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## Domestic Airline Mergers and Defining the Relevant Market: From Cities to Airports

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# DOMESTIC AIRLINE MERGERS AND DEFINING THE RELEVANT MARKET: FROM CITIES TO AIRPORTS

ALEXA NAUMOVICH\*

## I. INTRODUCTION

In 2017, more than four billion people in the world used aviation to travel.<sup>1</sup> Airlines within the United States transported 741 million passengers domestically.<sup>2</sup> As passenger demand for air travel has risen astronomically, the number of airlines who serve domestic passengers has dwindled to five major U.S. airlines.<sup>3</sup> This shift in the airline industry and the reduced number of domestic airlines requires the Department of Justice (DOJ) Antitrust Division (Antitrust Division) to alter its analysis of airline mergers to determine their anticompetitive ramifications.

This article serves as guidance for the future of airline mergers within the United States. It argues city-pairs should not provide the only method of defining the relevant market and that airports should be included in the relevant market determination. To accomplish this, Part II will provide the background of antitrust law and the airline industry by describing the historical development of the governing legal rules and the Antitrust Division's oversight of merger law. Part III will discuss the development of defining the relevant market in airline mergers by

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<sup>1</sup> 2017 Marked by Strong Passenger Demand, Record Load Factor, INT'L AIR TRANSP. ASS'N (Feb. 1, 2018), <http://www.iata.org/pressroom/pr/Pages/2018-02-01-01.aspx> [<https://perma.cc/PM58-6YF6>].

<sup>2</sup> BUREAU OF TRANSP. STATISTICS, DEP'T OF TRANSP., BTS 12-18, 2017 Annual and December U.S. Airline Traffic Data, <https://www.bts.dot.gov/newsroom/2017-annual-and-december-us-airline-traffic-data> [<https://perma.cc/9BBD-TQ4Z>] (last updated Mar. 15, 2018).

<sup>3</sup> Simon Kurash, Note, *Airline Consolidation: A Study of the American-US Airways Merger, Other Major Mergers from the Past Two Decades, and Their Effect on Consumers*, 48 SUFFOLK U. L. REV. 897, 898 (2015).

analyzing the evolving approach the agency has taken to airline mergers over the past twenty-five years. Part IV will critique the current ways of defining the relevant market within airline mergers, and Part V will provide suggestions for determining the relevant market and alternative ways to assess entry barriers.

## II. THE AIRLINE INDUSTRY AND FEDERAL ANTITRUST LAW

Antitrust concerns in the aviation industry arose after the Airline Deregulation Act of 1978 (Deregulation Act).<sup>4</sup> Prior to deregulation, the Civil Aeronautics Board (CAB) controlled and regulated any consolidation, merger, or acquisition of control of any air carrier.<sup>5</sup> Approval by the CAB granted automatic federal antitrust immunity for the airline industry.<sup>6</sup> The Deregulation Act eliminated the automatic federal antitrust immunity, subjecting the airline industry to federal antitrust laws.<sup>7</sup>

### A. AIRLINE MERGERS AFTER DEREGULATION

Congress enacted U.S. antitrust laws to protect consumers harmed by a lack of competition in the market.<sup>8</sup> The Deregulation Act diverged from protecting the airlines to protecting consumers.<sup>9</sup> After the enactment of the Deregulation Act, Section 7 of the Clayton Act became the gatekeeper to mergers and acquisitions within the airline industry, “restrain[ing] mergers only to

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<sup>4</sup> Congress transitioned away from command-and-control economic regulations toward allowing competition to serve consumers. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); *see also* *Competition in the Airline Industry*, Hearing Before the Subcomm. on Com., Sci., and Transp., 106th Cong. 14 (1999) (testimony of Joel I. Klein, Assistant Att’y Gen., DOJ Antitrust Division) [hereinafter Testimony of Klein].

<sup>5</sup> *See* Pub. L. No. 91-62, § 1(1), 83 Stat. 103 (amended 1969).

<sup>6</sup> *See* Pub. L. No. 95-504, § 30(a), 92 Stat. 1731 (amended 1978). Courts interpreted the previous immunity to apply when: “(1) the conduct charged was approved by a specific order of the Board or was clearly contemplated by such an order; and (2) the Board monitored and supervised the complained of conduct.” Jerry L. Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001, 1011 (1980); *see* *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 380–82 (1973).

<sup>7</sup> Immunity from federal antitrust laws can now only be granted at the CAB’s discretion as required in the public interest. Pub. L. No. 95-504, § 30(a), 92 Stat. 1731 (as amended at 49 U.S.C. § 1384).

<sup>8</sup> *See* *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); FED. TRADE COMM’N & DEP’T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, at 1 (2006) (explaining the core concern of antitrust laws focuses on the “creation or enhancement of market power”).

<sup>9</sup> Testimony of Klein, *supra* note 4, at 14.

the extent that such combinations may tend to lessen competition.”<sup>10</sup> Congress enacted Section 7 of the Clayton Act to protect competition rather than competitors and allowed the regulatory agencies to prohibit mergers and acquisitions when “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”<sup>11</sup> The Clayton Act sought to address “incipient monopolies and trade restraints,” which the Sherman Act lacked jurisdiction to regulate.<sup>12</sup> The Clayton Act merger regulations focus on preventing the occurrence of future monopolies by blocking the formation of monopolies at the onset, unlike the Sherman Act, which regulates already formed monopolies or anticompetitive behaviors.<sup>13</sup> Congress tasked the Federal Trade Commission (FTC) and the DOJ with the authority to enforce the Clayton Act.<sup>14</sup> While the Antitrust Division had historically reviewed airline mergers after deregulation, the Department of Transportation (DOT) originally gained oversight of airline mergers from the CAB.<sup>15</sup> The DOT’s approval of two airline mergers in the 1980s over the objections of the Antitrust Division led to Congress turning over merger review authority to the Antitrust Division in 1989.<sup>16</sup>

#### B. TOOLS OF AIRLINE MERGER ANALYSIS

The U.S. Supreme Court laid the groundwork for the modern-day merger analysis in *Brown Shoe Co.*<sup>17</sup> It defined the relevant product and geographic markets to determine the merger’s probable effects on said markets and if competition would be substantially lessened.<sup>18</sup> The regulatory agencies, with the enactment of the Hart-Scott-Rodino Antitrust Improvements Act, gained the authority to develop the rules for assessing the relevant product and geographic markets and the effect on compe-

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<sup>10</sup> *Brown Shoe Co.*, 370 U.S. at 320; Testimony of Klein, *supra* note 4, at 14.

