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Alliance Compliance: The Divergence in US–EU Airline Alliance Review Policies

Peter J White, JD

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1 INTRODUCTION

Throughout the late twentieth century and into recent years, the airline industry has been characterized by a vast increase in global airline alliances.¹ However, due to strict ownership restrictions,² air carriers cannot take advantage of international mergers or takeovers.³ As a result, many air carriers enter into alliances with other air carriers in order to create an extensive international network, allowing them to benefit from economies of scope and density.⁴ An alliance also may allow an air carrier to operate more efficiently by eliminating duplication of costs, thereby allowing the air carrier to perform a better service

¹ According to statistics from the Organization for Economic Cooperation and Development (OECD), 57% of the total share of world airline traffic is carried by transatlantic airline alliances. Committee on Competition Law and Policy, Airline Mergers and Alliances, Organization for Economic Cooperation and Development, DAFBE/CLP (2000), at 25. Over 80% of airlines worldwide have entered into some form of cooperation with another airline, and there are approximately seventy new or revised alliance agreements each year. Alliance Analysis, Playing for Posit, AIRLINE BUSINESS at 40 (July 2001).

² The United States, for example, has limits on foreign ownership that are stricter than most countries’ requirements. Foreign interests are permitted to hold 25% of the equity share capital of United States’ airlines, and they are not permitted to have “actual control.” Additionally, the airline’s president and at least two-thirds of its directors and managing officers must be citizens of the United States. 49 U.S.C. § 40102(15) (2006).


⁴ Id.
for its customers. Benefits provided to consumers by airline alliances include end-to-end routes to customers, reduced layover times, simplified ticketing, and more consistent service. To accomplish this, the alliance partners employ techniques such as code sharing, coordination of routes and scheduling, integrated marketing, joint product development, and harmonized frequent-flyer programs.

There are, however, potential disadvantages to international airline alliances. For example, alliances could develop strategic programs that allow them to become superpowers in the industry, thereby precluding entrance by other carriers into important city-pair markets. Another anticompetitive risk is that the alliance may drive out competitors from the market. Price fixing is another concern in airline alliances, due to the sharing of pricing information among alliance partners. By sharing pricing information, the airlines could

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5 Scott Kimpel, Comment, Antitrust Considerations in International Airline Alliances, 63 J. AIR L. & COM. 475, 476 (1997).
7 Id.
9 See id. (explaining that due to the United/Lufthansa alliance, American Airlines left the Miami–Frankfurt and Chicago–Dusseldorf route markets, TWA suspended its New York–Frankfurt route, and Delta closed its Frankfurt hub).
10 Id. (citing Charles N.W. Schlangen, Differing Views of Competition: Antitrust Review of International Airline Alliances, 2000 U. CHI. LEGAL. F. 413 (2000)).
achieve a very competitive price as if they were monopolists, which could result in market domination.\textsuperscript{11} It is also possible that an alliance could reduce the number of competitors to such an extent that pricing schemes become noncompetitive.\textsuperscript{12} Some experts believe that the growing number of alliances will result in the airline industry becoming even more highly concentrated.\textsuperscript{13}

Currently, there are three major alliances, although many smaller alliances also exist. Star Alliance, with 26 members, is the largest airline alliance, carrying 586.6 million passengers per year.\textsuperscript{14} SkyTeam, with 11 members, carries 462 million passengers per year, and Oneworld, with 11 members, carries 328.63 passengers per year.\textsuperscript{15}

\textsuperscript{11} \textit{Id.}
\textsuperscript{12} \textit{Id.}
\textsuperscript{13} \textsc{Pat Hanlon}, \textsc{Global Airlines 250} (1999).
DIVERGENCE IN US–EU ALLIANCE REVIEW POLICIES

The scope of an alliance can vary. Some airlines merely wish to enter into code-sharing agreements with other airlines, while others seek to pool revenues, create joint ventures, or even seek antitrust immunity from the government. The process by which airlines enter into an alliance or receive antitrust immunity differs between the U.S. and the EC. Section 2 of this Article will review the substantive competition law of the U.S. and the EU, including the alliance review procedure in each jurisdiction. Sections 3 and 4 will cover in some depth two alliances—SkyTeam and Oneworld—and the review process each alliance underwent in the U.S. and the EC. Finally, Section 5 will address the divergence in policy and procedure between the U.S. and the EC.
2 ALLIANCE REVIEW PROCEDURES AND REGULATIONS

When airlines are actual or potential competitors, the formation of alliances can give rise to antitrust issues, triggering investigations from various competition authorities. One of the key features of international airline alliances is code sharing. Code sharing is a contractual arrangement in which an airline sells a ticket under its name and code number, but the flight itself is operated by another airline.

The United States Department of Transportation (DOT) has the final authority to approve or disapprove a code-sharing agreement, and the United States Department of Justice (DOJ) reviews code-sharing proposals for potential violations of the antitrust laws. Although the DOJ has had jurisdiction over domestic airline mergers since the late 1980s, the DOT has jurisdiction over the approval of international airline alliances and granting antitrust immunity for those agreements.

The European Union (EU), however, was relatively inactive in applying its antitrust laws to alliances between U.S. and EU airlines until British Airways

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17 GLOBALIZATION AND STRATEGIC ALLIANCES, supra note 3, at 186.
19 GLOBALIZATION AND STRATEGIC ALLIANCES, supra note 3, at 186.
21 Id. § 41308.
(BA) and American Airlines (AA) proposed an Alliance in 1996.22 This alliance would give BA and AA 64% of all seats between London Heathrow and the United States, as well as a monopoly on some other important routes.23 This prompted the European Commission (EC)24 to review the anticompetitive consequences of airline alliances.25 The EC may prohibit an alliance, or it may adopt a decision with remedies that create the conditions for approval.26

Because airline alliances inherently cause anticompetitive effects, members of alliances often seek antitrust immunity from competition authorities.27 This Section will briefly review the applicable laws of the United States and the EU in their airline alliance review.

22 GLOBALIZATION AND STRATEGIC ALLIANCES, supra note 3, at 187.
23 Id.
24 The EC is the executive branch of the EU, and is responsible for proposing legislation, implementing decisions, upholding the EU treaties, and general administration of the EU. European Commission (EC)–Statistics Explained, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/European_Commission_%28EC%29 (last visited March 8, 2010).
25 GLOBALIZATION AND STRATEGIC ALLIANCES, supra note 3, at 187 (noting that EC officials could not restrict the BA/AA alliance without reviewing other alliances).
26 Id. at 188.
27 See LU, supra note 8, at 68.
2.1 United States

There are three principal antitrust laws in the United States: The Sherman Act, the Clayton Act, and the Federal Trade Commission Act (FTC Act). However, the FTC Act does not apply to air carriers, as they have been specifically exempted from the FTC Act’s application. An airline alliance that is in restraint of competition in the airline industry may violate Section 1 of the Sherman Act. Furthermore, since an alliance or alliance member can acquire a monopoly at various airports or routes, the agreement may also violate Section 2 of the Sherman Act.

