

**UNITED STATES OF AMERICA  
BEFORE THE U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, DC**

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Application of	)	
Virgin Atlantic Airways, Ltd.	)	
Delta Air Lines, Inc.	)	
Société Air France	)	
Koninklijke Luchtvaart Maatschappij N.V.	)	Docket DOT-OST-2013-0068
Alitalia Compagnia Aerea Italiana S.P.A.	)	
Under 49 U.S.C. §§ 41308 and 41309	)	
for approval of and antitrust immunity for	)	
Alliance Agreements	)	

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**COMMENTS IN RESPONSE TO SHOW CAUSE ORDER**

The American Antitrust Institute (AAI) hereby submits comments in response to the Order to Show Cause (Aug. 2, 2019) (“Show Cause Order” or “Order”) in the application of Virgin Atlantic Airways, Ltd. (Virgin Atlantic), Delta Air Lines, Inc. (Delta), Societe Air France (Air France), Koninklijke Luchtvaart Maatschappij NV. (KLM), and Alitalia Compagnia Aera Italiana S.P.A. (Alitalia) (collectively, the “parties”) under 49 U.S.C. §§ 41308 and 41309.<sup>1</sup> The application seeks approval for and the extension of antitrust immunity to the parties’ amended and restated transatlantic joint venture agreement. If granted, the immunity enjoyed by the Sky Team joint venture (consisting of Delta, Air France, KLM, and Alitalia) would be extended to Virgin Atlantic.

**I. INTEREST OF THE AMERICAN ANTITRUST INSTITUTE**

The AAI is an independent, nonprofit organization.<sup>2</sup> The AAI’s mission is to promote competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of

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<sup>1</sup> Order to Show Cause, OST-2013-0068-0062, Aug. 2, 2019.

<sup>2</sup> See <http://www.antitrustinstitute.org>.

antitrust enforcement as a vital component of national and international competition policy. The AAI has provided legal and economic analysis, commentary, and testimony on mergers, antitrust immunity policy, and competition policy involving the airline industry since the organization's founding in 1998.

## **II. THE DOT'S SHOW CAUSE ORDER DOES NOT RESPOND ADEQUATELY TO THE AMERICAN ANTITRUST INSTITUTE'S COMMENTS**

In comments filed February 26, 2019,<sup>3</sup> the AAI raised a number of concerns regarding the competitive effects and public benefits that are related to the parties' request for immunity. These comments reflect AAI's more general concerns regarding how the Department of Transportation (DOT) assesses requests for antitrust immunity. The Show Cause Order does not address many of these concerns.

The Show Cause Order states that AAI's and TFN's comments "closely mirror" those of JetBlue.<sup>4</sup> This is inaccurate. AAI's submission raises numerous issues relating to antitrust immunity that are not raised by JetBlue or others. For example, AAI explains that the requested grant of immunity does not equate to simply arithmetically adding two alliances together. Rather, a grant of immunity would fundamentally change incentives to compete by expanding immunity for activities that the parties themselves claim will generate significant new benefits.<sup>5</sup> AAI also argues that the DOT's approach to assessing competitive effects on nonstop routes while assessing public benefits on *all* routes is asymmetric.<sup>6</sup> Finally, AAI highlights that the DOT does not, but should, consider the effects of immunity in beyond- and behind-the-gateway markets because the growing dominance of U.S. air carriers

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<sup>3</sup> Motion For Extension Of Time And For Leave To File An Otherwise Unauthorized Document, And Comments Of The American Antitrust Institute In Response To Consolidated Joint Reply ("Motion and Comments"), Feb. 26, 2019, DOT-OST-2013-0068.

<sup>4</sup> Order to Show Cause, *supra* note 1, at 5.

<sup>5</sup> AAI Motion and Comments, *supra* note 3, at 4-5.

<sup>6</sup> *Id.* at 6-8.

in immunized alliances has direct effects in the markets through which alliance passengers connect.<sup>7</sup> The Show Cause Order neither acknowledges nor addresses these unique issues raised in AAI's comments.

AAI believes consumers, businesses, legislators, and other stakeholders should be very concerned that these issues were not considered in the Show Cause Order.