<sup>11</sup> 15 U.S.C. § 18 (1994); *Brown Shoe Co.*, 370 U.S. at 312–13, 320.

<sup>12</sup> *Brown Shoe Co.*, 370 U.S. at 318 n.32.

<sup>13</sup> See 15 U.S.C. §§ 1, 2 (2012); *Brown Shoe Co.*, 370 U.S. at 318 n.32.

<sup>14</sup> See 15 U.S.C. § 21 (2012) (FTC authority); 15 U.S.C. § 25 (2012) (DOJ authority).

<sup>15</sup> See Pub. L. No. 95-504, § 26(a)(2) (codified as 49 U.S.C. § 1378 (1982)).

<sup>16</sup> Pub. L. No. 98-443, § 3(c) (codified at 49 U.S.C. § 1551(a)(7) (1988)). The Antitrust Division objected to the approval of two mergers, Trans World Airlines/Ozark and Northwest/Republic, which would have created a monopoly over the nonstop service between the respective hub cities and surrounding smaller cities. Testimony of Klein, *supra* note 4, at 13–14.

<sup>17</sup> See *Brown Shoe Co.*, 370 U.S. at 306–09.

<sup>18</sup> *Id.* at 324.

tion.<sup>19</sup> The DOJ and FTC worked to promulgate the Horizontal Merger Guidelines (Merger Guidelines) to provide guidance to “the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies’ enforcement decisions.”<sup>20</sup> The DOJ and FTC sought to avoid unnecessary interference with mergers that might benefit competition or at least have no effect on competition.<sup>21</sup> They focused on pinpointing the creation or enhancement of market power through a merger.<sup>22</sup>

The DOJ has not promulgated a merger policy specific to the airline industry or any one industry in particular.<sup>23</sup> Rather, the Merger Guidelines provide flexibility for the Antitrust Division to assess a wide variety of mergers.<sup>24</sup> The Merger Guidelines provide techniques to predict the prospective effects a merger may have on competition and the ways the agencies define the relevant markets.<sup>25</sup> They seek to assess whether the merger would “increase market power” of the newly merged company and if the merger would allow the newly merged company “unilaterally to raise price[s] or otherwise exercise market power” in ways that negatively affect competition.<sup>26</sup>

Once the relevant product and geographic markets are determined, the Antitrust Division considers a variety of factors that allows it to predict the likely competitive effects of a merger and

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<sup>19</sup> Act of Dec. 21, 2000, Pub. L. No. 106-553, § 1(a)(2), 114 Stat. 2762, 15 U.S.C. § 18a(a)–(b) (2000) (requiring mergers of a certain size to pre-notify the governing enforcement agency before the merge occurs). The proposed merger cannot occur until the expiration of a thirty-day waiting period after the pre-notification, when the agency completes a review of the merger to decide whether to allow it or challenge it, or by a waiver of the agency. *See id.*; COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, *supra* note 8, at 1, 3.

<sup>20</sup> FED. TRADE COMM’N & DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES, at 1 (2010) [hereinafter HORIZONTAL MERGER GUIDELINES 2010].

<sup>21</sup> COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, *supra* note 8, at 1.

<sup>22</sup> *Id.*

<sup>23</sup> J. Bruce McDonald, DEP’T OF JUSTICE ANTITRUST DIV., ANTITRUST FOR AIRLINES 2 (2005) (speaking to the leaders of the Regional Airline Association about the effects of airline bankruptcies, high fuel prices, and other problems in the airline industry).

<sup>24</sup> *See* HORIZONTAL MERGER GUIDELINES 2010, *supra* note 20, at 1–2.

<sup>25</sup> COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, *supra* note 8, at 2.

<sup>26</sup> *Id.* at 3; HORIZONTAL MERGER GUIDELINES 2010, *supra* note 20, at 2 (“A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In evaluating how a merger will likely change a firm’s behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.”).

any indications the merger may lessen competition.<sup>27</sup> The gathered evidence allows the Antitrust Division to analyze the merger's potential effect on the relevant market as well as "potential adverse competitive effects," entry barriers, "efficiencies," and "failing and exiting assets."<sup>28</sup> The Antitrust Division, however, does not apply the Guidelines in a sequential progression starting with market definition and ending with failing assets.<sup>29</sup> Rather, the Merger Guidelines provide an integrated approach, which allows the Antitrust Division to include relevant pieces of evidence depending on the circumstance of the merge.<sup>30</sup>

One of the indications used to determine the potential competitive effects is the Herfindahl-Hirschman Index (HHI), which determines the market concentration and the potential competitive effects on the post-merger market.<sup>31</sup> The HHI informs agencies of the likelihood the Antitrust Division will challenge a proposed merger.<sup>32</sup> The HHI is calculated by adding the squared market share of each competitor in the market.<sup>33</sup> Based on a scale from 0 to 10,000 (in the case of a pure monopoly), unconcentrated markets have an HHI below 1,500, moderately concentrated markets have an HHI between 1,500 and 2,500, and highly concentrated markets have an HHI above 2,500.<sup>34</sup> The post-merger concentration is measured by multiplying the market share of the merging companies and then multiplying the result by two.<sup>35</sup> Small changes in concentration—increase in the HHI less than 100 points—are unlikely to have adverse competitive effects and will probably not be challenged.<sup>36</sup> Moderately and highly concentrated markets—increase in the HHI of more than 100 points—"potentially raise significant competitive concerns" and may get a second request for review if between

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<sup>27</sup> The evidence, drawn from the "Merging Parties," "Customers," and "Other Industry Participants," includes the "Actual Effects Observed in Consummated Mergers," "Direct Comparisons Based on Experience," "Market Shares and Concentration in a Relevant Market," "Substantial Head-to-Head Competition," and the "Disruptive Role of a Merging Party." HORIZONTAL MERGER GUIDELINES 2010, *supra* note 20, at 2–5.

<sup>28</sup> COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, *supra* note 8, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The HHI also helps determine the market concentration of pre- and post-merger markets. HORIZONTAL MERGER GUIDELINES 2010, *supra* note 20, at 18–19.

