The Transportation Antitrust Update

A publication of the Transportation Industry Committee of the Section of Antitrust Law, American Bar Association

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American Bar Association
Section of Antitrust Law

Continuing Legal Education 2009 Calendar

September 11, 2009
Antitrust Loyola Symposium
Chicago, IL

October 15-16, 2009
Antitrust Litigation Course
Chicago, IL

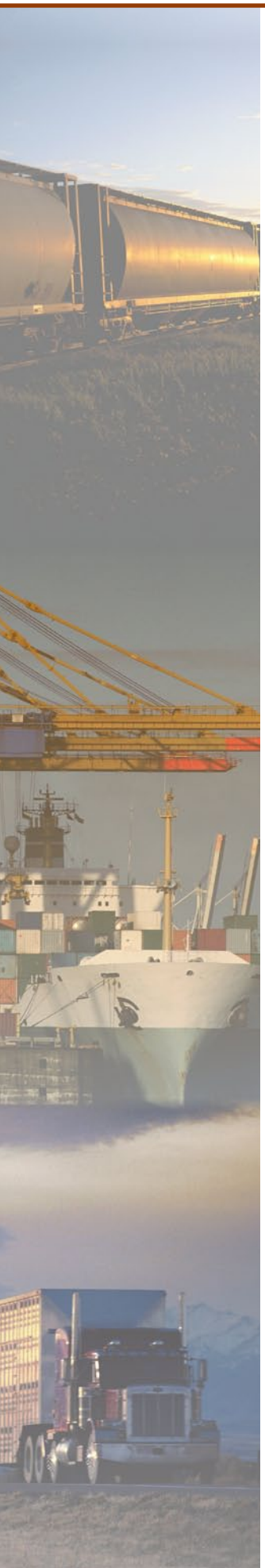
November 12-13, 2009
Fall Forum
Washington, D.C.

Message from the Chair

Bruce C. McCulloch

The Transportation Antitrust Update is the newsletter of the Transportation Industry Committee of the Section of Antitrust Law of the American Bar Association. The Summer 2009 edition will be the last edition of The Transportation Antitrust Update, as our Committee has been reformed as the Transportation and Energy Industries Committee. Bruce McDonald and I will co-chair the new Committee, and we are excited to be chairing a new Committee with a broader scope and more opportunities for programs and publications in the 2009-10 Section year.

In the coming weeks, Committee members will receive additional information regarding the new Committee. For example, the Committee listservs will be consolidated, and the content will cover both transportation and energy matters. A new Committee web site

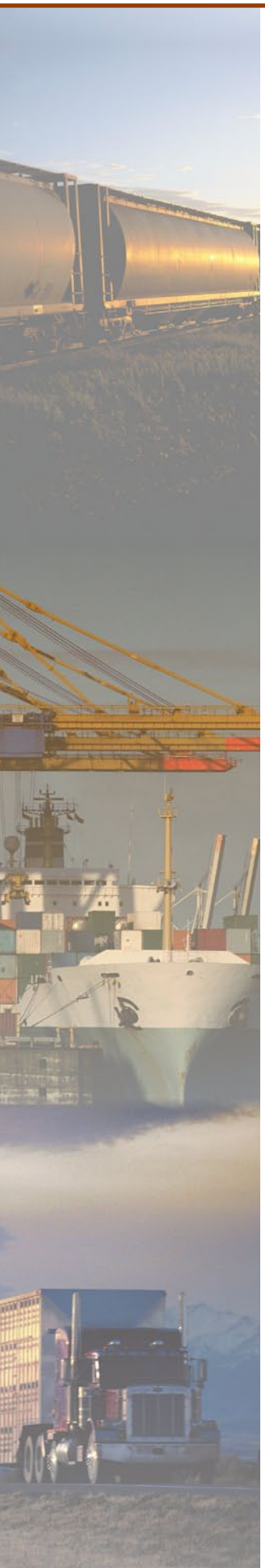


and newsletter also will be launched this Fall. These are exciting times for the Committee, and there is no better time to become involved in Committee operations. If you would like to be involved with any aspect of Committee operations – from publications to programs to web site – please reach out to any member of the Committee leadership.

This final edition of The Transportation Antitrust Update includes valuable contributions from members of the Committee and other contributors to the newsletter. Two articles dealing with timely subjects highlight this edition of The Transportation Antitrust Update. First, Stephen Rigby analyzes the implications of the recently concluded Canada – European Union air transportation agreement. Second, Jason Cruise and David Pettit provide an update on recent DOT and DOJ activities involving airline alliances and antitrust immunity issues. In addition, this edition of the newsletter includes summaries of recent developments in the airline, rail, and shipping industries, as well as relevant international and consumer protection matters.

As mentioned above, this will be a new and exciting year for the Committee. With an expanded membership and new industries under one Committee, we will provide more content and more opportunity. With Committee member assistance (led by Vice Chair Bridget Calhoun), the Transportation Industry Committee revitalized its web site during the 2008-09 Section year. Over the next few months, we will launch a new Committee web site that will incorporate transportation and energy resources. The web site is one of many new challenges for our Committee, and Bruce McDonald and I encourage all with an interest in the transportation and energy industries to join the Committee and/or volunteer for Committee projects.

Along with Newsletter Editor Jim Wade, I want to thank all of the authors and contributors to this edition of the newsletter, including Diane Tuomala, Edward Choe, David Osei, John Longstreth, Marta Rodrigues, and Holly Arceneaux.



Canada-European Union Air Transport Agreement

Stephen Rigby[1]

Introduction

Canada and the European Union (the "**EU**") recently concluded negotiations on a comprehensive air transport agreement (the "**Agreement**"). Upon entry into force,[2] the Agreement will establish a single market for transatlantic air transport between Canada and the EU, replacing the existing bilateral air service agreements. According to the Canadian government and the EU, the Agreement will stimulate competition and create substantial economic benefits for the airline and tourism industries, consumers and boarder business communities.

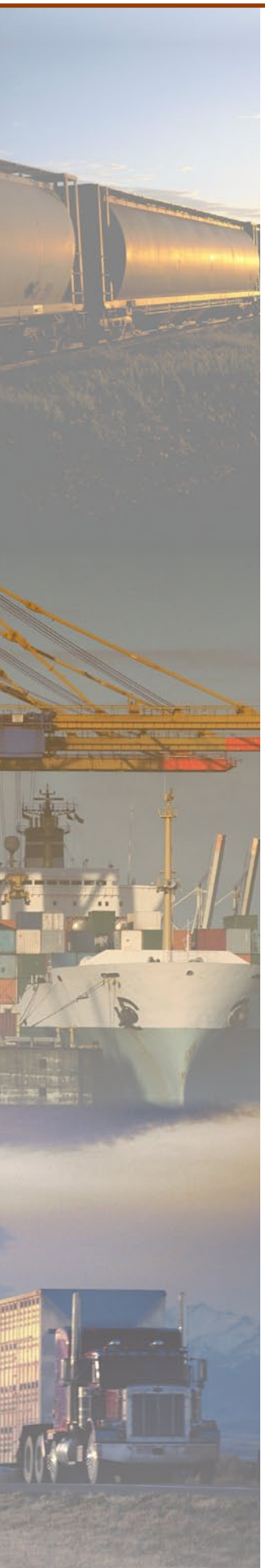
The Agreement provides for a gradual phasing-in of air traffic rights and investment opportunities by each party and encourages cooperation on issues relating to capacity, pricing arrangements, competition, consumer interests and aviation safety and security. During its first phase of implementation, the Agreement is similar in scope to the April 2007 open skies agreement between the United States and the EU.[3] However, the Agreement contemplates a broader reach over time and provides for deeper economic integration of air service industries. As a result, implementation of the Agreement may increase pressure on the U.S. to further relax its trade and investment barriers during the second stage of negotiations for a more liberalized U.S.-EU open skies agreement.

Background

Negotiations for an air transport agreement between Canada and the EU began in November of 2007, one year after Canada announced its new international air policy, entitled "Blue Sky". The Blue Sky policy supports the integration and deregulation of the global aviation market and reflects Canada's approach to bilateral air transport negotiations for passenger and cargo services. Under the policy, the federal government intends to actively pursue opportunities to increase competition and expand international air services.[4] Thus far, Canada has successfully concluded liberalized air services agreements with several different nations,[5] including its most important international aviation partner, the U.S.

