

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF TRANSPORTATION**

Agreement Adopted by the Passenger)
Services Conference of the International) Docket OST-2013-0048
Air Transport Association)

**COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE**

I. Introduction

The AAI files these comments in the above-captioned proceeding regarding the application by the International Air Transport Association (IATA) for approval of the agreement, “Resolution 787” (Enhanced Airline Distribution).¹ The AAI’s interest in this matter pertains to the competitive issues potentially raised by the IATA Resolution 787 proposal. The AAI is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws.² The AAI has extensive experience analyzing competition policy and regulatory issues in the commercial airline industry, including frequent congressional testimony and white papers analyzing the competitive effects of most major airline mergers. The AAI also has been active in

¹ International Air Transport Association, *Application for Approval of an Agreement (Resolution 787) by the International Air Transport Association (IATA Application)*, U.S. Department of Transportation Docket OST-2013-0048, March 11, 2013 (hereinafter “Application”).

² The AAI is managed by its Board of Directors, with the guidance of an Advisory Board consisting of approximately 130 prominent antitrust lawyers, law professors, economists, and business experts. The AAI’s Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI positions.

analyzing dynamic pricing, pricing transparency, standard setting, and the competitive effects of agreements among competitors. As an independent competition advocacy organization with this history, the AAI is uniquely qualified to comment on the Resolution 787 matter.

The AAI files these comments to identify and address competitive concerns raised by Resolution 787, particularly insofar as Resolution 787 serves as an agreement among some of IATA's largest member airlines to impose a new distribution standard in the commercial airline industry. Section II provides background on the two symbiotic dimensions of Resolution 787 – the technical data exchange standard and the distribution standard. Section III asks what IATA is actually seeking approval for in submitting Resolution 787 to the Department of Transportation (DOT). Section IV explores competitive issues potentially raised by Resolution 787, including (1) whether the process of crafting the technical standard was open and inclusive of all stakeholders and (2) whether the distribution standard constitutes a potentially anticompetitive agreement among competitors on the “rules” of competition. Section V concludes with recommendations for further DOT inquiry.

II. Resolution 787 Embeds a Technical Standard within an Airline-Mandated Distribution Standard in an Effort to Fully Embrace Dynamic Pricing

On March 11, 2013, IATA filed with the DOT an agreement (Resolution 787) adopted by its Passenger Services Conference (PSC) in October 2012 to become effective in June 2013. IATA frames Resolution 787 as a request for the DOT's approval of a technical standard, upon which electronic data interchange (communications or messaging protocols) between the airlines and other members of the industry would be

based. For example, the Application states that Resolution 787 “establishes high-level objectives for and a process for developing a new electronic data interchange standard for airline distribution communications using Extensible Markup Language (XML), the modern programming language of the Internet.”³ The Application characterizes the current model of information exchange involving airline products and services as an outdated system while explaining that there have been some efforts to update messaging protocols.⁴ For example, the airlines themselves currently use XML on their own websites when implementing the “direct-connect” model, and Global Distribution Systems (GDSs) use a variety of protocols (including XML) for data exchange. The Application states that the purpose of Resolution 787 is to implement XML as the industry *standard*, whereby all price, quality, and availability information pushed by the airlines would be in a uniform data exchange format, to be used by industry participants and across distribution channels.

Resolution 787 explains that the XML technical standard is essential for the purpose of facilitating a new standard for the distribution of airline pricing and product information. Indeed, Resolution 787 tightly weaves together XML and what IATA identifies as the New Distribution Capability (NDC). The Application acknowledges this relationship, explaining that “NDC is an aspirational description of various improvements in distribution which, if adopted in the market, the new XML standard would be capable

³ IATA Application, *supra* note 1, at 1.

⁴ Another data exchange system is “EDIFACT” (Electronic Data Interchange For Administration, Commerce and Transport).

of supporting.”⁵ NDC represents a fundamental change in how consumers will be able to shop for airfares by using the concept of “authentication,” which is essentially the development of tailored/targeted offers based on the collection of extensive consumer information.⁶ Under NDC, airline offers would consider price, but also potentially bundle in a variety of additional ancillary products and services (e.g., more legroom, lie-flat seats, etc.) that airlines have come to offer in recent years. The new XML-NDC standard would cover the range of current distribution channels. These include the airlines’ own websites, the GDSs, and third party data aggregators that are the source of fare and availability information for both online and offline retail and corporate travel agencies.

