FRIENDLY SKIES OR TURBULENT SKIES: AN EVALUATION OF THE U.S. AIRLINE INDUSTRY AND ANTITRUST CONCERNS

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INTRODUCTION

Chances are any evening news coverage lately about the commercial airline industry in the United States was not positive. Indeed, 2017 was not a banner year for U.S. airlines on the public perception front, with numerous videos showcasing conflicts between airlines and passengers. No incident garnered the attention and ubiquitous condemnation from the public better than the violent removal of Dr. David Dao from United Express Flight 3411.[1] Videos of a bloodied Dr. Dao being dragged down the aisle like a rag doll as he cried for help and fellow passengers gasped in horror saturated news networks for weeks.

While United Airlines takes the cake for most viral incident of 2017, it was certainly not the only airline to face negative publicity. The NAACP "warned African Americans that flying on American Airlines could subject them to disrespectful, discriminatory or unsafe conditions" after "a pattern of 'disturbing incidents.'"[2] Delta Airlines faced a spring break fiasco after severe weather hit Atlanta and forced more than 3,500 flight cancellations over five days; the incident highlighted systemic flaws in Delta's operations and ability to recover.[3] An electrical fire at the Atlanta airport in December

1. Michael Goldstein, *Biggest Travel Story of 2017: The Bumping and Beating of Dr. David Dao*, FORBES (Dec. 20, 2017, 9:13 PM), https://www.forbes.com/sites/michaelgoldstein/2017/12/20/biggest-travel-story-of-2017-the-bumping-and-beating-of-doctor-david-dao/#b43cd2cf61fc.

2. Hugo Martin & Joseph Serna, *Passenger Mix-Up on Flight to Japan Caps a Year of Airline Foul-Ups*, L.A. TIMES (Dec. 27, 2017, 4:50 PM), http://lat.ms/2Fkp01C.

3. Jon Ostrower, *Delta's Meltdown: What Went Wrong*, CNN (Apr. 10, 2017, 5:51 PM),

again tested Delta's preparedness in flight operations, luggage handling, passenger accommodations, and so forth as it was forced to cancel 1,400 flights.[4]

Notable incidents were not confined to legacy airlines. Shortly after the Dr. Dao incident, low-cost carrier ("LCC") Southwest Airlines had police forcibly remove a passenger after she complained of allergies to dogs in the cabin.[5] JetBlue Airways' "cakegate" incident drew headlines after a family was removed from a flight after a dispute over where to store their child's birthday cake.[6] Alaska Airlines suffered a slew of cancellations after falling behind on hiring and training for a new aircraft in its fleet.[7] A Spirit Airlines pilot union dispute led to more than 300 flight cancellations and a violent brawl at the Fort Lauderdale Airport between customers and employees.[8] Ultra-low cost carriers ("ULCC") Spirit, Frontier, and Allegiant occupied three of the four worst rankings in the American Customer Satisfaction Index.[9]

A common theme—one that is likely here to stay—in the above incidents is the presence of social media, with its ability to amplify incidents by transmitting news and images in real time. On any flight with the faintest whiff of an issue brewing there might suddenly be 200 aspiring Steven Spielberg's armed with camera phones ready to catch the next viral incident. News media outlets often compound the issues by running passenger-submitted content that only captures a snippet of the incident and failing to confirm facts. Facts, unfortunately, often take a back seat to the race to be first. For instance, the Dr. Dao incident did not actually involve any United Airlines employees as it occurred on a contracted United Express carrier, Republic Airline, and the forceful escalation was initiated by Chicago Department of Aviation officers.[10] Yet United Airlines was the focus of the

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http://cnnmon.ie/2oEJrwy. *See also* Scott McCartney, *The Best and Worst U.S. Airlines of 2017*, WALL ST. J. (Jan. 10, 2018, 9:33 AM), http://on.wsj.com/2FQLuoL (reporting overloaded telephone lines prevented Delta pilots and flight attendants from calling in for new assignments).

4. Bart Jansen, *Delta: Atlanta Airport Power Outage Cost $25M to $50M in Income*, USA TODAY (Jan. 3, 2018, 11:49 AM), https://usat.ly/2tcSUQN.

5. David Koenig, *Police Drag Woman Off Southwest Airlines Flight*, CHI. TRIB. (Sept. 28, 2017, 3:00 AM), http://trib.in/2Fbmr2E.

6. Amy B. Wang, *Passenger Says JetBlue Booted His Family from Flight Over a Birthday Cake*, WASH. POST (May 14, 2017), http://wapo.st/2FiEbZo.

7. McCartney, *supra* note 3 (noting that most of the operational shorthandedness was with Alaska's subsidiary, Horizon Air).

8. Amy B. Wang & Luz Lazo, *Federal Court Orders Spirit Pilots Back to Work After Chaos at Fort Lauderdale Airport*, WASH. POST (May 9, 2017), http://wapo.st/2oF3DhQ.

9. Kathryn Vasel, *America's Least Favorite Airline (Hint: It's Not United)*, CNN (Apr. 25, 2017, 12:13 PM), http://cnnmon.ie/2FclbMY.

10. Benjamin Zhang, *'Infuriated' United Pilots Union Slams Cops for Forcibly Dragging*

pervasive news coverage and became the public villain. United did not help itself by borrowing from the "What-Not-to-Do-in-a-Corporate-Crisis" playbook and issued a defensive, non-apologetic statement that effectively blamed "re-accommodat[ing]" Dr. Dao because of his "disruptive" and "belligerent" behavior.[11] After the public firestorm, congressional inquiries, and sinking share prices, United's CEO, Oscar Munoz, put out a revised statement[12] and began a TV apology circuit. But, by the time Mr. Munoz sat down on Good Morning America,[13] it was too late. United was the clear public villain, representing everything wrong with air travel.

The public discord is understandable. To many, Dr. Dao's treatment struck a nerve and perfectly epitomized the shortcomings of all U.S. passenger airlines.[14] Flying has become increasingly unpleasant for those unable or unwilling to fly in premium cabins. Passengers feel more like cattle in a metal tube squeezed into shrinking seats on crowded flights where airlines nickel and dime every conceivable charge. An oft-cited statistic is that, following a slew of mergers, the four largest airlines now control over 80% of the U.S. domestic air transportation market.[15] This consolidation is viewed as the engine behind the industry's newfound ability to turn profits at passengers' expense.[16] While including a catchy number without context or deeper analysis is effective in producing a mechanical reaction, it leaves open crucial questions that lead to better answers about the level of actual competition by airlines for passenger share in existing and new markets.

This Note attempts to answer some of these questions. It is clear that the failures listed above demonstrate operating flaws and areas for improvement. But with the number of passengers and flights already at an all-time high—U.S. airlines carry more than 928 million passengers annually

Passenger from Plane, BUS. INSIDER (Apr. 13, 2017, 6:22 PM), http://read.bi/2GYcNNl. The four Chicago Department of Aviation officers involved in the incident were suspended immediately, and two were subsequently fired. Maya Salam, *Security Officers Fired for United Airlines Dragging Episode*, N.Y. TIMES (Oct. 17, 2017) https://nyti.ms/2kXopKv. A Chicago directive later stripped Chicago Airport Security Officers of their "police" label. *Id.*

11. Tracey Lien, *Before Apologizing on Tuesday, United Tried Two Unsuccessful Tactics to Quell Its Public Relations Crisis*, L.A. TIMES (Apr. 11, 2017, 11:20 AM), http://lat.ms/2oYhLVt. *See also* Erin McCann, *United's Apologies: A Timeline*, N.Y. TIMES (Apr. 14, 2017), http://nyti.ms/2um2OeG.

12. Lien, *supra* note 11.

13. Michael Edison Hayden & Erin Dooley, *United CEO Feels 'Shame,' Passenger Will Be Compensated*, ABC NEWS (Apr. 12, 2017), http://abcn.ws/2o6tkpj.

14. Goldstein, *supra* note 1.

15. Trefis Team, *How M&A Has Driven the Consolidation of the US Airline Industry Over the Last Decade?*, FORBES: GREAT SPECULATIONS (May 4, 2016, 8:34 AM), http://bit.ly/2oG127C.

16. *See* Christopher Drew, *Airlines Under Justice Dept. Investigation Over Possible Collusion*, N.Y. TIMES (July 1, 2015), http://nyti.ms/1dyF91l.

on over 9.7 million regularly scheduled flights,[17] and the number of people flying is increasing faster than the overall population[18]—it is also clear that unfortunate passenger incidents are the exception, not the norm.

Recent antitrust decisions and policy initiatives by both the Department of Justice ("DOJ") and Department of Transportation ("DOT") have shaped the current U.S. airline landscape. The consolidation trend is not unique to the U.S. domestic air transportation market. The emergence of three global airline alliances—together accounting for around 80% of air traffic across the transatlantic, transpacific, and Europe–Asia markets—has transformed the international air transportation market as well.[19] This Note evaluates the results of the DOJ's antitrust approach to U.S. airline mergers and reconciles these results with the DOT's "public interest" emphasis in determining airline applications for antitrust immunity ("ATI"). Given the current domestic market, it is likely that the remaining legacy carriers will leverage their respective global alliances and seek ATI with foreign airlines for continued network growth.

Part I of this Note tracks the tumultuous history of the U.S. airline industry from deregulation to its current health. Part II presents the legal framework, including U.S. antitrust laws, that govern domestic airline mergers and international ATI. Part III proposes practical solutions for the DOT to improve the ATI regulatory process and incubate open market competition, thereby better serving passengers and airlines by edging closer to deregulation.

I. UNITED STATES COMMERCIAL AVIATION BACKGROUND

A. DEREGULATION: PUSHBACK AND TAXI TO TODAY'S U.S. AIRLINE INDUSTRY

At the outset of commercial aviation in the early twentieth century, there was little to no regulation by the U.S. government. Accidents were frequent, and aviation leaders viewed federal regulation as a key to bolstering public confidence by establishing safety standards.[20] To this end, President

17. *Airlines Carried Record Number of Passengers in 2016*, CBS NEWS (Mar. 27, 2017), http://cbsn.ws/2FSvrGU. *See also Air Traffic by the Numbers*, FED. AVIATION ADMIN. (Nov. 14, 2017), https://www.faa.gov/air_traffic/by_the_numbers.

18. Karl Russell, *Why We Feel So Squeezed When We Fly*, N.Y. TIMES (May 2, 2017), https://nyti.ms/2pv5cOa.

19. Brian Pearce & Gary Doernhoefer, *The Economic Benefits of Airline Alliances and Joint Ventures*, INT'L AIR TRANSP. ASS'N (Nov. 28, 2011), https://www.iata.org/whatwedo/Documents/economics/Economics%20of%20JVs_Jan2012L.pdf.

20. *A Brief History of the FAA*, FED. AVIATION ADMIN. (Jan. 4, 2017), https://www.faa.gov

Coolidge signed the Air Commerce Act into law in 1926, which formed an Aeronautics Branch under the Department of Commerce and vested it with authority to promulgate regulations to ensure civil air safety.[21] The Aeronautics Branch set about making and enforcing flight safety rules, licensing pilots, ensuring airworthiness of aircraft, and establishing airways.[22] In 1926, the first regulations arrived in a forty-five page document titled "Air Commerce Regulations;" by stark contrast, today's federal aviation regulations span over 3,600 pages in four volumes of the Code of Federal Regulations.[23]

The commercial aviation industry's next major transformation came in 1938, when the United States government began regulating domestic interstate and foreign passenger air transportation.[24] The Civil Aeronautics Board ("CAB") regulated air transportation as a public utility, exerting control over airline hubs, routes, schedules, and fares.[25] These economic regulations were crucial in managing the rapidly growing commercial airline industry; following World War II, the industrial complex and transition to the jet age revolutionized air travel and spiked demand. Airlines found solid footing and shed existing government support such as subsidies for carrying mail.[26] However, by the 1970s, bureaucratic inefficiencies,[27] hyperinflation, and oil supply shocks sparked concern over the continued viability of the U.S. airline industry.[28]

President Carter, therefore, signed the Airline Deregulation Act of 1978 ("ADA") into law in October 1978.[29] It was intended "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"[30] by

/about/history/brief_history.

21. Air Commerce Act, Pub. L. No. 69-254, 44 Stat. 568 (1926).

22. *Id.*

23. Dennis Parks, *The First Regulations*, GEN. AVIATION NEWS (Oct. 23, 2011), https://generalaviationnews.com/2011/10/23/the-first-regulations.

24. Civil Aeronautics Authority Act of 1938, Pub. L. No. 75-706, 52 Stat. 973.

25. *See id.*

26. *Post-War Revival and Regulation*, SMITHSONIAN NAT'L AIR & SPACE MUSEUM, http://s.si.edu/2FevJXI (last visited July 30, 2018).

27. *See* Con'l Air Lines, Inc. v. Civil Aeronautics Bd., 519 F.2d 944, 959–60 (D.C. Cir. 1975) (ordering the Civil Aeronautics Board to approve Continental Airline's outstanding application of eight years to begin service between Denver and San Diego).

28. *See* Justin Elliott, *The American Way*, PROPUBLICA (Oct. 11, 2016), https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust. *See also* JOHN F. STOVER, AMERICAN RAILROADS 234 (2d ed. 1997) (examining the Penn Central Railroad collapse and its domino effect causing concern that air transport could follow the nation's troubled railroads).

29. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

30. *Id.*

relaxing and eventually terminating economic controls by the government.[31] Thus the modern U.S. airline industry was born—one that "relie[s] on competition among airlines to promote affordability, innovation, and service and quality improvements."[32]

The initial foray into economic deregulation was mixed, at best. While it benefited passengers by reducing fares and expanding service and routes, many airlines struggled to adapt and survive under evolving industry dynamics.[33] A driving theory behind deregulation is that it lowers barriers to entry, which creates a more economically efficient market when coupled with competitive market forces. There were two periods when new airlines entered the market: immediately after deregulation (1978–1984) and the early 1990s.[34] But these sporadic bouts of entry were dwarfed by exits and consolidation.[35]

Years of sustained operating losses, job cuts, and periodic bankruptcies forced an intense consolidation that grounded many historical carriers.[36] In 1978, fifteen legacy airlines provided interstate and/or foreign air transportation; by 1988, just ten legacies remained and 168 airlines had failed or were absorbed.[37] The Reagan Administration's laissez-faire approach was crucial in setting the industry down a path of consolidation—seventeen of eighteen proposed airline mergers between 1985 and 1988 were approved, increasing the market share of eight major airlines from 74.1% in 1983 to 91.7% in 1988.[38] From 1978 to 2005, twenty mergers involving a legacy airline had transpired.[39] However, industry mergers pale in comparison to bankruptcies. Over 190 airline bankruptcies/reorganizations were filed between 1979 and 2012.[40] Upstart airlines were not the only casualties—legacy airlines Delta, Northwest, United, American, US Airways, and

31. JAGDISH N. SHETH ET AL., DEREGULATION AND COMPETITION: LESSONS FROM THE AIRLINE INDUSTRY 31 (2007) ("CAB's authority over routes that an airline could serve was to terminate by December 31, 1981, and regulation of fares that airlines could charge was to cease by January 1, 1983.").

32. Amended Complaint ¶ 1, United States v. US Airways Group., Inc., 38 F. Supp. 3d 69 (D.D.C. 2014) (No. 13-cv-1236-CKK) [hereinafter Amended Complaint].

33. *See* Wilfred S. Manuela Jr. et al., *The U.S. Airways Group: A Post-Merger Analysis*, 56 J. AIR TRANSP. MGMT. 138, 139 (2016).

34. Dennis W. Carlton et al., *Are Legacy Airline Mergers Pro- or Anti-Competitive? Evidence from Recent U.S. Airline Mergers*, INT'L J. INDUS. ORG. 1, 4 (2018), https://doi.org/10.1016/j.ijindorg.2017.12.002.

35. *Id.* at 4–5.

36. Drew, *supra* note 16.

37. SHETH ET AL., *supra* note 31, at 57–60.

38. *Id.* at 57–58, 65.

39. Manuela Jr. et al., *supra* note 33, at 139 (finding that only one merger could be judged successful in improving financial and operating performance).

40. *Id.*

Continental all filed for Chapter 11 bankruptcy.[41] Every remaining legacy airline has declared bankruptcy since 2000.[42]

While deregulation can be judged a success in expanding networks and departure frequency, increasing airline efficiency, and improving safety, financial instability at individual airlines has triggered industry volatility, employment losses, and service quality deteriorations.[43] A common response to these issues was increased consolidation, a trend that continues today.

B. CLEARED FOR TAKEOFF: A TWENTY-FIRST CENTURY MERGER MANIA

Seven legacy carriers entered the new Millennium, down from fifteen at the deregulation mark.[44] By 2014, that number was reduced to three.[45] The first to fall was TWA in 2001, with American Airlines acquiring the remaining assets of the faltering carrier that had become a shell of its former iconic self.[46] This was a small foreshadowing of what was to come.

Entering 2005, six legacy carriers and nine total major carriers remained; the four largest carriers, in terms of passengers carried, accounted for 56% of domestic traffic.[47] A series of mergers quickly altered that composition. First, America West Airlines acquired US Airways in 2005, then Delta Airlines and Northwest Airlines merged in 2008, followed by the merger of United Airlines and Continental Airlines in 2010, the acquisition of AirTran Airways by Southwest Airlines in 2011, and lastly the American Airlines and US Airways merger in 2013,[48] which created the world's largest airline.[49] The American-US Airways merger was initially hotly contested, but the eventual settlement caught many by surprise and caused many industry observers to express stern disagreement.[50] There was a strong sense

41. *Id.* at 138–39, 141. *See also* Carlton et al., *supra* note 34, at 4–5.

42. American Airlines filed most recently in 2011. Jiajun Liang, *What Are the Effects of Mergers in the U.S. Airline Industry? An Econometric Analysis on Delta-Northwest Merger*, 3 MACALESTER REV. no. 1, art. 2, 2013, at 1.

43. Manuela Jr. et al., *supra* note 33, at 139.

44. *See U.S. Airline Mergers and Acquisitions*, AIRLINES FOR AM., http://airlines.org/dataset/u-s-airline-mergers-and-acquisitions (last visited July 30, 2018).

45. FIONA SCOTT MORTON ET AL., BENEFITS OF PRESERVING CONSUMERS' ABILITY TO COMPARE AIRLINE FARES 34 (2015), http://3rxg9qea18zhtl6s2u8jammft-wpengine.netdna-ssl.com/wp-content/uploads/2015/05/CRA.TravelTech.Study_.pdf.

46. Elaine X. Grant, *TWA—Death of a Legend*, ST. LOUIS MAG. (July 28, 2006, 12:00 AM), https://www.stlmag.com/TWA-Death-Of-A-Legend.

47. *See* MORTON ET AL., *supra* note 45, at 35.

48. *Id.*

49. Chris Dimarco, *US Airways Defends American Airlines Merger*, INSIDE COUNSEL (Sept. 12, 2013), http://web3.insidecounsel.com/2013/09/12/us-airways-defends-american-airlines-merger.

50. A.W., *Why Did the Obama Administration Change Its Mind on the American Airlines-US Airways Merger?*, ECONOMIST: GULLIVER (Oct. 15, 2016), https://www.economist.com/blogs/gulliver

that because the DOJ had approved a "super-Delta and a super-United," it had no choice but to permit a "super-American" to act as a counterweight and restraint on the two.[51]

The result of these mergers is a highly concentrated U.S. airline industry, in both the aggregate and certain city-pair routes. The four largest U.S. airlines account for more than 80% of domestic passenger traffic.[52] A common criticism of consolidation is that it harms passengers as airlines, in tandem, match fare increases, impose new fees, reduce or eliminate service on certain routes, and downgrade amenities.[53] Stakeholders of the airlines, however, have cheered consolidation amidst steadily improving financial health. One airline executive referred to industry consolidation as the "New Holy Grail" given that "fewer and larger competitors" allow airlines to "reap the benefits," such as reduced capacity and increased ancillary revenue.[54]

Most recently, Alaska Airlines merged with Virgin America, receiving DOJ approval in December 2016.[55] The resulting Alaska Airlines will hold just roughly 5% of the domestic passenger market.[56] Given the current market share of the legacies and Southwest, any future mergers will likely be similar mergers of smaller airlines positioning themselves to compete with the big four.

C. Resulting Composition and Financial Picture of the Industry

Wall Street has viewed the airline industry mergers favorably. A 2014 Goldman Sachs report cheered the American-US Airways merger as a furtherance toward "dreams of oligopoly."[57] The report envisioned that consolidation would continue to push the industry toward "lower competitive intensity" and greater "pricing power with customers due to reduced choice."[58] The recent wave of mergers has helped airlines exercise better capacity control and set prices significantly above marginal cost

/2016/10/connected; James B. Stewart, *Baffling About-Face in American-US Airways Merger*, N.Y. TIMES (Nov. 15, 2013), http://nyti.ms/2thoSet.

51. Jad Mouawad & Christopher Drew, *Justice Dept. Clears Merger of 2 Airlines*, N.Y. TIMES, (Nov. 12, 2013), http://nyti.ms/2oHKBHU.

52. Trefis Team, *supra* note 15.

53. *See* Amended Complaint, *supra* note 32, ¶¶ 1–10.

54. *Id.* at ¶¶ 34–35.

55. Ben Mutzabaugh, *Justice Dept. OKs Alaska Airlines-Virgin America Merger*, USA TODAY (Dec. 6, 2016, 2:14 PM), https://usat.ly/2I31EMB.

56. Winnie Sun, *What the Virgin-Alaska Air Merger Means for Millennials and Investors Alike*, FORBES (Apr. 5, 2016, 4:14 PM), http://bit.ly/2D0qzwC.

57. Elliott, *supra* note 28.

58. *Id.*

relative to prior years.[59] Stock performance of the airlines reflect this newfound pricing power: American Airline's stock increased more than 300% after its 2013 merger compared to a roughly 90% gain in the S&P 500 index across the same time.[60] American Airlines is not the only airline stock to take off. The recent industry-wide performance caught the eye of Warren Buffet and his Berkshire Hathaway invested more than $1.4 billion into the four largest U.S. airlines in 2016.[61]

What used to be an unattractive investment (industries in which every leading company has undergone bankruptcy usually do not inspire confidence) is no longer so amidst surging profits. U.S. airlines collectively hauled in profits of approximately $15.5 billion in 2017, marking the fifth consecutive year an after-tax net profit was produced as a group.[62] Strong profitability should continue in 2018; North American airlines are projected to record net profits of close to $16.4 billion.[63]

The price of jet fuel is a major factor in the recent profitability of U.S. airlines. However, many pundits question why record low fuel prices have not had a more direct impact on airfare. Senator Chuck Schumer (D-NY) called for an investigation, writing to the DOJ, "[i]t's hard to understand, with jet fuel prices dropping by 40 percent since last year, why ticket prices haven't followed."[64] Indeed, after a sustained period of high fuel costs, jet fuel prices dipped nearly 70% between 2014 and 2016, while average airfares dropped 8.6%.[65] Airlines captured gains from cheaper fuel—Delta projected $2 billion in savings on fuel costs alone in 2015, while Southwest was able to nearly cut its average price per gallon of fuel in half from the fourth quarter of 2014 to the first quarter of 2015.[66]

But expecting a direct relationship between fuel costs, albeit a major marginal cost, and airfares is naïve. So too is comparing U.S. airlines' reaction to cheaper fuel with the reaction of European airlines. While fuel is

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59. James B. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. TIMES (June 11, 2015), http://nyti.ms/1QPNKtp.

60. *See id.*

61. Doug Cameron & Nicole Friedman, *Warren Buffett's Berkshire Hathaway Discloses New Investments in Airlines*, WALL ST. J. (Nov. 14, 2016, 9:57 PM), http://on.wsj.com/2fzTRHP.

62. *2017 Annual and 4th Quarter U.S. Airline Financial Data*, BUREAU TRANSP. STAT. https://www.bts.gov/newsroom/2017-annual-and-4th-quarter-us-airline-financial-data (last visited July 30, 2018).

63. *IATA Reveals 2018 Financial Forecast*, INT'L AIR TRANSP. ASS'N (Dec. 5, 2017), http://airlines.iata.org/news/iata-reveals-2018-financial-forecast.

64. Drew, *supra* note 16.

65. A.W., *supra* note 50.

66. Drew, *supra* note 16.

a global commodity, U.S. airlines and European airlines make business decisions in distinctly different markets.[67] European airlines "[d]runk on the profit boost served up by cheap fuel" added capacity at a greater rate than passenger demand, causing fares to dip.[68] The European airline industry's collective financial health lately pales in comparison to the United States—two European airlines, Monarch Airlines and AirBerlin, ceased operations in 2017, and a third, Alitalia, entered bankruptcy.[69] Granted, recent terrorist attacks and Brexit have not helped matters, but the remaining European airlines have had little choice but to scale back earnings expectations and slash ticket prices in an attempt to fill seats in a high capacity environment.[70]

As jet fuel prices continue to creep upwards, the responsiveness of U.S. airlines will be tested. Every cent that fuel per gallon increases equates to roughly $200 million in U.S. airline industry fuel expenses.[71] U.S. airlines are often hit harder by rising fuel costs compared to international airlines that are more aggressive in fuel hedging.[72] The recent consolidation has allowed the U.S. airline industry to mature to a level of sustainable adaptability while Europe lags behind. While European airlines flooded the market with seats in the wake of cheaper fuel, U.S. airlines were better disciplined in capacity; this difference was no doubt due in large part to consolidation and fewer U.S. airlines with sizeable market shares when compared to Europe.

D. Capacity Discipline: Corporate Catch-22

A common feeling is that consolidation has allowed U.S. airlines to better exercise "capacity discipline," a key term that became the crux of a DOJ investigation and class action lawsuits. Capacity discipline refers to

67. This Note cannot go into detail on Europe, but it is plain to see that the European airline industry has felt a large impact from the growth of ULCCs Ryanair and EasyJet. EBIT margins for European airlines were just 5.3% and 5.6% in 2015 and 2016, while North American carriers were 14.7% and 15.4% in 2015 and 2016, respectively. Chris Bryant, *Europe's Airlines are Drunk on Cheap Fuel*, Bloomberg (Oct. 6, 2016, 4:45 AM), https://bloom.bg/2dW6OLP. *But see* Airlines for Am., U.S. Airline Industry Review: Allocating Capital to Benefit Customers, Employees and Investors 16 (2018) [hereinafter Airlines for America] (finding that U.S. airlines' average pre-tax profit margin between 2010 and 2017 was 6.5%, while the average U.S. corporation margin was 16.7%).

68. Bryant, *supra* note 67.

69. Annabel Fenwick Elliott, *Thousands to Be Refused Refunds as Europe's 10th Biggest Airline Ceases Trading*, Telegraph (Oct. 10, 2017, 2:57 PM), https://www.telegraph.co.uk/travel/news/air-berlin-to-stop-flights-by-end-of-october.