### **III. THE SHOW CAUSE ORDER RELIES ON AN INAPPROPRIATELY SELECTIVE READING OF RECENT, IMPORTANT ECONOMIC EVIDENCE ON IMMUNITY**

A decision to grant immunity under both §§ 41309(b) and 41308(b) “entails a balancing of any anti-competitive effects against likely public benefits.”<sup>8</sup> The Show Cause order states that the DOT’s analysis “indicates that the maintenance of the existing public benefits of the SkyTeam and Delta/Virgin joint ventures, as well as the likely incremental benefits gained from the Amended JVA, make a grant of ATI required by the public interest.”<sup>9</sup> However, the Show Cause Order does not include a discussion of any adverse potential fare effects of immunizing the parties from antitrust liability if they coordinate on fares and other terms of trade. Many of these concerns were raised in AAI’s and other comments but the Show Cause Order does not acknowledge or respond to them.

The Show Cause Order supports the DOT’s finding that a grant of immunity is in the public interest with citations to economic literature that conclude that immunity is beneficial. The Order explains that “The Department is aware of several academic studies that have been conducted finding that immunized joint ventures have produced significant consumer benefits.”<sup>10</sup> The Order cites to four studies spanning a 19-year period finding that antitrust immunity provides public benefits. Absent from this discussion is any recognition

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<sup>7</sup> *Id.* at 9-11.

<sup>8</sup> *Id.*, at 4.

<sup>9</sup> Order to Show Cause, *supra* note 1, at 12.

<sup>10</sup> *Id.* at 6.

that some studies find adverse effects resulting from immunity, and the importance of those findings for regulatory decision-making. AAI cited in its comments to a diverse body of economic literature that presents empirical findings on the effects of antitrust immunity. These effects cover both competitive effects and public benefits.<sup>11</sup>

For unexplained reasons, the Show Cause Order’s analysis appears to give greater weight to proposed public benefits and less weight to the risk of adverse competitive effects. This is troubling. At a minimum, the results of important new empirical studies showing adverse fare effects should be properly recognized in the public record. The most recent study on immunity by Brueckner and Singer is especially noteworthy in that it utilizes the longest time series of data of any study (i.e., 1997-2016) to assess the fare effects of immunity. This data covers early grants of immunity in the 1990s and 2000s and more recent grants made in the 2010s.

The Brueckner and Singer study reinforces previous studies (that rely on shorter time series) finding that immunity results in higher fares on transatlantic nonstop routes. Indeed, Brueckner and Singer conclude that “The GTG results imply that, in the latter part of the sample period, granting antitrust immunity to two previously nonaligned carriers is equivalent to removing a competitor, with a consequent increase in fares (an effect seldom seen in previous work).”<sup>12</sup> The study also finds positive effects of immunity that, on net, outweigh the negative: “Cooperation between alliance partners reduces the fares for connecting interline trips relative to the fares charged by nonaligned carriers, with carriers that enjoy ATI or JV status both charging fares that are indistinguishable from online

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<sup>11</sup> AAI Motion and Comments, *supra* note 3, at footnotes 11-17.

<sup>12</sup> Jan K. Brueckner & Ethan Singer, *Pricing by International Airline Alliances: A Retrospective Study Using Supplementary Foreign-Carrier Fare Data 2* (CESifo Working Paper No. 7649, 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3422230](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422230).

fares.”<sup>13</sup> But the study suggests that regulators exercise caution, noting that their “simulations show that the downside is larger for alliances whose GTG markets are ‘thick,’ having substantial traffic.”<sup>14</sup> The transatlantic routes at issue in this proceeding are most definitely “thick.”

AAI’s Motion and Comments highlight the very “asymmetry” between effects on gateway-to-gateway routes and connecting routes that the Brueckner and Singer study supports with empirical evidence. The Show Cause Order does not respond to these comments. It does not highlight any adverse competitive effects, or otherwise explain how on balance public benefits prevail over anticompetitive effects, in finding that a grant of immunity is in the public interest.