International air transportation is considered as being heavily involved in the “public interest” and is therefore exempt from federal antitrust laws and is

\[\text{31 See Kimpel, supra note 5, at 483.}\]
\[\text{32 Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal.” 15 U.S.C. § 1 (2006).}\]
\[\text{33 Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.” 15 U.S.C. § 2 (2006).}\]
instead subject to supervision by special regulatory commissions.\textsuperscript{34} Prior to the air transportation deregulation in 1978, the industry was protected from intense competition by the Civil Aeronautics Act of 1938\textsuperscript{35} and later the Federal Aviation Act of 1958.\textsuperscript{36}

In 1978, the industry was deregulated by the passage of the Airline Deregulation Act of 1978\textsuperscript{37} and later the International Air Transportation Competition Act of 1979.\textsuperscript{38} Ever since the passage of these acts, the United States has promoted competition in the international air transportation industry.\textsuperscript{39} These acts, and particularly the International Air Transportation Competition Act of 1979, place the antitrust laws as the main promoter of a competitive environment.\textsuperscript{40}

\textsuperscript{34} \textit{See Lu, supra} note 8, at 192 (citing Patricia Barlow, \textit{Aviation Antitrust–International Consideration after Sunset (closing part)}, 12 Air Law 11, 56 (1982)).
\textsuperscript{40} \textit{See id.} (citing Patricia Barlow, \textit{Aviation Antitrust–International Consideration after Sunset (closing part)}, 12 Air Law 11, 12 (1982)).
Title 49, Subtitle VII, Chapter 413, of the United States Code contains the relevant provisions applicable to foreign air transportation that give the DOT the ability to approve\(^\text{41}\) and exempt\(^\text{42}\) intercarrier agreements from antitrust laws.

49 U.S.C. § 41308 reads, in part:

(b) Exemption authorized. When the Secretary of Transportation decides it is \textit{required by the public interest}, the Secretary . . . may exempt a person affected by the order from the antitrust laws to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order.\(^\text{43}\)

The DOT can exempt the intercarrier agreements from federal antitrust laws when they are “required by the public interest” and also when they are consistent with the public interest, convenience, and necessity test.\(^\text{44}\) Therefore, the agreement will be approved and granted antitrust immunity if the agreement is “required by the public interest,”\(^\text{45}\) “necessary to meet a serious transportation need or to achieve important public benefits (including international comity and

\(^{42}\) Id. § 41308.
\(^{43}\) Id. (emphasis added).
\(^{44}\) Lu, supra note 8, at 193.
\(^{45}\) 49 U.S.C. § 41309(b) (2006) (“The Secretary of Transportation shall approve an agreement, request, modification, or cancellation referred to in subsection (a) of this section when the Secretary finds it is not adverse to the public interest and is not in violation of this part.”).
foreign policy considerations),” and “the transportation cannot be achieved by reasonably available alternatives that are materially less anticompetitive.”

To obtain this approval and immunity, the domestic or foreign air carrier must file a complete memorandum of the agreement, or a “request for authority to discuss cooperative arrangements.” Approval and immunity are granted on a case-by-case basis and only if the agreement is found to be in the public interest.

The primary criteria for being in the “public interest” are set forth in 49 U.S.C. § 40101 and are as follows, not including criteria related to safety, labor, airports, etc.:

- The availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.
- Placing maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system; and to encourage efficient and well-managed

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46 Id. § 41309(b)(1)(A).
47 Id. § 41309(b)(1)(B).
48 Id. § 41309(a).
air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.  

- Developing and maintaining a sound regulatory system that is responsive to the needs of the public and in which decisions are reached promptly to make it easier to adapt the air transportation system to the present and future needs of the commerce of the United States; the United States Postal Service; and the national defense.  

- Preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.  

- Avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.  

- Encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—to provide efficiency, innovation, and low prices; and to decide on the variety

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51 Id. § 40101(6).
52 Id. § 40101(7).
53 Id. § 40101(9).
54 Id. § 40101(10).
and quality of, and determine prices for, air transportation services.\textsuperscript{55}

- Encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.\textsuperscript{56}

- Strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.\textsuperscript{57}

- Ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service.\textsuperscript{58}

- After the DOT receives the filing, it gives the Attorney General and Secretary of State a written notice about the filing, and provide them with an opportunity to submit written comments about the filing.\textsuperscript{59} If the Secretary of Transportation, Attorney General, or Secretary of State wish, the DOT may conduct a hearing to decide

\textsuperscript{55} \emph{Id.} § 40101(12).
\textsuperscript{56} \emph{Id.} § 40101(13).
\textsuperscript{57} \emph{Id.} § 40101(15).
\textsuperscript{58} \emph{Id.} § 40101(16).
\textsuperscript{59} \emph{Id.} § 41309(c)(1).
whether the agreement is consistent with the law.\textsuperscript{60} The party defending the agreement carries the burden of proving that the agreement is in the public interest.\textsuperscript{61}

- The procedural rules are spelled out in 14 CFR 303. These rules state that each application must state explicitly whether or not the applicant seeks antitrust immunity, and if so, whether the applicant seeks full or partial immunity.\textsuperscript{62} This application must also include a statement explaining why the applicant believes immunity is in the public interest and necessary in order for the transaction to proceed.\textsuperscript{63} The DOT may conduct a proceeding to review any antitrust immunity that was previously approved or terminate or modify the immunity after notice and a hearing.\textsuperscript{64} If there were previously approved immunity, the immunity seekers have the burden of justifying the continuation of that immunity.\textsuperscript{65} Finally, after investigations are completed, the Director of the Office of International Aviation has authority to approve or deny the

\textsuperscript{60} Id.

\textsuperscript{61} Id. § 41309(2)(b)(1).

\textsuperscript{62} 14 CFR § 303.05(a) (2006).

\textsuperscript{63} Id.

\textsuperscript{64} Id. § 303.03.

\textsuperscript{65} Id. § 303.06–303.07.
application for exemptions “where the course of action is clear under current policy or precedent.”

2.2 **EUROPEAN UNION**

Articles 81 and 82 of the European Community Treaty (EC Treaty) control the Commission’s investigation of an airline alliance. Article 81 prohibits agreements or practices that have as their object or effect the restriction of competition within the EU and that may affect trade between member states. Article 81(1) prohibits, in particular, agreements that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development, or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

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66 *Id.* § 385.13(a).
69 EC Treaty, *supra* note 6, art. 81.
70 *Id.* art. 81(a).
71 *Id.* art. 81(b).
72 *Id.* art. 81(c).
make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.\textsuperscript{74}

The Commission, however, reserves the power to exempt individual agreements, arrangements, or practices that infringe Article 81, but that produce benefits that outweigh the anticompetitive effect.\textsuperscript{75} Article 81(3) states that the provisions of Article 81(1) may be declared inapplicable in cases of the following:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
  - impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.\textsuperscript{76}

\textsuperscript{73} Id. art. 81(d).
\textsuperscript{74} Id. art. 81(e).
\textsuperscript{75} Id. art. 81(3).
\textsuperscript{76} Id. art. 81(3).
Although exemptions are possible for Article 81 violations, they are not possible under Article 82, which prohibits an abuse of a dominant market position. Article 82 provides the following rules:

- Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

- Such abuse may, in particular, consist in:
  - directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  - limiting production, markets or technical development to the prejudice of consumers;
  - applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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77 Id. art. 82.
78 Id.
Article 82 is therefore especially important to the air transport industry, since the industry is characterized by strong national carriers that may enjoy a dominant position and has the ability to developing an extensive network.\textsuperscript{79} Due to specific abuses of dominance in the air transport sector, certain actions, such as refusal to grant access to CRS,\textsuperscript{80} refusal to interline,\textsuperscript{81} or predatory pricing, are violative of Article 82.\textsuperscript{82}

Regulation 3975/87\textsuperscript{83} allows the Commission to apply Articles 81 and 82 in the aviation sector and obligates the Commission to initiate procedures to end any infringement of Articles 81 and 82 either on its own initiative or in response to a complaint.\textsuperscript{84} This regulation also enables undertakings to apply to the

\textsuperscript{79} See Lu, supra note 8, at 100 (stating that the present regulatory environment of bilateral air transport agreements or the “grandfather right” of slot allocation may result in dominance in a particular route). The “grandfather right” refers to the fact that an air carrier has priority in using the same slots in the next season as it does in the current season. \textit{Id.} at 100 n.112.

