

Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078 — procedure under Article 85 (ex 89) EC)

(2002/C 181/02)

(Text with EEA relevance)

1. PROCEDURAL ASPECTS

1. On 3 July 1996 the Commission initiated a proceeding pursuant to Article 85 (ex Article 89) of the EC Treaty with a view to examining the compatibility under EC competition law of the coordination agreements concluded between Lufthansa and United Airlines and between SAS and United Airlines ⁽¹⁾. On 18 September 1996 the Commission did the same in respect of the tripartite coordination agreement concluded between Lufthansa, SAS and United Airlines ⁽²⁾.
2. The Commission proceeding is concerned with these cooperation agreements between Lufthansa, SAS and United Airlines ('the parties') in so far as they relate to passenger air transport between the Community and the United States. It is not concerned with the cooperation agreements between the parties as they relate to the rest of the world or to cargo services.
3. On 2 October 1996 the Commission published a summary of the agreements in the *Official Journal of the European Communities* ⁽³⁾ asking Member States and other interested parties to submit observations.
4. On 28 July 1998 the Commission communicated to the parties a 'Draft Proposal' under Article 85(1) of the EC Treaty. This Draft Proposal set out the Commission's preliminary view that the agreements at issue ('the alliance') infringed Article 81(1) of the EC Treaty. Applying the principles of Article 81 as a whole, the Draft Proposal stated that in order to bring an end to the infringement, appropriate measures were needed in a regulatory framework which should actually permit the introduction of a sufficient level of competition on the relevant markets. The Draft Proposal described the draft measures then envisaged by the Commission and invited the parties to comment on the Commission's preliminary analysis and the draft measures.
5. In order to receive the comments of Member States and other interested third parties the Commission, on 30 July 1998, published a notice in the *Official Journal of the European Communities* ⁽⁴⁾ setting out the envisaged draft measures and explicitly stating that the communication of the Draft Proposal to the parties and the publication

of the notice were preliminary steps only and without prejudice to the Commission's final position on the compatibility of the alliance under EC competition law.

6. Both the parties and other interested parties submitted comments in writing to the Commission. An oral Hearing was held on 14 and 15 December 1998. Following these comments the Commission undertook a thorough review of the various issues and entered into negotiations with the parties and discussions with the regulatory authorities.

2. THE PARTIES

Lufthansa

7. Lufthansa AG ('Lufthansa'), the holding company of the Lufthansa Group, is controlled for about 90 % by the private sector and 10 % by MGL (Gesellschaft für Luftverkehrsunternehmen). Its turnover in 2000 amounted to EUR 15.2 billion. Lufthansa's main hubs are Frankfurt/Main and Munich. In 2000 Lufthansa transported about 47 million passengers. In terms of world wide traffic, Lufthansa is the second biggest EU carrier, after British Airways.

SAS

8. Scandinavian Airline Systems ('SAS') is a consortium owned by SAS Sverige AB (3/7), SAS Danmark A/S (2/7) and SAS Norge ASA (2/7). Each of the three companies is 50 % owned by the State and 50 % by industry. The turnover of SAS in 2000 amounted to EUR 4,9 billion. Its main hubs are Stockholm, Copenhagen and Oslo. In 1999 SAS transported about 22,2 million passengers.

United Airlines

9. United Airlines ('United'), a wholly-owned subsidiary of UAL corporation, is 55 % owned by its employees and two trade unions. United is one of the world's leading airlines with revenues amounting to about USD 18 billion in 1999. United has hubs at Chicago O'Hare, Denver, Los Angeles, San Francisco and Washington Dulles. In 1999 United transported about 82,8 million passengers.

10. All three parties are members of the Star Alliance ⁽⁵⁾.

⁽¹⁾ Case COMP/D-2/36.076/LH/UA and case COMP/D-2/36.078/SAS/UA respectively.

⁽²⁾ Case COMP/D-2/36.201.

⁽³⁾ OJ C 289, 2.10.1996, p. 8.

⁽⁴⁾ OJ C 239, 30.7.1998, p. 5.

⁽⁵⁾ With Air Canada, Air New Zealand, All Nippon Airways (ANA), Ansett Australia, Austrian Airlines, British Midland, Lauda Air, Mexicana Airlines, Singapore Airlines, Thai Airways International, Tyrolean and Varig Brazilian Airlines.

3. THE ALLIANCE AGREEMENTS

11. The agreements at issue are ⁽⁶⁾:

- (i) The 'Alliance Expansion Agreement' between Lufthansa and United which was concluded on 9 January 1996. This agreement expanded and enhanced an existing alliance agreement between Lufthansa and United that was concluded on 3 October 1993.
- (ii) The 'Alliance Expansion Agreement' between SAS and United which was concluded on 28 June 1996. This agreement expanded and enhanced an existing alliance agreement between SAS and United that was concluded on 1 September 1995.
- (iii) The 'Lufthansa/SAS/United coordination agreement' concluded on 9 August 1996. This agreement creates a framework for the three parties to discuss and coordinate the activities they have undertaken or plan to undertake in establishing and implementing any or all of the alliances.