The EU is Canada's second largest air transport market after the U.S. Canada is the fifth largest aviation market for EU carriers after the U.S., Switzerland, Turkey and Norway.[6] Air traffic between Canada and the EU continues to grow rapidly. The number of passengers carried between Canada and the EU doubled during 2000 to 2005. In 2007, approximately 9 million people traveled between Canada and the EU and air traffic between these jurisdictions is expected to reach 14 million by 2011. This market strength is reflective of Canada's longstanding economic, political and cultural ties with the EU.[7]

Traditionally, air transport between Canada and the EU has been governed by bilateral agreements between individual states. Canada currently has bilateral agreements in place with 17 of 27 EU member states. These agreements differ considerably, resulting in unequal market access opportunities



for Canadian and EU member state airlines. Eliminating bilateral restrictions on pricing, geography and capacity is seen as an important step to stimulate competition between existing and new air service markets. The European Commission has anticipated that the liberalization of air traffic between Canada and the EU could generate over 72 million Euros (or approximately US$92.6 million) in economic benefits and more than 3,700 jobs within the first year.[8]

Key Elements of the Canada-EU Agreement

Phased Market Opening – Air Traffic and Cabotage Rights

The Agreement contemplates implementation in four phases as national laws of each party are anticipated to evolve. Importantly, there is no obligation on governments of either party to change their national laws as contemplated by the Agreement. Each phase provides for a gradual increase in the level of traffic rights and investment freedoms granted by each party as described below.

Phase One

"**Phase One**", effective when the Agreement is signed, allows airlines to operate direct services between Canada and the EU without restrictions on the number of airlines flying or the number of services operated by any airline. Cargo airlines will also have the right to fly onward to third countries.

The two key elements to Phase One are the opening of the air service markets between Canada and the EU member states with which Canada has no existing bilateral treaty[9] and the ability of EU airlines to serve Canada directly from any member state. Under the bilateral treaty system, only airlines based in an EU member state that is party to an existing bilateral treaty could serve Canada directly from that state. It is now possible for any EU airline to serve the Canadian market and to do so from any European airport. Thus, it should be possible that, for example, Lufthansa may serve Canada from London, Paris or Amsterdam.

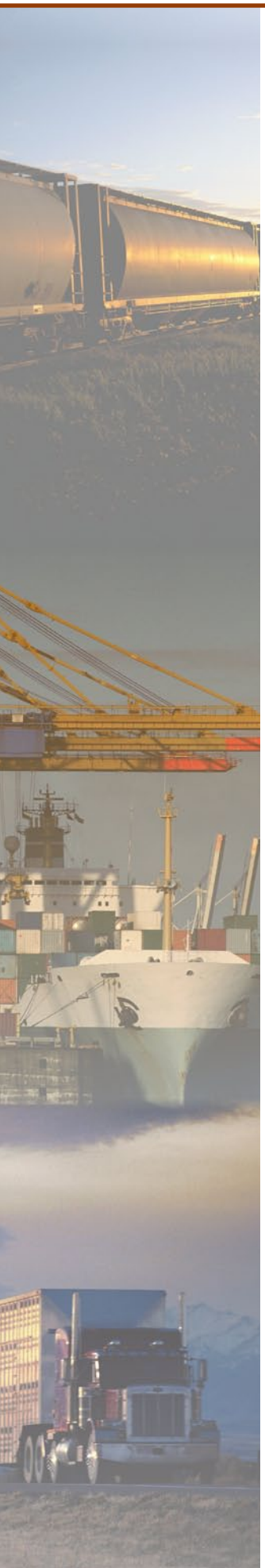
Phase Two

"**Phase Two**" will begin if and when national laws and regulations allow nationals of one party to own and control up to a total of 49% of the voting interests of the other party's airlines. Phase Two increases air traffic rights, including the right for Canadian airlines to take passenger traffic between EU member states if the flight starts or ends in Canada (i.e., partial "fifth freedom" rights) and the right for cargo carriers of a party to provide international transportation between the other party's territory and third countries without a requirement to service their point of origin (i.e., full cargo "seventh freedom" rights).

While the EU currently limits foreign ownership of EU airlines to 49%, Canada currently limits foreign ownership of Canadian airlines to 25%. However, the Canadian government has stated publically that it is considering relaxing its foreign ownership restriction on Canadian airlines.[10] Given the much publicized concern over the possibility of another Air Canada bankruptcy filing, pressure to act on this front may intensify.

Phase Three

"**Phase Three**" will begin if and when the national laws and regulations of both parties are amended to permit investors in Canada and the EU to establish domestic and international air services in each other's territory. During Phase Three, passenger airlines of both parties will be able to fly onward to a third country without frequency limitations (i.e., full "fifth freedom" rights).



Canada has considered in the past whether to allow foreign airlines to establish air services within Canada and rejected this concept. However, this may change at some point in the future, depending on how competition evolves in the Canadian market. That market is currently dominated by Air Canada and its smaller, "low cost carrier" competitor, Westjet. However, how this may change in the face of the pressures currently facing Air Canada is yet to be seen.

Phase Four

"**Phase Four**" will begin if and when the national laws and regulations of both parties permit the full ownership and control of their airlines by nationals of the other party and both parties permit Canadian and EU carriers to operate between, within and beyond both markets. This includes the lifting of statutory prohibitions against cabotage, which would allow Canadian airlines to carry EU nationals between points in the EU and vice versa for EU airlines in Canada.

In the current worldwide environment where the removal of cabotage restrictions is very rare, it is difficult to see when, if ever, Phase Four will be implemented. Nonetheless, it is interesting that the Agreement was expanded to contemplate this eventuality and demonstrates that the negotiators at least see a possibility for the elimination of these restrictions.

Capacity

Article 13 of the Agreement removes capacity restrictions relating to the number of flights that can be operated or passengers that can be carried between Canada and the EU. Instead, each airline may determine the frequency and capacity of the air services it offers under the Agreement based on the airline's commercial considerations in the marketplace. Neither Canada nor the EU is permitted to unilaterally limit the volume of air traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other party.

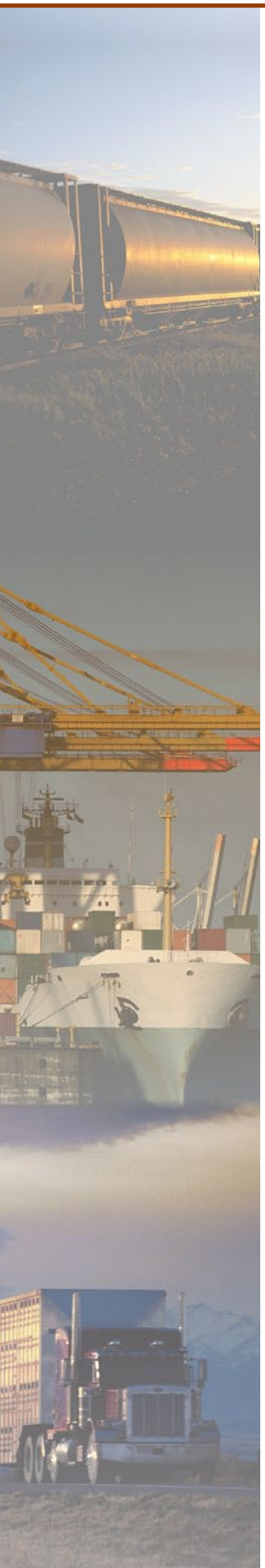
Flexible Pricing Arrangements

Article 13 also permits the airlines of each party to establish a flexible pricing framework on the basis of "free and fair competition". Once set, airlines are not required to file their prices with the aeronautical authorities. However, the aeronautical authorities may become involved to resolve matters relating to unjust, unreasonable or discriminatory pricing.

Competitive Environment

Article 14 of the Agreement describes Canada and the EU's joint objective to have a fair and competitive environment for the operation of air services. The key factors recognized to support this objective include the removal of competition distorting subsidies, deregulation and privatization, equitable and non-discriminatory access to airport facilities and services, and computer reservation systems. The parties are permitted to approach government entities in the territory of the other party to discuss matters relating to capital injections, cross subsidization, grants, guarantees, ownership, relief or tax exemption, and protection against bankruptcy or insurance, imposed by a government entity. The parties are also required to encourage cooperation between their respective competition authorities as contemplated by the "Agreement between the Government of Canada and the European Communities regarding the Application of their Competition Laws", which entered into force on June 17, 1999.

The Agreement was concluded against a backdrop of significant competitive changes to the transatlantic aviation market.



The U.S. Department of Transportation ("**DOT**") has granted anti-trust immunity to SkyTeam member airlines (Delta/Northwest and AirFrance/KLM) in connection with their transatlantic joint venture that will control approximately 25% of transatlantic passenger capacity.[11] In April, 2009, the DOT tentatively approved Continental Airlines participation in a joint venture of four Star Alliance member airlines (Continental, United, Lufthansa and Air Canada)[12] and is considering requests for similar immunities from **one**world Alliance member airlines (American Airlines, British Airways and Iberia).[13] The EU has announced that it will conduct a review of these alliances[14] and it can be expected that the Canadian Competition Bureau will be closely monitoring these developments insofar as Canadian/EU routes are involved. The Bureau will be expected to have particular interest in the Star Alliance proposal involving Air Canada, the dominant Canadian player in the transatlantic market.