<sup>32</sup> *Id.* at 19.

<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.* at 18 n.9, 19.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.*

100 and 200 points, while increases above 200 points have a presumption of a second request.<sup>37</sup> “The higher the post-merger HHI and the increase in the HHI,” the more potential competitive concerns will arise and the more likely the Agencies will challenge a proposed merge.<sup>38</sup> The way the Agencies define the relevant market provides the foundation for determining if a merge will be challenged.<sup>39</sup>

### III. THE EVOLVING ASSESSMENT OF THE RELEVANT MARKET IN AIRLINE MERGER ANALYSIS

The Merger Guidelines provide the flexibility necessary to allow for a case-by-case, fact-specific analysis.<sup>40</sup> Altering how the relevant market is defined changes the analysis regarding whether the DOJ will challenge an airline merge and how the airlines can settle with the DOJ. The Antitrust Division has used different ways to define the relevant product and geographic markets, including city-pairs, code-sharing agreements, and runway slot allocations.

#### A. CITY-PAIRS AND CODE-SHARING AGREEMENTS

“City-pairs” are defined as airline services between departure cities and arrival cities.<sup>41</sup> City-pairs incorporate multiple airports in a large metropolitan area into a single destination.<sup>42</sup> The Antitrust Division uses the city-pair approach to define the relevant geographic market.<sup>43</sup> Its rationale is that airline passengers have predetermined destinations in mind when booking flights and few passengers would fly to a different city than their desired destination in response to a price increase.<sup>44</sup> Code-share agreements allow airlines to extend their own networks by using flights operated by different airlines, increasing the city-pairs

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 18.

<sup>40</sup> COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, *supra* note 8, at 3.

<sup>41</sup> Amended Complaint at para. 26, *United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236-CKK, 2013 WL 5411082 (D.D.C. Sept. 5, 2013) [hereinafter *US Airways Amended Complaint*]. For example, departing from Dallas and arriving in Chicago makes up the Dallas–Chicago city-pair. *See id.*

<sup>42</sup> Jan K. Brueckner et al., *Airline Competition and Domestic US Airfares: A Comprehensive Reappraisal*, ECONS. TRANSP., Mar. 2013, at 1, 2.

<sup>43</sup> *See* Amended Complaint at para. 26, *United States v. Nw. Airlines Corp.*, No. 98-74611 (E.D. Mich. Dec. 18, 1998) [hereinafter *Northwest/Continental Complaint*].

<sup>44</sup> *US Airways Amended Complaint*, *supra* note 41, at para. 26.

that they can serve.<sup>45</sup> The code-share agreements permit an airline to market and sell seats on flights operated by another airline.<sup>46</sup> The benefit of code sharing lies in the ability for airlines to “strengthen or expand their market presence and competitive ability.”<sup>47</sup> This expansion of city-pairs affects the relevant geographic markets as well as potential competitive effects.<sup>48</sup>

## B. RUNWAY SLOTS

The Antitrust Division has also used runway slots to define the relevant market.<sup>49</sup> The Federal Aviation Administration (FAA) regulates the allocation of runway slots at certain airports to limit the number of flights going in and out.<sup>50</sup> The FAA uses take-off and landing slots as a way to manage air traffic at highly congested airports “and to prevent repeated delays that result from too many flights trying to take off or land at the same time.”<sup>51</sup> The FAA categorizes airports based on the degree of congestion and potential for delays; the higher degree of con-

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<sup>45</sup> *Code Sharing*, U.S. DEP’T OF TRANSP. (Feb. 10, 2015), <https://www.transportation.gov/policy/aviation-policy/licensing/code-sharing> [<https://perma.cc/22S7-6CZD>].

<sup>46</sup> Complaint at 2, *United States v. Alaska Air Grp., Inc.*, No. 1:16-cv-02377 (D.D.C. Dec. 06, 2016) [hereinafter *Alaska Airlines–Virgin Airlines Complaint*]. For example, a code-sharing agreement between Alaska Airlines and American Airlines allows a passenger flying from Walla Walla, Washington to Charlotte, North Carolina to book their ticket entirely through Alaska and fly on an Alaska flight on the first connection and an American flight on the final connection. *See id.* at 16.

<sup>47</sup> *Code Sharing*, *supra* note 45. The DOT will consider the competitive impact a code sharing agreement will have, but this only occurs prior to the agreement going into effect. *See id.*

<sup>48</sup> *See Alaska Airlines–Virgin Airlines Complaint*, *supra* note 46, at 10–11.

<sup>49</sup> The runway slots “constitute a line of commerce, section of the country, and relevant market within the meaning of Section 7 of the Clayton Act.” US Airways Amended Complaint, *supra* note 41, at para. 31.

<sup>50</sup> A runway slot is the ability to take off or land “at a particular airport on a particular day during a specified time period.” *Slot Administration – Slot Definition*, FED. AVIATION ADMIN., [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/slot\\_administration/slot\\_definition/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/slot_administration/slot_definition/) [<https://perma.cc/48ES-APZA>] (last modified May 30, 2018). Slot administration is divided into two seasons each year—Winter and Summer. *Slot Administration – Slot Allocation Process*, FED. AVIATION ADMIN., [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/slot\\_administration/slot\\_allocation\\_process/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/slot_administration/slot_allocation_process/) [<https://perma.cc/RN56-MD94>] (last modified June 11, 2018).

<sup>51</sup> *Slot Administration – Slot Definition*, *supra* note 50.



gestion and potential for delays, the more oversight the FAA imposes on the airport.<sup>52</sup>

The FAA classifies a substantial majority of airports as Level 1 airports.<sup>53</sup> Level 1 airports do not require slot control or a schedule facilitator because they can manage their own flight volume.<sup>54</sup> In contrast, the FAA classifies the three most congested airports in the country—John F. Kennedy International Airport (JFK), LaGuardia Airport (LGA) in New York, and Ronald Reagan National Airport (Reagan National) in Virginia—as Level 3 airports,<sup>55</sup> where it controls the allocation of runway slots.<sup>56</sup> The FAA allocates more slots to airlines who have historically held slots at the airports, creating a barrier for new airlines to enter the slot regulated airport.<sup>57</sup>

In addition, the FAA has listed four other airports—Chicago O’Hare International Airport (ORD), Los Angeles International Airport (LAX), San Francisco International Airport (SFO), and Newark Liberty International Airport (Newark Airport)—as