12. The agreements have the object and effect of establishing a long term alliance between the three parties, coordinating their commercial, marketing and operational activities while maintaining their distinct corporate identities. In particular the parties will coordinate in the following areas: route and schedule planning; establishment and management of marketing, advertising, sales and distribution networks, coordination of travel agents and other commissions; branding/co-branding, including the creation of logos and corporate marking; code-sharing; pricing, inventory and yield management; sharing of revenues; integration and development of information systems, information technologies and distribution channels; coordination of Frequent Flyer Programs; sharing of facilities and services at airports.

4. THE SERVICES CONCERNED

13. All parties are active in the provision of scheduled air transport of passengers between the EEA and the USA. The Alliance might in particular affect competition on the parties' hub-to-hub O & D markets for the transport of passengers on the origin and destination pairs Frankfurt–Chicago, Frankfurt–Washington, Frankfurt–Los Angeles, Frankfurt–San Francisco and Copenhagen–Chicago where the parties were prior to the Alliance actual or potential competitors.

14. On the Frankfurt–Chicago and Frankfurt–Washington markets the activities of the parties actually overlapped

⁽⁶⁾ As said above, a summary of these agreements has been published in the *Official Journal of the European Communities* (see footnote 1).

prior to the alliance: both Lufthansa and United operated a direct service on these routes. One other airline offers a direct service on the Frankfurt–Chicago route and the parties' combined market share on this market is over 70 %. As concerns Frankfurt–Washington, no other airline offers a non-stop service and the parties combined markets share is over 95 %.

15. On the Frankfurt–Los Angeles and Frankfurt–San Francisco markets Lufthansa operated a non-stop service prior to the alliance, and on the Copenhagen–Chicago route SAS operated a non-stop service prior to the alliance. No other airlines provide direct services on these routes and the parties' combined market shares on these markets range from 55 % to 80 %.

16. According to the parties the total O & D passengers on these routes amount to: 306 869 (Frankfurt–Chicago), 225 152 (Frankfurt–Washington), 212 245 (Frankfurt–Los Angeles), 208 871 (Frankfurt–San Francisco) and 54 665 (Copenhagen–Chicago) ⁽⁷⁾.

5. THE ARGUMENTS OF THE PARTIES

17. According to the parties, to the extent city pairs constitute meaningful markets in this case, the Alliance only restricts competition when it can be shown that there was either meaningful actual or potential competition between the Alliance partners prior to the creation of the Alliance. In this regard the parties have submitted that on none of the three hub-to-hub city pairs in respect of which either Lufthansa (Frankfurt–Los Angeles and Frankfurt–San Francisco) or SAS (Copenhagen–Chicago) operated a non-stop service, United Airlines would have been a potential entrant ⁽⁸⁾. According to the parties the mere fact that there is a United hub at one end of the route is not in itself sufficient for United to be a potential entrant, prior to the Alliance.

18. United has in this context submitted data, based on United's QSI ⁽⁹⁾ model which is used to forecast whether a new non-stop service on a given city-pair would be able to attract a sufficient number of passengers generating a satisfactory return for the new service to be profitable to United. In United's view the Alliance could not be considered to lead to the elimination of United as a potential competitor on Chicago–Copenhagen, Frankfurt–Los Angeles or Frankfurt–San Francisco and any remedy designed to deal with the alleged elimination of competition on these three city-pairs would not be justified.

⁽⁷⁾ Figures based on MIDT bookings for 2000.

⁽⁸⁾ Or on any of the other potential overlap routes referred to in the 1998 notice referred to in footnote 4 above.

⁽⁹⁾ Quality of service index.