70. Robert Wall, *European Airlines Fly into Trouble*, Wall St. J. (July 21, 2016), http://on.wsj.com/2D1sHEh.

71. Airlines for America, *supra* note 67, at 17.

72. *See, e.g.*, David Reid, *U.S. Airlines to Scoop Almost Half of Global Profit in 2018*, CNBC (Dec. 5, 2017), https://www.cnbc.com/2017/12/05/us-airlines-to-scoop-almost-half-of-global-profit-in-2018.html.

"restraining growth or reducing established service."[73] A large share of customer dissatisfaction with flying can reasonably be attributed to it. Load factor, the percentage of available seats filled with revenue passengers, has increased from around 70% in the early 2000s to nearly 85% in 2015.[74] When you mix in shrinking seats—average legroom has decreased two inches in the last decade[75]—with fuller flights and an increased chance of a middle seat neighbor, it is easy to understand the perception that flying is not what it used to be.

The U.S. airlines' affinity for capacity control caught the eyes of federal lawmakers, regulators, and passengers alike. In June 2015, Senator Richard Blumenthal (D-CT) requested that the DOJ investigate capacity control as a form of collusion and anticompetitive behavior.[76] He referenced numerous public comments by airline executives committing their respective airline to continued "capacity discipline."[77] For example, at the 2015 annual International Air Transport Association ("IATA") conference, chief executives from Delta, Air Canada, and American Airlines all stressed the need for capacity discipline in their public remarks.[78] Similar comments were regularly made by executives on earnings calls and other communications with securities analysts.[79]

The DOJ opened an investigation in July 2015 into possible collusion between Delta, American, United, and Southwest to limit seats and artificially inflate fares.[80] The DOJ's investigation posed an interesting question—"whether the airline executives have talked so much publicly about discipline to appease Wall Street's profit demands, or whether there is any smoking gun showing that airline executives have colluded privately."[81] Effectively, the DOJ inquired whether the level and persistence of stressing discipline could be interpreted "as thinly veiled invitations to restrict

73. Amended Complaint, *supra* note 32, ¶ 59.

74. Karl Russell, *Why We Feel So Squeezed When We Fly*, N.Y. TIMES (May 2, 2017), http://nyti.ms/2pv5cOa.

75. *Id.*

76. *E.g.*, Jad Mouawad, *Senator Urges Inquiry into Airline Behavior*, N.Y. TIMES (June 17, 2015), https://nyti.ms/1eoLoWK.

77. *Id.*

78. Stewart, *supra* note 59.

79. *See, e.g.*, Drew, *supra* note 16.

80. Brent Kendall & Susan Carey, *Obama Antitrust Enforcers Won't Bring Action in Airline Probe*, WALL ST. J. (Jan. 11, 2017, 5:33 AM), https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781; Ryan Strong, *DOJ Antitrust Investigation: Is It Time For Airline Discipline?*, COLUM. BUS. L. REV. ONLINE (Oct. 8, 2015) https://cblr.columbia.edu/doj-antitrust-investigation-is-it-time-for-airline-discipline.

81. Drew, *supra* note 16.

capacity increases to keep ticket prices high."[82] In rare cases, explicit communication and collaboration are easy to prove. When collusion "need[s] to be inferred from statements by executives to analysts, and other signaling," it is exponentially more difficult because something beyond circumstantial evidence must be proven.[83] The DOJ investigation shifted toward a possible nexus between airline executives and Wall Street via dominant shareholders; DOJ investigators questioned whether airlines signaled or communicated strategy with competitors through mutual large shareholders as a proxy.[84] However, by January 2017, the DOJ effectively shuttered its investigation as it concluded that the airlines' conduct did not cross the line of an antitrust violation.[85]

Shortly after the DOJ opened its investigation in 2015, numerous class action lawsuits were filed in federal district courts based on the same capacity and price fixing concerns of the DOJ investigation.[86] The multi-district litigation ("MDL") survived a major hurdle in November 2016 when D.C. District Judge Colleen Kollar-Kotelly denied the airlines' motion to dismiss, finding "that plaintiffs sufficiently set forth circumstantial evidence to demonstrate a plausible claim."[87] The MDL is currently ongoing. Southwest Airlines reached a $15 million settlement in January 2018 followed by American Airlines in June 2018 for $45 million; Delta and United remain in litigation and have pushed discovery to January 2019—

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82. Stewart, *supra* note 59.

83. Scott Mayerowitz et al., *Government Seeks Evidence that Airlines Illegally Worked Together, but Will the Case Fly?*, U.S. NEWS (July 3, 2015, 9:28 AM), http://bit.ly/2FfOgae. Perhaps no investigation was more open and shut than the DOJ investigation of Robert Crandall.

> In 1982, Robert Crandall . . . who would become CEO of American Airlines, expressed his anger about . . . fare wars in a phone call with Howard Putnam, CEO of Braniff Airways. Putnam . . . asked Crandall if he had a suggestion to deal with the problem. Crandall told him to raise his fares and he'd follow suit. Specifically, Crandall replied: "Yes. I have a suggestion for you. Raise your goddamn fares 20 percent. I'll raise mine the next morning." He said: "You'll make more money and I will too." The Justice Department sued and the case was settled for little more than an agreement by Crandall to keep a written record of all of his contact with other airline executives for two years.

Id.

84. Steven Davidoff Solomon, *Rise of Institutional Investors Raises Questions of Collusion*, N.Y. TIMES (Apr. 12, 2016), https://nyti.ms/2Gx2fJe. *See also* José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 73 J. FIN. 4. at 5, 12, 18 (2018) (finding that when common ownership is taken into account, HHI figures are ten times larger than what the DOJ considers "presumed likely to enhance market power," and that airfares are 3% to 7% percent higher for airlines that are commonly owned by the same major stockholders).

85. Kendall & Carey, *supra* note 80.

86. *Id.*

87. *In re* Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 60 (D.D.C. 2016).

more than three years after the suits were originally filed.[88]

When airlines embrace capacity discipline, they find themselves at the center of a DOJ investigation and multiple class action suits. But airlines that resist capacity discipline do so at their own peril. For years, "Wall Street analysts have browbeat airline executives to either have discipline, or they will bust their recommendations on their stock."[89] In 2015, Southwest CEO Gary Kelly announced capacity growth plans, but was forced to roll back these plans less than two months later after facing intense Wall Street backlash and coming under fire at the above-mentioned IATA conference—this conference spurred the DOJ investigation.[90] More recently, United Airlines announced plans in January 2018 to raise capacity by 4% to 6% annually over three years.[91] Investors immediately swatted the plan, and United's shares dipped 16% over the following three days.[92] The impact of United's capacity growth plans was felt industry wide: Delta, American, and Southwest each saw share prices decline more than 7%, and collectively the combined market of the largest four airlines fell by 9.7% from $133 billion to $120.1 billion in the immediate aftermath of the announcement.[93]

Officers and directors of corporations owe a fiduciary duty only to the corporation itself and its shareholders.[94] Thus, officers at the largest U.S. airlines have found themselves in a corporate catch-22 between DOJ investigations and multi-district class action lawsuits on the one hand, and tumbling share prices and shareholder pressures on the other hand.

II. LEGAL FRAMEWORK

A. THEORETICAL BASIS FOR CONSOLIDATION AND EXISTING LITERATURE

Mergers and acquisitions ("M&A") are external integration strategies in which legally and financially independent companies combine to form a larger entity.[95] Consolidation motives "include increasing revenues, improving management efficiency and capital investment performance, and

88. Andrew M. Harris & Mary Schlangenstein, *American Airlines Agrees to Pay $45 Million to Settle Fare Collusion Lawsuit*, BLOOMBERG (June 15, 2018), https://www.bloomberg.com/news/articles/2018-06-15/american-agrees-to-pay-45-million-to-settle-fare-collusion-suit; Chuck Stanley, *Airline Antitrust MDL Discovery Deadline Pushed to 2019*, LAW360 (Feb. 12, 2018), http://bit.ly/2tk9VbC.

89. Drew, *supra* note 16.

90. *Id.*

91. Shawn Tully, *Why United's Big Expansion Plans Made Investors Freak Out*, FORTUNE (Jan. 26, 2018), http://fortune.com/2018/01/26/united-airlines-stock-capacity.

92. *Id.*

93. *Id.*

94. *See, e.g.*, Arnold v. Soc'y for Sav. Bancorp, Inc., 678 A.2d 533, 539 (Del. 1996).

95. Manuela Jr. et al., *supra* note 33, at 139.

eliminating a competitor from the market."[96]

Two main views exist for what drives airline M&A: (1) efficiency gains in the resulting airline or (2) market power gains. The first view involves the potential to reduce costs by enhancing the "hub-and-spoke" networks of legacy airlines, while the second view perceives an improved ability to raise passenger fares.[97] Some see financial and competitive pressures as the primary driver, i.e., a solution to increase profitability and financial stability. Another view is that airline consolidation is "necessary to minimize asset devaluation to prevent a domino effect, as most major US airlines are 'too big to fail.'"[98]

At a basic level, the goal of M&A is to increase shareholder value.[99] A number of benefits are typically touted by airlines to gain regulatory approval and justify the merger to shareholders, including, but not limited to, "increase[d] . . . revenues by extending the airlines' network, increase[ed] market share . . . higher fares on some routes, improv[ed] network connectivity, increas[ed] frequent flyer loyalty, [and] better aircraft utilization."[100] In reality, however, receiving unanimous approval from all stakeholders is virtually impossible as shareholders, management, employees, customers, and governments harbor competing interests. M&A failure often results from a combination of factors, among them "clashing company cultures, union resistance," or other operational difficulties.[101] Three major obstacles to airline mergers include: (1) workforce integration; (2) fleet integration; and (3) information technology integration.[102]

To regulators, the airline industry is, theoretically, inherently susceptible to coordinated behavior—a few large airlines dominate the industry, each transaction is small, and most pricing by competitors is transparent and readily accessible.[103] In evaluating mergers, much of the focus has been on existing network overlap, particularly non-stop routes.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 140.

> Despite anticipated gains at the time of the announcement, market returns to the acquiring firm after the acquisition including return on assets (ROA), return on equity (ROE), and return on sales, are generally a zero-sum game and the expected synergies from the merger . . . are not realized by acquiring firms, indicating that acquisitions have no significant effect or even have a slightly negative effect on an acquiring firm's financial performance in the post-announcement period.

100. *Id.*

101. *Id.*

102. *Id.* at 140–41.

103. Amended Complaint, *supra* note 32, ¶ 41.

"The larger the degree of overlap between the networks of the two merging carriers, the larger is the potentially anti-competitive effect of the transaction. This 'enforcement principle' still guides the decisions of antitrust authorities on both sides of the Atlantic."[104] Thus, market concentration is a key factor in the regulatory authorities' antitrust analysis.

A measure of market concentration is the Herfindahl-Hirschman Index ("HHI"), calculated as the sum of the squared market shares of all firms in a market.[105] The DOJ considers markets "highly concentrated" when HHI exceeds 2,500.[106] A 2014 study found that "[n]early 97 percent of city pair markets are highly concentrated and well over half have HHIs in excess of 4,000. Some of those city pairs involve small cities."[107] Yet nearly 90% of all passengers traveled on city-pairs with HHIs above 2,500, and about 40% of city pairs have HHIs in excess of 4,000 . . . [t]he average passenger flew on a city pair with HHI of 4,202.[108]

On the surface, these HHI figures support the argument that the U.S. airline industry has become too concentrated following the recent mergers. However, as with any single statistic, the HHI has its limitations and does not account for every variable of competition.

Academic literature examining airline mergers is mixed, at best. Maruna and Morrell's investigation of eighteen mergers involving U.S. airlines between 1978 and 2005 found that only one merger could be judged a success.[109] Their review of existing literature suggested that between 50% to 80% of mergers failed to meet their stated goals.[110] A 2016 study judged the 2005 US Airways-America West merger "a success" as the emerging US Airways improved operations and cost controls, increased shareholder value, and developed long-term synergies.[111]

Post-merger studies often focus on routes in which both merging airlines previously competed, expecting any anti-competitive effects to occur

104. Kai Hüschelrath & Kathrin Müller, *Airline Networks, Mergers, and Consumer Welfare*, 48 J. TRANSP. ECON. & POL'Y 385, 386 (2014).

105. MORTON ET AL., *supra* note 45, at 33–35.

106. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 19 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES], https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

107. MORTON ET AL., *supra* note 45, § 36 (referring to domestic U.S. city pairs).

108. *Id.*

109. Max Maruna & Peter Morrell, *Mergers: After the Honeymoon*, FLIGHTGLOBAL (July 29, 2010), https://www.flightglobal.com/news/articles/mergers-after-the-honeymoon-345465.

110. *Id.*

111. Manuela Jr. et al., *supra* note 33, at 148–49.

most strongly on such routes.[112] Multiple studies of airline mergers prior to the recent wave beginning in 2005 generally found that the mergers resulted in loss of competition and higher fares.[113] Such effects were, surprisingly, not confined to overlap routes, but also routes in which one merged airline was only a potential competitor.[114] However, studies evaluating the recent legacy airline mergers are generally inconclusive as to the competitive impacts.[115] The 2008 Delta-Northwest merger received a healthy amount of academic attention, with most studies unable to discern any large effects other than small fare increases ranging from 1% to 4% on overlapping routes.[116] Research into the 2010 United-Continental merger is limited, but it has generally found the merger produced competitive results with reduced fares of 3% to 4% on some routes.[117] A study of the three recent legacy carrier mergers found them to be, as a whole, pro-competitive.[118] Across the three mergers, "overlap routes . . . experienced statistically significant output increases and statistically insignificant nominal fare decreases relative to non-overlap routes."[119]

Thus, there is analytical support that the recent airline mergers and industry consolidation were not anticompetitive or bad for passengers. This Note does not seek to add to the voluminous record evaluating mergers (particularly in the domestic market) or question regulators for past decisions; rather, it seeks to explore the current regulatory approach and propose solutions for greater transparency and competition promotion moving forward.