The intent of Resolution 787 is relatively easy to decipher. Namely, it establishes a technical standard embedded in a new airline-mandated distribution model. The overarching proposal seems designed to more fully embrace dynamic airline pricing by linking the collection of personal consumer data to the provision of tailored information on fares and ancillary services. Such tailored offers are generally considered a sophisticated form of price discrimination. Dynamic pricing, as practiced in a number of industries, is powered by detailed information on consumer characteristics. The IATA Application clearly embraces this goal in “describ[ing] one anticipated business model [NDC] in which the pricing and product offer is assembled dynamically by the airline upon request . . .”⁷

⁵ IATA Application, *supra* note 1, at 3.

⁶ While the AAI does not intend to comment on consumer protection issues raised by Resolution 787 (NDC in particular), we note that a number of commenters in this proceeding have raised consumer privacy concerns about the nature of consumer information proposed to be collected.

⁷ IATA Application, *supra* note 1, at 8.

The dynamic pricing concept that underlies NDC is fundamentally different than the current industry approach – so-called “drip pricing” – where consumers search primarily on price and availability but are subjected to additional fees for services at the end of their shopping experience. Under drip pricing, consumers only see add-on fees after they have incurred substantial search costs and are thus less likely to initiate new searches. The Resolution 787 agreement cannot achieve its objective of moving the industry off of drip pricing and onto a dynamic pricing platform without packaging the technical XML standard with a standardized distribution platform (NDC).

III. The Application Begg the Fundamental Question – For What Is IATA Seeking Approval?

Despite the symbiotic relationship between XML and NDC, IATA asserts that the current Application pertains only to the matter of the technical standard and that IATA seeks approval of Resolution 787 “only insofar as it describes a means to modernize distribution communications technology with a new XML standard . . . [;] IATA is not seeking an endorsement of the stated business requirements or marketplace aspirations of NDC.”⁸ Yet by IATA’s own admission, DOT approval for the XML technical standard is not necessary. The Application explains that Resolution 787 could have been filed for “information only” under DOT Order 2012-4-18 (Tier 1).⁹ Indeed, IATA emphasizes that Resolution 787 is “principally an articulation of goals and a template for future work and has no immediate effect on airline distribution practices, competition or passengers.”¹⁰

⁸ *Id.*, at 2.

⁹ *Id.*, at 17.

¹⁰ *Id.*

The most obvious interpretation of IATA's filing an application with the DOT that does not require the agency's approval is that it has some trepidation about whether the DOT will accept the NDC proposal, which has generated significant controversy. The Application confirms this interpretation:

“Nevertheless, IATA recognizes that movement toward any significant coordinated change in the technical standards for selling airline services is likely to warrant fuller scrutiny by the Department . . . and recognizes that any additional conference agreements on standardization of distribution practices would need to be filed with DOT before becoming effective.”¹¹

While this filing approach allows IATA to provide the DOT with a “sneak peek” at the NDC, the filing itself is its own best argument *against* DOT approval, particularly where the applicant attests that it is not obligated to obtain the only approval it purports to seek. Under the circumstances, the filing invites obvious confusion about whether DOT approval of Resolution 787 can be construed as approval of the NDC model, or any aspects of the NDC model.

In light of the above, the AAI respectfully submits that solely as a matter of jurisdiction and statutory compliance, there is confusion over exactly what is being sought from the DOT in regard to IATA's Application for approval of Resolution 787. If the intent – as the Application states – is limited to implementing a new technical standard governing data interchange, then IATA should withdraw its Application and issue such a standard without requesting DOT approval. If IATA does not withdraw its Application, the DOT should not assume the risk of accidentally “smuggling in” any aspects of the NDC model by granting unneeded approval for the XML standard.