Consumer Interests

Article 10 of the Agreement is focussed on protecting consumer interests. The Agreement permits the parties to require airlines, on a non-discriminatory basis, to take measures relating to, among other things, the protection of funds advanced to airlines, denied boarding compensation initiatives, passenger refunds, financial fitness of airlines and passenger injury liability insurance.

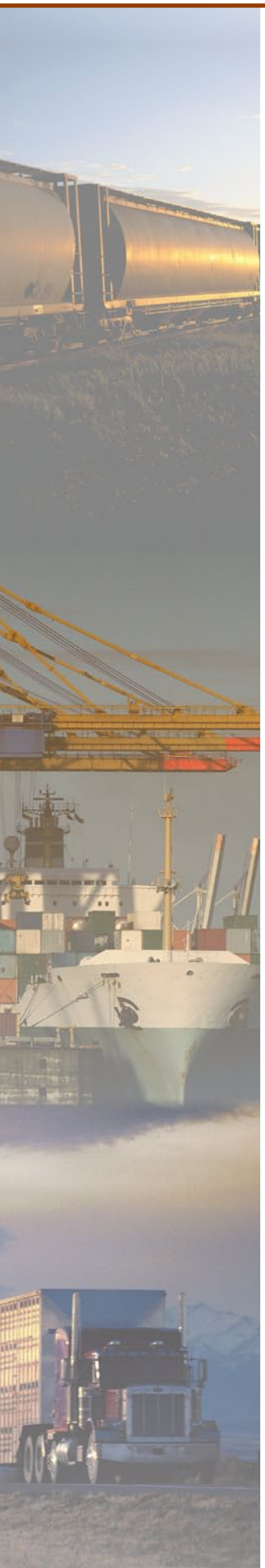
Safety and Security

Articles 6 and 7 of the Agreement reaffirm the importance of safety and security in the field of aviation. The parties are required to cooperate in relation to air operations, allowing for the sharing of information that could impact on the safety of international air navigation, participating in each other's oversight activities and conducting joint oversight activities and initiatives in the area of aviation safety, including with third countries.

Canada and the EU must also act in conformity with their rights and obligations under international law to protect the security of civil aviation against acts of unlawful interference. Upon request, the parties are required to provide all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and must ensure that adequate measures are effectively applied within their territories to protect air carriers, passengers, crew members, baggage, carry-on-items, cargo, mail and aircraft stores prior to boarding or loading. The parties agree to work towards achieving mutual recognition of each other's security standards and close cooperation regarding quality control measures on a reciprocal basis.

Canada-EU Joint Committee

The Agreement establishes a new governance mechanism, the Canada-EU Joint Committee, composed of representatives of Canada and the EU. The Joint Committee must meet to identify and facilitate contracts between relevant authorities for matters covered under the Agreement. In addition, either party may request a meeting with the Joint Committee to consult regarding the interpretation or application of the Agreement and seek to resolve concerns raised by the other party. The Joint Committee will foster cooperation between the parties and may provide advice on any matter relating to the Agreement, including changes to domestic law and policy which affect the Agreement. All decisions of the Joint Committee must be made by consensus.



Additional Provisions

The Agreement is a comprehensive air services framework and contains a number of additional provisions relating to matters such as international cooperation, protection of the environment, customs duties, taxes and charges, cooperation in air traffic management and dispute settlement.

Some Broader Implications

Canadian airlines do not enjoy any rights to fly point-to-point within the EU and will not enjoy such rights until "Phase Four" of the Agreement is in effect. At that time, EU airlines will enjoy the same rights within Canada. The U.S.-EU open skies agreement has been subject to criticism from some European commentators[15] that it is "one-sided" or unfair to EU airlines because U.S. airlines have certain "point-to-point" rights within the EU while EU airlines do not enjoy equivalent rights within the U.S.

It is perhaps because of the more parallel positions of Canadian and EU airlines that the Agreement does not include a provision equivalent to Article 21.3 of the U.S.-EU open skies agreement allowing for the suspension of certain rights if no second stage agreement has been reached by the parties within twelve months of the start of the review.[16] If the U.S.-EU agreement is rolled back, it is possible that the Canada/EU market could be much more open and competitive than the U.S./EU market. While it is difficult to predict the appetite within the U.S. for an expanded agreement with the EU, it is possible that such a contrast may exert some pressure on the U.S. in its ongoing relationship with the EU.

One group that may be poised to take advantage of the more open market between Canada and the EU are the major Canadian airports, particularly at Toronto and Vancouver. Canadian airports are endeavouring to establish themselves as preferred connection points for passenger traffic from Europe, Latin America and many parts of Asia whose final destination is outside of the U.S. Canada does not impose visa requirements for most connecting passengers which is regarded as a potentially significant competitive advantage over airports in the U.S. Expanded service between Canada and the EU can be expected to contribute to this advantage.

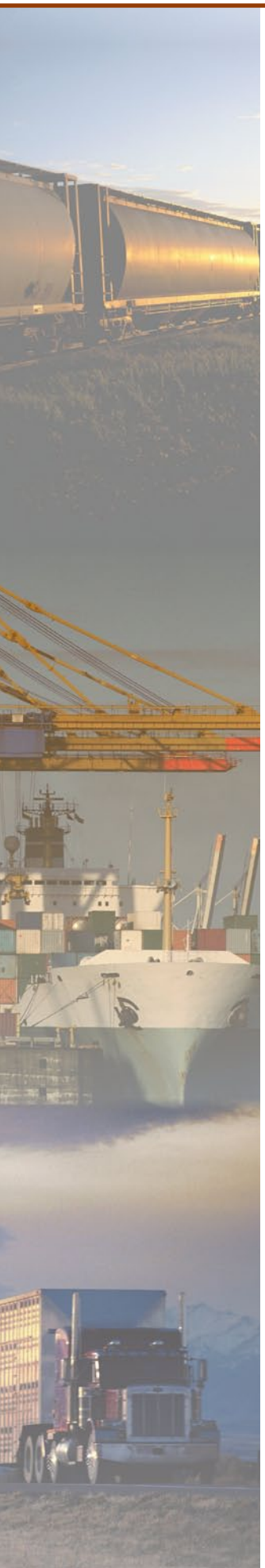
Conclusion

The establishment of a single market for transatlantic air transport between Canada and the EU will undoubtedly have significant effects for Canadian travellers and for those who may visit Canada from the EU, particularly if the later phases of the Agreement are achieved. Whether the "substantial economic benefits" each party is hoping for will be realized remains to be seen as does any impact on the upcoming discussions between the U.S. and the EU with regard to further liberalization of that transatlantic air market.

1 Stephen Rigby is a partner in the Toronto office of McMillan LLP and chair of the aviation practice at McMillan LLP. This paper was prepared with substantial contributions from Marie Bruchet, Student-at-Law, McMillan LLP.

2 The Agreement will be proclaimed into force when it is signed by the parties. The Canadian and EU governments announced the conclusion of negotiations on the Agreement at the annual Canada-EU Summit on May 6, 2009 in Prague, Czech Republic. Formal signature of the Agreement is expected to take place in the following months.

3 The U.S.-EU open skies air transport agreement was signed on April 30, 2007. The first stage of the agreement came into force on March 30, 2008 and both parties are committed to continue second stage negotiations to further liberalize air traffic rights and investment opportunities. The



agreement provides that if no substantial progress has been made in the second stage of negotiations by November 2010, the EU can decide to suspend certain rights granted to the U.S. See: Europa, "The EU-US Open Skies Air Transport Agreement Q&A" (Brussels: March 28, 2008) available online at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/185&format=HTML&aged=1&language=EN&guiLanguage=en [Europa].

4 Transport Canada, "Blue Sky: Canada's New International Air Policy" (November, 2006), available online at: http://www.tc.gc.ca/pol/en/ace/consultations/blueSky.pdf.

5 For example: Ireland, Iceland, New Zealand, and the United Kingdom.

6 Commission of the European Communities, "Developing a Community Civil Aviation Policy towards Canada" (Brussels: January 9, 2007).

7 *Ibid*.

8 *Ibid*.

