Antitrust Law Blog

Posted at 7:17 PM on August 12, 2009 by Sheppard Mullin

Blue Skies For Continental Airlines In Bid To Join Star Alliance

On July 10, 2009, the U.S. Department of Transportation ("DOT") granted antitrust immunity to Continental Airlines for its planned participation in the Star Alliance, allowing Continental to coordinate international air services with other Star Alliance members without being subject to antitrust liability. The Star Alliance is a joint venture that includes over 20 member airlines. The Star ATI Alliance is a nine-member antitrust-immune subset of the Star Alliance. Continental is expected to join the Star Alliance and become the newest Star ATI member on October 24, 2009, when its current agreement with rival SkyTeam Alliance expires. The DOT also approved a new international joint venture between Star ATI members Continental, Air Canada, Deutsche Lufthansa Airlines and United Air Lines to be called Atlantic Plus-Plus, or A++. A++ members will be able to jointly arrange capacity, sales and marketing and share revenue on a portion of their international air services, also without being subject to antitrust liability.

On June 26, 2009, The U.S. Department of Justice ("DOJ") filed a 55-page objection to the DOT's April 7, 2009 tentative decision to grant global antitrust immunity to Continental for its participation in the Star Alliance. According to the DOJ, global immunity would result in substantially reduced competition in nonstop international air service markets, including transatlantic, transpacific and transborder flights. The DOJ argued that Continental would be removed as a major competitor for nonstop international flights, which would lead to higher prices for consumers. The DOJ also noted that barriers to entry in these markets were high due to the difficulty in obtaining FAA and DOT approvals, among other factors. The DOJ also expressed concern that domestic competition would be reduced due to spillover effects from the international coordinating activities of United and Continental, the third and fourth largest domestic air carriers. The DOJ recommended complete denial of Continental's request, but, if immunity was to be granted, the DOJ recommended carving out all nonstop overlap routes or limiting the grant of immunity to transatlantic routes.

The DOT's final approval of the joint application for antitrust immunity filed by Continental and the Star ATI members includes carve-outs in response to antitrust concerns raised by the DOJ. Antitrust immunity will not extend to coordinating activities on all routes between the United States and Beijing, four transatlantic routes and four routes between the United States and Canada. In addition, the DOT required A++ to be implemented within 18 months, and A++ members must provide annual reports to the DOT. However, the DOT agreed with Continental and the Star ATI members that Continental's antitrust-immune participation in the Star Alliance will benefit consumers by allowing member airlines to provide more services, expand their networks, improve lounges, improve frequent flyer programs, improve passenger handling and result in more travel options, shorter travel times and reduced fares.

Airline alliances may face additional and tougher antitrust challenges in the future. Members of the U.S. House of Representatives have recently considered whether to give the DOJ greater power over decisions to give airlines antitrust immunity, and legislation passed by the House in May would impose a three-year "sunset" after which antitrust immunity for airlines would expire (a Senate version did not include the sunset clause). Even Continental president Jeff Smisek was recently quoted as saying "this Department of Justice appears to be a tad more aggressive than that of the prior administration."

Authored by:
Leo Caseria
(213) 617-4206
LCaseria@sheppardmullin.com