B. ANTITRUST STATUTES AND REGULATORY REGIME

The principal architect of deregulating the U.S. airline industry, Alfred E. Kahn, recognized that a deregulated industry would require vivid antitrust law enforcement to realize the potential benefits of competition it was intended to promote.[120] Two chief antitrust laws exist in the United States to

112. *See, e.g.*, Carlton et al., *supra* note 34, at 2–4, 29.

113. *Id.* at 3–4.

114. *See* John Kwoka & Evgenia Shumilkina, *The Price Effect of Eliminating Potential Competition: Evidence from an Airline Merger*, 58 J. INDUS. ECON. 767, 782 (2010) (finding that the US Airways and Piedmont merger resulted in higher fares on routes in which Piedmont was only a potential entrant).

115. Carlton et al., *supra* note 34, at 3–4.

116. *Id.* at 4.

117. *Id.*

118. *See id.* at 2.

119. *Id.* at 3.

120. *See* Nancy L. Rose, *After Airline Deregulation and Alfred E. Kahn*, 102 AM. ECON. REV.: PAPERS & PROC. 376, 379 (2012) (finding that Kahn did not intend nor advocate for deregulation to mean

protect consumers from lack of competition: the Sherman Act (1890)[121] and the Clayton Act (1914).[122] Section 1 of the Sherman Act declares "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . to be illegal."[123] The Clayton Act focuses on specific types of conduct or transactions believed to threaten competition, such as mergers.[124] For example, § 7 prohibits mergers when "the effect of the acquisition may substantially lessen competition or tend to create a monopoly."[125] The DOJ Antitrust Division and the Federal Trade Commission ("FTC") are the primary enforcers; however, any state attorney general or individual alleging economic harm by a violation of the antitrust laws may also file suit.[126]

The Clayton Act lacks explicit definitions of prohibited activities; therefore, historical enforcement is determinative. The legislative history shows the drafters' intent was "to *protect 'competition, not competitors*, and [Congress's] desire to restrain mergers only to the extent that such combinations may tend to lessen competition.'"[127] This does not invite regulators "to thwart business efficiencies that may be achieved through the combination of two firms' resources."[128] Congress' intent was to "cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding" by authorizing the review of activities that might "create, enhance, or facilitate the exercise of market power."[129]

The Supreme Court's approach in *Brown Shoe Co. v. United States*[130] set out the pattern used in modern antitrust jurisprudence:

> There, the Court (1) defined the relevant product and geographic markets; (2) analyzed the probable effects of the merger by

"laissez-faire" and that he attributed the industry's early struggles and industry concentration to "a 'lamentable failure of the administration to enforce the policies of the antitrust laws—to disallow a single merger or to press for divestiture of the computerized reservation systems or attack a single case of predation.'") (citation omitted).

121. Sherman Act, 26 Stat. 209 (1890).

122. Clayton Act, 38 Stat. 730 (1914).

123. Sherman Act, ch. 647, § 1, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1 (2018)).

124. Volodymyr Bilotkach & Kai Hüschelrath, *Antitrust Immunity for Airline Alliances*, 7 J. COMPETITION L. & ECON. 335, 358 (2011).

125. Clayton Act, ch. 323, § 7, 38 Stat. 731 (codified as amended at 15 U.S.C. § 18 (2018)).

126. Bilotkach & Hüschelrath, *supra* note 124, at 358.

127. Catherine A. Peterman, *The Future of Airline Mergers After the US Airways and American Airlines Merger*, 79 J. AIR L. & COM. 781, 783–84 (2014) (emphasis added).

128. AM. BAR ASS'N SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 1 (3d ed. 2008).

129. Peterman, *supra* note 127, at 784.

130. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325–32, 336, 343–46 (1962).

> examining the market shares of the firms, the current concentration of the industry, the trend toward continued consolidation in the industry, and the statements and behavior of the individual firms; and (3) found a lack of mitigating factors that would provide procompetitive benefits from the merger.[131]

Effectively, any merger that increases market share or market concentration enough to "raise an inference" of illegality is presumed to be anticompetitive, and the merging entities carry the burden to "rebut the inherently anticompetitive tendency manifested by these percentages."[132]

Judicial decisions concerning section 7 of the Clayton Act historically drove antitrust enforcement until the Hart-Scott-Rodino Antitrust Improvements Act of 1976[133] imposed new pre-merger notification requirements and signaled a shift of authority to enforcement agencies.[134] Prior to its passage, Merger Guidelines were drafted to assist in the movement from judicial interpretation toward agency law.[135] The Antitrust Division of the DOJ published the first Merger Guidelines in 1968 "to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied."[136] The Merger Guidelines have undergone multiple revisions as the rules guiding merger enforcement have developed;[137] The DOJ and FTC released their current version in 2010.[138] While the Merger Guidelines are not binding legal authority, their influence on the business community cannot be overstated, particularly in improving DOJ and FTC transparency.[139]

Turning to the U.S. airline industry, the DOJ Antitrust Division is responsible for reviewing airline mergers and acquisitions and enforcing controlling antitrust laws as a result of the ADA.[140] The ADA stipulated that approval of airline M&A would continue, but that jurisdiction would be transferred from the CAB (set to expire in 1984) to the DOJ.[141] However, the

131. Peterman, *supra* note 127, at 785.
132. *Id.* (citation omitted).
133. 15 U.S.C. § 18a (2018) (establishing that proposed mergers that exceed a certain size cannot be legally consummated until expiration of the thirty-day waiting period after making the pre-merger filings or waiver by the reviewing agency).
134. Peterman, *supra* note 127, at 785–86.
135. *Id.* at 786.
136. *Id.* (citation omitted).
137. *Id.*
138. *See* HORIZONTAL MERGER GUIDELINES, *supra* note 106.
139. *See* Peterman, *supra* note 127, at 786–87.
140. Bilotkach & Hüschelrath, *supra* note 124, at 359.
141. WILLIAM E. O'CONNOR, AN INTRODUCTION TO AIRLINE ECONOMICS 41 (6th ed. 2001).

DOT filled this role from 1984 until the end of 1988 due to the Sunset Act of 1984,[142] modifying the deregulation transition.[143] The DOT's authority expired, and since 1989, the DOJ has retained jurisdiction over applying the antitrust laws to airline M&A and other control relationships.[144] The DOT assists the DOJ by utilizing its expertise to advise and exert authority over slot controls and routes to remedy competitive concerns.[145]

Paradoxically, the authority to immunize foreign air services agreements between U.S. and foreign airlines from U.S. antitrust laws rests with the DOT.[146] This authority stems from the 1979 International Air Transportation Competition Act.[147] While the DOJ may submit comments during public comment periods, the DOT retains sole statutory authority to approve and immunize foreign air services agreements[148] from the same antitrust laws that the DOJ applies when evaluating domestic airline mergers and acquisitions. The DOJ, or DOT, has "no corresponding authority" to immunize domestic alliances between U.S. airlines.[149]

142. Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).

143. O'CONNOR, *supra* note 141, at 41–42.

144. *Id.* at 42. *See also* Charles N.W. Schlangen, *Differing Views of Competition: Antitrust Review of International Airline Alliances*, 2000 U. CHI. LEGAL F. 413, 437 (2000) ("Although DOJ was slated to oversee mergers and other domestic aviation-related antitrust issues beginning in 1989, Senator Metzenbaum . . . was so dissatisfied with DOT's performance that he introduced a bill to accelerate the transfer to the fall of 1987. It is telling that both DOT and DOJ favored the transfer.").

145. U.S. Department of Transportation Notice of Practice Regarding Proposed Airline Mergers and Acquisitions, No. 80,011, 80 Fed. Reg. 2468–69 (proposed Jan. 16, 2015).

146. Bilotkach & Hüschelrath, *supra* note 124, at 359.

147. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980).

148. 49 U.S.C. §§ 41308–41309 (2018).

149. William Gillespie & Oliver M. Richard, *Antitrust Immunity and International Airline Alliances* 5, 5 n.10 (Econ. Analysis Group, Discussion Paper No. 11-1, Feb. 2011), https://www.justice.gov/atr/antitrust-immunity-and-international-airline-alliances.

> U.S. airlines may merge. They may also request from the antitrust agencies a business review on joint venture proposals. There was an exception on immunity grants within the U.S after the U.S. Congress passed the Aviation and Transportation Security Act of 2001 in response to the terrorist attacks of 09/11/2001. The Act, which has since expired, included a provision that allowed DOT to grant antitrust immunity to carriers in States with "extraordinary" air transportation needs. This provision only applied to intra-state routes. Under this Act, DOT temporarily granted antitrust immunity to Aloha Airlines and Hawaiian Airlines in inter-island routes in Hawaii in the period from 12/2002 to 10/2003 . . . [W]ith antitrust immunity the carriers made significant capacity reductions and not only did fares rise sharply (by 35% to 41%) but they also remained high well past the expiration of immunity.

C. FOREIGN AIRLINE COLLABORATION MODELS AND THEIR SIGNIFICANCE

1. Foreign Ownership Restrictions

Passengers today, particularly loyal and lucrative business travelers, demand seamless service from everywhere to anywhere in the world. Both U.S. and European legacy airlines have pursued business models reflecting such demands. However, few city-pairs generate enough daily demand to warrant non-stop service, and no airline could efficiently provide service with its own fleet to every destination their customers require.[150] Most businesses meet such global customer demands through cross-border mergers or the establishment of facilities abroad.[151]

Such a solution is not available for airlines; full cross-border airline mergers are restricted by long-standing government restrictions on foreign ownership and control of airlines by non-nationals.[152] Faced with these restrictions, airlines seek foreign airline partners and develop vast alliances to provide customers expanded network coverage and greater service options.[153] Global airline alliances, leveraging the "fundamentals of network economics and [the] global economy," have prevailed as a next-best substitute[154] for airlines to realize the economic benefits of mergers and have become a dominant feature of the airline industry.[155]

Cooperation between foreign airlines first requires that "freedoms" be granted for airlines to serve foreign nations.[156] These freedoms, or rights to board and deplane passengers in a foreign country, are established in international commercial aviation agreements (bilateral or multilateral treaties between governments).[157] The terms vary as some "agreements may restrict the number of carriers that provide air service between the countries, the number of flights that they offer, and sometimes the fares that they charge

150. Pearce & Doernhoefer, *supra* note 19, at 3.

151. *Id.* at 4 (arguing that "[i]n open markets firms locate themselves and their services where consumers demand them, constrained only by competition law or regulations such as health and safety"). This is the strategy pursued by telecom, banking, media, and other industries. *Id.*

152. *Id.*

153. EUR. COMM'N & U.S. DEP'T OF TRANSP., TRANSATLANTIC AIRLINE ALLIANCES: COMPETITIVE ISSUES AND REGULATORY APPROACHES 3 (2010) [hereinafter TRANSATLANTIC AIRLINE ALLIANCES].

154. *Id.* at 3.

155. Bilotkach & Hüschelrath, *supra* note 124, at 360 (noting "the impossibility of worldwide airline networks operated by a single airline, and the impossibility to coordinate (and therefore rationalize) operations by way of merging two companies").

156. Pearce & Doernhoefer, *supra* note 19, at 4.

157. Gillespie & Richard, *supra* note 149, at 2.

for travel between the countries."[158] The 1993 "Open Skies" agreement between the United States and Netherlands was crucial in spurring a liberalization of foreign air transportation access.[159] U.S. and Dutch airlines "no longer needed permission from either government to provide service, carry passengers, and offer particular fares between the [countries]."[160] This was just the beginning. In April 2008, the U.S.-E.U. Open Skies Agreement signaled a major culmination of the U.S. government's push toward expanded foreign airline access.[161]

Despite providing for marked improvements in expanding access, the U.S.-E.U. agreement does not permit cabotage (the eighth and ninth "freedoms" of the air),[162] which is the right to transport passengers within the boundaries of another country, or relax foreign ownership restrictions on airlines.[163] Even the most liberal international aviation agreement in existence restricts airline operations and consolidation.[164] There are no indications these restrictions will be relaxed in the foreseeable future,[165] so cooperation among foreign airlines will continue to play a large role shaping the international air transportation market, particularly while foreign ownership and control restriction preclude higher levels of integration.

A "broad spectrum of cooperation" between airlines exists, ranging from arms-length interline agreements to full-fledged, highly-integrated joint ventures ("JVs").[166] Within JVs, airlines participate on a revenue or profit-sharing basis and seek grants of ATI, the highest form of cooperation. The next section is a basic introduction to various levels of cooperation between foreign airlines. However, note that these levels are not absolute, so airlines are generally free to pursue unique and specific levels of cooperation.