\textsuperscript{80} A Computer Reservation System (CRS) is a system for reserving seats on commercial flights electronically. Several airlines own and market such systems, which are used by travel agents. Airline Glossary, www.avjobs.com/history/airline-glossary.asp (last visited March 9, 2010).

\textsuperscript{81} Refusal to interline refers to a situation where a traveler has an exchangeable ticket issued by one airline on one route. The airline then refuses to allow the ticket to be used on another airline, forcing the traveler to use the ticket on another flight with the original issuing airline. This limits the traveler’s choice and can also prevent other airlines issuing tickets on their behalf, creating barriers to entry on that route. \textit{See} Lu, supra note 8, at 102.

\textsuperscript{82} \textit{Id.} at 102.


\textsuperscript{84} See Lu, supra note 8, at 108 (adding that, in carrying out investigations and enforcement procedure, the Commission should be in close liaison with
Commission, requesting that, based on the facts in their situation, Articles 81 and 82 should not apply to a particular situation.\textsuperscript{85} This application is also usually accompanied by a separate exemption request pertaining to Article 81, subject to Article 81(3).\textsuperscript{86} Prior to 2004, the Commission could not apply Articles 81 and 82 to air transport services on routes that include points both inside and outside the EU.\textsuperscript{87} In 2004, the Commission amended Regulation 3976/87, extending the Commission’s power to air transport between the EU and third countries.\textsuperscript{88}

Article 2 of Regulation 3976/87 allows the Commission to adopt block exemption regulations with respect to agreements, decisions, or concerted practices which have as their object any of the following:

- joint planning and coordination of schedules;
- consultations on tariffs for the carriage of passengers and baggage and of freight on scheduled air services;
- joint operations on certain new scheduled air services;
- national authorities and an advisory Committee on Agreements and Dominant Positions).


\textsuperscript{86} See Lu, supra note 8, at 108 (citing John Balfour, European Community Air Law 187–90 (1995)).

\textsuperscript{87} Soames, supra note 16, at 1.

• slot allocation at airports and airport scheduling in accordance with the Code of Conduct adopted by the Council; or

• the common purchase, development, and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings in accordance with the Code of Conduct adopted by the Council.\textsuperscript{89}

The Commission applies its power under Articles 81 and 82 in order to ensure continued competition between networks at the global level and creates conditions to which alliances must adhere instead of simply prohibiting them.\textsuperscript{90}

3 SKYTEAM (DELTA, NORTHWEST, AIR FRANCE, KLM, ALITALIA, CZECH)

3.1 BACKGROUND

On September 24, 2004, Delta, Northwest, Air France, KLM, Alitalia, and Czech filed an application to the DOT requesting antitrust immunity.\textsuperscript{91} In response to their application, the DOJ submitted comments expressing concern that the applicants did not justify a grant of immunity for a worldwide alliance

\textsuperscript{89} COMPETITION LAW OF THE EUROPEAN COMMUNITY 1302 (eds. Van Bael & Bellis) (2004) (citing Article 2, Council Regulation 3976/87 on the application of Article 81(3) of the treaty to certain categories of agreements and concerted practices in the air transport sector, OJ 1987 L347/9, as most recently amended by the Regulation on Procedure).

\textsuperscript{90} Lu, \textit{supra} note 8, at 132.

\textsuperscript{91} Joint Application for Antitrust Immunity (No. OST-2004-19214-1).
relationship. The applicants responded to the DOJ’s concerns by limiting the scope of the alliance agreements to foreign air transportation via transatlantic routings.

The applicants stated that their application should be approved because it meets the statutory criteria under 49 U.S.C. § 41308–41309. They argued that the proposed alliance does not eliminate or substantially reduce competition and is not adverse to the public interest. In the alternative, they argued that even if the DOT found a substantial reduction or elimination in competition, the alliance would still qualify for approval because it achieves important public benefits, specifically, the preservation of efficiencies, the introduction of new flights, more frequent service, increased competition among branded global marketing alliances, and international comity. Additionally, the applicants stated that the benefits of the alliance could not be achieved through any available alternative means, stating that they want to agree on international routes and schedules and fares and discuss service enhancements to reduce costs and create public benefits. The applicants claimed that to do so would require antitrust

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92 Comments of the DOJ at 2 (No. OST-2004-19214-164).
94 Order to Show Cause at 6 (No. OST-2004-19214-0195).
95 Id. at 6–7.
96 Id. at 7.
97 Id.
immunity. The applicants argued that conventional code sharing would not result in the envisioned public benefits, because the airlines would be advancing their own interests instead of the interests of the alliance as a whole. They argued that they would not pursue the proposed alliance without antitrust immunity and that they would forego the potential benefits of the alliance rather than run the risk of lawsuits. The applicants further argued that failure to approve the application would frustrate the expectations of the foreign governments involved and would contravene the spirit of the open-skies treaties. Since two of the carriers were United States-based, the applicants argued that the inclusion of Northwest and Delta would not affect the competition analysis, because the antitrust immunity would be only applied

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\begin{align*}
98 & \text{Id.} \\
99 & \text{Id.} \\
100 & \text{Id.} \\
101 & \text{An open-skies agreement is defined as a type of agreement which, while not uniformly defined by its various advocates, would create a regulatory regime that relies chiefly on sustained market competition for the achievement of its air-services goals and is largely or entirely devoid of a prior governmental management of access rights, capacity, and pricing, while having safeguards appropriate to maintaining the minimum regulation necessary to achieve the goals of the agreement. Ruwantissa Abeyratne, } US/EU Open Skies Agreement—Some Issues, 72 J. AIR L. & COM. 21 n.19 (2007). \text{ Open-skies agreements are based upon the model open-skies text, which is available at http://www.state.gov/documents/organization/114970.pdf. As a prerequisite to granting antitrust immunity, DOT policy requires that an open-skies agreement be signed between the United States and the foreign carrier’s home country. Globalization and Strategic Alliances, supra note 3, at 187 (noting that the United States’ bilateral open-skies agreements with the Netherlands, Austria, and Belgium were signed concurrently with the United States’ granting antitrust immunity to the KLM/Northwest and Delta/Sabena/Swissair/Austrian alliances).} \\
102 & \text{Order to Show Cause at 7 (No. OST-2004-19214-0195).}
\end{align*}
\]
towards their international operations, leaving their domestic operations fully subject to the antitrust laws.\textsuperscript{103} Finally, the applicants agreed to accept a range of conditions that the DOT has commonly placed on approvals and grants of immunity.\textsuperscript{104}

In response to the application for antitrust immunity, there were numerous comments in support of and against the proposed immunity.\textsuperscript{105} American Airlines filed a response\textsuperscript{106} which argued that the immunity would provide few benefits and will instead enable SkyTeam partners to leverage their combined market share to obtain higher prices.\textsuperscript{107} American alleged that harm had occurred because the ease of entry permitted by open-skies agreements had been outweighed by greater market power gained by European alliance partners at their hubs.\textsuperscript{108} American also invoked Air France’s interline policies, stating that Air France’s recently announced prorate terms had reduced American’s interline traffic on the Air France system by 90%, making it very costly for non-alliance members to interline with Air France.\textsuperscript{109} Further, American argued, the

\textsuperscript{103} \textit{Id.} (adding that if the DOT were to deny the immunity on the basis that it includes two U.S. carriers, it would create a scenario whereby U.S. carriers would be excluded from participation in the kind of alliances that the DOT has found to be beneficial to a competitive marketplace).

