

I. THE DEPARTMENT FACES A DIFFICULT ADMINISTRATIVE CHALLENGE BECAUSE IT MUST CARVE THE NDC DISTRIBUTION STANDARD OUT OF ITS APPROVAL OF RESOLUTION 787

Many stakeholders, including IATA, apparently embrace the substantive conclusions reflected in the Department’s Order to Show Cause, and thus the Department is now in the more agreeable position of being asked only to effectuate an accord between IATA and one of the leading critics of the original Resolution 787 proposal.⁴ Because the Department has tentatively approved this accord, subject to certain modifications and clarifications,⁵ its primary challenge at this stage of the proceedings is to clearly articulate the nature and scope of its approval in writing. This task is made very difficult, and critically important, by the iterative nature of IATA’s request for approval, which is cumulatively incorporated into a series of disparate submissions, including Resolution 787 itself, IATA’s original application seeking approval of Resolution 787, the modifications to IATA’s proposal reflected in IATA’s reply to public comments, and the modifications to those modifications reflected in IATA’s Joint Motion with Open Allies for Airfare Transparency (“Joint Motion”).⁶

The AAI offers these brief comments to make two suggestions to clarify the nature and scope of approval that would be conferred in the Department’s written final order. First, insofar as the Department has determined that the agreement to institute a new distribution standard described in IATA’s New Distribution Capability (NDC) proposal is not part of the overall Resolution 787 proposal that is before it for approval, but rather is merely a description of “goals,” the Department should ground its approval of Resolution 787 in the public benefits that

⁴ See IATA and Open Allies’ Joint Motion for Leave to File Agreed Limitations Concerning Resolution 787.

⁵ See Order to Show Cause at 9.

⁶ See AAI Response to IATA Reply at 3-4 (discussing problems associated with submitting a “moving target” for approval).

would flow from the modernized communication standard it is approving, *not* any claimed benefits that would flow from the NDC distribution standard. Second, to avoid problematic misinterpretations of the scope of its approval, and the attendant tax on Department resources that would flow from future disputes caused by the ensuing confusion, the Department should state affirmatively that approval of Resolution 787 constitutes approval *only* to implement a new communications standard.

II. THE DEPARTMENT’S BASES FOR APPROVAL SHOULD BE GROUNDED IN THE PUBLIC BENEFITS OF THE XML MESSAGING STANDARD IT IS APPROVING, NOT ALLEGED PUBLIC BENEFITS OF NDC

In its Order to Show Cause, the Department’s Summary states that Resolution 787 establishes a process for developing a technical standard for data exchange using XML, and that it “additionally establishes certain goals associated with using the new technical standard These goals are called the ‘New Distribution Capability’ (NDC).”⁷ It then states that “IATA seeks Department approval of IATA Resolution 787.”⁸ According to this formulation, IATA implicitly seeks approval of NDC, but only insofar as it describes “goals” rather than a formal agreement to standardize distribution.

In its Tentative Decision, the Department rules only on IATA’s concrete proposal to institute a new technical standard for data exchange, and it does not accept IATA’s invitation to approve any abstract “goals,” let alone a new distribution standard. However, the Department’s Tentative Decision is susceptible to misinterpretation, namely as embracing the purported “goals” of NDC, rather than the goals of the new XML messaging standard, as its bases for

⁷ Order to Show Cause at 1.

⁸ *Id.*

approving the XML messaging standard.⁹ In the “Public Benefits” subsection, for example, the Department explains the second of two “broad categories of public benefits” justifying overall approval of Resolution 787 as follows:

[T]he use of common technical standards could facilitate the marketplace development of distribution practices and channels that would make it easier for consumers to compare competing carriers’ fares and ancillary products across multiple distribution channels, make purchasing more convenient, allow carriers to customize service and amenity offers, and increase transparency, efficiency, and competition.¹⁰

AAI submits that this second category of public benefits should be eliminated, or altered, as a basis for approving Resolution 787, because IATA claims this category of benefits would arise *from implementing NDC*, not from adopting an XML messaging standard. In a subsection of its application describing NDC as “A Vision for the Future,” IATA’s application clearly states, optimistically, that the same benefits quoted in the Department’s language above would arise upon implementation of NDC, *after XML has already been adopted*, which process “is expected to take at least a full year to complete.”¹¹ By grounding approval of Resolution 787 in a purported benefit of implementing NDC, yet expressly not approving NDC insofar as it describes an agreement to institute a new distribution standard, the Department’s Tentative Decision threatens to convey the mistaken message that adoption en masse of a single, industry-wide distribution standard, other than by express agreement, would be beneficial for consumers. The Department can correct for this problem by eliminating this second category of benefits as a basis for approving Resolution 787, or altering it to clarify that such benefits are capable of being

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ See IATA Application at 5-6 (asserting “hope” that post-XML implementation of NDC would lead to three benefits: “(1) allowing a customer to shop, select and purchase ancillary services or fares packaged with ancillaries, (2) the ability to see and weigh differences in competing products, such as more leg room, lie-flat premium seats, in-flight entertainment or WiFi along with price, and (3) customized service and amenity packages and pricing based on attributes such as loyalty program status that the customer is willing to share in the shopping process.”)

realized insofar as the Department's Conditions on Approval help ensure they do not come at the expense of distribution competition.

