

U.S. Department of Transportation Imposes Significant Conditions While Granting Antitrust Immunity to Delta's Alliance with Aeromexico

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PRACTICES Antitrust and Competition, Aviation, Litigation

In a final order issued on December 14, 2016, the U.S. Department of Transportation (“DOT”) granted conditional antitrust immunity to a proposed alliance agreement between Delta Air Lines, Inc. (“Delta”) and Aerovias de Mexico, S.A. de C.V. (“Aeromexico”) with the two carriers agreeing to meet stringent conditions for DOT approval.¹

The antitrust immunity from DOT allows Delta and Aeromexico to essentially operate as one company on cross-border flights by jointly setting fares, sharing revenues, and aligning flight schedules to ensure more travelers can make flight connections. In addition, Aeromexico and Delta will co-locate at airport terminals where possible. DOT approved the alliance because it concluded that the expected consumer benefits – broader U.S.-Mexico connectivity, improved network coordination, reduced travel times, and improved efficiencies – outweighed the potential anticompetitive effects of eliminating competition between the two airlines.²

Under the DOT’s final order, Delta and Aeromexico must give up 24 slot pairs at Mexico City’s Benito Juarez International Airport (“MEX”) and four slot pairs at New York City’s John F. Kennedy International Airport (“JFK”), with the surrendered takeoff and landing rights going to low-cost carrier (“LCC”) airline competitors. Also, unlike prior DOT grants of antitrust immunity to similar airline joint ventures, the antitrust immunity granted to Delta and Aeromexico is for a five-year term only, although subject to application for renewal.

Mexico’s regulators had already approved the proposed Delta-Aeromexico alliance in May, 2016, requiring the two airlines to give up eight slot pairs at MEX. The DOT’s earlier preliminary order, requiring the 24 slot pair divestitures at MEX, left the regulators at Mexico’s Directorate General of Civil Aviation (“DGAC”) to question the large number of slot pairs required to be divested in light of a variety of considerations including the impact on air service around Mexico which depends on MEX for feeder service. DOT countered that divestitures at airports outside the United States are a common condition imposed on airline mergers or grants of antitrust immunity and are undertaken in order to preserve competition. The DOT further argued that additional divestitures at MEX (beyond the eight sought by DGAC) were necessary to facilitate new trans-border service from MEX, a key DOT objective given the DOT’s understanding of difficulties for new carriers in obtaining such slots at MEX.³

The DOT order also limits application for the divested slots at MEX and JFK only to LCC. The DOT’s position was that such LCCs exert the greatest competitive impact when entering slot-constrained markets. Therefore limiting the slot acquisition process to LCCs minimizes, in DOT’s view, the number of divested slots required to remedy any potential competitive harm resulting from the antitrust immunity grant.

Under the DOT's slot divestiture plan in its final order, 14 slots at MEX will be divested immediately, with 10 more divested only after the LCC airline applicants can demonstrate that they have exhausted all reasonable efforts to obtain slots through the MEX airport's own slot allocation procedures. The DOT also clarified that it will give preference for the four relinquished JFK slots to LCC airline applications seeking new nonstop JFK-MEX service.

Finally, the DOT order requires that Delta and Aeromexico remove all exclusivity provisions in the alliance operating agreements based on the rationale that neither carrier should be permitted to block potentially procompetitive commercial activities by the other partner. In addition, the DOT order requires that Delta and Aeromexico must withdraw from participation in all International Air Transportation Association ("IATA") tariff coordination activities that discuss fares, rates, and any other charges applicable between the United States and any countries whose airlines have been (or are subsequently) granted antitrust immunity to participate in similar alliance activities with a U.S. airline.

For more information please contact one of the lawyers listed below.

1 Delta, which holds a small minority stake in Aeromexico, has announced plans to increase its stake to 49 percent.

2 Approval of the Delta-Aeromexico alliance by DOT was generally viewed as the final element of the newly expanded U.S.-Mexico Bilateral Air Services Agreement that entered into effect in 2016 and liberalized the airline services market between the two countries.

3 An expansion of the Mexico City International Airport has been announced with completion estimated in 2020. That expansion would presumably eliminate the need for a slot-controlled environment.