\textsuperscript{104} \textit{Id.} at 8.

\textsuperscript{105} \textit{Id.} at 10.

\textsuperscript{106} Answer of American (No. OST-2004-19214-97).

\textsuperscript{107} Order to Show Cause at 11 (No. OST-2004-19214-0195).

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.}
immunity would have anticompetitive effects domestically.110 Since 49 U.S.C. §§ 41308–41309 prohibit the DOT from immunizing transactions that relate to domestic travel, the DOT could not lawfully grant Delta and Northwest immunity because they do not operate separate international and domestic networks.111 The immunity, American argued, would create a spillover of competitive information and an atmosphere of cooperation between Delta and Northwest that would permeate all markets.112

The Department of Justice also answered113 in opposition to the immunity, reminding the DOT that the applicants must meet a “significant burden” to justify the immunity.114 The DOJ argued that although there could be some procompetitive benefits from the immunity, the immunity is not necessary to achieve them.115 Noting that Delta and Northwest compete on routes between the United States and Canada, Mexico, the Caribbean, and Asia, the DOJ highlighted that the application made no justification for the proposed immunity with respect to those markets.116

110 Id. at 12.
111 Id. (arguing that domestic flights carry a significant number of international passengers because international traffic now accounts for nearly 30% of Delta’s and Northwest’s revenues).
112 Id. (stating that the application would not only open no new markets, it would create overlaps affecting 2.8 million passengers annually).
113 Comments of the DOJ at 8, 15 n.37 (No. OST-2004-19214-164)).
114 Order to Show Cause at 15 (No. OST-2004-19214-0195) (citing Comments of the DOJ at 8, 15 n.37 (No. OST-2004-19214-164)).
115 Id.
116 Id.
The DOJ also emphasized the vigorous domestic competition between Delta and Northwest and the fact that they have overlapping networks. Since there is a ripe opportunity for collusion, the DOJ warned that there should be closer scrutiny on this agreement, since allowing Delta and Northwest to coordinate on international initiatives could present opportunities for them to discuss and resolve competitive issues on their domestic routes. The DOJ also claimed that the wording in the agreements was inchoate and provided too much latitude for Northwest and Delta to combine any and all of their activities that involve international air transport and that the applicants need to present more definitive agreements.

3.2 DOT’s Response—SkyTeam I

Although the DOT rejected SkyTeam’s request for antitrust immunity, it did approve the application for code sharing. In a February 2006 order, the DOT found that the SkyTeam members did not “show that their alliance would

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117 Id. (relying on evidence showing that Delta and Northwest are the only two carriers with nonstop service in five domestic city-pairs, they are two of three carriers with nonstop service in two other city-pairs, and they are significant competitors in many other city pairs).
118 Id.
119 Id.
120 Order to Show Cause at 2 (No. OST-2004-19214).
provide sufficient public benefits to warrant an extraordinary grant of antitrust immunity.”

The DOT further observed that the networks of each alliance overlapped to a large extent. It relied on the booking data submitted by the applicants to estimate that approximately 85% of bookings including transatlantic travel on the Northwest/KLM network involved travel to cities served by the Delta/Air France/Alitalia/Czech network. Additionally, they found that 82% of the bookings on the Delta/Air France/Alitalia/Czech network involved travel to cities served by the Northwest/KLM network.

This case—SkyTeam I—represented the first attempted merger of two immunized alliances. It failed because the DOT felt that there were no new substantial public benefits produced by the merged alliance.

3.3 DOT’S RESPONSE—SKYTEAM II

On June 28, 2007, SkyTeam carriers Air France, Alitalia, Czech, Delta, KLM, and Northwest again applied for antitrust immunity, and this application became known as SkyTeam II. The most critical part of the SkyTeam II application was a joint venture between Delta, Northwest, Air France, and KLM, known as the “4-way JV”. This sought to bring all transatlantic services

\[121\] Order to Show Cause at 3 (No. OST-2004-19214-0202).
\[122\] Order to Show Cause at 14 (No. OST-2007-28644).
\[123\] Order to Show Cause at 3 (No. OST-2007-28644).
\[124\] Id.
offered by the participants under the control of the joint venture. It sought to align the economic incentives of the participants to create “metal neutrality.” Metal neutrality refers to a revenue-sharing program that allows the participants’ respective sales forces to sell the alliance’s services without giving preference to any of the member carriers.

In light of the rejection of SkyTeam I’s request for antitrust immunity, the applicants argued that the situation in SkyTeam II was different. They focused on the creation of the joint venture, arguing that it would deliver substantial public benefits, and that the recent U.S.–EU Air Transport Agreement would “enhance competition for transatlantic air service and

125 Id.  
126 Id.  
128 Order to Show Cause at 3 (No. OST-2007-28644). The DOT found that “each alliance had developed separate and mutually exclusive benefit sharing arrangements that were not reconciled in the [SkyTeam I] application.” Id. at 2. 
129 Air Transport Agreement, Official Journal of the European Union, L134 (volume 50, May 25, 2007). This agreement replaced the numerous individual bilateral air service agreements between the United States and EU Member States. This agreement sought to spark competition and provide welfare gain by allowing any EU airline and any U.S. airline to fly between any point in the EU and any point in the U.S. It further allowed U.S. airlines to fly between points in the EU, but it did not allow European airlines to conduct intra-U.S. flights. It also did not change the United States’ ownership and control requirements, which ban foreign entities from purchasing a controlling stake in a US airline. Id. Open-skies agreements tend to promote competitive airline service because market forces, rather than restrictive agreements, affect the price, frequency,
remove regulatory flux in the marketplace.” Furthermore, because the DOT had recently granted expanded immunity to Star Alliance—one of the three primary airline alliances and SkyTeam’s competitor—SkyTeam argued that there would be a “competitive imbalance” unless the DOT approved SkyTeam’s request for immunity.

The request for immunity was met with opposition from American Airlines, which argued that granting antitrust immunity would reduce competition. They argued that SkyTeam had not proposed an adequate remedy for the “unavoidable spillover of competitively sensitive information in domestic markets that could result from the immunized cooperation of Delta and Northwest for their international alliance activities.”

As part of its competitive analysis, the DOT applied the Clayton Act test, which requires the DOT to consider whether the alliance agreement is likely to substantially reduce competition such that the applicants would be able to exercise market power. The DOT concluded that once the joint venture was

capacity, and quality of airline service. Order to Show Cause at 3 (No. OST-2008-0252).