2. Interline Agreements

Simple interline agreements are at the lowest spectrum of the airline cooperation scale. When two or more airlines agree to a multilateral or bilateral agreement to accept other airlines' passengers, travelers can then buy a single ticket itinerary with flights on two or more independent

158. *Id.* at 2–3.
159. *Id.* at 3.
160. *Id.*
161. *Id.*
162. *See Freedoms of the Air*, INT'L CIV. AVIATION ORG., https://www.icao.int/Pages/freedomsAir.aspx (last visited July 31, 2018).
163. Gillespie & Richard, *supra* note 149, at 3.
164. *See id.*
165. TRANSATLANTIC AIRLINE ALLIANCES, *supra* note 153, at 13.
166. *Id.* at 5.

airlines.[167] An interline fare is typically less than the sum of available fares on the individual legs, resulting in a small pricing benefit and booking convenience for consumers.[168] But this arms-length level of cooperation does not approach the efficiencies and integration possible through consolidation, and the quality of the interline product may differ widely on different airlines or airports.[169] For example, travelers may face multiple check-ins, long distances between gates or terminal transfers, greater likelihood of lost luggage, and uncertainty over customer service responsibility for missed connections or related travel disruptions.[170]

3. Alliances

Alliances depend upon agreements between airlines and can take a variety of forms. Alliance agreements typically begin as code share arrangements, with additional perks getting added over time.[171] Code share agreements are essentially enhanced marketing joint-ventures, whereby one airline sells and markets seats under its own designation on a flight operated independently by an alliance airline.[172] Alliances thus open new destinations and expand route networks for airlines without requiring additional aircraft.[173] Faced with foreign ownership rules and entry restrictions, airlines have increasingly joined one of three major global alliances—Star Alliance, SkyTeam, and OneWorld—to expand their route network in foreign nations.[174]

Alliance participants determine which international routes to include in the agreement. If the alliance partners are not competitors on a route, they can communicate about fares and other competitive matters without ATI.[175] If the allies are competitors on the same route, then the alliance agreement remains arms-length and the operating airline determines seat availability for the marketing partner, but each airline sets prices independently.[176] Further, alliances allow a flexibility that improves services and offers passengers a more seamless experience. Partner airlines may adjust flight schedules to coordinate connection schedules, benefit from better gate or terminal

167. Pearce & Doernhoefer, *supra* note 19, at 4.
168. *Id.*
169. *Id.* at 4–5.
170. *Id.* at 5.
171. *Id.*
172. *Id.* at 2, 5.
173. Gillespie & Richard, *supra* note 149, at 3.
174. *Id*. at 1.
175. *Id.* at 3.
176. *Id.* (noting that sales revenue goes to the operating carrier and the marketing carrier receives a booking fee to cover handling costs).

proximity, open lounge and club access with partners, and link frequent-flyer programs.[177] Airline alliances, in the absence of ATI, provide benefits to consumers relative to interline agreements by both improving networks and lowering fares through the economies of denser passenger flows.[178]

4. Joint Ventures

A closer form of cooperation and integration between airlines is the joint venture ("JV"). Airlines agree to share revenue from JVs on specific international routes independent of which airline operates the flight.[179] JVs create an agreement that is "metal neutral" in the sense that the physical metal, or aircraft, involved in producing passenger revenue is irrelevant in determining the respective airline's share of revenue, thereby erasing any incentive for opportunistic advantages in cooperating.[180] Metal neutrality is significant in capturing the possible pro-competitive efficiency gains from increased economies of scale.[181] Thus, under a metal-neutral JV, the profits (or losses) are split equally amongst the carriers regardless even when Airline A's flights are at capacity, but Airline B's flights are empty. JVs are, in effect, mergers that apply to defined international routes.

5. Antitrust Immunity

Airlines operating a revenue- or profit-sharing JV combined with a grant of ATI achieve the highest degree of cooperation.[182] As noted earlier, the DOT holds the statutory authority to immunize international air transportation agreements from U.S. antitrust laws.[183] However, the government of the foreign carrier's country retains sole authority to immunize the agreement from its own antitrust laws; thus, JVs are often conditioned on receiving ATI approval from both governments. ATI effectively allows two airlines to operate as one on certain routes and jointly coordinate pricing, revenue sharing, flight schedules, marketing (such as aligning frequent flyer programs), sales, and any other competitively sensitive matters without concern that they violate antitrust laws.[184]

Some support ATI by pointing to benefits consistent with closer

177. Pearce & Doernhoefer, *supra* note 19, at 5.

178. *Id. See also* Gillespie & Richard, *supra* note 149, at 13–16, 20.

179. Pearce & Doernhoefer, *supra* note 19, at 1–2.

180. *Id.*

181. *Id.* at 1, 6.

182. TRANSATLANTIC AIRLINE ALLIANCES, *supra* note 153, at 5.

183. *Supra* Section II.B.

184. *See* Gillespie & Richard, *supra* note 149, at 1. *See also* Order to Show Cause at 4, Am. Airlines, Inc., DOT-OST-2015-0129 (Dep't of Transp. Nov. 18, 2016) [hereinafter AA-QF Show Cause Order].

integration, while others criticize it as anti-competitive. Regulators are particularly concerned about consumer welfare on non-stop travel between partners' hub cities, where overlapping services allow the trip to be taken on either airline.[185] Thus, the DOT has a longstanding policy precluding consideration of ATI until all elements of an Open Skies agreement are in place to ensure that un-aligned airlines may freely enter and compete.[186]

D. ATI Regulatory Scheme

While jurisdiction over airline mergers was vested in the DOJ in 1988, the DOT retains exclusive authority to immunize international air transportation agreements from U.S. antitrust laws.[187] ATI applications are filed in a public docket and decided on by the Secretary of Transportation after a detailed competitive analysis.[188] Once an application is complete, the DOT allows a period of public comment and issues a written decision within six months.[189]

Applicant airlines have a high bar to meet. The DOT publicly recognizes that "the antitrust laws represent a fundamental national economic policy . . . that serves . . . travelers well" and that "immunity from [them] should be the *exception*, not the rule."[190] Airlines' applications for ATI are "strictly construed and strongly disfavored . . . to ensure that alliance partners maintain the ability and incentive to pass on the potential benefits . . . to consumers."[191]

The DOT engages in a two-step review of air transportation agreements submitted for ATI involving both a competitive analysis and a public interest analysis.[192] First, the DOT evaluates whether approving ATI would be adverse to the public interest by "substantially [reducing] or [eliminating] competition."[193] If the DOT makes that determination, it then decides whether ATI is nonetheless "necessary to meet a serious transportation need or to achieve important public benefits."[194] If it makes that finding and the

185. Pearce & Doernhoefer, *supra* note 19, at 2.

186. Order to Show Cause at 7, Delta Air Lines, Inc., DOT-OST-2015-0070 (Dep't of Transp. Nov. 4, 2016) [hereinafter DL-AM Show Cause Order].

187. 49 U.S.C. §§ 41308–41309 (2018).

188. *See* 14 C.F.R. § 303 (2018).

189. 49 U.S.C. § 41710 (2018).

190. Order to Show Cause at 33, Alitalia-Linee Aeree Italiane-S.p.A., DOT-OST-2004-19214 (Dep't of Transp. Dec. 22, 2005) (emphasis added).

191. Answer of Hawaiian Airlines, Inc. at 4, Am. Airlines, Inc., DOT-OST-2015-0129 (Dep't. of Transp. Feb 22, 2016) (citation omitted).

192. *See* 49 U.S.C. §§ 41308-41309 (2018).

193. *Id.* § 41309(b)(1).

194. *Id.* § 41309(b)(1)(A).

public benefits cannot be achieved by other "reasonably available" and "materially less anticompetitive" means, then the DOT must approve ATI pursuant to § 41309(b).[195]

Second, if the DOT concludes after its initial review that the application is not adverse to the public interest, § 41309(b) directs it to grant ATI.[196] The DOT next determines whether sufficient public benefits justify ATI under § 41308.[197] The DOT is authorized to exempt agreements from the antitrust laws "to the extent necessary to allow the [airlines] to proceed with the transaction specifically approved by the order," provided that the public interest requires it.[198] In sum, the DOT must find that ATI would reduce or substantially eliminate competition and such harm would not be offset by consumer benefits generated by ATI to deny an application.

1. Competitive Analysis

Because ATI results in similar commercial effects as a merger, the DOT conducts a full Clayton Act test just as when evaluating domestic airline mergers.[199] The Clayton Act test evaluates competitive implications and whether approval is likely to substantially reduce competition and "facilitate the exercise of market power."[200] Applied to ATI applications, the DOT must determine whether approval would allow the immunized airlines "to profitably charge supra-competitive prices or reduce service or product quality below competitive levels."[201] In determining this, the DOT evaluates: "(1) whether [ATI] would significantly increase market concentration; (2) whether [ATI] would cause potential competitive harm; and (3) whether new entry into the market would be timely, likely, and sufficient either to deter or to discipline the potential competitive harm."[202]

The importance of defining relevant markets is not lost on enforcement agencies. The DOJ has stated that properly defining markets "could be 'a central focus' of the analysis and be outcome determinative."[203] In the context of ATI requests, the DOT evaluates competitive effects at three market levels: (1) a broad network level; (2) a country-pair level; and (3) a

195. *Id.* § 41309(b)(1)(B).
196. *Id.* § 41309(b).
197. *Id.* § 41308.
198. *Id.* § 41308(b).
199. Hubert Horan, *Double Marginalization and the Counter-Revolution Against Liberal Airline Competition*, 37 TRANSP. L.J. 251, 254 (2010).
200. DL-AM Show Cause Order, *supra* note 186, at 9.
201. *Id.*
202. *Id.*
203. Peterman, *supra* note 127, at 788–89 (citation omitted).

city-pair level.[204] Because ATI diminishes competition on routes on which the airlines compete, ATI reviews have largely focused on the potential loss of competition in non-stop overlaps.[205]

Market power is "the ability to profitably raise prices above competitive levels (or reduce competition on dimensions such as [capacity]), for a significant period of time."[206] Just as in DOJ domestic airline merger reviews, the HHI of impacted city-pairs is calculated to define the market concentration and quantify increased concentration attributable to ATI; any HHI increase of 200 points or more is presumed market power enhancing.[207] This presumption is rebuttable by airlines; Supreme Court doctrine allows parties to present evidence specific to itself or its industry to rebut statistical indicators of anticompetitive effects.[208] But rebutting statistical evidence with non-statistical defenses is difficult, often being rejected by courts.[209] While market concentration alone may not be determinative—as evidenced by the rebuttable presumption—it is influential in the analysis of other potential anticompetitive effects of ATI, such as unilateral and coordinated effects.[210]

The DOT must determine any unilateral effects of granting ATI. Unilateral effects stem from the "internalization of . . . competition" between the airlines.[211] Therefore, this determination is highly dependent on the level of competition between the airlines at the time of application and whether the respective airlines' services can be considered close substitutes.[212]

Coordinated effects, on the other hand, consider potential impacts of ATI on how firms compete in the relevant market(s).[213] A reduction in competitors may diminish competition by encouraging coordinated interaction among fewer competing airlines. Evaluating coordinated effects is largely an offshoot of game theory, as it involves decisions by multiple airlines in which certain conduct is profitable for each of them, but only as a

204. Order to Show Cause at 6–10, Delta Air Lines, Inc., DOT-OST-2015-0070 (Dep't of Transp. Nov. 4, 2016).

205. Gillespie & Richard, *supra* note 149, at 1–2.

206. *Id.* at 7.

207. Peterman, *supra* note 127, at 789.

208. *See* United States v. Gen. Dynamics, 415 U.S. 486, 506–08 (1974).

209. Peterman, *supra* note 127, at 790.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 791.

result of cooperative reactions by the others.[214] The DOT may also consider external factors such as infrastructure or slot constraints that act as barriers to open entry or potentially exacerbate competitive harm.

2. Public Interest Considerations

The consideration of public benefits and mitigating factors in determining ATI is largely where the DOT's approach diverges from the DOJ's approach in reviewing mergers. Congress has enumerated numerous factors that the DOT may consider in its public interest evaluation, including "the availability of a variety of air service, maximum reliance on market forces, the avoidance of unreasonable industry concentration, and opportunities for the expansion of international services."[215] While § 41308 imposes a more stringent test that ATI be "required by" the public interest, the DOT has proffered several forms of public benefits to justify approval, including reductions in double marginalization, cost and operational efficiencies, expanded networks, improved coordination and services, increased capacity, and aligned frequent flyer benefits.[216]

The expansion of international air services has undoubtedly emerged as the dominant public interest factor permitting ATI despite a competitive analysis indicating rejection, and the DOT recognizes U.S. foreign policy goals as a key public benefit.[217] Since the early 1990s, the DOT and the State Department have used ATI as an incentive and bargaining chip to induce foreign nations to enter into Open Skies agreements with the United States.[218] For instance, the first ATI grant in 1993 was a result of the U.S.-Netherlands Open Skies agreement. Recently, the DOT approved ATI proposals by both United-All Nippon Airways and American-Japan Airlines, conditioning approval on the U.S.-Japan Open Skies Aviation Agreement being signed.[219] The State Department and DOT effort has succeeded as the United States currently has more than 120 open-skies partners.[220]

Occasionally, public interest considerations beyond Open Skies prove

214. *Id.*

215. TRANSATLANTIC AIRLINE ALLIANCES, *supra* note 153, at 14 (citation omitted).

216. DL-AM Show Cause Order, *supra* note 186, at 18.

217. Gillespie & Richard, *supra* note 149, at 18.

218. Bilotkach & Hüschelrath, *supra* note 124, at 360. *See also* AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 1486 n.1425 (6th ed. 2007) ("The DOT has defined an open skies agreement as containing, among other things, open entry on all routes, unrestricted capacity and frequency on all routes, unrestricted route and traffic rights, and open code-sharing opportunities.").