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<sup>52</sup> The three categories include: Level 1, which indicates that the airport has a general ability to meet demand with no extensive pattern of delays; Level 2, which indicates that the airport has certain periods of the day with the potential for congestion and may require a schedule facilitator to ensure the scheduling is within the airport’s capacity; and Level 3, which indicates that the airport’s infrastructure cannot meet demand, will not be able to be improved to meet the demand, and requires that the airport be subjected to slot controls to prevent the significant possibility of delays. *Slot Administration – Schedule Facilitation*, FED. AVIATION ADMIN., [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/slot\\_administration/slot\\_administration\\_schedule\\_facilitation/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/slot_administration/slot_administration_schedule_facilitation/) [<https://perma.cc/34UJ-ZAXL>] (last modified June 11, 2018).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Slot Administration – U.S. Level 3 Airports*, FED. AVIATION ADMIN., [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/slot\\_administration/slot\\_administration\\_schedule\\_facilitation/level-3-airports/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/slot_administration/slot_administration_schedule_facilitation/level-3-airports/) [<https://perma.cc/8YK2-5SMS>]. FAA imposed slot control on JFK from 1968 to 2007. Congress terminated the constraints at JFK on January 1, 2007. After the phase-out, the significant increase of operations caused significant congestion and delays that negatively reverberated through the entire domestic air traffic. In January 2008, a year after lifting the slot constraints, FAA re-imposed slot limits on JFK. Operating Limitations at John F. Kennedy International Airport, 81 Fed. Reg. 40167 (May 24, 2016) (to be codified at 14 C.F.R. pt. 93). LGA slot controls also expired on January 1, 2007, and were subsequently re-imposed December 2008. Operating Limitations at New York LaGuardia Airport, 81 Fed. Reg. 33126 (May 25, 2016) (to be codified at 14 C.F.R. pt. 93).

<sup>56</sup> *Slot Administration – Schedule Facilitation*, *supra* note 52.

<sup>57</sup> *Slot Administration – U.S. Level 3 Airports*, *supra* note 55. The first step for the FAA to allocate Level 3 slots is for it to assess the historic slot data. *Id.*

Level 2 airports.<sup>58</sup> For this level, the airport and the FAA schedule facilitator work together to ensure the airline carriers collaborate and mutually agree on the schedules and potential limitations.<sup>59</sup> Rather than first focusing on historic slot data, airline carriers at Level 2 airports provide a proposed schedule to the FAA, which allows the carriers to remove potential flights if they do not intend to operate in the next season.<sup>60</sup>

For the past thirteen years, the DOT has tracked a variety of airport statistics for over 816 domestic airports.<sup>61</sup> The department tracks the number of passengers arriving and departing from the airports, the scheduled flights and the carrier shares of passengers, and on-time performance summaries for the time period selected.<sup>62</sup> This data allows conclusions to be drawn about the current status of the airports, whether to increase the classification levels of airports, and the ramifications after a merger occurs.

When the FAA temporarily removed its long-standing slot control over JFK and LGA between 2007 and 2008, the airline carriers over-scheduled flights in and out of the New York City airports to a point that it overwhelmed the capacity in the airports that serve as a pass-through for nearly one third of the air

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<sup>58</sup> *Slot Administration – U.S. Level 2 Airports*, FED. AVIATION ADMIN., [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/slot\\_administration/slot\\_administration\\_schedule\\_facilitation/level-2-airports/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/slot_administration/slot_administration_schedule_facilitation/level-2-airports/) [<https://perma.cc/RZP5-KZ9X>]. The FAA lowered Newark Airport's classification from Level 3 to Level 2 on October 30, 2016. Newark Airport was classified as a Level 3 airport in May 2008 in response to potential spillover delays caused by the limitation of JFK airport during the summer season. *FAA Announces Slot Changes at Newark Liberty International*, FED. AVIATION ADMIN., <https://www.faa.gov/news/updates/?newsId=85309> [<https://perma.cc/QF5T-RENF>] (last modified Apr. 1, 2016).

<sup>59</sup> The presence of a schedule facilitator has the effect of a carrot-stick approach: voluntarily cooperate to minimize delays by agreeing on schedules or have the FAA trigger Level 3 controls. If the carriers refuse to cooperate with the FAA by failing to seek and obtain schedule approval under the Level 2 process, the carrier will not receive priority for historic slots if the airport subsequently gains a Level 3 characterization. *Slot Administration – U.S. Level 2 Airports*, *supra* note 58.

<sup>60</sup> *Id.*

<sup>61</sup> See *Airport Statistics*, BUREAU OF TRANSP. STATISTICS, DEP'T OF TRANSP., <https://www.transtats.bts.gov/NewAirportList.asp?xpage=airports.asp&flag=FACTS> [<https://perma.cc/DAS7-BXK8>].

<sup>62</sup> *About BTS*, BUREAU OF TRANSP. STATISTICS, DEP'T OF TRANSP., <https://www.bts.dot.gov/about-BTS> [<https://perma.cc/YK46-LP6S>] (last updated July 25, 2018).

traffic in the United States.<sup>63</sup> JFK increased its scheduled departures by 21% in 2007.<sup>64</sup> The 2007 percentages for JFK, LGA, and Newark Airport averaged 71.5% on-time departures, 62% on-time arrivals, and 3.46% cancellations in comparison to the national averages of 76.5%, 73.4%, and 2.16%.<sup>65</sup> After the FAA stepped back in and re-imposed its control of the runway slots, the New York airports' on-time percentages increased.<sup>66</sup> However, when the FAA downgraded Newark Airport from a Level 3 to a Level 2 and gave more control to Newark Airport's airline carriers, the on-time percentages began to decrease.<sup>67</sup> Capacity issues within airports cause the FAA to subject the airports to greater oversight, which, in turn, alters the way the Antitrust Division defines the relevant market.<sup>68</sup>

### C. CITY-PAIR BASED APPROACH TO DEFINE THE RELEVANT MARKET

Prior to the US Airways and American Airlines merger in 2013, the Antitrust Division defined the geographic markets pri-

<sup>63</sup> LIYA WANG ET AL., ANALYSIS OF AIR TRANSPORTATION FOR THE NEW YORK METROPLEX: SUMMER 2007, at 1 (2008), [http://catsr.ite.gmu.edu/pubs/Wangetal\\_ICRAT\\_v8.pdf](http://catsr.ite.gmu.edu/pubs/Wangetal_ICRAT_v8.pdf) [<https://perma.cc/EB9B-EPAE>]; see *supra* note 55 and accompanying text.

