TRANSAT A.T. BRIEF SUBMITTED TO THE SENATE OF CANADA
STANDING COMMITTEE ON TRANSPORT AND
COMMUNICATIONS (TRCM) RE BILL C-49 / TRANSPORTATION
MODERNIZATION ACT

Montréal, 30 January 2018
Introduction

- The present is the brief hereby submitted by Transat A.T. in the context of the review by the Senate of Canada Standing Committee on Transport and Communications of the proposed provisions of Bill C-49, *The Transportation Modernisation Act*.

- Transat A.T. is Canada’s leading integrated holiday travel and tourism services provider with one of our country’s largest retail and wholesale package tour distribution networks. We employ over 5,000 Canadians in every region of Canada, carry over three million airline passengers annually and welcome over half a million foreign visitors and tourists who choose to fly with us back to Canada every year. Indeed, our airline unit, Air Transat, is Canada’s second largest operator by passenger volume of scheduled international air services that connect small and large Canadian communities alike with over 65 popular destinations in North America, the Caribbean, Europe and the Middle East.

- Unlike our brief submitted to the TRAN in September, comments and views outlined herein will focus exclusively on the proposed provisions in C-49 concerning the approval of airline joint ventures.

Context and Issues

- Bill C-49 proposes to establish an approval process for airline joint ventures that would empower the Minister of Transport, without an open and transparent public process, to receive, review (in concert with the Commissioner of Competition) and ultimately approve (conditionally or otherwise) such applications when deemed to be in the “public interest”.

- Once an application is deemed to be in the public interest by a decision of the Minister, the airline joint venture would be “immunized” from the application of the *Competition Act*: the current criminal sanctions and civil remedial powers under Sections 45, 47, 90.1 and 92 of the *Competition Act* with respect to potential anti-competitive behavior resulting from the joint venture would *no longer be available* to the Commissioner of Competition, as these provisions would be inapplicable to the joint venture. Furthermore, the Minister is not required to make public his reasoning for the decision which further adds to a lack of transparency in the process.

- C-49 thus *eliminates* the Commissioner of Competition’s independent decision-making powers and deviates from the current treatment of mergers under the CTA in the transportation industry, where *both* the Commissioner of Competition and
the Minister of Transport have the power to review mergers with respect to competition and public interest issues, respectively.

- The only Canadian airline currently involved in one or more joint ventures and for which these proposed provisions would be of immediate and direct interest is Air Canada.

- Air Canada’s joint venture for transatlantic services (known as the “A++ agreement”) with United Airlines and Lufthansa (which includes Swiss, Austrian and Brussels Airlines) was immunized from anti-trust law in the US in 2009 following public consultations by the U.S. Department of Transport.

- In June 2011, Canada’s Commissioner of Competition filed an application with the Competition Tribunal per Section 90.1 of the Competition Act that identified 19 transborder routes of the A++ joint venture where commercial coordination between the partners would result in a substantial lessening of competition due to overwhelming combined market shares. An agreement was reached in October 2012 whereby pricing and other commercial coordination was specifically prohibited on 14 of the above-mentioned routes where combined market shares between the joint venture partners approached 100%. *It is precisely this type of market surveillance and enforcement by the Competition Bureau made prior to a final “public interest” decision that would be pre-empted and transferred to the Minister of Transport per the provisions of C-49.*

- Once immunized, as per the provisions of C-49, the joint venture partners are in effect sheltered from the normal application and scrutiny of competition law safeguards and are allowed to jointly undertake and coordinate the following activities and thus operate as one de facto or merged commercial entity:
  
  - Capacity planning and deployment
  - Fleet planning
  - Code-sharing
  - Route development
  - Revenue sharing
  - Network scheduling
  - Fares / pricing
  - Onboard service
  - Reciprocal frequent flyer programs / benefits

- In return for the waiving by US authorities of normal competition law oversight of the above coordinated activities, the A++ partners promised new resulting routes, better connecting times, the elimination of the alleged “double marginalization” impact on
fares, more reciprocal loyalty program benefits, etc. In brief, it was argued that the purported benefits for the consumer would outweigh the potential risks from the neutralizing of competition law safeguards. *No public review or assessment with the objective of confirming or validating the realization of these promised consumer benefits has ever been conducted in this regard.*

- Moreover, the essential question of whether immunization from competition law enforcement is absolutely essential in order for the joint venture partners to deliver their promised consumer benefits has never been asked or used as a standard or test.

