

As is the case with all industry, carriers must not engage in practices which would destroy the framework under which fair competition operates. Air carriers are prohibited, as are firms in other industries, from practices which are inconsistent with the antitrust laws or the somewhat broader prohibitions of Section 411 of the Federal Aviation Act (corresponding to Section 5 of the Federal Trade Commission Act) against unfair competitive practices.

Subsequently, Congress expressly determined that this Department should implement special procedures to ensure that the potential anti-competitive effects of code-share agreements and other joint venture agreements between major airlines are thoroughly analyzed before the agreements may go into effect. Congress implemented that determination by enacting 49 U.S.C. 47120. Congress enacted section 47120 after several announcements of proposed code-share arrangements between major U.S. airlines, including the existing arrangement between Northwest and Continental.³

The Airlines' Proposed Relationship. The proposed Delta/Continental/Northwest alliance is a comprehensive marketing arrangement that would involve code-sharing, frequent flyer reciprocity, and reciprocal access to airport lounges. The alliance agreements have a ten-year term. Each airline would put its code on each of its partners' flights to the extent possible given the limited number of available flight numbers. The airline operating the flight would obtain the revenue paid by the passenger. Members of each airline's frequent flyer program could earn award miles and use them on flights operated by the other two airlines. Members of each partner's airport lounge program will have access to the other two airlines' airport lounges. The three airlines would engage in joint marketing programs whereby they would make joint contract proposals to corporate customers to the extent allowed by the antitrust laws and create joint travel agency incentive commission programs.

The three airlines have vigorously asserted that their alliance will benefit consumers by providing on-line services to travellers in markets that now have no on-line service and improved access to frequent flyer programs and airport lounges. They contend that each of them

will independently set its own fares and schedules. They assert that they will engage in some discussions on subjects such as flight arrival times, gate locations, and certain other service features in order to provide "more seamless service." Delta, Continental, and Northwest also contend that they have structured their alliance so that they will continue to compete independently. That contention is based primarily on the fact that the ticket price paid by a traveller would go to the operating airline, even if the passenger bought the ticket from a marketing airline. Since the marketing airline does not share in the ticket revenue, that airline assertedly should have an incentive to operate its own flights. In addition, their agreements would not authorize any discussions prohibited by the antitrust laws.

Our Authority under Section 411. Our review of this proposed alliance has been conducted under this Department's unique statutory scheme. Under our governing statutes, any determination that the agreements should be prohibited would be based on a finding that they constituted an unfair method of competition. Section 411 authorizes us to prohibit conduct that does not violate the Sherman Act. See, e.g., *Pan American World Airways v. United States*, 371 U.S. 296, 303–308 (1963). As discussed above, our statutory authority under section 411 must be exercised in the context of the mandates to protect the public interest enumerated in 49 U.S.C. 40101.

The leading case on the scope of our authority under section 411 is *United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985) (Posner, J.). This Department inherited from the CAB the same statutory provision that was at issue in that case. In *United Air Lines*, the Court affirmed the Board's computer reservations system rules notwithstanding the absence of any finding that the systems' practices violated the antitrust laws. The Court held that the Board could nonetheless regulate CRS practices, because the Board "can forbid anticompetitive practices before they become serious enough to violate the Sherman Act." *United Air Lines*, 766 F.2d at 1114.

Competition Analysis. In reviewing the agreements between Delta, Continental, and Northwest, we are mindful that their joint venture relationship will not be the equivalent of a merger, that they do not now intend to significantly integrate their operations, and that each airline has represented that it will independently establish its fare levels and capacity levels in its city-pair markets. We note

as well that the fares paid by passengers on flights operated under the code-share arrangement will go to the airline operating the flight, even if the passenger bought the ticket under the other airline's code. This should give each airline some incentive to compete with its partner by operating its own flights.

Nonetheless, based on all the facts presented to us, our independent knowledge of and long experience with the airline industry, and our detailed analysis under our governing statute, the Delta/Continental/Northwest alliance presents serious competitive concerns. It is substantially different from previous alliances between U.S. airlines, both in terms of the combined size of the three partners and the extent of overlap between their route systems.

First, in contrast to earlier alliances, the Delta/Continental/Northwest alliance involves three airlines that together have a large share of the national market. Northwest and Continental together have a national market share of 18 percent as measured by domestic revenue passenger miles, and Delta has 17 percent of the national market. The proposed three-airline alliance would therefore have a national market share of 35 percent. In contrast, the largest of the previous alliances, United/US Airways, resulted in a combined market share of 23 percent, and that share may be expected to decline if the two airlines' financial difficulties ultimately lead to a shrinkage of their route systems.

More significantly, both the existing Continental/Northwest alliance and the recent United/US Airways alliance involved airlines whose route systems overlapped relatively little. In 2001, Continental and Northwest overlapped in 558 markets, accounting for 6.5 million annual passengers. The United/US Airways alliance involved 543 overlapping markets accounting for 15.1 million annual passengers. United has a largely east-west route system, while US Airways has a largely north-south route system along the East Coast. In dramatic contrast, the three alliance partners' services overlap in 3,214 markets accounting for approximately 58 million annual passengers.

Thus, the Delta/Continental/Northwest alliance is not an end-to-end alliance, unlike most of the other domestic and international alliances reviewed by us, which typically have expanded the network of each alliance partner. Contrary to the three airlines' representations regarding new on-line service, Delta's code-share with Continental would give Delta access to only eleven domestic airports not now

³ Because Northwest and Continental implemented their code-share proposal before the enactment of 49 U.S.C. 47120, the Justice Department reviewed that agreement pursuant to its authority to enforce the antitrust laws. That Department determined that it would not challenge the code-share arrangement if the two airlines complied with certain conditions, but challenged Northwest's simultaneous acquisition of the major block of Continental voting stock.