¹¹ *Id.*

Approval of the NDC standard is a separate matter for purposes of regulatory oversight and should be presented to the agency at another time, subjected to separate notice requirements, and opened up for comment. Anything less than a separation of dockets serves to muddy the waters around the Resolution 787 proposal, risks confusing the public on the scope and breadth of the competitive issues surrounding NDC, and seriously threatens to short circuit full DOT review. The AAI submits, therefore, that the DOT cannot approve Resolution 787 in its current form. The DOT should place the burden on IATA to resolve the tension between Resolution 787 and the language in IATA's Application for which it seeks approval. Specifically, IATA must take the necessary steps to eliminate confusion as to whether it now seeks approval of the XML standard (which it believes it does not need), the NDC standard (which it believes it does not currently seek), neither, or both.

IV. Resolution 787 Raises Important Policy Issues Relating to Potential Anticompetitive Coordination Among Rivals

As a standalone technical standard-setting exercise, adopting XML may well generate efficiencies and benefits to consumers. By embedding the XML standard in a new distribution standard (NDC) for the industry, however, Resolution 787 strays outside a technical standard-setting exercise. Resolution 787 raises important policy issues relating to IATA as a standard-setting trade association versus a group of competitors that have agreed on a new distribution model for their industry. Taken together, the XML and NDC proposals could potentially affect two important forms of competition: head-to-head competition between airlines and inter-distribution channel competition. Given the apparent lack of public interest benefits associated with transitioning to a technical

standard *together* with the rollout of a new distribution standard, the AAI suggests that the DOT further probe into a number of important competitive issues.

A. The DOT Should Ensure that the Stakeholder Process for Developing Resolution 787 Was Open, Transparent, and Inclusive

Technical standard setting is important in any industry that depends on physical or electronic networks to facilitate technical coordination among market participants to facilitate commerce. Examples of such industries include electricity, financial networks, telecommunications, and airlines. Standards affect key parameters such as interoperability, compatibility, reliability, and efficiency. Industry efforts to set new technical standards and develop frameworks for the transition to such platforms are thus typically inclusive of all industry stakeholders. This includes manufacturers, distributors, retailers, consumer groups, and trade groups. Regulatory authorities are routinely called upon to participate in and/or approve standard setting processes. For example, the Federal Energy Regulatory Commission has played an integral role in the development of standards for Smart Grid technologies.¹²

The AAI suggests that in its review, the DOT should ensure that IATA's crafting and adoption of Resolution 787 reflected an open and inclusive industry stakeholder process. If not, the Application raises fundamental concerns about the intent of the XML-NDC proposal as a competition-neutral or competition-enhancing process. The record evidence indicates that IATA's adoption of Resolution 787 may not reflect an open and inclusive stakeholder process. IATA's Passenger Distribution Group (PDG), within its PSC, began the process for crafting and adopting Resolution 787 in July 2011. The PSC

¹² See, e.g., Federal Energy Regulatory Commission, Smart Grid, [ferc.gov](http://www.ferc.gov/industries/electric/indus-act/smart-grid.asp#skipnav), <http://www.ferc.gov/industries/electric/indus-act/smart-grid.asp#skipnav>.

has historically taken responsibility for developing communications standards for the industry. The PDG – which endorsed the NDC standard – is made up of representatives from 11 of the largest airlines in the world, which constitute a tiny proportion of the IATA membership.¹³

The PDG subgroup responsible for the technical work on XML-NDC is the Distribution Data Exchange Working Group (DDXWG). Over the period July 2012 to November 2012, the DDXWG held two meetings that included a variety of stakeholders: airlines, the three major GDSs, online travel agents, traditional travel agents, and industry technology service providers.¹⁴ The PDG therefore took 12 months to deliberate internally before producing the initial proposal, and it opened the process to stakeholders for three months. It is notable that based on information contained in the Application, Resolution 787 was adopted in October 2012. However, the second meeting of stakeholder groups, in November 2012, occurred more than one month *after* the vote to adopt, thus begging the question of whether all stakeholder input was considered.¹⁵

Needless to say, the AAI and some other commenters have not been privy to the internal workings of the IATA groups charged with promulgating Resolution 787. In light of the apparent anomalies in IATA's stakeholder process, coupled with the competitive issues raised by the XML-NDC proposal discussed below, the AAI urges the DOT to issue a data request to the parties to divulge all internal documents related to the

¹³ IATA Application, *supra* note 1 at 15. Those airlines are: Air Canada, Alitalia, United Airlines, Inc., Delta Air Lines Inc., Air France/KLM, British Airways p.l.c., Deutsche Lufthansa AG, Swiss International Airlines Ltd, Korean Air Lines Co. Ltd, Cathay Pacific Airways Ltd, and Singapore Airlines Ltd.

