

Summary of Commission Decision
of 12 May 2015
relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union
(Case AT.39964 — Air France/KLM/Alitalia/Delta)
(notified under document number C(2015) 3125)
(Only the English text is authentic)
(2015/C 212/05)

On 12 May 2015, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Introduction

- (1) The Decision makes legally binding the commitments offered by Société Air France ('AF'), Koninklijke Luchtvaart Maatschappij NV ('KLM'), Alitalia Società Aerea Italiana SpA ('AZ') and Delta Air Lines Inc. ('Delta') (together 'the Parties') under Article 9 of Council Regulation (EC) No 1/2003 ('Regulation 1/2003') in a proceeding under Article 101 of the Treaty on the Functioning of the European Union ('the Treaty'). This Decision concerns the agreements concluded between the Parties in relation to the establishment of a profit/loss-sharing joint venture called the Transatlantic Joint Venture Agreement ('the TAJV Agreement'), which covers, among other things, all passenger air transport services operated by the Parties on routes between Europe and North America ('the Transatlantic Routes').

Procedure

- (2) On 23 January 2012, the Commission opened antitrust proceedings with a view to taking a decision under Chapter III of Regulation (EC) No 1/2003. On 26 September 2014, the Commission adopted a preliminary assessment ('the Preliminary Assessment'), which set out the Commission's competition concerns in relation to the Paris-New York premium market, the Amsterdam-New York premium and non-premium markets and the Rome-New York premium and non-premium markets ('the Routes of Concern')⁽²⁾.
- (3) On 3 October 2014, the Parties proposed commitments to address the Commission's preliminary concerns. On 23 October 2014 the Commission published a notice in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the proposed commitments and inviting interested third parties to give their observations ('the Market Test Notice'). Following the comments received from third parties, on 4 May 2015, the Parties submitted the signed version of the final commitments.
- (4) On 28 April 2015, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted and gave a positive opinion. On 30 April 2015 the Hearing Officer issued his final report.

Concerns expressed in the Preliminary Assessment

Assessment under Article 101(1) and 101(3) of the Treaty

- (5) The Preliminary Assessment of 26 September 2014 set out the preliminary concerns of the Commission that the Parties may have restricted competition on the Paris-New York route in relation to premium passengers and on the Amsterdam-New York and Rome-New York routes in relation to premium and non-premium passengers both by object and by effect through their cooperation under the TAJV Agreement.
- (6) In its Preliminary Assessment, the Commission provisionally concluded that the TAJV Agreement has an anti-competitive object, as it provides for extensive cooperation between the Parties in relation to all key parameters of airline competition, including price, capacity, scheduling and quality of service. Within the metal-neutral profit/loss-sharing joint venture, the Parties' individual incentives on the Transatlantic Routes are replaced by the common interest and benefit of the joint venture and of all the Parties combined.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

⁽²⁾ The premium market includes passengers buying first class, business class and flexible economy tickets, while the non-premium market includes passengers buying restricted economy tickets.

- (7) The Commission also provisionally considered that the TAJV Agreement has the effect of appreciably restricting competition for (i) premium passengers on the Paris-New York route and (ii) premium and non-premium passengers on the Amsterdam-New York and Rome-New York routes respectively. The Commission provisionally concluded that the competition that existed between the respective Parties on the Routes of Concern before their cooperation is eliminated and is unlikely to be replaced by competition from other airlines, due to substantial barriers to entry and expansion.
- (8) Therefore, in the Commission's preliminary view, the cooperation between the Parties under the TAJV Agreement infringes Article 101(1) of the Treaty on the Paris-New York route in relation to premium passengers and on the Amsterdam-New York and Rome-New York routes in relation to premium and non-premium passengers.
- (9) The Parties did not provide any arguments concerning the creation of efficiencies in relation to the Routes of Concern. Therefore, the Commission provisionally concluded that there are no efficiencies that would offset the appreciable restriction of competition that is likely to result from the TAJV Agreement on the Routes of Concern.