130 Order to Show Cause at 3 (No. OST-2007-28644).
131 Id.
132 “Market power” refers to the ability to profitably charge supracompetitive prices or reduce service or quality below competitive levels in any relevant market. This is determined by considering whether the alliance would significantly increase concentration, whether it raises concerns about potential anticompetitive effects, and whether entry into the market would be “timely, likely, and sufficient,” either to deter or counteract the alliance’s potential for anticompetitive effects. Id.
fully implemented, it would likely produce cost reductions and operating efficiencies on a larger scale than prior SkyTeam agreements and would “likely result in the introduction of new capacity and greater availability of discount fares.” 133 The DOT viewed the “4-way JV” as a “significant shift in the way in which SkyTeam plans to deliver benefits to the traveling and shipping public.” 134

The DOT, however, required conditions to the approval of antitrust immunity. One such condition was the timely implementation of the joint venture. 135 Since the most critical component of the application was the joint venture, the DOT wanted to ensure that the joint venture was created in a timely fashion, and instituted an eighteen-month deadline for its creation. 136 Because the DOT felt that the joint venture was necessary to mitigate possible anticompetitive effects of the antitrust immunity and ensure the production of public benefits, antitrust immunity would expire if the joint venture were not created within eighteen months.

A second condition to the approval of antitrust immunity was “carve outs.” Carve outs are enumerated exceptions to the grant of immunity and are issued with the goal of protecting against anticompetitive effects. Carve outs have been the principle mechanism used by the DOT to guard against anticompetitive

133 Id. at 15.
134 Id.
135 Id. at 16.
136 Id.
implications of granting antitrust immunity.  

Because the SkyTeam II alliance agreements would supersede previous SkyTeam arrangements, such as the code sharing allowed in SkyTeam I, the DOT needed to make a special requirement that those carve outs made in previous agreements would not be eliminated by this most recent SkyTeam II agreement. These continued carve outs included Atlanta to Paris Charles de Gaulle (CDG) and Cincinnati to Paris CDG routes, which had been imposed in the Delta/Air France/Alitalia/Czech/Korean alliance, but not in the Northwest/KLM alliance. In its 2008 order granting SkyTeam II the authority to operate an immunized alliance in transatlantic markets, the DOT stated

In several past cases involving nonstop overlaps, we have only been willing to approve the agreements provided that the parties avoid coordinating the sale of tickets to time-sensitive travelers in the nonstop markets who might not otherwise have viable connecting options. These so-called “carve outs” preclude the alliance partners from coordinating fares for unrestricted coach, business, and first class traffic for the U.S.-point-of-sale. The carve out conditions do

\footnote{A notable exception to the DOT’s history of utilizing carve outs came in 2010 in its Oneworld decision, explained in detail infra on page 33.}  
\footnote{See SkyTeam I, supra page 20.}  
\footnote{Order to Show Cause at 16 (No. OST-2007-28644).}
not affect nonstop overlaps that may occur subsequent to the transaction.\textsuperscript{140}

The applicants maintained that carve outs were not appropriate or necessary for SkyTeam, arguing that the number of affected passengers was small and that there were reasonable alternatives for passengers if the applicants were to raise prices or restrict output.\textsuperscript{141} The DOT agreed that carve outs were “inconsistent with the nature” of the alliance, but held that the carve outs were necessary until the applicants were ready to implement the joint venture.\textsuperscript{142} Furthermore, they did not impose any carve outs on nonstop overlaps that were created by the SkyTeam II transaction.\textsuperscript{143}

3.4 EC’S RESPONSE

As previously described, the EC’s alliance review procedures differ greatly from those of the U.S., in that the EC issues a statement of objections to which the applicants respond with a statement of commitments.\textsuperscript{144} This “commitment package” describes in detail the methods by which the parties will mitigate the potential anticompetitive effects envisioned by the EC.

\textsuperscript{140} Order to Show Cause at 9 (No. OST-2007-28644).
\textsuperscript{141} Id. at 10 (asserting that carve outs would “impose duplicative costs, undermine the alignment of economic incentives, and destroy revenue and cost efficiencies”).
\textsuperscript{142} Id.
\textsuperscript{143} Id. These newly created nonstop overlaps included Atlanta–Amsterdam, Detroit–Paris CDG, and New York JFK–Amsterdam. Id.
\textsuperscript{144} See Alliance Review Procedures and Regulations, supra page 5.
In June 2006, the EC submitted a Statement of Objections to SkyTeam members, noting that they were particularly concerned about cooperation on certain city pairs on which the applicants had strong market presence and on which there were significant barriers to entry.\textsuperscript{145} On these routes, the EC believed that SkyTeam did not face sufficient competition from other carriers, unlike in the past when alliance members competed with each other.\textsuperscript{146} SkyTeam submitted a commitment package in 2008, in which they proposed making takeoff and landing rights—called “slots”—available for transfer, sharing frequent-flyer programs with new entrants if they do not have a similar program, entering into an interlining agreement with new entrants, entering into prorate agreements for “behind and beyond traffic” on the intra-EU routes, and facilitating intermodal services.\textsuperscript{147} The EC disclosed the commitment package for public consultation, and the investigation is ongoing.\textsuperscript{148}

\begin{itemize}
\item \textsuperscript{145} These city pairs included Amsterdam–Detroit and Amsterdam–Minneapolis; Paris–Atlanta, Paris–Cincinnati, Rome–Atlanta, Milan–New York City, Paris–Prague, Milan–Prague, Rome–Prague, Amsterdam–Prague, and Paris–Seoul.
\item \textsuperscript{146} Global Competition Review, \textit{Airports, Airlines, Alliances and Mergers: Increasingly on the Radar of Antitrust Regulators}, http://www.globalcompetitionreview.com/reviews/19/sections/68/chapters/743/air-transport/ (last visited May 20, 2010).
\item \textsuperscript{147} John Ratliff, SkyTeam Commitments, Major Events and Policy Issues in EC Competition Law, 2006–2007 (Part 2), at 88.
\item \textsuperscript{148} Global Competition Review, \textit{Airports, Airlines, Alliances and Mergers: Increasingly on the Radar of Antitrust Regulators}, http://www.globalcompetitionreview.com/reviews/19/sections/68/chapters/743/air-transport/ (last visited May 20, 2010).
\end{itemize}
4 ONEWORLD (BRITISH AIRWAYS, IBERIA, FINNAIR, ROYAL JORDANIAN)

4.1 BACKGROUND

On August 15, 2008, American, British Airways, Finnair, Iberia, and Royal Jordanian filed an application for antitrust immunity for Oneworld alliance.\(^{149}\) In addition to filing an application for immunity, they also filed an application for code-share authority.\(^{150}\) The submitted agreements sought to integrate the alliance in the areas of planning, marketing, and operations, allowing the participant airlines to engage in code sharing, coordinate customer service and ground operations, link frequent-flyer plans, coordinate sales and corporate contracts, and jointly price and manage capacity on certain routes.\(^{151}\)

This was the third time that American and British Airways sought antitrust immunity.\(^{152}\) The first case began in 1997 and ended when the DOT terminated the proceeding after it became obvious that the United Kingdom and the United States would not reach an open-skies agreement.\(^{153}\) The second case began in 2001 and ended when the applicants withdrew their request because

\(^{149}\) Joint Application for Antitrust Immunity (No. DOT-OST-2008-0252-001).
\(^{151}\) Joint Application for Antitrust Immunity at 3 (No. DOT-OST-2008-0252-001).
\(^{152}\) Id. at 4.
\(^{153}\) Id.
they would not accept the principal remedies proposed by the DOT.\textsuperscript{154} These remedies included transferring sixteen slots at London’s Heathrow airport with the goal of facilitating new entry into the U.S.–London market.\textsuperscript{155}