<sup>64</sup> *Airport Statistics*, BUREAU OF TRANSP. STATS., DEP'T OF TRANSP., <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/YLU3-RJH9>] (last updated Sept. 15, 2018) (viewing New York, NY: John F. Kennedy International Airport (JFK) statistics from December 2007).

<sup>65</sup> WANG ET AL., *supra* note 63, at 1. As of September 2018, the current on-time national percentages are 80.7% departures, 80.12% arrivals, and 1.95% cancellations. *On-Time Performance – Flight Delays at a Glance*, BUREAU OF TRANSP. STATS., DEP'T OF TRANSP., <https://www.transtats.bts.gov/HomeDrillChart.asp> [<https://perma.cc/4A72-JYWQ>].

<sup>66</sup> *On-Time Performance – Flight Delays at a Glance*, *supra* note 65 (averaging the 2017 on-time percentages of arrivals, departures, and cancellations).

Table 1

	Arrivals	Departures	Cancellation
JFK	72.80%	75.64%	2.20%
LGA	72.05%	75.80%	3.23%
Newark (2017)	67.74%	73.42%	2.57%
<b>2017 Average</b>	<b>71.35%</b>	<b>74.95%</b>	<b>2.67%</b>

<sup>67</sup> Newark Airport's on-time arrival percentage for 2015, the last full year of its Level 3 classification, was 9.01% better than it was in 2017. *Id.* (viewing Newark, NJ: Newark Liberty International statistics from 2015 and 2017).

<sup>68</sup> See US Airways Amended Complaint, *supra* note 41, at para. 84.

marily using the city-pair approach.<sup>69</sup> The nonstop service to each of the city-pairs defined the product market.<sup>70</sup>

1. *1993 US Air/British Airways Merger*

In 1993, the Antitrust Division challenged the proposed code-sharing agreement between USAir and British Airways on its United States to London routes.<sup>71</sup> The Antitrust Division found the relevant geographic market to be the city-pairs of U.S. cities with nonstop service to London.<sup>72</sup> Additionally, it defined the relevant product market as “nonstop scheduled airline passenger service” between the American cities and London due to nonstop service being “faster and more reliable” than connecting service.<sup>73</sup> Bilateral agreements between the United States and the United Kingdom regulated the cities that could be gateway cities between the countries.<sup>74</sup> Per the international agreements, only gateway cities could have nonstop services.<sup>75</sup> The agreements placed an artificial limitation on the capacity of flights between select cities in the United States and the United Kingdom.<sup>76</sup> USAir and British Airlines were the only airlines that could provide nonstop service on the Philadelphia–London route and were two out of three airlines that could provide nonstop service on the Baltimore/Washington–London route.<sup>77</sup> According to the DOJ, the proposed cooperation agreement on the U.S.–London routes would lessen competition by creating a disincentive to compete against one another on those routes in order to protect each other’s profits and traffic along the

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<sup>69</sup> *Impact of Consolidation on the Aviation Industry, with a Focus on the Proposed Merger Between Delta Air Lines and Northwest Airlines*, Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure, 110th Cong. 29 (2008) (James J. O’Connell explaining how the Antitrust Division evaluates the potential competitive effects of airline mergers).

<sup>70</sup> Testimony of Klein, *supra* note 4, at 14–15 (explaining how some airlines service city-pairs on a nonstop basis and others on a connecting basis, which some passengers will not entertain as a reasonable alternative to nonstop service).

<sup>71</sup> Complaint at para. 16, *United States v. USAir Grp., Inc.*, No. 93-0530 (D.D.C. Mar. 15, 1993) [hereinafter *US Air–British Airlines Complaint*].

<sup>72</sup> *Id.* at para. 6 (concluding one-stop or connecting airline service fails to be a substitute for nonstop service when passengers highly value their time).

<sup>73</sup> *Id.* Connecting service is where passengers must stop or change planes at an intermediate point. *Id.*

<sup>74</sup> *Id.* at para. 9.

<sup>75</sup> *Id.* The U.S. gateway cities included Philadelphia, Baltimore/Washington, and Charlotte. *Id.* at para. 11.

<sup>76</sup> *Id.* at para. 18.

<sup>77</sup> *Id.* at para. 13.

routes.<sup>78</sup> Subsequently, USAir was ordered to divest each U.S.–London route.<sup>79</sup>

## 2. 1998 Northwest Airlines/Continental Airlines Merger

The Antitrust Division challenged the merger of Northwest Airlines and Continental Airlines in 1998.<sup>80</sup> Before the proposed merger, Northwest Airlines was the fourth largest airline in the United States and Continental was the fifth largest.<sup>81</sup> The airlines were each other's most significant competitor, with stiff competition related to prices and offered services.<sup>82</sup> The airlines competed vigorously along "hub-to-hub" routes and markets that serve as connecting flights.<sup>83</sup> The DOJ's complaint asserted that the merger would disincentivize both airlines from competing against each other and would deter Continental from expanding in Cleveland.<sup>84</sup> The merger proposed ceding a majority of Continental's voting rights to Northwest, creating an interlocking board of directors who would work for the benefit of both airlines, and sharing the profits.<sup>85</sup> In addition to merging the voting rights and board of directors, the airlines entered into a code-sharing agreement that provided for the joint marketing of each other's services.<sup>86</sup>

The DOJ argued that the relevant markets consisted of non-stop routes between hub-to-hub city-pairs.<sup>87</sup> If the merger occurred, it alleged that Northwest and Continental would

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<sup>78</sup> *Id.* at para. 17. The Antitrust Division proposed USAir divest the authority to provide nonstop service between select U.S. cities and London.

<sup>79</sup> Final Judgment at 4, *United States v. USAir Grp., Inc.*, No. 93-0530 (D.D.C. Sept. 30, 1993).

<sup>80</sup> The merger plan was to turn over a majority of Continental's voting rights to Northwest, creating a profit-sharing system. There would also be a joint board of directors aiming to benefit both airlines. *See generally* Northwest/Continental Complaint, *supra* note 43, at paras. 4, 16, 21–22.