¹⁴ IATA Application, *supra* note 1, at 16.

¹⁵ *Id.*

Resolution 787 process. Such discovery would allow the DOT to examine the openness and inclusiveness of IATA's stakeholder process. Deviations from an inclusive process would cast a shadow on the intent of Resolution 787, potentially raising pressing policy questions or even – if the outcome is anticompetitive – antitrust liability.

B. NDC May Constitute a Potentially Anticompetitive Agreement Among Competitors on the “Rules” of Competition

By intertwining the XML technical standard with the rollout of a new airline-crafted distribution model (NDC) that is the product of an agreement among the world's largest airlines, Resolution 787 exits the realm of a technical standard setting exercise and enters the arena of potentially restraining competition. A number of issues deserve the DOT's consideration. First, as noted earlier, the apparent intent of the XML-NDC model is to allow the airlines to implement dynamic pricing through sophisticated information collection and development of tailored, consumer-specific offers. Arguably, this objective can be fulfilled through means that stop short of an agreement among the 11 members of IATA's PDG to impose a new distribution standard on the industry. For example, IATA could promulgate a new uniform XML standard *and* offer a new menu of information on fares, availability, and ancillary products and services to GDSs and third party data aggregators that service the range of online and brick-and-mortar industry travel agencies.

Second, going the additional step of standardizing distribution under a model that has been agreed to by the very rivals who compete for consumer travel dollars potentially constitutes an anticompetitive agreement on the “rules” of competition. The nature of an agreement on rules – which is not new to competition policy – is generally to reduce the

number of variables or dimensions across which rivals compete. Legal-economic analysis of anticompetitive agreements among competitors typically parses agreements into one of three categories: (1) agreements on price, (2) agreements to disadvantage rivals, and (3) agreements on rules.¹⁶ Unlike naked price fixing, an agreement on rules is a more subtle form of competitive restraint whereby rivals agree on and implement practices that “insulate cartel members to some degree from hard competition.”¹⁷

Rule “fixing” often is found in situations such as the one under discussion, where straightforward price fixing is unduly difficult because the competitors compete along many dimensions in addition to price. Afterwards there still will be price competition, but the price competition will be softer or less vigorous because the rule fixing will have collusively altered the competitive environment. The ultimate effects of fixing the rules of competition, however, often will be the same as the effects of price fixing or other forms of cartelization – higher prices and restricted consumer choice in terms of non-price competition.

Imposition of a uniform distribution model (NDC) that is the product of an agreement among the largest airlines could soften existing competition between airlines and between the airlines’ direct-connect distribution channel and other channels of distribution, such as online and offline retail and corporate travel agencies. The current model for purchasing airfares, particularly on the Internet, is widely acknowledged to be

¹⁶ Robert H. Lande & Howard P. Marvel, "The Three Types of Collusion: Fixing Prices, Rivals, and Rules," 2000 Wisconsin L. Rev. 941 (2000), at 2-3. Available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134820&download=yes.

¹⁷ *Id.*

transparent and to generate stiff price competition.¹⁸ This is immensely valuable to consumers.

NDC's potential to allow airlines to escape this competition and erode existing consumer benefits highlights why the DOT should exercise caution in considering IATA's assertion that Resolution 787 will enable increased competition among airlines "seeking to entice customers with enhanced service offerings in addition to price."¹⁹ Under agreements on rules, airlines' decisions on price and output may still be made independently, but the agreement effectively creates the space for rivals to have some degree of pricing freedom.²⁰ The DOT might consider whether that will facilitate the isolation of consumers who can then potentially be exploited through higher prices.²¹

Other comments in this proceeding have raised concerns about consumers' ability to comparison shop for fares under NDC in a way that lends itself to maximum transparency. For example, consumers will be furnished tailored or targeted offers from airlines based on the provision of detailed information under "authentication." Contrary to IATA's claim that NDC supports comparison shopping and enhanced consumer

¹⁸ See, e.g., written testimony (dated March 12, 2012) of Daniel Kasper in the American Airlines bankruptcy proceeding: "In addition, other factors such as Internet-based airline search and booking tools have also put downward pressure on airfares by increasing price transparency for both business and leisure passengers." (at 21) "Quoting Airlines & Academics About Comparison Shopping," Business Travel Coalition, available <http://businessstravelcoalition.com/documents/quoting-airlines--academics.html>.