219. Gillespie & Richard, *supra* note 149, at 19 n.44.

220. U.S. Dept. of State, *Fact Sheet: Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation* (July 5, 2017), https://www.state.gov/e/eb/rls/fs/2017/267131.htm.

instrumental. The 2005 SkyTeam ATI application was denied because the DOT determined it was not required by the public interest given that "the carriers had not shown they could effectively reconcile" differing business practices to achieve commonality within the alliance.[221] In 2009, in the midst of a global recession and struggling airlines, the DOT approved a Star Alliance ATI request because it "[would] help Continental and the other participants manage cyclical changes in the industry to preserve existing services, with a view toward increasing capacity and enhancing competition between carriers and alliances."[222] The DOT has justified airlines' insistence of not proceeding with an agreement without ATI as a public benefit.[223] Lastly, OneWorld's 2010 ATI application was approved because a OneWorld immunized JV was needed to "provide a third global network [to] better discipline the fares and services offered by the Star and SkyTeam alliances," reasoning that "this too is a public benefit."[224] Recall that this "competitive counterweight" line of reasoning was instrumental in the DOJ's approval of the American-U.S. Air merger. [225]

III. STRIKING THE RIGHT LEVEL AND MANNER OF ANTITRUST REGULATION

The 1993 Open Skies Agreement between the United States and Netherlands opened a new industry order of cooperation among foreign airlines. Northwest Airlines and KLM immediately created an alliance and eventually expanded it into a JV.[226] United Airlines seized on the newfound expansion opportunities and launched the Star Alliance in 1996; American Airlines followed suit in 1999, creating the OneWorld Alliance, and Delta finished the alliance trifecta with its SkyTeam Alliance in 2000.[227] The DOT's willingness to approve ATI is a significant development; more than twenty-eight international alliance agreements were granted ATI by the DOT after 1993, contributing to the formation of four vast, transatlantic JVs.[228]

The proliferation of foreign air services agreements is not confined to the lucrative transatlantic market. The United States and Japan completed an

221. Gillespie & Richard, *supra* note 149, at 19 (citation omitted).
222. *Id.* (citation omitted).
223. TRANSATLANTIC AIRLINE ALLIANCES, *supra* note 153, at 13.
224. Gillespie & Richard, *supra* note 149, at 19 (citation omitted).
225. *See supra* text accompanying notes 48–51.
226. Gillespie & Richard, *supra* note 149, at 18–19.
227. *See* TRANSATLANTIC AIRLINE ALLIANCES, *supra* note 153, at 6.
228. *See* U.S. Dep't of Transp., *Airline Alliances Operating with Antitrust Immunity* (Jan. 3, 2018), http://bit.ly/2Hh62q0 (OneWorld Transatlantic, SkyTeam II, Delta-Virgin Atlantic-Air France-KLM-Alitalia, and Star Alliance).

Open Skies agreement in 2010, signaling a countervailing shift toward greater liberalization in the transpacific air market.[229] Since then, American Airlines-Japan Airlines, Delta-Virgin Australia, United-Air New Zealand, and United-ANA created transpacific JVs with ATI.[230] As airlines across the globe increase cooperation with foreign counterparts, international travel demand has steadily increased. Each year, over 80 million U.S. residents travel abroad.[231] Global air passenger demand increased 7.6% in 2017 compared to 2016, above the ten year average annual growth rate of 5.5%.[232] International passenger traffic increased 7.9% in 2017, slightly edging domestic traffic which increased 7%; in sum, more than 4 billion passengers took to the skies in 2017, with the Asia-Pacific and Latin America regions capturing the highest year-to-year demand gains.[233]

While U.S. airlines were undergoing a merger-fueled movement toward greater concentration that left four airlines accounting for nearly 85% of the domestic market (up from 65% in 2010),[234] a similar battle opened on the international front. Nearly every major airline worldwide has joined one of the three global alliances: (1) Star Alliance consists of twenty-eight carriers;[235] (2) SkyTeam consists of twenty carriers;[236] and (3) OneWorld consists of thirteen carriers.[237] Immunized alliances operated 41% of transatlantic capacity in 2000; by 2015, that share increased to 86%.[238] During that time, HHI increased 1,592 points, a 155% increase.[239] Since 2015, the number of independent, non-aligned transatlantic airlines has decreased, leaving four transatlantic JVs in control of more than 90% of U.S.-E.U. traffic.[240] Similarly, the three global alliances provide over 80%

229. *See* Gillespie & Richard, *supra* note 149, at 19 n.44.

230. *See* U.S. Dep't of Transp., *supra* note 228.

231. Katherine LaGrave, *A Record 80 Million Americans Traveled Abroad Last Year*, CONDÉ NAST TRAVELER (Nov. 7, 2017) https://www.cntraveler.com/story/a-record-80-million-americans-traveled-abroad-last-year.

232. Press Release, Int'l Air Transp. Ass'n, 2017 Marked by Strong Passenger Demand, Record Load Factor (Feb. 1, 2018), http://www.iata.org/pressroom/pr/Pages/2018-02-01-01.aspx.

233. *Id.*

234. Trefis Team, *supra* note 15.

235. *Star Alliance Member Airlines*, STAR ALLIANCE, http://www.staralliance.com/en/member-airlines (last visited Aug. 13, 2018).

236. *SkyTeam Airline Alliance*, SKYTEAM, https://www.skyteam.com/en/about (last visited Aug. 13, 2018).

237. *Introduction to Oneworld—An Alliance of the World's Leading Airlines Working as One*, ONEWORLD, https://www.oneworld.com/news-information/oneworld-fact-sheets/introduction-to-oneworld (last visited Aug. 13, 2018).

238. Answer of Hawaiian Airlines, Inc., *supra* note 191, at 13.

239. *Id.* at 15–16.

240. Answer of JetBlue Airways Corporation at 49–50, Delta Air Lines, Inc., DOT-OST-2015-0070 (Dep't of Transp. July 6, 2016) [hereinafter JBLU Answer] (noting that Aer Lingus was acquired by IAG

of capacity in both the U.S.-Asia Pacific and E.U.-Asia Pacific markets,[241] and both shares are set to rise given the relative novelty of Open Skies agreements with Asian nations. Given this backdrop, it is no surprise that ATI applications are controversial and frequently spur regulatory disputes.[242] Two recent DOT decisions fueled the flames and left interested parties pondering whether they signal a DOT policy shift or are simply anomalies.

In November 2016, the DOT tentatively blocked American Airlines and Qantas Airways's JV application for ATI finding that the JV, which would control around 60% of the U.S.-Australia market if approved, would "substantially reduce competition and consumer choice, without producing sufficient countervailing public benefits."[243] The DOT did not believe that there would be greater capacity growth under the JV than what it expected would happen without it; thus, it found that many of the public benefits presented by an American-Qantas JV could be achieved through materially less anticompetitive cooperation such as codesharing.[244] American and Qantas' application invited challenges from LCC competitors over certain "exclusivity" provisions in the joint business agreement.[245] Lastly, JetBlue Airways highlighted that American Airlines was seeking ATI, a prerequisite of which is an active Open Skies agreement, while embroiled in a nasty industry dispute concerning Open Skies and the big three Middle Eastern carriers ("ME3"),[246] which could have impacted the DOT's decision.

Less than a month later, the DOT approved Delta and Aeromexico's application for an immunized JV; however, it imposed multiple conditions to address competition concerns. The DOT found that "the non-transparent slot allocation regime and infrastructure constraints at Mexico City's Benito Juarez International Airport (MEX)," coupled with Delta and Aeromexico's control of nearly 50% of the MEX slots, were unique constraints on the public realizing the benefits of the JV.[247] To remedy the airlines' entrenched share at MEX and John. F. Kennedy International Airport ("JFK") and to

and that US Airways merged with American Airlines).

241. Pearce & Doernhoefer, *supra* note 19, at 1.

242. *Id.* at 2.

243. AA-QF Show Cause Order, *supra* note 184, at 2.

244. *Id.*

245. *See, e.g.*, Answer of Hawaiian Airlines, Inc., *supra* note 191, at 85–87.

246. Reply of JetBlue Airways Corporation at 2, Am. Airlines, Inc., DOT-OST-2015-0129 (Dep't of Transp. Mar. 2, 2016). *See generally* P'SHIP FOR OPEN & FAIR SKIES, RESTORING OPEN SKIES: THE NEED TO ADDRESS SUBSIDIZED COMPETITION FROM STATE-OWNED AIRLINES IN QATAR AND THE UAE (2015) (charging the ME3 with receiving over $40 billion in improper government subsidies and distorting markets rather than driving new demand).

247. DL-AM Show Cause Order, *supra* note 186, at 1.

address the difficulty of new entrant airlines to acquire slots, the DOT conditioned approval on Delta and Aeromexico divesting twenty-four MEX slots and six JFK slots.[248] In a surprising development, the DOT also limited its ATI grant to five years.[249] After JetBlue and Hawaiian Airlines called for a three-year limit, the DOT determined a five-year limit and a de novo application to extend ATI was required by the public interest so interested parties could evaluate the effects of the slot divestures and proposals by the Mexican government to improve MEX slot allocation procedures.[250] Lastly, the DOT required Delta and Aeromexico to remove "certain anticompetitive," or exclusivity, provisions from their JV agreement.[251]

Moving forward, the need for a clear and transparent approach to ATI by the DOT on international air travel cannot be overstated. With mergers involving U.S. legacy airlines likely off the table for the foreseeable future, these legacy airlines will continue to expand their respective alliances and favor ATI (the closest substitute to a merger facing foreign ownership restrictions) to expand their global network and capture maximum integration efficiencies. United Airlines is exploring an immunized JV with Air Canada following a shift in Canadian laws.[252] American Airlines and Qantas have reapplied for ATI with an improved application,[253] hoping for a better result under the Trump administration. The following subsections will explore practical regulatory and systematic reforms available to ensure "friendly skies" for *both* airlines and passengers alike. The key is a transparent and consistent approach by the DOT that allows robust free market forces (for which deregulation paved the way) to better regulate and ensure continued competition.

A. CONSTRAIN THE "PUBLIC INTEREST" AND EMPHASIZE PREDICTABILITY IN DETERMINING ATI

The DOT justified its initial ATI approvals in the 1990s largely on the public interest factor that Congress provided it, finding that passengers

248. *Id.* at 2 (requiring that all slots be turned over to LCCs to boost competition).

249. *Id.*

250. *Id.* at 27.

251. *Id.* at 2.

252. Frederic Tomesco, *Air Canada Hopes to Resuscitate Cross-Border Venture with United*, BLOOMBERG (June 27, 2017, 1:43 PM), https://bloom.bg/2Hiw5Ns (noting that the Canada-U.S. bilateral market is the busiest in the world and that the two airlines collectively control 57% of the market).

253. *See generally* Joint Application of American Airlines and Qantas Airways for Approval of and Antitrust Immunity for Proposed Joint Business Agreement, Am. Airlines, Inc., DOT-OST-2018-0030 (Dep't of Transp. Feb. 26, 2018) (emphasizing the impact in the wake of the initial rejection on both AA & QA with regards to the U.S.-Australia market).

would benefit from network efficiencies and increased competition "by allowing airlines with small market shares to combine their networks and become more effective in competing against larger airlines."[254] In doing so, the DOT seemingly disregarded a fundamental principle of antitrust law—it exists to protect *competition*, not competitors—in its ATI approach. Indeed somewhere along the line, the public interest consideration has merged with an omnipresent "industry interest" review. And the DOT continues to tout "the benefits of creating alliances that could compete against one another, rather than against individual airlines" in granting ATI.[255]

Even after the DOT established a "heightened public benefits standard[]," which effectively required applicants to propose a metal-neutral JV for ATI approval,[256] its emphasis on competitors remained. But the recent American-Qantas and Delta-Aeromexico proceedings illustrate that how the DOT considers competitor-to-competitor effects as a public interest is anything but consistent. The DOT rejected American and Qantas' ATI bid after it previously granted Delta-Virgin Australia and United-Air New Zealand immunity in the same U.S.-Australia market. Yet shortly after this rejection, the DOT approved ATI for Delta and Aeromexico finding it to be "required by the public interest because the proposed JV would provide . . . a third network competitor [to] the current first and second largest competitors."[257] Interested parties, particularly airlines eying future immunized JVs, are left squinting to find the DOT's rationale or distinction between these applications. When one compares the novelty of the U.S.-Mexico Open Skies agreement and the infrastructure/slot issues at MEX[258] to the established U.S.-Australia Open Skies agreement that led to two transpacific immunized JVs without similar concerns of barriers to entry, American Airlines and Qantas have to be left wondering how a third network in the U.S.-Australia market differs from a third network in the U.S.-Mexico network.

At the heart of its public benefits analysis, the DOT must consider "international comity and foreign policy considerations."[259] A determinative factor in virtually every ATI approval has either been expanding the DOT

254. Bilotkach & Hüschelrath, *supra* note 124, at 361 (citation omitted).

255. *Id.* (citation omitted).

256. JBLU Answer, *supra* note 240, at 47 n.98.

257. DL-AM Show Cause Order, *supra* note 186, at 2.

258. *See* Final Order at 3–6, Delta Airlines, Inc., DOT-OST-2015-0070 (Dep't of Transp. Dec. 14, 2016) [hereinafter DL-AM Final Order] (responding to concerns of Hawaiian Airlines as to whether the U.S.-Mexico air services agreement contains the requisite elements of an Open Skies Agreement and of JetBlue as to the non-transparent slot allocation and infrastructure limitations at MEX).