The Oneworld alliance agreement stated that three of the airlines—American, British Airways, and Iberia—would enter into a joint venture agreement and would jointly plan and manage all of their capacity services over the North Atlantic, coordinating business operations and sharing revenue.\textsuperscript{156} Furthermore, the arrangement was designed to be “metal neutral,” with each carrier acting for the benefit of the alliance as a whole.\textsuperscript{157}

The alliance was met with opposition from Virgin Atlantic, which argued that circumstances had not changed since the last American/British Airways application that the DOT rejected.\textsuperscript{158} They also argued that the alliance was a “grave threat” to competition in several transatlantic markets in which there was an overlap of services.\textsuperscript{159} Among other arguments, Virgin Atlantic argued that

\begin{footnotesize}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} The DOT assumed that the two countries would reach an agreement that would allow all of the proposed new services to be introduced. However, upon the voluntary withdrawal of the applicant’s request, new entry did not occur in the U.S.–Heathrow market. \textit{Id.}
\textsuperscript{156} \textit{Id.} at 5.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 7.
\textsuperscript{159} \textit{Id.}
\end{footnotesize}
there were no consumer benefits and that the anticompetitive effects could not be remedied.\textsuperscript{160}

The DOJ also filed supplemental comments in which it argued that the alliance would result in anticompetitive effects on six transatlantic routes,\textsuperscript{161} stating that fares on these routes could increase substantially.\textsuperscript{162} The DOJ recommended that the DOT's grant of immunity should be limited, and proffered three remedies that could protect competition: (1) unencumbered slot divestitures, (2) earmarked slot divestitures, and (3) carve outs from immunity.\textsuperscript{163}

### 4.2 DOT's Response

In its Order to Show Cause, dated February 13, 2010, the DOT tentatively approved both the code sharing and the alliance agreements. The Department found that the expanded code-share authority between American and British Airways was encompassed by the U.S.–EU Air Transport (“open-skies”) Agreement and that it is in the public interest and would result in new service opportunities for U.S. passengers and shippers.\textsuperscript{164}

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\textsuperscript{160} Id.


\textsuperscript{162} Joint Application for Antitrust Immunity at 8 (No. DOT-OST-2008-0252-001).

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 12.
With regard to the alliance agreement, the DOT considered the potential competitive harm to flights between the U.S. and Heathrow, which serves as a primary hub for Oneworld. Due to the limited runway capacity at Heathrow, slots are extremely scarce, which serves as a barrier to entry in the Heathrow market. The DOT recognized that it was necessary to take procompetitive precautions because the proposed alliance would give Oneworld control of almost half of Heathrow’s available slots.

To prevent this potential harm, the DOT departed from its typical remedy of issuing immunity carve outs and instead proposed that the applicants make four slot pairs available to competitors for new U.S.–Heathrow services. This slot remedy would, according to the DOT, “offset the potential loss in competition that results from combining the international operations of American and British Airways, which currently compete in U.S.–Heathrow markets, and it would give competitors the opportunity to introduce new services and improve their access to Heathrow.” The slot remedy includes allowing four daily round trips out of Heathrow—two to Boston and two to any other U.S. airport. In addition to the slot remedy, the DOT proposed other remedies including changing some terms of

\[\text{Id. at 2.}\]
\[\text{Id. at 2–3.}\]
\[\text{Id. at 3.}\]
\[\text{Id.}\]
\[\text{Oneworld proposal advances, DALLAS NEWS, D01 (Mar. 11, 2010).}\]
the joint venture agreement and requiring the submission of traffic data and implementation of the alliance within eighteen months.\footnote{Joint Application for Antitrust Immunity at 3 (No. DOT-OST-2008-0252-001).}

4.3 EC’S RESPONSE

The EC began an investigation in April, 2009, to determine whether the Oneworld alliance deal violated EU rules against restrictive business practices.\footnote{Europe Has Antitrust Concerns in Airline Alliance, NYTIMES.COM (Oct. 2, 2009).} The EC’s statement of objection is primarily concerned with the potential dominant market position the deal would give British Airways and American Airlines on routes between Heathrow and American cities such as Dallas–Ft. Worth, Boston, and Miami.\footnote{Commission confirms sending Statement of Objections to three members of oneworld airline alliance, MEMO/09/430 (Oct. 2, 2009), available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/430&format=HTML&aged=0&language=EN&guiLanguage=en.}

In March, 2010, the EC stated that the Oneworld partners have offered to lease enough slots at Heathrow to give competitors six additional flights per day to U.S. cities.\footnote{Oneworld proposal advances, DALLAS NEWS, D01 (Mar. 11, 2010).} This would allow two daily flights to New York–Kennedy, two to Boston, one to Dallas–Ft. Worth, and one to Miami.\footnote{Id.} Additionally, the parties agreed to let passengers on those competing flights earn frequent-flier miles on Oneworld programs. The concessions also included allowing competing airlines

\footnote{Id.}
to feed passengers to and from the alliance’s flights as well as prorate the revenue from airfares.\textsuperscript{175} Although the EC is still reviewing the Oneworld case, some commentators feel that the EC’s announcement indicates that the Commission will likely approve the request for immunity against strenuous objections from Virgin Atlantic.\textsuperscript{176}

5 \textbf{TOWARD HARMONIZING ALLIANCE REVIEW}

Currently, the alliance review in the U.S. and the EU are divergent. As explained in detail above, the same alliance must undergo different standards of review under U.S. and EU law, and then they are faced with different remedies to mitigate any antitrust concerns that arise in the course of that review. This is highly inefficient and poses great expense to the airlines and the competition authorities charged with alliance review. Furthermore, this adds unnecessary delay to the alliance review process, stalling potential welfare gain. There are, however, several policy and procedural modifications that could help make the alliance review process more efficient.

\textsuperscript{175} \textit{Id.}  
\textsuperscript{176} \textit{Id.}
5.1 Evaluation of Market Concentration

One example of divergent competition policy is the U.S. and EC’s differing methods of evaluating market concentration. The EC requires alliance partners to reduce their combined number of weekly frequencies to allow their competitors to operate up to 55% of frequencies on the hub-to-hub routes. U.S. authorities, however, rely on both market share and market power data in evaluating whether antitrust immunity should be granted. In addition to utilizing the commonly accepted Herfindahl-Hirschman Index (HHI), the DOT considers whether the alliance charges supracompetitive prices or reduces services below competitive levels.

This divergence in market concentration evaluation can result in the U.S. not considering an alliance’s market power to be concentrated, but the EC still

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177 LU, supra note 8, at 243.
178 Id. (noting that the Commission gave no emphasis to the 55%-45% ratio in recent alliance review, which may or may not be an indicator of the EC’s approach to determining market concentration).
179 Id.
180 HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. It takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. HHI is increased when there is a decrease in the number of firms in a market and when there is an increasing disparity in size between those firms. The Herfindahl-Hirschman Index, http://www.justice.gov/atr/public/testimony/hhi.htm (last visited May 17, 2010).
181 LU, supra note 8, at 243.
requiring the alliance to reduce its weekly frequencies and slots.\textsuperscript{182} The approach utilized by the U.S. is more scientific and persuasive\textsuperscript{183} and should be adopted by the EC.

5.2 REMEDIES

As described in detail in the SkyTeam and Oneworld cases above, another divergence exists in the remedies imposed by U.S. and EC competition authorities. The EC relies on the following remedies with regard to approving transatlantic airline alliances:

- Frequency divestiture: In the British Airways/American Airlines case, the Commission stated that the alliance had to reduce frequencies on hub-to-hub routes and allow competitors to hold up to 55\% of the total number of slots on non-hub-to-hub routes.\textsuperscript{184}

- Interlining agreements: Airlines established in the European Common Market or in the U.S. that operate service on the same relevant route markets as the alliance partners should be able to ask for an interlining agreement with members of the alliance.\textsuperscript{185}

\textsuperscript{182} Id. at 244–45.