¹⁹ IATA Application, *supra* note 1, at 18.

²⁰ There is a burgeoning literature on privacy as a term of competition. See e.g. Julie Brill, *The Intersection of Consumer Protection and Competition in the New World of Privacy*, 7 Competition Policy Int'l. 7 (Spring 2011); Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Markets*, 76 Antitrust L. J. 769 (2010). One of the concerns with NDC is that potential privacy competition may be absorbed in the "cushion" provided by a rules agreement. NDC has the potential to mandate uniformity in the terms of data collection, thereby threatening to eliminate incentives for airlines to compete by offering less intrusive booking opportunities.

²¹ Lande & Marvel, *supra* note 16, at 4.

choice, a standardized distribution model may well undermine the ability of consumers to assess their options, leading to undesirable outcomes, even if price competition in the industry continues. In other words, authentication could affirmatively reduce transparency.

Finally, IATA asserts that a major role for distributors under NDC will be to add the necessary dimensions to allow consumers to comparison shop. For example, the Application states that NDC will open the “existing distribution market to strong competition from new distribution channels (e.g., travel agents) . . . to evolve to better meet customer needs.”²² However, by mandating a standard industry distribution model, NDC removes many of the dimensions and opportunities that currently facilitate inter-channel competition. In fact, NDC may well facilitate further distribution standardization that could ultimately eliminate the need for GDSs or other data aggregators. These entities could be replaced with airline joint ventures that use airline data, together with detailed consumer information, under an algorithm that would help airlines set their prices for individual customers.

The efficiency with which the airline industry migrates to a dynamic pricing model is, of course, a central issue for any trade association in a standard setting exercise. There is nothing to prevent any individual airline from developing and implementing dynamic pricing on its own, and we would have no objection to individual airlines doing this unilaterally. There is, however, no need for the airlines to do this collectively. On the contrary, it is their collective action that has the potential to be as anticompetitive as more straightforward forms of collusion. In light of these concerns, the AAI suggests that the

²² IATA Application, *supra* note 1, at 18.

DOT carefully scrutinize the Resolution 787 proposal to determine if an agreement among airlines to impose a standardized distribution model is necessary to achieve reasonable commercial goals within the confines of fair competition and the public interest. If it is not, then IATA should go back to the drawing board to explore other ways to modernize the airlines' delivery of pricing and other information to consumers.

V. Policy Issues and Recommendations

The foregoing analysis highlights a fundamental tension surrounding the airline industry's efforts to update their business model and move toward a more sophisticated system where they compete not only on price but also on other dimensions of service and quality. It is very likely possible to implement such changes without the steps proposed by Resolution 787, particularly an agreement on new rules of competition embodied in the NDC proposal. However, IATA is asking the DOT to sign off to a large degree on a proposal that has not been articulated with sufficient specificity or clarity to evaluate its potential upsides or downsides. In light of the fundamental questions raised by the proposed IATA Resolution 787 agreement, the AAI suggests that the DOT pursue further avenues of inquiry to determine if the proposal is in the public interest. The AAI respectfully suggests the DOT should:

- 1. Issue a data request for all internal IATA documents relating to the Resolution 787 crafting and adoption process. Were all relevant stakeholders in the supply chain invited to participate in the process in a timely and meaningful way? How was input from various stakeholders processed and included in the final recommendation?**
- 2. In conjunction with the DOJ, determine the extent to which the NDC agreement among rivals will disable or soften competition between airlines or between the direct connect distribution channel and other distribution channels. Even though airlines will continue to compete on price, will the agreement allow airlines to compete less vigorously**

**on price and along other non-price dimensions of competition,
resulting in higher overall prices and restricted consumer choice?**

- 3. Determine whether the XML-NDC model will deliver benefits to competition and consumers that cannot be achieved in any other feasible way. Absent the NDC could XML – in conjunction with other changes to how airlines provide information on products and services – achieve the same goals toward improving how consumers are able to shop for travel? Can this be done without sacrificing competition and consumer choice?**

Respectfully submitted,

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