259. 49 U.S.C. § 41309(b)(1)(A) (2012) (providing the statute's only stated considerations).

and State Department's Open Skies push or threats by airlines that they would not finalize a proposed deal without ATI.[260] Assertions of public benefits and threats of withholding agreements without immunity have accompanied airlines' applications since the beginning.[261] It is precisely the DOT's job to independently evaluate the anticompetitive effects and public benefits of an application and ferret out false claims or threats made by applicants from truth. Instead, the DOT's public interest methodology has been critiqued as "nothing more than 'copy and paste'" in accepting applicants' claims as its justification for approval.[262] The consistent acceptance by the DOT of applicants' claims, despite objections by the DOJ and other affected parties, has raised suggestions that the DOT is a "captured agency."[263]

The DOT's emphasis on expanding Open Skies should be a textbook example of foreign policy considerations. Open Skies agreements carry enormous potential to promote competition and liberalize air travel by removing barriers to entry in foreign airspace. However, when large legacy airlines hold prominent seats at the table consummating such agreements,[264] or the DOT links Open Skies to ATI with signatories' national airlines,[265] Open Skies agreements can quickly turn to be protectionist and anticompetitive in their implementation.

The public interest is not served by entrenching incumbent national airlines' positions and insulating them from robust competition. The three U.S. legacy carriers neither desire nor require government protection; instead, they have routinely demonstrated a willingness to compete with other legacies and LCC/ULCCs in the domestic U.S. market. There is no reason to expect anything different in the international market. Ample room exists for the DOT to reign in its public interest approach and emphasize that ATI applicants present verifiable benefits to passengers while still fulfilling its "foremost international aviation goal . . . [of] opening international markets to the forces of competition."[266] In construing the public interest narrowly and, by default, placing greater emphasis on the competitive analysis, industry participants should experience a more transparent and uniform approach toward ATI applications. The DOT's ability to clean up

260. AM. BAR ASS'N, *supra* note 218, at 1487.

261. *See* Schlangen, *supra* note 144, at 439.

262. Horan, *supra* note 199, at 256.

263. Schlangen, *supra* note 144, at 439–40.

264. *See* Horan, *supra* note 199, at 260, 284–85.

265. Schlangen, *supra* note 144, at 443.

266. *Id.* at 445 (citation omitted).

its public interest approach and improve the predictability of its evaluations would reduce the likelihood of a repeat of the two above-referenced ATI decisions—in which American and Delta highlighted the exact same public benefits of ATI as virtually every application, but American was denied while Delta was approved despite more troubling competition concerns in its applicable market. Such an approach by the DOT would provide airlines efficiency and cost improvements when evaluating whether a potential application might receive immunity. Lastly, a narrower public interest approach improves the chances that the DOT, crucially, keeps passenger welfare at the forefront of its evaluations and adheres to the fundamental principle of antitrust to protect competition, not competitors.

B. Periodic Reviews of Immunized Alliances that Minimize the Burden on Airlines

Independent, non-aligned U.S. airlines have played an increasingly active role in recent DOT public dockets evaluating ATI applications. A consistent and vehement belief of such airlines is that approvals of immunity not be in perpetuity, but instead come with time constraints. Particularly, Southwest, JetBlue, and Hawaiian have argued for three- to five-year time limitations on any new grants of ATI[267] and called for de novo reviews of existing immunized alliances.[268] Calls for periodic reviews of ATI is not a novel argument; multiple advocates have pushed for some form of mandatory review mechanism. In 2009, a House Bill by Rep. James L. Oberstar proposed to sunset ATI approvals after three years.[269] While his exact proposal may not have left the ground, it is past due for the DOT to implement a revised policy of periodic ATI reviews that reflects the present competitive dynamics of both the domestic and international markets, which have seen an unprecedented move toward greater consolidation.

The DOT's recent five-year time limit imposed on Delta and Aeromexico was the first of its kind, yet the DOT recognizes its authority "to alter or amend its grant of ATI at any time if [it] believes a change in competitive circumstances has occurred."[270] But the DOT's regulations covering reviews of ATI were codified in 1985,[271] eight years before the

267. *See, e.g.*, DL-AM Final Order, *supra* note 258, at 3–6.

268. *See* Motion of JetBlue Airways Corporation to Institute an Antitrust Immunity Review Proceeding at 4, Delta Air Lines, Inc., DOT-OST-2002-11842 (Dep't of Transp. July 28, 2017).

269. H.R. 831, 111th Cong. § 1(e) (2009).

270. DL-AM Final Order, *supra* note 258, at 27.

271. *See* Implementation of the Civil Aeronautics Board Sunset Act of 1984: Transfer of Antitrust Authority Under Sections 408, 409, 412 and 414 of the Federal Aviation Act of 1958 from the Civil Aeronautics Board to the Department of Transportation, 50 Fed. Reg. 31134 (July 31, 1985) (codified at

DOT approved a single ATI application or realized the foreign policy implications of ATI in expanding Open Skies. Under § 303.06 of the DOT's regulations, the DOT "may initiate a proceeding to review any [ATI] previously conferred . . . [and] may terminate or modify such immunity if the [DOT] finds . . . that the previously conferred immunity is not consistent with the provisions of section 414."[272] Thus, while the DOT explicitly acknowledges its authority to amend or revoke ATI at any time, its actions reflect otherwise. In rejecting a request by JetBlue and Hawaiian to institute a de novo review of Delta and Korean Air's ATI grant after they sought to implement a JV (fifteen years after initial ATI approval), the DOT again recognized its authority to undertake reviews at any time, but held that for it to do so "JetBlue and Hawaiian must show that a new proceeding is necessary . . . either because the existing process for reviewing the agreements is flawed or because there is a substantial basis to revisit the grant of [ATI]." [273] While the DOT may occasionally give lip service to the notion that immunity from antitrust laws is an exception, not the rule,[274] its actions fly in the face of that notion when it rejects calls for periodic review of ATI and shifts the burden of proof from those enjoying ATI to those challenging it.

At a basic level, it is difficult to accept that on the one hand the DOT categorizes ATI as an exception to the norm and only appropriate when the public interest requires it, but on the other hand approves ATI in perpetuity without an adequate regime of ex post review in place. Critics of the DOT's current approach claim that after the initial public benefits review, ATI approval "is virtually permanent and the [airlines] are left unchecked to stifle innovation and competition in the market through coordinated pricing, scheduling, and operation functionalities, to the detriment of the travelling public."[275] They argue that periodic reviews of five years or less in a public docket "will increase public transparency and ensure that immunized alliances remain beneficial and in the public interest, as defined not only by the immunized [airlines], but also by the public to whom they purport to bring benefits."[276] Additionally, some studies have claimed that the pricing efficiencies and passenger benefits generated by alliances relative to

14 C.F.R. pts. 251, 261, 287, 291, 296, 298, 299, 303 & 380).

272. 14 C.F.R. § 303.06 (2018) (Section 414 refers to the Federal Aviation Act of 1958).

273. Order at 3, Delta Air Lines, Inc., DOT-OST-2002-11842 (Dep't of Transp. Nov. 17, 2017).

274. Peterman, *supra* note 127, at 790–91.

275. Motion of JetBlue Airways Corporation to Require Submission of Additional Documents and Data at 4–5, Delta Air Lines, Inc., DOT-OST 2015-0070 (Dep't of Transp. July 2, 2015).

276. Comments of JetBlue Airways Corporation at 9, Delta Air Lines, Inc., DOT-OST-2015-0070 (Dep't of Transp. Nov. 18, 2016) [hereinafter JBLU Comments].

interlining has not required ATI to capture such benefits.[277]

Opponents of instituting duration limits on ATI are primarily legacy airlines with portfolios of active immunized agreements. This is predictable given that any policy changes will have the largest impact on their global network strategies. They argue that a policy of ATI term limits would have a chilling effect on investment in joint operations and expanding route networks as airlines would be hesitant to make long-term investments, reducing the likelihood of reaching the level of cooperation that offers the greatest level of passenger benefits.[278] The effects of such a policy reduces the incentive to cooperate fully and creates uncertainty that diminishes consumer benefits and runs counter to the purpose of Open Skies agreements.[279] Additionally, factoring in the time constraints involved with the public docket and application process, a 3-5 year limit "would place the [DOT] and [airlines] in a state of perpetual re-application and re-review."[280]

An optimal and practical policy that the DOT could adopt is to conduct a de novo review in a public docket of every active immunized agreement once every ten years (in the absence of unique competitive concern such as the slot/infrastructure issues at MEX). Such a policy would permit the DOT to regularly assess market conditions and verify that airlines are meeting the proposed public benefits that drove the DOT to approve their applications, while granting immunized airlines a longer horizon to entice full cooperation and investment with aligned foreign airlines and avoiding a perpetual administrative counterweight to international expansion. Current DOT regulations permit adopting such a policy via an informal, but clearly defined, case-by-case approach, thereby avoiding the difficulties of formal rulemaking or Congressional re-engineering.[281] Additionally, this approach would allow the DOT to evaluate its projected docket volumes and work directly with airlines to set application and review timelines that minimize administrative burdens and facilitate quick reviews. For example, an airline may voluntarily agree to do its review after nine years if it would lead to

277. *See, e.g.*, Gillespie & Richard, *supra* note 149, at 20. *See also* Bilotkach & Hüschelrath, *supra* note 124, at 348–49; JBLU Answer, *supra* note 240, at 47–48 n.98 (noting the benefits of JetBlue's many codeshare agreements without ATI).

278. Joint Applicants' Reply to Answer of Hawaiian Airlines, Inc. at 28, Am. Airlines, Inc., DOT-OST-2015-0129 (Dep't of Transp. Mar. 2, 2016) [hereinafter Joint Applicants' Reply].

279. Reply of the Joint Applicants at 14, Delta Air Lines, Inc., DOT-OST-2015-0070 (Dep't of Transp. July 15, 2016) [hereinafter Reply of the Joint Applicants].

280. Joint Applicants' Reply, *supra* note 278, at 29.

281. JBLU Comments, *supra* note 276, at 8. *See also* 14 C.F.R. § 377.10 (2018) (permitting licenses to continue to have effect during DOT review or action and allowing DOT to apply § 377 to immunized alliances in the interim until re-approval).

quicker turnaround times and the DOT agrees to permit it eleven years of ATI, if approved.

It is clear that effective international JVs require significant long-term investment and advance work to facilitate optimal division of resources between airlines and maximum public benefits. The proposed policy attempts to weigh this against the reality that the DOT's past and current approach does not grant verified and actual passenger benefits a seat at the ATI table. While it would impose a new burden on U.S. legacy airlines operating with numerous grants of ATI, it should not be considered an undue burden. These airlines already comply with numerous recurring DOT obligations such as "continuing fitness reviews" and "renewal of certificates."[282] Further, "the vast majority of the United States' aviation partners authorize alliances for limited periods including . . . Australia, the European Union, New Zealand and South Korea."[283] Thus, network airlines are experienced in structuring alliances or JVs with ATI with advanced knowledge of an eventual requirement to re-apply. Lastly, airlines' claims that ATI time limits will temper investments may carry an element of application gamesmanship with them. For example, despite teeing off on the DOT in accepting the DOT's slot divestitures and five-year ATI limit, Delta invested more than $620 million to acquire a 49% equity stake in Aeromexico and consummated their U.S.-Mexico transborder JV.[284]

A tangential issue to ATI limits is the public release of annual ATI reports prepared by immunized airlines for DOT review. DOT has required ATI recipients to prepare annual reports on the implementation of alliance agreements and benefits resulting from ATI.[285] JetBlue has called for the public release of these reports, arguing that it "will increase transparency and promote a more robust understanding of the public benefits, if any, that are produced by . . . ATI."[286] It claimed that both the procedural process and the substantive components are a mystery and that it was denied access to redacted versions of such annual reports.[287]

Delta responded to JetBlue's request by highlighting that there are multiple types of reports prepared by airlines and sent to the DOT that are

282. DL-AM Final Order, *supra* note 258, at 27.

283. JBLU Answer, *supra* note 240, at 48.

284. Morgan Durrant, *Delta Successfully Completes Cash Tender Offer for Additional Shares of Grupo Aeroméxico*, DELTA: NEWS HUB (Mar. 13, 2017, 8:30 AM), http://bit.ly/2IcsmT6. *See also* AA-QF Show Cause Order, *supra* note 184, at 3 (noting that American and Qantas launched new routes and codeshare arrangements between the U.S. and Australia/New Zealand without a grant of ATI).

285. DL-AM Show Cause Order, *supra* note 186, at 28.

286. JBLU Answer, *supra* note 240, at 52.

287. *Id.* at 51–52.

kept confidential that would seemingly fall under JetBlue's push to increase transparency.[288] The DOT has sided with the airlines that prepare these annual ATI reports largely over concerns that requiring public disclosure could potentially inhibit competition and diminish airlines' "candor with the [DOT]."[289]

The DOT's hesitation to publicize immunized airlines' annual reports is reasonably related to concerns with the free flow of information required to determine whether alliances are providing public benefits on a continual basis. Therefore, this Note does not suggest any changes to the DOT's current annual review policy. Instead, the proposed periodic review and time limitations on ATI grants should adequately remedy the transparency concerns that JetBlue raises while respecting an airline's right to confidential trade secrets and candor with the DOT.

There is no disputing the incredible difficulty antitrust regulators face in evaluating potential mergers and ATI requests. Using current and past information to project future competitive implications of corporate activities (in a constantly evolving competitive landscape) is certainly an art rather than science. To expect clairvoyance or perfection from regulatory agencies would indicate a complete lack of reality. The DOJ is tasked with the unenviable job of having to get it right on the first try in evaluating domestic airline mergers. A merged airline cannot simply be unwound ten years later if it is not delivering the expected consumer benefits. This is not the case with the DOT and its ATI role. Rather, the flexibility of ATI to account for evolving competitive landscapes of international markets is a tremendous safeguard and positive byproduct of the restrictions on foreign mergers. While there are valid concerns against imposing a firm time limit and periodic public reviews of immunized alliances, these concerns do not outweigh the DOT's primary responsibility to promote competition to its primary constituent, the flying public, in fulfilling its antitrust responsibilities given to it by Congress. A reasonable and practical solution to balancing these interests is to establish a periodic ten-year ATI review.