9 Including Cyprus, Estonia, Latvia, Lithuania, Luxembourg, Malta, Slovakia and Slovenia.

10 In March of 2009, the Canadian government indicated the possibility to allow up to 49% investment by foreigners, with an actual percentage number to be set in the regulations in the future. Thus, the rights associated with Phase Two of the Agreement could apply from the time the Agreement is proclaimed into force. EUROPA, "The EU-Canada Aviation Agreements – Q&A" (Brussels: May 6, 2009), available online at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/218&format=HTML&aged=0&language=en&guiLanguage=en.

11 U.S. Department of Transportation, Office of Public Affairs, "DOT Approves Expanded Transatlantic Alliance Involving Delta, Northwest" (DOT 73-08: May 22, 2008), available online at: http://www.dot.gov/affairs/dot7308.htm.

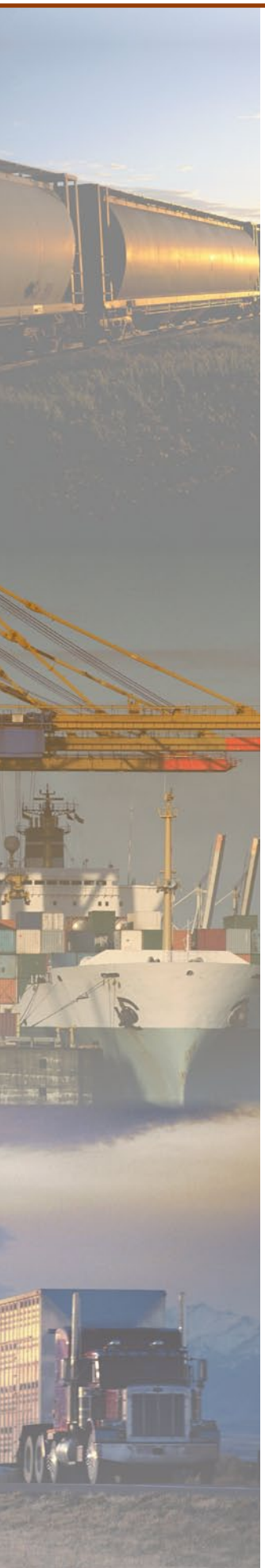
12 U.S. Department of Transportation, Office of Public Affairs, "DOT Proposes to Approve Star Alliance Plan to Add Continental, Establish Joint Venture" (DOT 42-09: April 7, 2009), available online at: http://www.dot.gov/affairs/dot4209.htm.

13 OAG Travel News, "Alliance Immunity Altering Airspace" (April 29, 2009), available online at: http://www.oag.com/travel-news/oag-travel-news/alliance-immunity-altering-airspace/.

14 On April 20, 2009, the European Commission launched two antitrust investigations against certain members of Star Alliance and **one**world. EurActiv, "EU Probes Transatlantic Airline Alliances" (April 21, 2009), available online at: http://www.euractiv.com/en/transport/eu-probes-transatlantic-airline-alliances/article-181424.

15 See: Association of European Airlines, "Open Skies: the EU-US Air Transport Agreement" available online at: http://files.aea.be/News/News020408.pdf, which provides at p. 1 that the first stage of the U.S.-EU agreement "does not yet provide all elements of a level playing field for fair competition, and is only a first step towards the ultimate goal, a true EU-US Open Aviation Area."

16 See: Europa, *supra* note 3.



Airline Alliances Under Fire: What a Skeptical Congress and a Vigorous Justice Department Mean for Airlines Seeking Antitrust Immunity

Jason Cruise and David Pettit[1]

U.S. Secretary of Transportation Ray LaHood recently described airline alliances as "life-savers."[2] However, certain members of Congress lack the same enthusiasm and are calling for enhanced scrutiny by the Department of Transportation ("DOT") and the Department of Justice ("DOJ") when these alliances seek immunity from U.S. antitrust laws. DOJ appears poised to answer that call. It recently voiced its opposition to a request by members of Star Alliance and Continental Airlines to add Continental to the existing alliance and including participation in an enhanced revenue-sharing joint venture called Atlantic Plus-Plus ("A++"), a request that DOT ultimately approved. Despite DOT's approval, the A++ joint venture and a proposed alliance between **one**world Alliance members American Airlines, British Airways and Iberia have recently come under fire, which may raise doubts as to the future of broad airline cooperation that is central to such alliances.

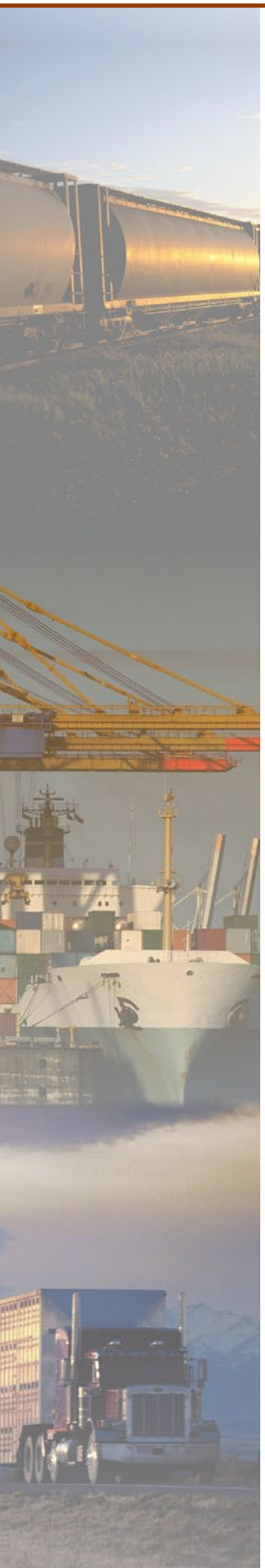
Airline Alliance Background

Airline alliances involve agreements that typically call for coordination among carriers in areas including planning, marketing and operations.[3] These agreements commonly provide for practices including:

- Code-sharing, in which partner airlines market and sell seats on other partners' flights;
- Coordination of customer service and ground operations, including the scheduling of connecting flights; and
- Integration of customer reward programs, such as frequent flyer programs.[4]

Proponents of airline alliances maintain that alliance activities have provided substantial benefits to travelers in terms of increasing access to more remote locations through expanded connecting services and lower fares.[5] For example, long-distance, less-dense routes often require connecting services simply because there is not enough demand to efficiently provide direct flights.[6] Code-sharing agreements may benefit passengers on these routes, who would otherwise need to purchase tickets on multiple airlines and potentially deal with non-coordinated customer services.[7] Traditionally, while code-sharing agreements have allowed for the creation of a joint "product," the partnering airlines will often continue to compete on price—they market and sell the joint tickets individually like a booking agent.[8]

The first global airline alliance, Star Alliance, officially launched in May 1998. The alliance currently consists of twenty-one members, including United Airlines and Lufthansa. Since then, two other alliances have emerged: SkyTeam Alliance, led by Delta and Air France-KLM, and **one**world Alliance, led by American Airlines and British Airways.



Beyond the basic alliance elements described above, certain members of the three global alliances have taken their partnerships a step further and enacted various joint venture agreements whereby members share revenue and jointly manage schedules, capacity and pricing. Because of the extensive exchange of sensitive pricing and marketing data involved the member airlines have generally sought antitrust immunity from the U.S. government prior to undertaking these activities. Although they have attracted intense scrutiny, DOT, the agency responsible for global alliance antitrust enforcement, has looked upon the deeper partnerships favorably and awarded antitrust immunity.[9] For example, Delta and Air France-KLM completed a deal in May 2009 after DOT formally granted them antitrust immunity in 2008.[10] DOT also recently approved a request for an enhanced alliance involving Star Alliance members and is currently reviewing a proposed alliance involving American, British Airways and Iberia.