<sup>81</sup> *Id.* at para. 1.

<sup>82</sup> *Id.* at para. 3.

<sup>83</sup> The Antitrust Division had concerns about seven hub-to-hub routes that served over 3.6 million passengers per year: Detroit, Memphis, and Minneapolis for Northwest Airlines; and Cleveland, Houston, and Newark for Continental Airlines. *Id.* at para. 3.

<sup>84</sup> *Id.* at para. 4.

<sup>85</sup> *Id.* at paras. 21–22.

<sup>86</sup> *Id.* at para. 23. The complaint noted that these agreements, called "Alliance Agreements," were common among airlines that sought to extend their networks into and beyond their current capacity. This situation differed from usual business because the alliance partners, Northwest and Continental, had substantial equity ownership in each other. *Id.*

<sup>87</sup> *Id.* at para. 31.

overwhelmingly dominate nonstop service to the seven hub-to-hub city-pairs.<sup>88</sup> Of the seven hub-to-hub nonstop city-pairs, the government alleged that the merged airline would not only control the nonstop service on five of the routes but also form monopolies on two other routes.<sup>89</sup> According to the DOJ, barriers to entry would exist because entering airlines lacked the cost advantages of the established airlines and would face steep costs to enter the market.<sup>90</sup> In addition to increased costs, entering airlines would have difficulty obtaining gates at the monopolized airports and may not be able to offer the travel incentives provided by the established airlines, such as expanding service at the hubs or frequent flyer programs.<sup>91</sup> Northwest Airlines and Continental Airlines ultimately settled with the DOJ for Continental to buy back 6.7 million common shares, terminating Northwest's ability to influence Continental's operations.<sup>92</sup>

<sup>88</sup> *Id.* An estimated four million passengers would have been affected by the merge. *Id.* at para. 33.

<sup>89</sup> On certain routes, the combined airline would have had a monopoly over nonstop flights. *Id.* at para. 31.

Table Two

Route	NW Share of Nonstop Flights	CO Share of Nonstop Flights	Combined NW & CO Share of Nonstop Flights
Detroit–Cleveland	54%	40%	94%
Detroit–New York	70%	17%	87%
Detroit–Houston	36%	64%	100%
Cleveland–Minneapolis	53%	47%	100%
Minneapolis–New York	80%	20%	100%
Houston–Minneapolis	42%	58%	100%
Houston–Memphis	39%	61%	100%

<sup>90</sup> These entry costs include the cost to build competing hubs in the same city, which requires significant time and investment. *Id.* at para. 34.

<sup>91</sup> *Id.* at para. 35. For an example of monopolization and attempts by an incumbent airline at a hub to prevent new entries into their established market, see *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1144 (D. Kan. 2001). American Airlines was charged with violating Section 2 of the Sherman Act for attempting to monopolize Dallas–Fort Worth International Airport (DFW) by preventing new entries. *Id.* at 1145–46.

<sup>92</sup> The acting assistant attorney general for the Antitrust Division stated the settlement “will ensure that Northwest and Continental remain independent competitors.” *Northwest to Sell Stake*, CNN MONEY (Nov. 6, 2000), [https://money.cnn.com/2000/11/06/deals/airlines\\_continental/index.htm](https://money.cnn.com/2000/11/06/deals/airlines_continental/index.htm) [https://perma.cc/4AUF-ZTRA].

#### D. AIRPORT-BASED APPROACHES TO THE RELEVANT MARKET

The airline industry underwent significant consolidation between 2005 and 2015.<sup>93</sup> In that time, the number of major airlines reduced from more than ten airlines to only five.<sup>94</sup> This mass consolidation led the Antitrust Division to alter its approach to analyzing proposed mergers. The Antitrust Division began assessing airports when defining the relevant product and geographic markets.<sup>95</sup>

##### 1. Proposed 2013 American Airlines–US Airways Merger

The proposed merger between American Airlines and US Airways had the potential to create the world's largest airline.<sup>96</sup> The merger would also reduce the major domestic airlines from five to four, which would handle eighty percent of domestic scheduled passenger service.<sup>97</sup> As a result, on August 13, 2013, the Antitrust Division challenged the proposed merger.<sup>98</sup> For the first time, the Antitrust Division factored individual airports into its definition of the relevant market.<sup>99</sup> It asserted that the proposed merger constituted two relevant markets: one based on

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<sup>93</sup> See Brian Bostick, *Timeline: Major U.S. Airline Merger Activity, 1950-2015*, AVIATION WK. NETWORK (Feb. 17, 2015), <http://aviationweek.com/blog/timeline-major-us-airline-merger-activity-1950-2015> [<http://perma.cc/CWZ8-SD8E>].

<sup>94</sup> *Airline Mergers Since 2000*, WASH. POST (Nov. 12, 2013), <https://www.washingtonpost.com/apps/g/page/business/airline-mergers-since-2000/398/> [<https://perma.cc/L3YA-GMMJ>].

<sup>95</sup> US Airways Amended Complaint, *supra* note 41, at paras. 26, 29, 31; Complaint at paras. 30, 32, *United States v. United Cont'l Holdings, Inc.*, No. 2:33-av-00001 (D.N.J. Nov. 10, 2015) [hereinafter *United–Delta Complaint*]; *Alaska Airlines–Virgin Airlines Complaint*, *supra* note 46, at paras. 28–29.

<sup>96</sup> US Airways Amended Complaint, *supra* note 41, at paras. 1, 77.

<sup>97</sup> *Id.* at para. 36. After the merger, the combined airline would serve millions of customers and have 6,700 daily flights, 1,500 airplanes, and over 100,000 employees. Jad Mouawad, *Merger of American and US Airways is Waved Ahead*, N.Y. TIMES (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/business/airlines-clear-final-merger-obstacle.html> (last visited Nov. 5, 2018).

<sup>98</sup> Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines (Aug. 13, 2013), <https://www.justice.gov/opa/pr/justice-department-files-anti-trust-lawsuit-challenging-proposed-merger-between-us-airways-and> [<https://perma.cc/5VBW-Q6DT>] (“This transaction would result in consumers paying the price—in higher airfares, higher fees and fewer choices. Today’s action proves our determination to fight for the best interests of consumers by ensuring robust competition in the marketplace.”).