Initial and the final commitments

- (10) On 3 October 2014, the Parties offered commitments to address the competition concerns set out in the Preliminary Assessment. The Parties offered:
- (a) to make arrival and departure slot pairs available at Amsterdam airport and/or New York JFK/Newark Liberty airports, as well as at Rome airport and/or New York JFK/Newark Liberty airports – at the competitor's choice – to allow one or more eligible competitor(s) to operate or increase up to seven (7) new or additional frequencies weekly on each of Amsterdam-New York and Rome New-York. The offer is subject to certain conditions, including that the competitor has exhausted all reasonable efforts to obtain the necessary slots through the general slot allocation process;
- (b) to enter into fare combinability agreements⁽¹⁾ with competitors for all classes of passengers on each Route of Concern, except on Paris-New York, where the agreements will cover premium passengers only. Eligible competitors are all competitors which start to operate new or increased non-stop services on the relevant Route of Concern, and which, alone or in combination with their alliance partners, do not operate a hub/focus-city airport at both ends of the route. In the case of Paris-New York, this commitment also covers competitors which already operate non-stop services on the route;
- (c) to enter into special prorated agreements⁽²⁾ with competitors for all classes of passengers on each Route of Concern, except on Paris-New York, where the agreements will cover premium passengers only, for traffic with an origin and a destination in Europe or North America/the Caribbean/Central America, provided that part of the journey involves one of the three Routes of Concern. Eligible competitors are all competitors which start to operate new or increased non-stop services on the relevant Route of Concern, and which, alone or in combination with their alliance partners, do not operate a hub/focus-city airport at both ends of the route. In the case of Paris-New York, this commitment also covers competitors which already operate non-stop services on the route;
- (d) to open their frequent flyer programmes to a competitor which commences or increases services on any of the Routes of Concern, if such competitor does not have a comparable programme of its own and does not already participate in any of the Parties' frequent flyer programmes.
- (11) The Parties offer to give responsibility to a trustee to monitor the application of the commitments. In case of disagreement between an applicant airline and the Parties concerning the commitments, the Parties offer a dispute resolution process, under which an arbitral tribunal will ultimately decide on the matter.
- (12) In response to the comments received by the Commission following publication of the Market Test Notice, the Parties submitted the signed version of the final commitments on 4 May 2015. Other than some clarifications, these revised commitments differ from the initially offered commitments only as regards the scope of the special prorated agreement commitment. The geographical scope of this commitment was extended to cover traffic with

⁽¹⁾ A fare combinability agreement allows a competitor (or travel agents) to offer a return trip to a group of passengers covered by the commitment, thus comprising a non-stop service provided one way by one of the Parties, and the other way by the competitor.

⁽²⁾ Special prorated agreements allow eligible competitor airlines to obtain favourable terms from the Parties to carry passengers who travel on connecting flights operated by the Parties on routes in Europe and North America (and selected other countries), in order to 'feed' the competitor's own transatlantic services on the relevant Route of Concern, by transferring such passengers onto the competitor's transatlantic flights.

a true origin/destination in Lebanon and Israel, in addition to traffic with origin/destination in Europe or North America/the Caribbean/Central America. Furthermore, a clarification was included whereby the special prorate agreement commitment, which includes a right of the competitor to select up to twenty (20) behind/beyond routes operated by the Parties, also includes behind/beyond routes that are marketed by the Parties and operated by certain subsidiaries of the Parties (i.e. KLM Cityhopper, Alitalia CityLiner, HOP operated flights wet-leased by AF, and connecting flights marketed under the Delta Connection brand).

Assessment and proportionality of the proposed commitments

- (13) The commitments in their final form are sufficient to address the concerns identified by the Commission in its Preliminary Assessment, without being disproportionate. They facilitate entry or expansion on the Routes of Concern, by lowering barriers to entry or expansion and strengthening the services of competitors, by granting them access to connecting traffic and the possibility of concluding fare combinability agreements and cooperation agreements on frequent flyer programmes.
- (14) For the Amsterdam-New York and Rome-New York routes, the Commission considers that the combination of the slot commitments, on the one hand, together with the fare combinability, special prorate agreements and frequent flyer programmes commitments, on the other, is adequate and sufficient to remedy the competition concerns identified in the Preliminary Assessment. In particular, the conditions attached to the slot commitments make them effective and attractive enough to encourage competitors to actually take them up, while the other commitments should enable competitors to increase the sustainability of their new services. As regards the Paris-New York route, the Commission notes that competitors operate more frequencies per day than the Parties combined and that competitors have recently been able to add frequencies on the route. Therefore, the Commission considers that the fare combinability agreement, special prorate agreement and frequent flyer programme commitments offered by the Parties, for both existing and new competitors, are adequate and sufficient to remedy its concerns on this route.

Conclusion

- (15) The Decision makes the commitments proposed by the undertakings concerned legally binding upon them.
 - (16) In light of the final commitments offered by the Parties, the Commission considers that there are no longer grounds for action on its part. The Decision shall be binding for a period of 10 years from the date of its adoption.
-