19. In so far as the Commission would nevertheless conclude that the Alliance would fall within the scope of Article 81(1) of the EC Treaty, the parties have submitted the following arguments in favour of their view that the conditions of Article 81(3) of the EC Treaty are fulfilled ⁽¹⁰⁾.
- (i) *Improvements in the provision and distribution of airline services and promotion of economic progress*
20. The parties take the view that the alliance between them will enable them to offer a more competitive network, especially to passengers travelling between Europe and the United States, as a result of externalities from the combining of three networks. They will be able to provide a larger number of direct and indirect routes, a larger number of frequencies on these routes, greater capacity and improved connections.
21. In fact, since the alliance agreement were concluded the parties have: commenced new non-stop services on at least four routes; increased the frequency of their services on several other non-stop routes and been able to increase greatly the number of indirect routing that they can offer their customers. On indirect routes connections are improved as a result of better synchronisation of timetables, connection times have been reduced and extra connecting traffic from alliance partners has allowed member airlines to start new connecting services.
22. In addition the alliance allows cost savings to be pursued in such areas as: the sharing of ground handling facilities; the elimination of duplicated marketing and distribution costs; and, the joint purchasing of fuel, equipment, catering services etc.
- (ii) *Consumers will share the benefits flowing from the alliance*
23. According to the parties passengers benefit directly from the improvements in the services offered by the parties described above. In addition new customer services have been introduced such as the automatic checking in of passengers and luggage to their final destination at the point of departure harmonised in-flight services and centralised data on the three airlines flights and passengers enabling passengers to use the airport services of any of the three airlines rather than those of the 'own' flight operator only.
24. According to the parties customers will also benefit from cost reductions as these will be passed on to them as lower fares through the operation of competition with other airlines.
- (iii) *The alliance does not impose on Lufthansa, SAS and United restrictions which are not indispensable to the attainment of the benefits of the alliance*
25. According to the parties, given their goal of operating as a single integrated network, it would not be feasible for them to structure their alliance in a manner where the parties retained the independent ability to compete for traffic on any market.
- (iv) *The alliance does not afford the parties the opportunity of eliminating competition in respect of a substantial part of the markets for air transport*
26. According to the parties the alliance does not lead to the elimination of competition in respect of a substantial part of any market for air transport. However, in order to resolve the competition concerns identified by the Commission, the parties have proposed certain undertakings, as described below.
27. These undertakings relate to the above mentioned routes except for the route Copenhagen–Chicago. According to the parties the O & D traffic on this route is relatively small, amounting to 58 049 passengers/year in 2001 and would be too thin for UA to be considered a potential entrant. Also, there would be effective competition from indirect services. Moreover, on the Copenhagen–Chicago routes there are according to the parties no regulatory constraints on indirect service providers since the Danish Authorities do not exercise any price control on 6th freedom traffic and the airports would not be slot constrained. Therefore, the parties consider that the alliance will not lead to the elimination of competition and in their view remedies would not be necessary.

6. UNDERTAKINGS SUBMITTED BY THE PARTIES

28. The parties have offered to surrender slots at Frankfurt airport to allow one or more prospective new entrants to provide new or additional competitive non-stop or indirect ⁽¹¹⁾ scheduled passenger air services. In particular, the parties have offered to make available sufficient slots to allow one additional daily competing air service on the city pairs Frankfurt–Chicago, Frankfurt–Los Angeles and Frankfurt–San Francisco, and two additional services on the city pair Frankfurt–Washington. The slots will only be made available if the prospective new entrant can demonstrate that all reasonable efforts to obtain the necessary slots for the provision of such competitive air services through the normal working of the slot allocation procedures have failed.

⁽¹⁰⁾ In the framework of Article 85 of the EC Treaty the Commission is not empowered to grant an exemption under Article 81(3) of the EC Treaty. However, in order to determine whether there is an infringement of EC competition law and what measures are necessary to bring it to an end the Commission must apply the principles of Article 81 of the EC Treaty as a whole.

⁽¹¹⁾ That is an indirect service with a connecting time of not more than 150 minutes.

29. In addition, the parties have offered that a new entrant using the slots which operates a non-stop service, will be admitted to the frequent flyer programme of the parties and will be offered the possibility of entering into an interlining agreement with the parties. The parties have also offered not to participate in that part of the IATA tariff conference concerning services on the routes in question.
30. According to the proposed undertakings, any carrier that has the right to operate air passenger services between at least one or more EU Member States and the USA is considered as 'eligible carrier', provided its is not legally controlled by the parties, a franchisee of the parties, or an alliance partner of the parties.

7. PROPOSED REGULATORY CHANGES

31. The German aviation authorities require that published fares for indirect services are filed with them and they then may prohibit fares that undercut fares for non-stop services offered on the same route by a German or US carriers providing third/fourth freedom services⁽¹²⁾. The possibility of this price control on indirect (sixth freedom services)⁽¹³⁾ has been considered as an entry barrier by some potential competitors.
32. In order to meet these competition concerns the German Government has stated that it will not exercise any control on fares of indirect services from Germany to the US on the four identified routes from Frankfurt. The German Government has made this declaration in the understanding that German air carriers will receive equivalent treatment with respect to sixth freedom price control

under comparable conditions in other EEA markets where necessary as a result of the Commission's assessment of comparable transatlantic alliance cases.

8. THE INTENTION OF THE COMMISSION

33. In view of the foregoing, the Commission intends to adopt a favourable position concerning the LH/SAS/UA Alliance and to close its pending Article 85 proceeding.
34. Any position of the Commission in this case is without prejudice to the Commission's position in the pending open skies proceedings before the Court of Justice against various Member States, and in particular the legality under EC law of bilateral open skies agreements between those Member States, including Germany, and the US.
35. Before closing the pending Article 85 proceeding, it invites interested third parties to send their comments within one month of the publication of this notice in the *Official Journal of the European Communities*. These observations should be submitted, quoting reference Case COMP/D-2/36.201 — LH/SAS/UA, to:

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Unit D2 (Transport)
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B-1049 Brussels
Fax (32-2) 296 98 12
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⁽¹²⁾ The third freedom is the right to carry passengers from the airline's home State to another State and the fourth freedom is the right to carry passengers to the home State.

⁽¹³⁾ The sixth freedom is the linkage of a fourth and a third freedom service, thereby enabling airlines to carry passengers from one State via their home State to a third State.