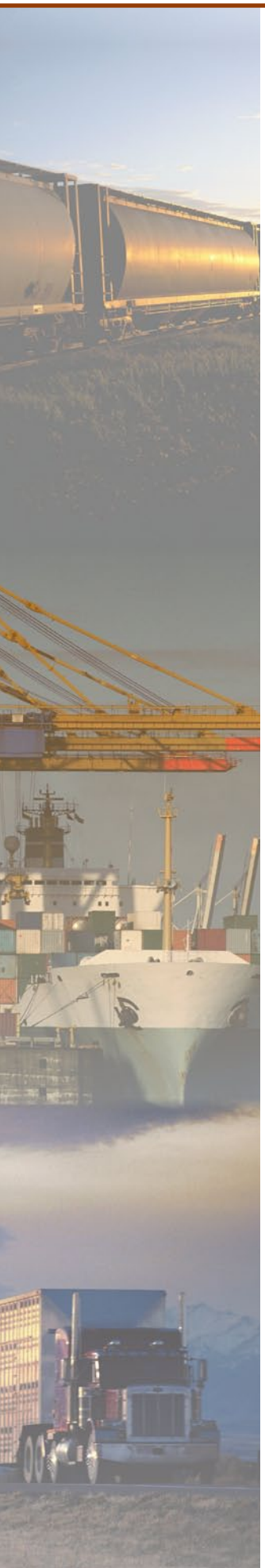
Department of Transportation Review of Airline Alliances

The Department of Transportation has authority to grant antitrust immunity to activities involving domestic and foreign airline companies.[11] As a prerequisite to reviewing a request for antitrust immunity, DOT requires that the home country of each foreign partner airline have an "open-skies" agreement with the United States.[12] An open-skies agreement deregulates air transportation between two countries, allowing carriers unlimited access to all points in each country's markets.[13] The United States currently has some form of open-skies agreement with ninety-four countries, including the twenty-seven members of the European Union.[14]

If the open-skies requirement is satisfied, DOT applies a two-step review process. DOT first conducts a competitive analysis to determine whether the agreement is adverse to the public interest.[15] Agreements that reduce or eliminate competition will not be approved unless they meet a serious transportation need that cannot otherwise be achieved using less anticompetitive methods.[16] The analysis also considers the likelihood of new entrants that could counteract the potential harm.[17] In addition to these factors, DOT may consider foreign policy factors and international comity in its analysis.[18]

If the agreement is not adverse to the public interest, DOT next determines whether the grant of antitrust immunity is "required by the public interest."[19] Essentially, DOT has the discretion to decide whether the agreement would promote the public interest and whether the parties need antitrust immunity to carry out the activities envisaged in the agreement. If the parties require antitrust immunity to enter into an agreement, and that agreement will benefit consumers, then DOT grants the parties' request.

While DOT is the ultimate decisionmaker in granting antitrust immunity, DOJ may, and is sometimes encouraged to, file comments regarding the antitrust implications of a proposed alliance. DOJ operates under a presumption against granting immunity, and to overcome that presumption, applicants must show that (1) the agreement will generate significant benefits in excess of any potential harm to competition, (2) these benefits cannot be achieved without immunity and (3) the proposed immunity is narrowly tailored.[20] Even though DOT's analysis resembles DOJ's approach, the two agencies may reach notably different results, as demonstrated by the recent Star Alliance and Continental immunity request.



Recent Antitrust Immunity Requests

In June 2007, several members of the SkyTeam alliance applied for antitrust immunity to operate a joint venture on certain transatlantic routes.[21] The joint venture agreement provided for cooperative planning and management of capacity and pricing.[22] The applicants' expressed goal was "metal neutrality," meaning that participants would pool revenues and costs to create incentives to maximize alliance profits rather than compete against one another to carry more passengers on their own "metal."[23] DOT concluded that the public benefits of the joint venture outweighed the reduction in competition on certain transatlantic routes and formally granted the alliance immunity in May 2008.[24] Nearly one year (and two mergers) later, Air France-KLM and Delta-Northwest entered into the contemplated joint venture agreement.[25]

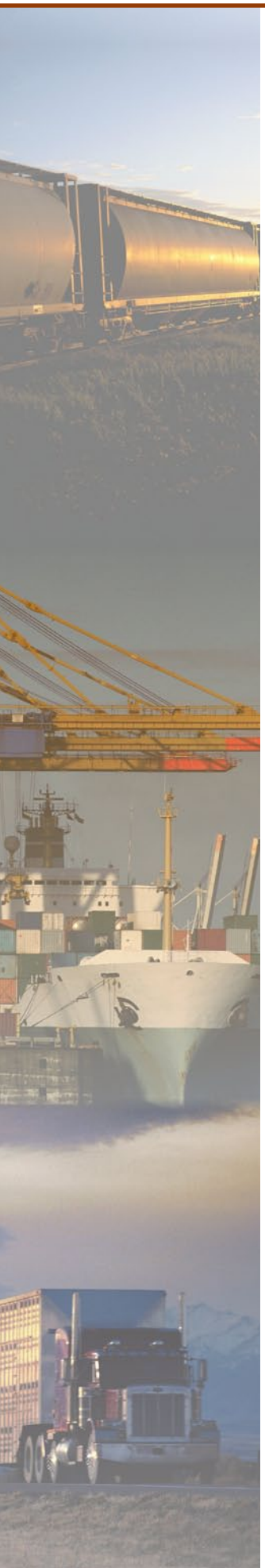
Likewise, in July 2008, members of Star Alliance and Continental filed an application with DOT to add Continental to the existing alliance including participation in the enhanced revenue-sharing joint venture called A++.[26] DOT tentatively approved the request in April 2009.[27] Under the A++ arrangement, the four carriers would share revenues and jointly coordinate capacity, sales and marketing.[28] DOT found that the joint venture would likely expand capacity, providing travelers with more options, shorter travel times and lower fares.[29]

DOT's tentative A++ approval contained several caveats and qualifications. First, even though the A++ arrangement includes two U.S. domestic carriers, United and Continental, the scope of DOT's immunity grant was limited to coordination of international air transportation, and any coordination regarding domestic services was still subject to U.S. antitrust regulation.[30] Additionally, the carriers were required to implement the new alliance within eighteen months and to submit annual reports on the alliance's impact.[31] Finally, DOT's tentative approval preserved existing Star Alliance carve-outs for the Chicago-Toronto and San Francisco-Toronto routes.[32]

DOJ, however, reached a very different conclusion on the A++ application. Nearly two months after DOT's comment period closed, and about a week after Attorney General Eric Holder appeared before the Senate Judiciary Committee to provide assurances that DOJ would work with DOT on the immunity matter,[33] DOJ filed a statement opposing DOT's tentative approval of the A++ alliance.[34] DOJ called for significantly limited antitrust immunity applicable only to transatlantic markets, with carve-outs for selected transatlantic routes.[35] The Justice Department expressed concerns regarding loss of competition on routes between the United States and China, Canada and a handful of transatlantic markets.[36] DOJ also opined that information-sharing between United and Continental, the third- and fourth-largest U.S. airlines, could result in spillover effects on domestic markets.[37]

Just two weeks later, however, DOT issued its final approval of both Continental's addition to Star Alliance and the formation of the A++ joint venture.[38] While DOT rejected DOJ's core market definition and competitive effects arguments, it agreed to supplement its tentative approval order with additional temporary carve-outs on routes where the number of non-alliance competitors would be reduced from two to one.[39]

DOT is currently reviewing a joint venture among **one**world Alliance members American Airlines, British Airways, and



Spanish carrier Iberia. Unlike the A++ agreement, which received only tempered opposition by Delta, this joint venture has received staunch opposition from Virgin Atlantic.[40] Virgin founder Richard Branson has publicly voiced concern that this joint venture would accumulate nearly half of all takeoff and landing slots at London Heathrow Airport, which could lead to anticompetitive fare increases.[41] DOT's ruling on this joint venture is expected in Fall 2009.[42]

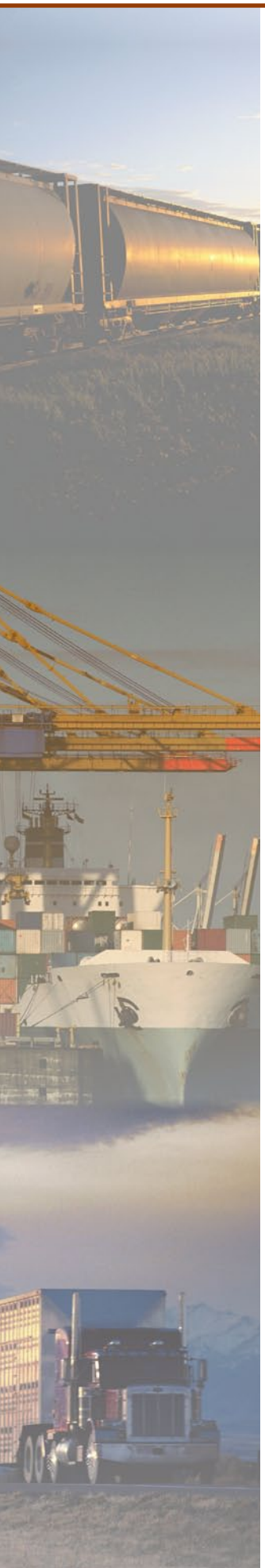
The European Commission also recently opened formal proceedings involving both the AC/CO/LH/UA and the **one**world joint ventures.[43] There is an ongoing parallel proceeding involving the SkyTeam carriers and European Commission officials have indicated a desire to deal with the three cases at the same time if possible. DOT and the European Commission are also currently drafting a joint report on airline alliances as part of their cooperation under the 2007 US-EU Air Transport Agreement that should be released mid-2009.[44]

It is unclear how DOT will react in the future to DOJ's newfound vigor regarding international airline alliances. While DOT holds ultimate decision-making authority, it seems unlikely that DOJ's opposition will continue to fall on deaf ears. Yet given Secretary of Transportation LaHood's enthusiasm for airline alliances, particularly in times of need for the airline industry and given that various regulatory restrictions continue to prevent international mergers in the airline industry, it appears that DOT has a difficult choice to make. To the extent that DOT continues to fly in the face of opposition from DOJ and other powerful interests, the agency may risk accelerating Congressional initiatives to limit its antitrust enforcement authority.