- There is no evidence that the current regulatory regime in Canada, whereby the Commissioner of Competition has the power to challenge competitor collaborations that have significant anticompetitive effects, is preventing the operations of airline joint ventures that are in the public interest. Moreover, nothing suggests that antitrust immunity granted by a non-public decision of the Minister of Transport without an open and transparent public process is required for airline joint ventures to be successful.

- While it may be argued that the convergence of such a similar proposed anti-trust immunity process in Canada with the existing regime in the US may be necessary in order for the joint venture partners to achieve the full potential of their operation in the Canadian market, it should be noted that there are major differences in market realities:
  - The US (pop. 323 million) market is 10 times the size of the Canadian (pop. 36.3 million) market; in the EU, with a market 20 times the size of the Canadian market, there is no “antitrust immunity” regime;
  - The US and EU markets have numerous network and vigorous low cost airline competitors (ex. Southwest, JetBlue, Spirit, Frontier, Allegiant, Ryanair, EasyJet, Wizz Air, etc) that are active in ensuring some market-driven consumer safeguards with respect to immunized joint ventures;
  - Air Canada is the sole dominant air carrier in Canada for domestic, transborder and international air services with WestJet a distant second. No genuine independent low cost carriers operate nationally or even regionally in Canada;
  - Air Canada controls over 65% of the slots at Toronto-Pearson, Canada’s largest airport by far, as well as the majority of slots at Vancouver and Montreal, respectively. The largest airlines at the three busiest airports in the US and EU are all competing network carriers;
• With respect to the issue raised earlier regarding the identified risks to fair competition and air travelers / consumers posed by pre-existing dominant market shares of the joint venture partners, please see attached transatlantic market share analysis and summary thereof.

• Indeed, it is clear that the A++ airline joint venture already commands fortress market shares in many of Canada’s important international air transport markets, including Germany, Switzerland, Austria and Belgium, which consequently has led to an unmistakeable trend of reduced competition and rising fares for consumers therein.

**Summary of recommendations**

• The *Canada Transportation Act* provides for a joint review of mergers in the transportation industry by **both** the Minister of Transport and the Commissioner of Competition. These provisions create a transparent and balanced regime in the assessment of competition policy objectives and broader public interest considerations. *They should therefore be applied mutatis mutandis to the consideration and ultimate approval of airline joint ventures.*

• The Commissioner’s report should be made public. There should also be an open and transparent public consultation process to ensure that all stakeholders have the opportunity to make their views known prior to exempting an airline joint venture from the application of competition law.

• The decision to grant, or not, immunity should be made by the Governor in Council, following the Minister’s recommendation. The Minister would obtain the Commissioner’s assessment before making an immunity recommendation to the GiC.

• The decision to grant immunity should specify which conditions and undertakings relate to competition concerns, and which relate to other public interest considerations. The Commissioner should have the authority to take enforcement action for a breach of conditions relating to competition, and the Minister for a breach relating to public interest concerns.

• There should be a regular and mandatory review process undertaken **every three years** that requires continuing evidence that the immunized joint ventures are enhancing competition and are delivering on their promised consumer benefits.

• The current provisions relating to the Minister’s decision that a joint venture does **not** raise significant considerations with respect to the public interest are **ambiguous**. Consequently, since the effect of an authorization is to immunize a joint venture from
the application of competition law, a review process in which the Commissioner of Competition plays a major role in the Minister’s decision should be mandatory to ensure that the anticompetitive effects of the joint venture are fully analyzed before such authorization is granted.

- For any questions and/or additional information: Mr. Bernard Bussières, Vice-President - Legal Services and Corporate Secretary (Tel 514-987-1660 x 4520 / Bernard.bussieres@transat.com) and/or Mr. George Petsikas, Senior Director – Government and Industry Affairs (Tel 514-987-1660 x 4562 / George.petsikas@transat.com).

- The above is respectfully submitted for the Committee’s consideration.