\textsuperscript{183} Id. at 244.

\textsuperscript{184} Id. at 246 (citing Commission Notice concerning the Alliance between British Airways and American Airlines, O.J. C239/10 (1998)).

\textsuperscript{185} Id. (citing Commission Notice concerning the Alliance between Lufthansa, SAS, and United Airlines, COMP/D-2/36.201, 36.076, 36.078).
Other remedies used by the EC include prohibiting securing the loyalty of travel agencies to the members of the alliance, restrictions on frequent-flyer programs, and preventing Computer Reservation System (CRS) bias.\textsuperscript{186}

The U.S., in contrast to the EC, primarily relies on the following remedies with regard to approving transatlantic airline alliances:

- **Carve outs**: The DOT routinely excludes certain categories of services to preserve competition in market overlaps.\textsuperscript{187}
- **Withdrawal from IATA tariff consultation activities**: The DOT prevents alliance carriers from participating in some IATA tariff coordination activities.\textsuperscript{188}

In addition to these remedies, the DOT has recently imposed a slot divestiture in the Oneworld case described above as well as a British Airways/American Airlines alliance case in 2001 in which the parties rejected the proposed remedy of transferring sixteen slots. The DOT has also imposed an immunity carve out on CRS ownership interests.\textsuperscript{189}

It is a promising sign that the DOT imposed slot reductions in its 2010 approval of the Oneworld alliance, but the EC has not imposed carve outs as a remedy to anticompetitive effects. This divergence in remedies has the effect of

\textsuperscript{186} Id.
\textsuperscript{187} Id. at 247.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
causing a burden for the airlines instead of promoting free competition in the international airline market. As competition policies of the U.S. and EC converge, authorities should pay greater attention towards imposing parallel remedies on the alliance applicants.

5.3 Concurrent or Transferred Alliance Review Authority

One method to promote policy harmonization in alliance review is to adopt dual, concurrent authority by the DOJ and the DOT to review alliances and mergers. Currently, the DOT has sole authority to approve or reject airline alliances, and input from the DOJ, though extensive, is often afforded no more than a mere sentence or paragraph in DOT final orders. In numerous cases, the DOT has granted immunity in spite of the DOJ’s ardent objections. In other cases, the DOJ and DOT have differed on the type of remedy to be imposed on the applicants.

The tension between the DOT and the DOJ on this issue is palpable. In 2007, nine members of Star Alliance applied for antitrust immunity. Because

190 Id. at 246.
191 The Airline Deregulation Act of 1978 curtailed the Civil Aeronautics Board’s (CAB) authority to grant immunity in the domestic industry. The DOJ was subsequently given an expanded role in enforcing domestic competition laws and, later, authority to review airline mergers. The Deregulation Act, however, did not change CAB’s authority to approve agreements involving international air transportation or to confer antitrust immunity on an agreement, if necessary for diplomacy or public interest. The DOT inherited these authorities from CAB in 1985. National Research Council, Transportation Research Board, Entry and Competition in the U.S. Airline Industry: Issues and Opportunities, at 146 n.5.
192 See, e.g., Oneworld case study, supra page 33.
Continental Airlines withdrew from SkyTeam and joined Star Alliance, this was the first antitrust immunity case that included two U.S. carriers. The DOT, after conducting a thorough analysis of four markets, issued an Order to Show Cause granting authority for Continental to be added to the existing immunized alliance involving Star Alliance. In June, 2009, the DOJ filed comments in response to the DOT’s order. This filing constituted the first opportunity for Christine Varney, President Barack Obama’s appointee to Assistant Attorney General for Antitrust, to evaluate global antitrust alliances. In its comments, the DOJ voiced great concerns about harm to domestic competition caused by Star Alliance and recommended extensive carve outs. Furthermore, the DOJ asserted that there was no justification for global immunity, asserting that a grant of global immunity between Continental and United would eliminate competition in non-transatlantic international markets where they currently compete and would increase the risk of “spillover effects” in domestic markets.

193 The Star Alliance case revolved around four markets: regional markets, country-pair markets, city-pair markets, and domestic competition.
194 Order to Show Cause (No. OST-2008-0234).
195 Comments of the Department of Justice on the Show Cause Order (No. OST-2008-0234).
196 Id. at 39. The DOJ warned that fares would increase by 6% to 15% on key routes if the DOT ignored its advice to reject antitrust immunization. Id. at 43.
197 Id. at 42 (declaring that the applicants did not show that global immunity between Continental and United is necessary to the public interest, and that in the absence of such a showing, there is no justification for accepting the risk of consumer harm in both international and domestic markets).
The DOJ concluded, based on its empirical research, that carriers in nonimmunized alliances offer lower fares than those in immunized alliances.\textsuperscript{198} In spite of this eager opposition by the DOJ, the DOT approved the alliance as well as antitrust immunity for Continental Airlines.\textsuperscript{199} This filing could constitute the DOJ’s attempt to lay the groundwork for removing antitrust immunity authority from the DOT.

In many areas of antitrust review, there is dual, concurrent jurisdiction by antitrust and regulatory agencies. For example, the Federal Communications Commission and the antitrust agencies have concurrent jurisdiction over communication industry mergers.\textsuperscript{200} The Federal Energy Regulatory Commission (FERC) and the antitrust agencies have concurrent jurisdiction over electric utility company mergers.\textsuperscript{201}

\textsuperscript{198} Id. at 43.
\textsuperscript{200} Memorandum, Supplemental Regulated Industries Discussion Memorandum—Merger Review in Regulated Industries at 8 (July 21, 2006). The FCC’s role in the merger review is primarily concerned with the transfer of electromagnetic spectrum licenses. Additionally, the FCC has specific authority under the Clayton Act to review common carrier mergers, although this authority is not often invoked. Id. (citing 15 U.S.C. §§ 18, 21(a)).
\textsuperscript{201} Id. (indicating that such mergers require FERC approval and are also subject to Hart-Scott-Rodino review and challenge under § 7 of the Clayton Act).
Similarly, the DOT’s mission is grounded in public policy,\textsuperscript{202} whereas the DOJ primarily acts as an enforcement agency rather than a policymaking body.\textsuperscript{203} As such, the DOJ has resources available to it that assist in global antitrust policy convergence. For example, the DOJ is a member of the International Competition Network (ICN), which exists to encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies, and facilitate international cooperation.\textsuperscript{204} The EC, as an antitrust enforcer, is also a member of the ICN, but the DOT is not. Although the DOT and EC confer,\textsuperscript{205} involvement with antitrust-related international organizations such as the ICN and the Committee on Competition Law and Policy of the OECD could facilitate greater policy harmonization.

There has also been some concern in the competition community concerning the link between antitrust immunity and open-skies agreements.\textsuperscript{206} The DOT has dual authority to approve bilateral treaties and to review requests

\textsuperscript{202} The DOT’s mission is to “[s]erve the United States by ensuring a fast, safe, efficient, accessible, and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future.” Mission & History, http://www.dot.gov/mission.htm (last visited May 17, 2010).

\textsuperscript{203} Martin L. Stern, Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions, Communications Law Conspectus (1998).

\textsuperscript{204} International Competition Network, http://www.internationalcompetitionnetwork.org/ (last visited May 17, 2010).