Congressional Skepticism of Airline Alliances

Congressional dissatisfaction with DOT's apparent leniency in granting antitrust immunity began gaining momentum with a December 2008 letter from Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, to then-Attorney General Michael Mukasey and then-Secretary of Transportation Mary Peters. The letter, which was joined by Senators Arlen Specter (D-PA), Orrin Hatch (R-UT) and Herb Kohl (D-WI), sought a more active role by DOJ in reviewing airline alliances because of concerns that these alliances might undermine competition and raise prices.[45] Senators Kohl and Hatch sent a second letter in June 2009 to Attorney General Holder and Secretary of Transportation LaHood to request DOJ's comment on the two Star Alliance and Continental requests and the American Airlines, British Airways and Iberia request.[46] The letter further requested that DOT refrain from making any final decisions until its joint report on alliances with the European Commission was released.[47] On June 17, 2009, Attorney General Holder appeared before the Senate Judiciary Committee and soon thereafter DOJ formally voiced its opposition to the Star Alliance/Continental requests.[48]

In the House, Representative James Oberstar (D-MN), Chairman of the House Transportation Committee, introduced H.R. 915, the Federal Aviation Administration Reauthorization Act of 2009. Among other things, the bill would create a three-year sunset provision for grants of antitrust immunity by DOT and require the Government Accountability Office to conduct a study of the current framework DOT uses to decide whether to grant immunity.[49] The bill passed out of the House on May 21, 2009 and was sub-



sequently sent to the Senate Committee on Commerce, Science, and Transportation.

Conclusion

While DOT continues to look favorably on international airline alliances, Congress and DOJ are second-guessing the benefits of these agreements. DOT's recent approval of the Star Alliance and Continental immunity requests might be seen as the agency drawing a line in the sand. If this move draws the ire of Congressional opponents, DOT might see its antitrust enforcement powers severely limited in short order.

1 Jason Cruise is an associate and David Pettit is a summer associate in the Washington, D.C. office of Latham & Watkins.

2 Dave Michaels, *American Airlines Global Alliance Soon to be OK'd?,* DALLAS MORNING NEWS, May 9, 2009.

3 *See* U.S. Dep't of Transp., Docket OST-2008-0234, Show Cause Order 3 (Apr. 7, 2009) [hereinafter "Continental Order"].

4 *Id.*

5 U.S. DEP'T OF TRANSP., INTERNATIONAL AVIATION DEVELOPMENTS: GLOBAL REGULATION TAKES OFF (FIRST REPORT) 2 (1999).

6 *Id.* at 5.

7 Olivier Armantier & Oliver Richard, *Domestic Airline Alliances and Consumer Welfare,* 39 RAND. J. ECON. 875, 878 (2008).

8 *Id.*

9 This favorable view is at least partly based on the airline industry's recent financial difficulties. For example, DOT approved a code-sharing agreement in 2003 between Continental Airlines, Delta, and Northwest Airlines despite "serious competitive concerns." SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 3.25A (2008).

10 Daniel Michaels, *Air France-KLM, Delta Form Trans-Atlantic Joint Venture,* WALL ST. J., May 25, 2009.

11 49 U.S.C. § 41308.

12 Continental Order, *supra* note 2, at 2, 6.

13 U.S. Dep't of State, Open Skies Agreement Highlights web site, http://www.state.gov/e/eeb/rls/fs/2009/119760.htm.

14 U.S. Dep't of State, Open Skies Partners web site, http://www.state.gov/e/eeb/rls/othr/ata/114805.htm.

15 Continental Order, *supra* note, 2, at 6 (citing 49 U.S.C. § 41309).

16 *Id.*

17 *Id.* at 7.

18 *Id.* at 6.

19 49 U.S.C. § 41308.

20 U.S. Dep't of Justice, Comments of the Department of Justice on the Show Cause Order, Docket OST-2008-0234 1 (June 26, 2009) [hereinafter "Comments"].

21 U.S. Dep't of Transp., Docket OST-2007-28644, Show Cause Order 2-3 (April 9, 2008).

22 *Id.*

23 *Id.*

24 U.S. Dep't of Transp., Docket OST-2007-28644, Final Order 1 (May 22, 2008).

25 David Jolly, *Air France and Delta Seal Trans-Atlantic Joint Venture,* N.Y. TIMES, May 20, 2009.

26 Continental Order, *supra* note 2, at 3.

27 *Id.* at 1.

28 *Id.* at 3-4.

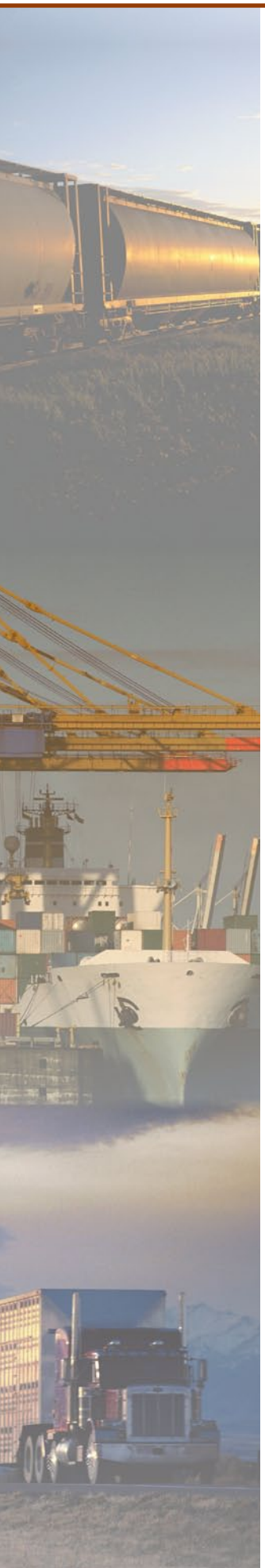
29 *Id.* at 19.

30 *Id.* at 2.

31 *Id.*

32 Continental Order, *supra* note 2, at 22.

33 Susan Carey & Elizabeth Williamson, *Airline Cases Shows U.S. Antitrust Stance,* WALL ST. J., July 2, 2009, at B3.



34 Susan Carey & Doug Cameron, *United-Continental Plan Opposed,* WALL ST. J., June 30, 2009, at B2.

35 Comments, *supra* note 19, at 36-42.

36 *Id. at 1-3.* DOJ opposed granting immunity to routes that Continental and one of its future alliance partners both serviced, such as routes between the United States and Canada and certain transatlantic flights. *Id.* at 22-23, 26. DOJ also cited pricing data showing that in markets where the number of nonstop carriers went from three down to two, prices went up 6.6 percent, and prices went up 15 percent in markets where two carriers went down to one. *Id.* at 24-25. The argument against granting immunity for flights between the United States and China seemed weaker though because Continental Airlines did not have any overlapping flights with its future alliance partners. *Id.* at 18-19. Instead, DOJ was concerned about a possible decrease in connecting traffic because only a limited number of cities in the United States can fly to Beijing or Hong Kong. *Id.* So, even though there are no overlapping flights to Beijing or Hong Kong, DOJ still advocated limiting immunity to select transatlantic markets. *Id.*

37 *Id.* at 3, 5.

38 U.S. Dep't of Transp., Docket OST-2008-0234, Final Order 1 (Jul. 10, 2009).

39 *Id.* at 16-18.

40 Christine Caulfield, *Virgin Chief Calls On US to Reject BA-American Pact,* LAW 360, May 15, 2009.

41 Jocelyn Allison, *Virgin Questions BA, American Stats in Antitrust Spat,* LAW 360, Sept. 12, 2008.

42 *AA, BA Line Up Airports, Pols, to Back Immunity Bid,* YAHOO! NEWS, May 19, 2009.

43 Brendan Pierson, *EU to Investigate Star Alliance, **One**world Members,* LAW 360, Apr. 20, 2009.

44 *Id.;* Erin Coe, U.S., *EU Regulators Examine Airline Alliances,* LAW 360, Mar. 19, 2008.

