a notice to that effect on the record in this docket;
6. We determine that our approval and grant of immunity should be limited in transborder markets as follows:
- a. The Department retains limitations on immunity in the Chicago-Toronto and San Francisco-Toronto markets, as described in Appendix A to Order 97-9-21, and places limitations on immunity in the Cleveland-Toronto, Houston-Calgary, Houston-Toronto, and New York-Ottawa markets, as described in Appendix A to this Order;
  - b. The Joint Applicants may notify the Director of the Office of Aviation Analysis in writing if a new entrant initiates nonstop service in any of the subject markets and sustains that service with a minimum of five weekly roundtrip flights for more than nine months;
  - c. If the Joint Applicants provide notification as set forth in Ordering Paragraph 6(b), above, the limitations on immunity in the subject market(s) in which the new entry has occurred are automatically withdrawn 60 days from the date of notification, unless the Department objects in writing;
  - d. If limitations on immunity are withdrawn in any subject market, the Department shall place a notice to that effect on the record in this docket;
7. We determine that our approval and grant of immunity should be limited in transpacific markets as follows:
- a. The Department places limitations on immunity in markets between the United States and Beijing, China, as described in Appendix A to this Order;
  - b. The Joint Applicants may notify the Director of the Office of Aviation Analysis in writing if a U.S. carrier that does not have antitrust immunity with any applicant

in this proceeding initiates nonstop service between a point in the United States and a point in China, and sustains that service with a minimum of five weekly roundtrip flights for more than nine months;

- c. If the Joint Applicants provide notification as set forth in Ordering Paragraph 7(b), above, the limitations on immunity in markets between the United States and Beijing, China are automatically withdrawn 60 days from the date of notification, unless the Department objects in writing;
  - d. If limitations on immunity are withdrawn in the subject market, the Department shall place a notice to that effect on the record in this docket;
8. Should any of the city pairs identified as “carved out” in ordering paragraphs 5-7 above become part of a joint venture, the Joint Applicants may petition the Department for its removal from the carved-out list;
  9. We determine that our approval and grant of immunity is subject to the limits and conditions described in Appendix B to this Order concerning the applicability of the U.S. antitrust laws;
  10. We direct the Joint Applicants to submit annual progress reports to the Office of Aviation Analysis, beginning one year from the issuance of this order and continuing each year thereafter while the Alliance Agreements are effective;<sup>116</sup>
  11. We direct Air Canada, The Austrian Group, British Midland Airways, Ltd., Continental Airlines, Inc., Deutsche Lufthansa AG, Polskie Linie Lotnicze LOT S.A., Scandinavian Airlines System, Swiss International Air Lines Ltd., TAP Air Portugal, and United Air Lines, Inc. to withdraw, or to remain withdrawn, from participation in any International Air Transport Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal thereof, to participate in similar alliance activities with a U.S. airline(s);
  12. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in Ordering Paragraph 11, above, as to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;
  13. We direct Air Canada, Austrian, British Midland Airways, Deutsche Lufthansa, Polskie Linie Lotnicze LOT, Scandinavian Airlines System, Swiss, and TAP Air

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<sup>116</sup> The reports should address all the parameters set forth in Section V of the body of this order. We expect the Joint Applicants to deliver the progress report by the close of business on the anniversary date. If the anniversary date falls on a weekend or federal holiday, the Joint Applicants may deliver the report by the close of business on the following business day.

Portugal to continue to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a U.S. point;<sup>117</sup>

14. We may amend, modify, or revoke this authority at any time without hearing;
15. We defer action on all motions for confidential treatment submitted in this docket to date; and
16. We will serve this Order on all parties on the service list in this docket.

By:

**CHRISTA FORNAROTTO**  
Acting Assistant Secretary for Aviation  
and International Affairs

(SEAL)

*An electronic version of this document is available at: <http://www.regulations.gov>*

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<sup>117</sup> We treat the foreign airlines' O&D data as confidential, do not allow U.S. airlines any access to the data, and do not allow foreign airlines any access to U.S. airline O&D Survey data. We use these data only for internal analytical purposes.