<sup>99</sup> US Airways Amended Complaint, *supra* note 41, at 31.

city-pairs and the other based on takeoff and landing slots at a particular airport.<sup>100</sup>

For the city-pair relevant market approach, the Antitrust Division asserted that the domestic scheduled air passenger service constituted the relevant product market because consumers could not substitute the time savings and convenience of airline travel for other forms of travel.<sup>101</sup> The product market definition departed from its prior focus on the convenience of non-stop service between city-pairs.<sup>102</sup> The Antitrust Division considered nonstop air service to particular airports within cities in its discussion of the relevant geographic market.<sup>103</sup> It not only asserted that the relevant geographic market consisted of city-pairs but also considered individual airports within the city-pairs as a factor into the relevant market.<sup>104</sup> The Antitrust Division alleged the merger would create highly concentrated, presumptively anticompetitive markets in 1,000 city-pairs in which American Airlines and US Airways competed head-to-head for customers.<sup>105</sup> It also alleged that the concentration of the markets would probably lead to an increased likelihood of price raising, output reductions, and diminished quality of the services.<sup>106</sup>

The Antitrust Division, however, deviated from its normal assessment of the relevant market by also defining it as the takeoff and landing slots at Reagan National.<sup>107</sup> It alleged that the run-

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<sup>100</sup> *Id.* at paras. 28, 31.

<sup>101</sup> “[A] flight from Washington, D.C., to Detroit takes just over an hour of flight time. Driving between the two cities takes at least eight hours. A train between the two cities takes more than fifteen hours.” *Id.* at paras. 24–25 (relying on the theory that a “hypothetical monopolist of all domestic scheduled air passenger service likely would increase its prices by at least a small but significant and non-transitory amount”).

<sup>102</sup> Compare US Airways Amended Complaint, *supra* note 41, at para. 25, with Northwest/Continental Complaint, *supra* note 43, at para. 25.

<sup>103</sup> US Airways Amended Complaint, *supra* note 41, at para. 26.

<sup>104</sup> “Some passengers prefer nonstop service because it saves travel time; . . . others prefer service at a particular airport within a metropolitan area. For example, most business customers traveling to and from downtown Washington prefer service at Reagan National over other airports in the Washington, D.C.[,] metropolitan area.” *Id.* at para. 29.

<sup>105</sup> In over 1,000 city-markets, “the post-merger HHI would exceed 2,500 points and the merger would increase the HHI by more than 200 points.” *Id.* at para. 38. The Antitrust Division calculated the HHI based on publicly available nonstop and one-stop ticket revenues for 2012 from the DOT’s Airline Origin and Destination Survey database. See *id.* at App. A.

<sup>106</sup> *Id.* at para. 39.

<sup>107</sup> *Id.* at para. 28 (defining a city-pair as comprising of a flight’s departure and arrival cities). City-pairs, which include flights to all airports in and around rele-



way slots constituted both the relevant product and geographic market.<sup>108</sup> At airports with slot controls, there are no alternatives besides slot allocations for airlines to enter or expand their service.<sup>109</sup> The Antitrust Division's reasoning for Reagan National constituting the relevant geographic market highlighted its divergence from the traditional city-pair approach. It alleged that "[a]irlines do not view service at other [Washington, D.C.] airports as adequate substitutes for service offered at Reagan National for certain passengers."<sup>110</sup> It reasoned that consumer preferences for services provided by airlines and for particular airports within a city-pair could have an effect on competition even within the city-pair.<sup>111</sup> The Antitrust Division alleged consumers preferred Reagan National due to its proximity to Washington, D.C. and direct service via the Metro.<sup>112</sup>

The Antitrust Division honed in on this consumer preference for particular airports within metropolitan areas to alter its focus from city-pairs to city-airport pairs and the potential competitive effects a proposed merger would have on particular airports.<sup>113</sup> This shifted the relevant market analysis to an airport-related approach.<sup>114</sup> The Antitrust Division recognized airlines may not view services at other airports within a city-pair as adequate substitutes for services desired by certain passengers, just as consumers prefer nonstop service due to its time savings and convenience.<sup>115</sup> It argued the merger of the slots at Reagan National would cause a highly concentrated market and should be presumed to be anticompetitive.<sup>116</sup>

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vant cities, provide a broader approach than airport pairs to better account for competition by low-cost carriers at adjacent airports. *City Pairs*, FED. AVIATION ADMIN., <https://www.faa.gov/nextgen/snapshots/airportpairs/> [<https://perma.cc/D5YZ-KEGK>] (last modified Jan. 30, 2018); see, e.g., Jan K. Brueckner et al., *City-Pairs Versus Airport-Pairs: A Market-Definition Methodology for the Airline Industry*, 44 REV. INDUS. ORG., Jan. 1, 2013, at 10–11.

<sup>108</sup> US Airways Amended Complaint, *supra* note 41, at para. 31.

<sup>109</sup> "Slots are expensive (often valued at over \$2 million per slot), difficult to obtain, and only rarely change hands between airlines." *Id.* at para. 30; see also *Slot Administration – Schedule Facilitation*, *supra* note 52.

<sup>110</sup> US Airways Amended Complaint, *supra* note 41, at para. 31.

<sup>111</sup> *Id.* at para. 29.

<sup>112</sup> *Id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at paras. 9, 31.

<sup>115</sup> This distinguishes the airports in the same area from each other. *Id.* at paras. 24, 29.

<sup>116</sup> The Antitrust Division calculated the post-market HHI to be 4,959 points, an increase in concentration of 1,493 points. *Id.* at para. 40.

The Antitrust Division's merger analysis of the potential American Airlines/US Airways merge dove outside the world of hypotheticals and analyzed the actual ramifications of past mergers and their effect on growth and services, including the 2005 America West/US Airways merge, the 2008 Delta/Northwest Airlines merge, and the 2010 Southwest/SkyTran merge.<sup>117</sup> It declined to accept the merged airlines' arguments that reducing unused capacity by restricting growth or reducing established services would lead to more efficient uses of resources and lead to lower costs to consumers.<sup>118</sup> Rather, the Antitrust Division analyzed the data after previous mergers and argued that increased consolidation caused "fewer flights and higher fares."<sup>119</sup> It focused on statements by CEOs and CFOs of US Airways expressing their desire to reduce their capacity in order to increase their profits by reducing the number of airports and hubs served.<sup>120</sup>

To allow the merger and to proceed with the creation of the biggest airline in the United States, the Antitrust Division innovatively required US Airways and American Airlines to divest slots and gates at certain congested airports.<sup>121</sup> The divestment was intended to boost competition across the domestic airline industry by allowing low cost carrier airlines (LCCs) to provide more choices and more competitive ticket prices for consumers.<sup>122</sup> This agreement provided LCCs with newly created footholds at key airports.<sup>123</sup> The settlement agreement required significant divestiture or transfers of runway slots and gates at certain airports including 104 runway slots at Reagan National,

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<sup>117</sup> *Id.* at paras. 62–65.