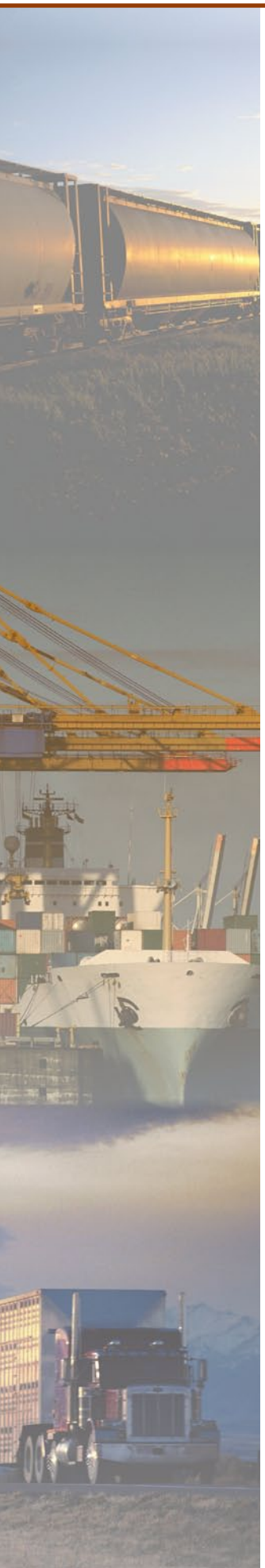
45 Sholnn Freeman, Airline Alliances Draw Hill Scrutiny, WASH. POST, Jan. 9, 2009, at D06.

46 Jessica Dye, DOJ, DOT Team Up to Consider Airline Antitrust Case, LAW 360, June 17, 2009.

47 *Id.*

48 *Id.;* Carey & Cameron, *supra* note 33.

49 Ryan Davis, *Airlines Comes Out Against Alliance Oversight Bill,* LAW 360, Mar. 24, 2009.



DEVELOPMENTS

Airlines

Continental Airlines Successful in Bid to Join Star Alliance

On July 10, 2009, the DOT granted antitrust immunity to Continental Airlines for its planned participation in the Star Alliance, overruling DOJ objections and paving the way for Continental to join Star Alliance in late October after its agreement with rival SkyTeam alliance expires. The Star Alliance is a joint venture of over 20 member airlines including United Airlines, Air Canada, and Lufthansa Airlines. DOT's approval allows the participating airlines to jointly arrange capacity, sales and marketing activities on a portion of their international air services free from antitrust scrutiny.

DOJ filed its objections to the DOT's tentative decision to grant the requested antitrust immunity in late June, arguing that such action would result in substantial reductions in competition in numerous nonstop international air service markets. Specifically, DOJ maintained that the inclusion of Continental in the Star Alliance would have the effect of removing a major competitive constraint in these markets and could result in higher fares for passengers. While the DOT's final approval did include certain route "carve-outs" intended to address DOJ's concerns, DOT ultimately disagreed with the DOJ's analysis of the overall competitive effects of Continental Airlines' participation in the alliance, finding that such participation would benefit consumers.

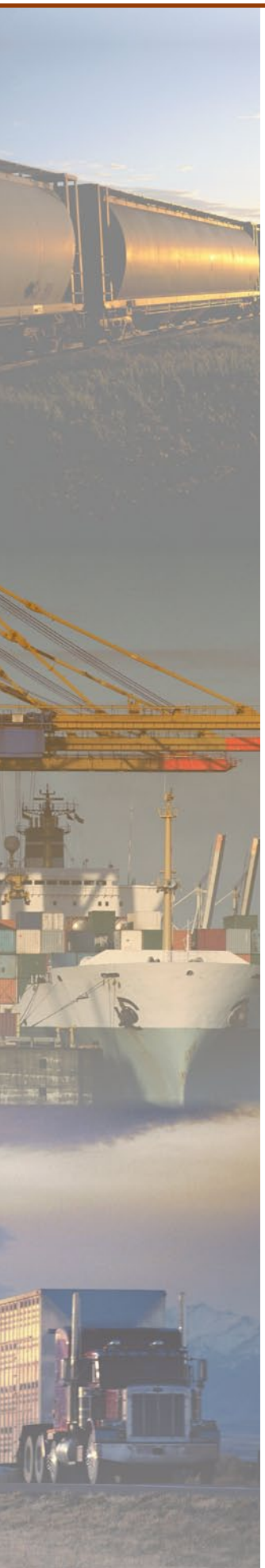
Lufthansa Acquisition of Brussels Airlines

Lufthansa won approval from the European Commission (EC) on June 22 to proceed with its acquisition of SN Airholding (SNAH), a Belgian company and parent company of Brussels Airlines after agreeing to certain divestitures and other conditions. The EC's in-depth investigation found that the acquisition: 1) would lead to the creation of a monopoly with respect to two routes—Brussels-Hamburg and Brussels-Munich, and 2) would create competitive concerns on two other routes—Brussels-Frankfurt and Brussels-Zurich. Lufthansa proposed a set of concessions to the EC that included offering slots on the four problematic routes to new entrants through an efficient slot allocation mechanism, and providing grandfathering rights on those relevant slots to the new entrants once they have operated the routes for a requisite period of time. EU Spokesman Jonathan Todd commented that the EC found the proposed concessions to be very attractive and believed they would preserve competition by ultimately allowing other airlines to start up new routes.

Following its acquisition of BMI British Midland, Lufthansa had the second most slots at Heathrow Airport (second to British Airways), and is Europe's second-largest carrier behind Air France. Lufthansa has made moves to purchase shares in several other troubled airlines, including Austrian Airlines, BMI British Midland, and JetBlue Airways. Passenger traffic for Brussels Airlines had fallen 14% in the first 4 months of 2009 as compared against 2008. The average drop for other major European airlines was 6%.

Lufthansa Acquisition of Austrian Airlines

On August 28, 2009 Lufthansa received conditional approval to purchase Austrian Airlines after agreeing with the European Commission to reduce the number of flights from



Vienna to Frankfurt, Munich, Stuttgart, Cologne and Brussels. The EC had previously extended its antitrust investigation of Lufthansa's proposed acquisition of Austrian Airlines (AUA) in order to review the latest round of concessions offered by Lufthansa. The EC was concerned about competition on routes between Austria, Switzerland, Belgium, and Germany. Lufthansa offered to cut an unspecified number of its flights (i.e., its frequency of flights on those routes) in order to alleviate the EC's concerns and to allow entry into those routes by potential competitors. It is reported that the EC, in light of Lufthansa's parallel takeover of Brussels Airlines, was not satisfied with Lufthansa's initial offer in this case to give competitors additional slots and demanded a reduction in flight frequencies on affected routes to counteract Lufthansa's growing market power.

Rail

Railroad Antitrust Enforcement Act of 2009 Placed on Hold

On June 1, 2009, the Railroad Antitrust Enforcement Act of 2009 was put on hold when the author of the bill, Sen. Herb Kohl, and Sen. John Rockefeller moved to make the bill part of a broader piece of legislation. According to a letter from Sens. Kohl and Rockefeller, they planned to put together a "bipartisan package that reforms the Surface Transportation Board and repeals the railroads' antitrust exemption."

On May 19, 2009, the House Judiciary Committee's Subcommittee on Courts and Competition Policy held a hearing on H.R. 233, the "Railroad Antitrust Enforcement Act of 2009." Howard Morse provided comments on behalf of the ABA Antitrust Section. All of the witness comments are available on the Judiciary committee web site at the following link: http://judiciary.house.gov/hearings/hear_090519.html.

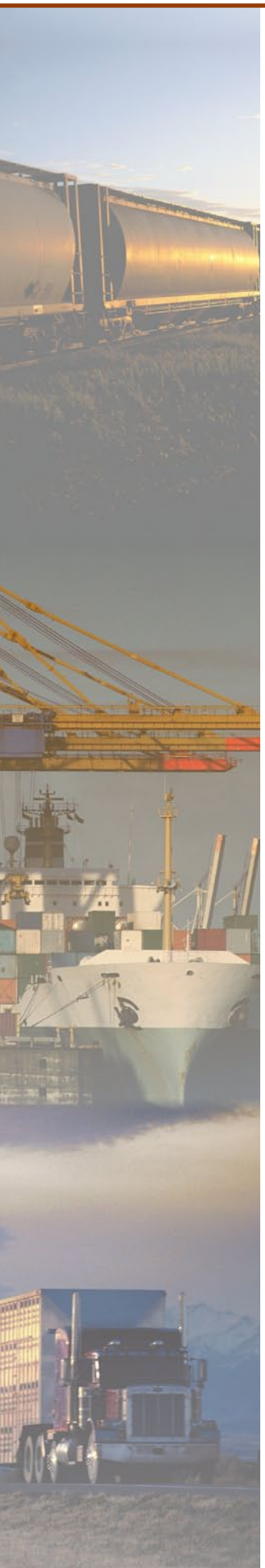
Shipping

Federal Maritime Commission Denied Preliminary Injunction In First-Ever Complaint Challenging Anti-Competitive Agreement

On April 15, 2009, Judge Leon of the U.S. District Court for the District of Columbia denied a motion of the Federal Maritime Commission (FMC) to enjoin the Cities of Los Angeles and Long Beach from proceeding under an FMC-filed agreement to implement certain provisions of their ports' Clean Trucks Program. The FMC had sought "surgical relief" to enjoin the Port of Los Angeles' prohibition, over time, of the use of independent owner-operated truckers to dray containers to and from the Port, and to enjoin certain fee incentives imposed by both ports.