### **III. THE SHOW CAUSE ORDER FOCUSES ON MARKET “DOMINANCE” AND IGNORES HIGH MARKET CONCENTRATION IN ASSESSING COMPETITIVE EFFECTS**

The proposed grant of immunity contained in the Show Cause Order is based on a competitive analysis that focuses exclusively on unilateral effects. The order states: “[W]e look at the incremental change in market share that the proposed alliance would create, and if that position would create a dominant position in the market or allow the alliance to engage in other anticompetitive behavior, such as charging supra-competitive prices or excluding competitors.”<sup>15</sup> This exclusive focus on market share ignores other potential anticompetitive effects relating to antitrust immunity. Namely, highly concentrated alliance markets raise the specter of alliances coordinating on fares and other competitive variables in those markets. AAI’s comments highlighted the problem of high alliance concentration, which was not addressed by the DOT in its Show Cause Order.

Unilateral effects pertain to the potential exercise of market power by a single entity,

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<sup>13</sup> *Id.* at 38.

<sup>14</sup> *Id.*

<sup>15</sup> Show Cause Order, *supra* note 3, at 5.

resulting in adverse effects such as higher prices, lower quality, and less innovation. A leading metric for assessing the potential for unilateral effects is market share. Unilateral effects differ fundamentally from “coordinated effects,” which assess the potential exercise of market power by firms acting together. The leading metric for assessing the potential for coordinated effects is market concentration, as measured by the HHI.

The Show Cause Order notes that there has been no incremental change in the market share of the proposed alliance, and the proposed alliance would not have a dominant position in the U.S.–UK and U.S.–Europe (Ex-UK) markets.<sup>16</sup> However, in the course of concluding that the proposed alliance raises no market dominance issues, the Show Cause Order clearly reveals that the U.S.-UK and U.S.-Europe markets are highly concentrated. For example, market concentration for non-stop passengers in the U.S.-UK market is almost 3,500 HHI in early 2019.<sup>17</sup> About 87% of traffic in the U.S.-UK market is controlled by the three immunized alliances. This is far in excess of the 2,500 HHI threshold used by the antitrust agencies for identifying highly concentrated markets.<sup>18</sup> Market concentration for the U.S.-Europe (Ex-UK) market is almost 2,800 HHI, also in excess of the threshold for a highly concentrated market. Almost 78% of traffic in the U.S.-Europe market is controlled by the three immunized alliances. Concentration levels for both the U.S.-UK and U.S.-Europe market regions are likely to be higher as the result of the recent exit of, or scaling back of service by, European-based carriers.

It is well known that highly concentrated markets are not conducive to competitive outcomes. They are far more likely to result in explicit or tacit coordination between market

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<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 6. HHI calculated from the data provided as the sum of squared market shares for all carriers in the market.

<sup>18</sup> *Horizontal Merger Guidelines*. Washington, D.C.: U.S. Dept. of Justice, 2010.

players – in this case the three major airline alliances (SkyTeam, Star, and oneworld) – than in hard-nosed competition. By focusing exclusively on market dominance, the Show Cause Order ignores the implications of continued high concentration in two major transatlantic market areas. The significance of this cannot be understated. As AAI noted in its comments, expanding immunity to Virgin Atlantic will bring the airline under the umbrella of a larger and more powerful immunized joint venture. The airlines that are party to an immunized agreement can coordinate in more and different ways than could be achieved when the Sky Team and Delta-Virgin Atlantic joint ventures agreements operated “in parallel.”<sup>19</sup> This will solidify the role of an immunized SkyTeam on transatlantic routes.

The fact that the Show Cause Order ignores high alliance concentration in transatlantic markets is not only problematic in the instant case, but for immunity policy more broadly.

#### **IV. CONCLUSION**

For all of these reasons, the DOT’s analysis does not adequately address important issues, evidence, and analysis raised in public comments, or adequately balance any anticompetitive effects against likely public benefits as required by §§ 41309(b) and 41308(b).

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<sup>19</sup> AAI Motion and Comments, *supra* note 3, at 5.

Respectfully submitted,

**AMERICAN ANTITRUST INSTITUTE**

*/s/ Diana L. Moss* \_\_\_\_\_

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Dated: August 15, 2019



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by electronic mail  
This 15th day of August, 2019 on the following:

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