C. Increase DOJ Involvement in ATI Competitive Analysis

As previously detailed, following deregulation, the DOJ was given authority to evaluate U.S. domestic airline M&A while the DOT retained ATI authority.[290] During the short span in which the DOT held authority for

288. Reply of the Joint Applicants, *supra* note 279, at 59.
289. DL-AM Show Cause Order, *supra* note 186, at 29.
290. *See supra* Section II.B.

both functions, it faced criticism over its performance with aviation-related antitrust issues and itself favored the transfer of M&A authority to the DOJ.[291] Since the division of antitrust roles in 1989, there have been periodic spats between the agencies and continued questions over the DOT's fitness to perform its antitrust functions.

Given this backdrop, it is rather surprising that the DOT has often exhibited a proclivity to ignore the DOJ's antitrust expertise. Although the DOT states that it "initially confer[s] with [the DOJ], given its experience [with] the antitrust laws,"[292] rhetoric between the two, at times, reasonably suggests otherwise. Concerns have been raised that the DOT does not give "sufficient consideration" to the impacts of ATI "on the competitive structure of the domestic airline industry."[293] The DOT and DOJ publicly disputed the evidentiary standards used by the DOT in approving the Star Alliance-Continental (2009) and OneWorld-British Airways (2010) ATI applications. The DOJ charged that DOT's review process was a complete abandonment of evidentiary standards because it rubber stamped the applicants' unsubstantiated public benefits claims; some agreed with the DOJ and characterized the DOT's "public benefits methodology [as] literally nothing more than 'copy and paste.'"[294] The DOT claimed the DOJ attacks were "an inappropriate interference with [its] aviation policy and bilateral negotiation prerogatives."[295]

Calls for increased DOJ involvement or even complete transfer of authority are not new. In 1998, the Transportation Research Board ("TRB"), under the Congressional direction to study government actions promoting airline industry competition, recommended that Congress shift ATI review to the DOJ; the TRB had concerns over the DOT's policy linking consummation of Open Skies to ATI with signatories' national airlines.[296] Others argue that the DOT is a "captured agency" as it frequently underestimates the potential anticompetitive effects of ATI because it favors the concerns of the largest shareholders of the industry it regulates.[297] Proposed solutions to the captured agency issue include retaining the initial ATI review with DOT given "its role in crafting U.S. global aviation policy," but transferring authority to the DOJ for subsequent reviews and

291. Schlangen, *supra* note 144, at 437.
292. Order to Show Cause at 19, United Air Lines, Inc., OST-96-1116-20 (Dep't of Transp. May 9, 1996).
293. Bilotkach & Hüschelrath, *supra* note 124, at 361.
294. Horan, *supra* note 199, at 256.
295. *Id.* at 253.
296. Schlangen, *supra* 144, at 443.
297. *Id.* at 438–40.

reapplications.[298]

This Note does not advocate for either approach. While there may be valid agency capture concerns over comingling regulatory and industry policy roles, the DOT's authority over tangential matters such as airport slots and route certificates, expertise in the airline industry, and past successes working with the State Department to expand Open Skies make it the best agency to regulate ATI moving forward. That said, there is ample room for improvement in the ATI regulatory process. An increased role by the DOJ would facilitate many improvements. DOJ has demonstrated a tremendous ability to work with the Securities & Exchange Commission ("SEC") and international regulators to effectively enforce the Foreign Corrupt Practices Act.[299] There is no reason that the DOT cannot similarly leverage the DOJ's antitrust expertise in its quantitative competitive analysis of ATI applications and continuous monitoring obligations. Finally, given the interplay between the competitive situation in domestic and international markets, increased coordination will ensure that sufficient consideration is given to ATI impacts on both markets.

D. KNOCK DOWN BARRIERS TO ENTRY, WHILE RESPECTING THE TENETS OF DEREGULATION AND FREE COMPETITION

With most industries, high market concentration indicates an industry ripe for new entrants. The airline industry, however, contains numerous industry-specific barriers, including takeoff and landing slots (particularly at commercially-coveted airports), airport terminal/gate access, and the tremendous capital required to acquire aircraft and initiate services.[300] Additionally, the hub-and-spoke networks of legacy airlines effectively serve as operational barriers.[301] Collectively, these barriers inhibit the formation of new airlines and often create enormous difficulties for existing airlines to enter specific markets. The U.S. government should prioritize efforts to minimize barriers to entry and promote robust industry competition. However, in trying to spur competition, the government often finds itself potentially crossing a line of government intervention that deregulation was intended to leave behind in lieu of free market competition. This section steps beyond antitrust law and explores potential systematic and

298. *Id.* at 443–45.

299. *See* John F. Libby & Jacqueline C. Wolff, *The FCPA in 2016: DOJ and SEC Focus on International Cooperation and Investigation of Individuals*, LEXOLOGY (Jan. 21, 2016), https://bit.ly/2GLy8wU.

300. *See* MORTON ET AL., *supra* note 45, at 40.

301. *Id.*

philosophical reforms to spur further innovation and competition in the U.S. airline industry.

Overhauling U.S. aviation infrastructure has tremendous potential to generate real economic benefits and fresh competition. The United States' antiquated aviation infrastructure and policies carry costly effects. U.S. airports are increasingly congested as growing travel demands strain airports' ability to keep up—72% of U.S. air passenger traffic flows through the thirty busiest airports and delays cost passengers and airlines billions annually.[302] President Trump touted improving U.S. transportation infrastructure, including U.S. airports which he referred to as "bottom of the rung" internationally, as a key policy agenda; he pushed for an investment of over $1 trillion in U.S. infrastructure improvements through public-private financing and tax incentives shortly after being elected.[303] Improving airport infrastructure is arguably just as important as easing air traffic congestion. For example, airlines without historical control of terminal space or gates at Los Angeles International ("LAX") find lack of real estate is a huge barrier to entering or expanding service at LAX;[304] while LAX may not have the slot constraints or air space issues that the New York City airports do, the lagging infrastructure has the same practical effect in limiting the number of airlines and flights that can serve LAX. Expanding and improving U.S. airports will provide opportunities for those airlines without historical real estate holdings to enter or expand at airports that are currently space constrained.

Lastly, moving forward, the DOT should be cautious of pushing policies that position it to pick "winner and loser" airlines or overstep its regulatory authority abroad and disrupt international comity. Its approach toward "exclusivity clauses" in alliance or JV agreements applying for ATI presents a powder keg of issues moving forward. Hawaiian Airlines recently requested that the DOT require Qantas to codeshare on routes in Australia with other U.S. airlines on the same terms and availability that American Airlines would receive via their JV (thereby requiring ongoing price regulation and monitoring by the DOT).[305] While the request became moot after the DOT denied American and Qantas' ATI bid, it offers an interesting

302. Robert Puentes, *Aviation Needs a Makeover*, U.S. NEWS (Jan. 19, 2017, 8:00 AM), https://www.usnews.com/opinion/economic-intelligence/articles/2017-01-19/americas-aviation-industry-needs-a-makeover.

303. Michael Laris, *After Assailing 'Obsolete' Airports and Transportation System, Trump Tells Airline Executives He's Here to Help*, WASH. POST (Feb. 9, 2017), http://wapo.st/2DdrdXr.

304. *See* Ted Reed, *When the Olympics Are Ready for Los Angeles, Will LAX be Ready for the Olympics?*, FORBES (Sept. 15, 2017, 11:00 AM), http://bit.ly/2oW33wq.

305. *See* Answer of Hawaiian Airlines, Inc., *supra* note 191, at 84–87.

case study. The DOT and State Department's Open Skies objective has been to open and liberalize air travel between the U.S. and other countries; to entertain forcing foreign airlines to codeshare with U.S. airlines on flights entirely within a foreign country would seemingly undermine the entire notion of Open Skies and international comity. The DOT should be extremely hesitant to intervene in the contractual relations of private airlines, especially when foreign airlines are involved, and any DOT action may invite a reciprocal response by foreign regulators.

The DOT's MEX slot divesture approach in granting Delta and Aeromexico ATI is also troubling and should not set a precedent moving forward. The DOT limited eligibility for the divested MEX slots to LCCs only and deemed Interjet, a Mexican LCC, ineligible because it was the second largest airline at MEX.[306] It reasoned that LCCs have the largest competitive impact in disciplining fares and that restricting slots to just LCCs would limit the total number divested.[307] The rationale behind the DOT's decision is arguably sound; there is continued support for a "Southwest Effect"—lower airfares on routes with a Southwest or other LCC/ULCC presence.[308] But its decision produced negative outcomes. The DOT should not be in the business of picking winners and losers by completely shutting out a segment of airlines—legacies—from even stepping to the plate and making their case. While the 80% market share of the four largest U.S. airlines is often tossed around, it fails to capture competitive realities. Legacy airlines have demonstrated a willingness to compete against both fellow legacies, by encroaching into entrenched hubs and growing nonstop service to more destinations,[309] and LCCs, by expanding product offerings such as the introduction of "basic economy" fares to reach even the most price-conscious of passengers.[310]

The MEX slot divesture also concerns matters of international comity. Interjet has challenged the DOT's slot divestiture process in the D.C. Circuit as "arbitrary and capricious" and questioned whether the DOT "exceeded its statutory authority" in allocating slots at an airport outside the United States.[311] Moving forward, the DOT should refrain from taking similar

306. DL-AM Show Cause Order, *supra* note 186, at 24–25.

307. *Id.* at 21.

308. *See* Alan R. Beckenstein & Brian M. Campbell, *Public Benefits and Private Success: The Southwest Effect Revisited* 27–28 (Darden Bus. Sch., Working Paper No. 206, 2017).

309. DANIEL M. KASPER & DARIN LEE, COMPASS LEXECON, AN ASSESSMENT OF COMPETITION AND CONSUMER CHOICE IN TODAY'S U.S. AIRLINE INDUSTRY 22–25 (2017), http://bit.ly/2Fo77zO.

310. Bart Jansen, *Airlines Gauge Success of Basic Economy by How Many Passengers Avoid It*, USA TODAY (Oct. 26, 2017), https://usat.ly/2lkfgvz.

311. Final Brief of Petitioner at 2, ABC Aerolineas, S.A. de C.V. v. U.S. Dep't of Transp., No. 17-

actions that can be construed, at a minimum, as regulatory fiat, or, worse, as encroaching on the sovereignty of Open Skies agreement partners. JetBlue's experience in trying to receive slots at MEX illustrates the "opaque [and] confusing" process: JetBlue was awarded only commercially undesirable slots before 5:00 a.m. and after 10:00 p.m.[312] Rather than unilaterally engineer a solution that arbitrarily excluded U.S. and Mexican airlines from the process, the DOT should have shared its slot concerns with the Mexican aviation authority and the MEX airport authority in order to come to a consensus for slot divestitures together that would permit ATI approval. Offering assistance in bringing the MEX slot allocation system in line with the IATA World Slot Guidelines, while touting the benefits that JetBlue and other U.S. airlines bring to communities would also be more effective than a divestiture power grab. Going forward, a DOT mentality that respects international comity and robust market competition will incentivize *all* airlines and generate the greatest public benefit.

CONCLUSION

Under many metrics, U.S. airlines are serving passengers at record levels. Foremost, U.S. commercial aviation has never been safer; 2017 marked the eighth straight year of zero U.S. airline passenger fatalities.[313] Average ticket prices are at historic lows, and increases in fares are considerably behind increases in disposable income, CPI, and jet fuel prices this century.[314] Airlines are aggressively competing and expanding into competitor hubs, while improving flight operations; in 2017, fewer flights were cancelled, on-time arrival rate increased, and airlines lost fewer bags and bumped fewer passengers.[315] However, viral incidents such as United's removal of Dr. Dao and the large domestic market share of the four biggest U.S. airlines contribute to the public's negative perception of air travel. The data paint a different picture. Ugly on-board incidents are the exception, and all U.S. airlines have demonstrated an impressive flexibility to quickly adopt policies that reduce the likelihood of repeating such incidents. United adopted ten policy changes in response to the Dr. Dao incident, including reducing overbooking and increasing gate agent flexibility to reach voluntary seat denials, which other U.S. airlines also adopted.[316]

1056 (D.C. Cir. Sept. 1, 2017).

312. JBLU Answer, *supra* note 240, at 12–14.

313. Bart Jansen, *Airline Safety Best on Record in 2017: Trump Claims Credit, but Experts Cite Years of Efforts*, USA TODAY (Jan. 2, 2018, 5:36 PM), https://usat.ly/2qjapNx.

314. AIRLINES FOR AMERICA, *supra*, note 67, at 5–7, 9.

315. McCartney, *supra* note 3.

316. Hugo Martin & Lauren Raab, *United Airlines Reaches 'Amicable' Settlement with Passenger*

There will always be room for improvement, but high market concentration in the U.S. domestic airline market has not caused disastrous anticompetitive results. That said, there is no guarantee that similar results will occur as international markets become more concentrated. International air travel involves unique barriers—as the slot situation at MEX exemplifies—and significant costs to acquire aircraft and establish operations abroad. Open Skies and ATI have enormous potential to open international markets and improve travel for U.S. passengers. However, ATI is also an extraordinary tool of regulatory relief that requires adequate safeguards. The DOT can better serve airlines and passengers alike by clarifying public interest considerations, periodically reviewing ATI approvals, and increasing DOJ involvement.

Dragged from a Plane, L.A. TIMES (Apr. 27, 2017, 4:20 PM), http://www.latimes.com/business/la-fi-united-david-dao-20170427-story.html.