\textsuperscript{205} Oneworld proposal advances, DALLAS NEWS, D01 (Mar. 11, 2010).

\textsuperscript{206} See National Research Council, Transportation Research Board, Entry and Competition in the U.S. Airline Industry: Issues and Opportunities, at 149.
for antitrust immunity, and there is some fear that immunity might be used as an incentive or concession in negotiating agreements without giving proper regard to effects on competition.\textsuperscript{207} This concern was most apparent in the American Airlines–British Airways application for immunity.\textsuperscript{208} This application was filed in January 1997, and the DOT began processing it and accepting comments ten weeks later, in spite of the fact that the open-skies negotiations with the United Kingdom had not been concluded.\textsuperscript{209} Some commentators noted that by openly associating antitrust immunity with open-skies goals, DOT furthered the belief that entering into an open-skies treaty was not only necessary for antitrust immunity but was sufficient for it.\textsuperscript{210}

Furthermore, the DOJ could subject alliances to the traditional, economic-based merger analyses and require that the cooperation plans be subject to advance notification requirements, similar to the merger requirements.\textsuperscript{211} The Transportation Research Board has expressed a concern that in advocating international airline alliances and in granting antitrust immunity, the DOT may not be affording consideration to the effect of international alliances on the

\textsuperscript{207} Id. (explaining that since the 1993 immunity approval for Northwest–KLM, over three dozen new treaties have been negotiated).
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 143 (recommending that cooperation plans—even if they do not involve exchanges of equity or transfers of assets—be subject to requirements similar to the Hart-Scott-Rodino process).
competitive structure of the domestic airline industry.\textsuperscript{212} As evidence, the committee states that in the early days of DOT-approved immunity, the DOT’s reasoning was that immunity would enhance competition by allowing airlines with relatively small market shares to combine their networks to better compete against larger airlines.\textsuperscript{213} However, more recently, the DOT’s emphasis has been on the benefits of creating alliances that could compete against each other, rather than against individual airlines. \textsuperscript{214} The DOJ, by virtue of the Sherman Act and the Clayton Act, could subject alliances to the same rigorous economic analyses that it affords other cooperative agreements.

To summarize, by allowing concurrent jurisdiction in the form of dual approval by the DOJ and the DOT—or even shifting alliance review entirely to the DOJ with input from the DOT—the U.S. review policies could become more grounded in traditional economic analysis practices utilized by international antitrust enforcers. Additionally, the same agency which grants antitrust immunity should not handle open-skies treaties, in order to avoid the former becoming an unchecked—and perhaps anticompetitive—reward for the latter. Finally, because policy convergence tends to occur in homogenous environments with ample networking and communication, the DOJ’s informal consultations

\textsuperscript{212} Id. at 145.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
and networking with international antitrust authorities could facilitate a more global approach to alliance review.

5.4 **Other Recommendations**

Further recommendations to improve alliance review include the following:

- The DOT should consider soliciting commitment packages from the applicants in the same manner as the EC. This empowers the airlines and could help balance corporate freedom with government regulation.

- The DOJ’s and the EC’s reviews should be made public like the DOT’s reviews, with the exception of sensitive or confidential corporate data. The release of this information could not only help prepare airlines and alliances for antitrust review, but could facilitate policy convergence by stimulating scholarly debate on antitrust best practices.

- The U.S. and EU governments should fund a joint committee charged with investigating best practices for alliance review. The committee would have access to data from the DOJ, the DOT, and the EC, and would conduct empirical analyses of econometric and fare data pertaining to the actual effect of previous regulatory decisions, metal neutrality, and various remedies. Upon completion
of its research, the committee would publicly publish its recommendations.\textsuperscript{215} The long-term goal is a multilateral treaty similar to the Chicago and Montreal Conventions\textsuperscript{216} that would coordinate and regulate international alliance review.

- The U.S. should continue pursuing open-skies efforts, especially with China and Russia with whom there are no current U.S. open-skies agreements. Furthermore, when entering or renewing bilateral open-skies treaties, the U.S. should include language similar to Article 20 of the U.S.–EU Air Transport Agreement. Article 20 stresses the importance of competition among airlines and confirms that each party will “apply their respective competition regimes to protect and enhance overall competition and not individual competitors.”\textsuperscript{217}

\textsuperscript{215} This model has been successful in the U.S. with the Antitrust Modernization Commission, which was established by Congress “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.” Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002), \textit{amended by} Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007).

\textsuperscript{216} The Chicago Convention established the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations that coordinates and regulates international air travel. The Montreal Convention amended the Warsaw Convention’s regime concerning compensation for the victims of air disasters.

• The U.S. and EC should continue to take actions that positively affect the competitive structure of the international air transport industry. Such actions include implementing the Single European Sky,\(^{218}\) the resurrection of the plan to build a third runway at Heathrow,\(^{219}\) and further investigation into financial subsidy of London Stansted.\(^{220}\)

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more detailed explanation of cooperation undertaken by the DOT and EC, which includes, \textit{inter alia}, semiannual meetings of competition experts, consultations, timely notifications of proceedings, and information sharing.

\(^{218}\) The Single European Sky refers to the harmonization of design, management, and regulation of airspace throughout the European Common Aviation Area.

\(^{219}\) The construction of a third runway at Heathrow would increase the supply of slots, lowering their cost, thereby decreasing the barriers to entry to the Heathrow market. It would also result in fewer emissions due to less delays and aircraft “circling.” The United Kingdom’s new government has canceled plans to build the third runway, and has similarly pledged to refuse extra runways at London-area airports Gatwick and Stansted. Planned third runway at Heathrow is scrapped, FINANCIAL TIMES (May 12, 2010), \textit{available at} http://www.ft.com/cms/s/0/9b278458-5ddb-11df-8153-00144feab49a.html.

\(^{220}\) BAA, owner and operator of Heathrow and Stansted airports, has argued for financial cross-subsidization of Stansted to reduce charges there at the expense of incurring higher charges at Heathrow/Gatwick. This subsidy, they argue, would attract traffic to Stansted that would otherwise use busier airports, thereby reducing congestion at the latter. BAA also argued that even if the pricing differentials did not shift traffic to Stansted, spare capacity and lower charges at Stansted would increase competition in the airline industry by lowering air fares at other airports. Others argue that there had already been spare capacity and lower fares at Stansted, and many airlines at Heathrow showed no propensity to transfer to Stansted. For more on this debate, see DAVID STARKIE, \textit{AVIATION MARKETS: STUDIES IN COMPETITION AND REGULATORY REFORM} 103 (2008), and \textit{AVIATION INFRASTRUCTURE PERFORMANCE: A STUDY IN COMPARATIVE POLITICAL ECONOMY} 121 (Clifford Winston et al. eds., 2008).
6 Conclusion

In an environment of increased air travel and alliance membership, the inefficiencies caused by divergent alliance review policies and remedies are becoming increasingly costly not only to the airlines, but to individual governments and the taxpayers that support them. Competition authorities should work together to arrive at parallel policies based on strong economic analyses of relevant markets and applicant airlines. As noted in the SkyTeam and Oneworld cases, alliances currently must expose themselves to varying review standards followed by inconsistent remedies. In some instances, alliance reviewers arrive at contrary conclusions—even among different agencies of the same government. Antitrust enforcers must abandon the policy intransigence that has led to continued divergence in economic analyses and prescribed remedies and should adopt a forward-looking approach towards research and convergence on these issues.