## APPENDIX A

### **CARVE OUT CONDITIONS GOVERNING ANTITRUST IMMUNITY FOR THE ALLIANCE AGREEMENTS BETWEEN AIR CANADA, AUSTRIAN, BMI, CONTINENTAL, LUFTHANSA, LOT, SAS, SWISS, TAP, AND UNITED**

#### **Grant of Immunity**

The Department grants immunity from the U.S. antitrust laws to Air Canada, Austrian, bmi, Continental, Lufthansa, LOT, SAS, Swiss, TAP, and United to implement the Alliance Agreements and any agreement incorporated in or made pursuant to the Alliance Agreements.

#### **Limitations on Immunity**

The foregoing grant of antitrust immunity shall not extend to pricing, inventory or yield management coordination, pooling of revenues, or the provision by one party to the other of more information concerning current or prospective fares or seat availability that it makes available to airlines and travel agents generally, with respect to: (i) local U.S.-point-of-sale passengers flying nonstop on transatlantic routes between New York and Copenhagen, New York and Geneva, New York and Lisbon, and New York and Stockholm; (ii) local U.S.-point-of-sale passengers flying nonstop on transborder routes between Cleveland and Toronto, Houston and Calgary, Houston and Toronto, and New York and Ottawa; and (iii) U.S.-point-of-sale passengers flying on transpacific routes between the United States and Beijing, China.<sup>118</sup>

#### **Exceptions to Limitations on Immunity**

Notwithstanding the foregoing limitations,

(1) Antitrust immunity shall extend to coordination among parties to the Atlantic Plus-Plus joint venture pursuant to its terms; and

(2) Antitrust immunity shall extend to coordination to develop, promote, and sell the following discounted fare products: corporate fare products, consolidator/ wholesaler fare products, promotional fare products, group fare products, and fares and bids for government travel or other traffic that any party is prohibited by law from carrying on service offered under its own code:

(a) Among those parties; and

(b) Among those parties and the other alliance participants granted immunity by this order, provided that

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<sup>118</sup> Unless the conditions described in the attached order are met, the parties are also subject to carve outs in the Washington-Frankfurt and Washington-Chicago markets (pursuant to Order 96-11-1) and Chicago-Toronto and San Francisco-Toronto markets (pursuant to Order 97-9-21).

(i) 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 any two or more of the parties; and

(ii) 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 pairs in addition to the routes listed in the previous section of this appendix.

## **Definitions**

“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, which discounts may be stated as percentage discounts from specified published fares, not 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 (i) 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 (ii) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, which 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, which 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, and the configuration of such aircraft; coordination of pricing, inventory and yield management and pooling of revenues; 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 and Conditions for Removal**

At any time, the Department may review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of the following: current competitive conditions in the affected city pairs; 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.

## APPENDIX B

### APPLICABILITY OF THE U.S. ANTITRUST LAWS

The United States antitrust laws, and the defenses available thereunder, shall remain fully applicable to claims that the Joint Applicants' conduct has resulted in or would result in an unlawful restraint of competition within any market for air transportation solely within the United States.

In any civil or criminal action or federal investigation relating to anticompetitive conduct involving a market for air transportation solely within the United States, the Joint Applicants shall not assert that immunity granted by this Order exempts them from an obligation to produce any documents or other evidence.

The conduct immunized by this Order is subject to the Continental-United Antitrust Guidelines and the United-Lufthansa-Continental Guidelines (together, the "Guidelines") submitted as Exhibit JA-2 to the Joint Application, as amended pursuant to agreement between Continental/United and the U.S. Department of Justice.<sup>119</sup> Conduct that is not in accordance with the Guidelines is not immunized. Continental and United shall submit the Guidelines, as amended, as an implementing agreement, and Continental and United shall also submit any proposed revisions to the Guidelines.

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<sup>119</sup> See Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 12/18/08; Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 1/14/09.