As noted in the opinion, this is the first time the FMC has sought to enjoin a filed agreement as likely to unreasonably reduce transportation service or increase transportation cost through a reduction in competition. Agreements filed with and approved by the FMC become effective within 45 days of filing unless the FMC seeks additional information or sues to enjoin them. Filed and approved agreements are exempt from the antitrust laws.

The Court first held that the FMC must meet the traditional 4-factor test to obtain a preliminary injunction, rather than a relaxed test of the type available to the FTC or the SEC. The court held the FMC unlikely to succeed on the merits because even without indepen-



dent truckers the drayage market would have abundant competition and low barriers to entry. The court rejected the FMC's alternate theory that competition between the *ports* was reduced because the ports had not agreed on the employee-driver requirement and had different fee incentives. Any increased costs were the result of environmental requirements and not anticompetitive conduct. As to irreparable harm, the court conceded that some independent truckers might be driven out of business, but held there would be no harm to competition in the market in general, as the FMC had alleged. Balancing the equities between the parties, the court held that the harm to independent truckers was speculative, and deferred to the judgment of the ports, made after a lengthy deliberative process, that the restrictions were necessary to obtain the health and environmental benefits of the program.

The court did not rule on the ports' contention that the FMC lacked jurisdiction over the trucking programs because they did not involve ocean transportation in U.S. foreign commerce, reserving that issue for decision on defendants' motion to dismiss.

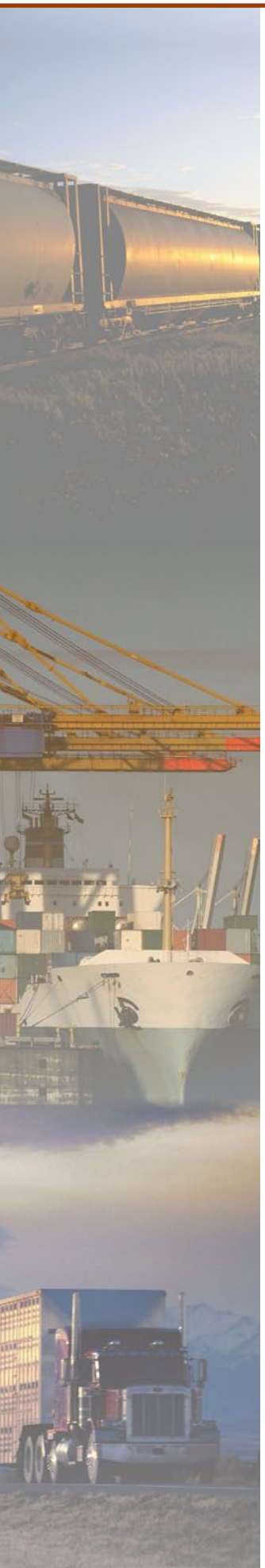
In a closely related development, on April 28, 2009, the United States District Court for the Central District of California, acting on remand from the Ninth Circuit, *American Trucking Association v. The City of Los Angeles, et al.,* 559 F.3d 1046 (9th Cir 2009), enjoined portions of the same Clean Trucks Program on the ground that they were preempted by federal law prohibiting state and local regulation relating to the "price, route, or service" of motor carriers, and did not fall within the safety exemption to preemption. The court enjoined the employee-driver requirement and various other provisions of the concession agreements, including driver hiring preferences, financial capability and health insurance requirements, and parking restrictions. The court upheld some other provisions of the concession agreements, including requiring that trucks be licensed and permitted, properly maintained, and comply with security requirements.

A link to the decision in the FMC case is available on the district court's opinions web page https://ecf.dcd.uscourts.gov/cgi-bin/Opinions.pl?2009 or via PACER (Civil Case No. 08-1895).

International

DSV and Vesterhavet Acquisition of Joint Control of DFDS

Following the EC's decision to initiate phase two proceedings against the acquisition, DSV cancelled its conditional agreement with Vesterhavet to obtain joint control over DFDS. DSV is the leading freight forwarder in Scandinavia. DFDS is the leading shipping company providing Roll-On/Roll-Off ("Ro-Ro") shipping services throughout Northern Europe. Ro-Ro services are an important input for freight forwarders in Scandinavia. The EC had vertical competition concerns that other freight forwarders (i.e., DSV's competitors) would be disadvantaged in terms of price and access to Ro-Ro shipping services following DSV's proposed acquisition of DFDS. DSV cancelled the deal after concluding that its chances of clearing the deal through the EC were unlikely. The proposed deal would have created joint control between DSV (45% ownership) and Vesterhavet (55% ownership) over a 56% share of DFDS, currently held by Vesterhavet. DSV, Vesterhavet, and DFDS are all Danish companies.



Consumer Protection

FTC Challenges Hydro-Assist Fuel Cell Claims

Federal and state enforcement agencies have shown a renewed focus on advertising claims related to fuel efficiency and fuel costs. For example, early this year, the FTC challenged the pseudo-science behind the Hydro-Assist Fuel Cell, which defendant Dutchman Enterprises claimed could improve a car's fuel efficiency by 50% and turn any car into a hybrid. The Hydro-Assist kit was priced at over $1000 and advertised in major publications such as *Newsweek* and *Popular Science*. The FTC secured a temporary restraining order, halting the potentially deceptive advertising campaign and freezing Dutchman Enterprises' assets. See http://ftc.gov/os/caselist/0823203/index.shtm

Enforcement Actions Target Fuel-Efficiency Claims

- In April, the Attorney General of Texas secured a temporary restraining order, precluding Media Dime Marketing and its owners from claiming that its aftermarket "cheap gas" magnet device increased automotive fuel-efficiency and reduced toxic gas omissions by 90%.

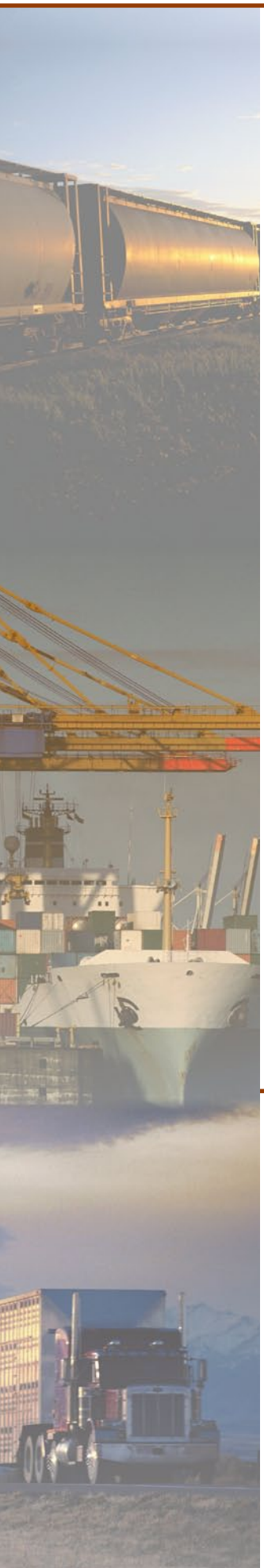
  http://www.oag.state.tx.us/consumer/release_view.php?id=2916

- In May, the Attorney General of Tennessee along with 16 other state attorneys general settled deceptive advertising investigations against Michelin North America, Inc. relating to the company's claims of fuel saving and increased fuel-efficiency of several of its tire brands.

  http://www.tennessee.gov/attorneygeneral/press/2009/story/PR16.pdf

- In May, the Connecticut Attorney General announced he will ask federal authorities to conduct a multi-state investigation into wholesale gasoline prices after noticing that prices have soared 54 cents a gallon since Feb. 19, even though national inventories are at an 18-year high and demand is at a seven-year low.

  http://www.ct.gov/ag/cwp/view.asp?A=3673&Q=439764



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