III. ADEQUATE COMPETITION AND CONSUMER PROTECTION WITHIN A DISTRIBUTION SYSTEM IS NOT A FUNCTION OF WHETHER THAT SYSTEM EMPLOYS AN XML MESSAGING STANDARD

After the airline industry institutes modern, industry-wide technical standards and protocols for data exchange, the current mechanisms for distribution of airline products could undergo a wide variety of changes. As the Order to Show Cause expressly states, one result of instituting XML "could" be that procompetitive distribution practices emerge through "marketplace development."¹² As the Order to Show Cause also implicitly recognizes, however, another result is that the industry could use the adoption of a new technical standard as an occasion to collusively agree to institute a single new distribution model, which would soften or eliminate intra-channel and inter-channel distribution competition to the detriment of consumers.¹³ We note that, importantly, this result is foreclosed by Section 1(a) of the Department's Tentative Conditions on Approval, which expressly states that no formal agreement as such would be hereby approved.

Still other results are possible, however. A third result could be that the industry coalesces around a single distribution model through tacit rather than express coordination. The airlines, for example, could use the plain text of Resolution 787 as a roadmap to individually but uniformly adopt the industry-wide distribution model contemplated by NDC, with only a (tacit) wink and a nod rather than a formal agreement approved by the Department. Collusion has been

¹² Order to Show Cause at 9.

¹³ *See id.* (adopting language from Joint Motion in response to concern that NDC "would establish a mandatory business process for all airlines that wish to distribute enhanced content").

called “the supreme evil of antitrust,”¹⁴ but “[t]acit coordination is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws.”¹⁵ If the airlines were to “individually” switch to NDC’s single, industry-wide distribution model in unison, the competitive effects on intra-channel and inter-channel distribution likely would be indistinguishable, from the consumer’s perspective, from the competitive effects that would result after an express agreement. Even worse, they would be more difficult to prosecute under the antitrust laws.

If a distribution system that constrains competition is allowed to develop after the institution of common technical standards, the higher prices and reduced choice flowing from the softening or elimination of distribution-channel competition likely would dwarf any public benefits flowing from easier comparison shopping, customized offers, and increased transparency. Consumers likely would be comparing, customizing, and discovering degraded and more expensive products. If the Department’s approval of Resolution 787 could be misinterpreted as approval of the goals or aspirations of NDC, the Department would send a dangerous message that could signal approval of the NDC vision for a single, coordinated distribution standard. As many parties noted in earlier comments, this is one of the alarming NDC “aspirations” under the plain text of Resolution 787. Whether improved comparison shopping, customization and transparency are a net public benefit depends entirely on the competitive characteristics of the distribution system that develops in the wake of the new XML messaging standard. As the Department has noted, any such system(s) should be the product of market forces. The Department should take care to ensure that its final written order does not

¹⁴ *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

¹⁵ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001).

encourage the airline industry to pursue the functional equivalent of the NDC model insofar as that model contemplates a single, non-competitive distribution system.

IV. THE DEPARTMENT'S FINAL ORDER SHOULD AFFIRMATIVELY STATE THAT IT APPROVES ONLY THE XML STANDARD

The complexities posed by the Department's approval of Resolution 787 flow from the dissonance between the text of the resolution and the text of IATA's application for approval. The latter insists that IATA seeks approval only for a technical messaging standard, whereas the former intertwines that messaging standard with "[b]usiness . . . standards . . . to distribute products."¹⁶ The Department's Tentative Decision treats NDC as an explanation of "goals," and not as an agreement to institute a new distribution standard. It has determined that an agreement to institute a new distribution standard is not part of the overall Resolution 787 proposal, and accordingly, is not before the Department for approval. The Department's Tentative Conditions on Approval also go a long way toward alleviating the most obvious concerns posed by the overall proposal. However, the Department's Tentative Conditions primarily address what approval of Resolution 787 *does not* constitute,¹⁷ and legitimate questions remain, including those discussed above, as to precisely what it *does* constitute.

To avoid unintentionally communicating approval of any aspects of a potentially anticompetitive distribution system, and creating confusion which leads to disputes that unnecessarily tax the Department's resources, the Department should affirmatively describe – in positive, rather than only negative, language – the boundaries of its approval of Resolution 787.

¹⁶ Resolution 787, Sec. 1.2.1 ("Key Principles").

¹⁷ *See, e.g.*, Appendix at 1(a), 2, 3(b)-(c), 4, 5 (repeatedly referring to what agreement "does not constitute approval of").

This could be accomplished through an addition to the Tentative Conditions on Approval in the Appendix as follows:

Resolution 787 is approved only insofar as it constitutes a request to implement a voluntary, non-exclusive XML messaging standard that could have been filed under Tier 1 of the Department's three-tiered system for the filing and implementation of IATA agreements, and would have qualified for an exemption to Condition #2 to the IATA by-laws under Order 2012-4-18.

Respectfully submitted,

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