<sup>118</sup> *Id.* at para. 59.

<sup>119</sup> *Id.*

<sup>120</sup> In 2007, US Airways's CEO explained that a 4% reduction in capacity will increase everyone's industry profits. Also, in 2010, the US Airways CFO stated, "We believe in the hub system. I just think there's too many hubs. If you look across the country, you can probably pick a few that are smaller hubs and maybe duplicative to other hubs that airlines have that they could probably get out of." *Id.* at para. 62.

<sup>121</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-Wide Competition and Settle Merger Challenge (Nov. 12, 2013), <https://www.justice.gov/opa/pr/justice-department-requires-us-airways-and-american-airlines-divest-facilities-seven-key> [<https://perma.cc/5J43-VGNZ>].

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* ("The extensive slot and gate divestitures at these key airports are groundbreaking[,] and they will dramatically enhance the ability of LCCs to compete system-wide.").

34 slots at LGA, and 2 gates at Boston Logan, ORD, Dallas Love Field, LAX, and Miami International.<sup>124</sup> The settlement agreement focused on access to airports rather than city-pairs and created a new approach to analysis of airline mergers.

2. *2015 United–Delta Acquisition of Runway Slots at Newark Airport*

The next major litigation against an airline under Section 7 of the Clayton Act centered on United Airlines’s attempt to purchase runway slots at Newark Airport, a Level 3 airport at the time, from Delta Airlines in 2015.<sup>125</sup> United attempted to purchase the slots under the veil of a permanent lease agreement.<sup>126</sup> When United proposed to acquire twenty-four slots from Delta, it controlled 902 of the 1,233 allocated slots at Newark Airport.<sup>127</sup> The Antitrust Division noted, “United’s slot holdings dwarf those of its competitors,” with the next largest competitor holding seventy slots.<sup>128</sup> Even with its dominant hold over the slots, United failed to utilize eighty-two slots per day, more than the slots controlled by its competitors.<sup>129</sup>

The Antitrust Division argued anticompetitive effects would occur in two relevant markets: (1) runway slots at Newark Airport, and (2) scheduled air service between Newark Airport and other cities.<sup>130</sup> In defining both of the relevant markets, the Antitrust Division declined to distinguish the relevant product mar-

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<sup>124</sup> The settlement barred the newly merged American Airlines–US Airways from reacquiring ownership in the divested or transferred slots and gates during the settlement term. *Id.*

<sup>125</sup> United–Delta Complaint, *supra* note 95, at para. 4; *FAA Announces Slot Changes at Newark Liberty International*, *supra* note 58.

<sup>126</sup> FAA rules prohibit the sale of Newark Airport runway slots. United and Delta tried to circumvent the prohibition by creating a long-term, automatically renewable lease. The Antitrust Division perceived this as an implied sale of the slot to United. United–Delta Complaint, *supra* note 95, at para. 7.

<sup>127</sup> United gained control of a substantial majority of slots when it merged with Continental in 2010. To alleviate the DOJ’s concerns, United divested thirty-six slots to Southwest Airlines and held Continental’s 894 slots. Since the merger, United sought to reverse the divestiture by attempting to acquire slots from other airlines, all of which the DOJ objected to—thirty-six slots from Southwest Airlines in 2010, eighteen slots from American in March 2015, and now twenty-four slots from Delta in June 2015. *Id.* at paras. 18–21.

<sup>128</sup> The third largest slot holder, Delta, held sixty-four slots, and LCCs Southwest and JetBlue held thirty-six and thirty-three slots respectively. *Id.* at para. 18.

<sup>129</sup> The Antitrust Division declined to accept United Airlines’s argument that it would use the new slots to “provide service to a handful of new destinations and add frequencies to existing routes.” *Id.* at paras. 23–24.

<sup>130</sup> *Id.* at para. 28.

ket from the relevant geographic market when it defined the relevant market, similar to its analysis concerning Reagan National's slots in the 2013 American/US Airways merger.<sup>131</sup> In accessing the relevant market with the slots, it alleged the slots create stiff entry barriers for airlines seeking to enter or expand service at Newark Airport since there are no alternatives to slots and the allocated slots are difficult to obtain and "rarely change hands."<sup>132</sup> Additionally, like in the 2013 American–US Airways complaint, the Antitrust Division considered the preference of airlines and consumer preference for services at Newark Airport when defining both relevant markets.<sup>133</sup> The Antitrust Division ultimately argued that the merger would result in increased barriers to entry and expansion, reduced service at Newark Airport, and increased fares, leaving passengers with fewer choices.<sup>134</sup>

Antitrust concerns over runway slot controls ceased on April 1, 2016, when the FAA announced its plans to lift slot controls at Newark Airport and reclassify it as a Level 2 airport.<sup>135</sup> United and Delta agreed to terminate their slot purchase agreement on April 5, 2016, causing the DOJ to drop its case against the merger.<sup>136</sup>

### 3. 2016 Alaska–Virgin Airlines Merger

The 2016 Alaskan Airlines and Virgin Airlines merger is the latest consolidation within the airline industry.<sup>137</sup> Alaska Airlines and Virgin Airlines—respectively, the sixth- and ninth-largest

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<sup>131</sup> *Id.* at paras. 31–32; *see also* US Airways Amended Complaint, *supra* note 41, at para. 31.

<sup>132</sup> United–Delta Complaint, *supra* note 95, at paras. 29, 39.

<sup>133</sup> "Airlines do not view service at other airports as reasonable substitutes for service offered at Newark, and thus they are unlikely to switch away from slots at Newark . . ." *Id.* at para. 30.

Newark is the most convenient airport for passengers traveling to or from locations in Northern New Jersey and portions of Manhattan. Many passengers who live or work in these areas have a strong preference for Newark over LaGuardia and JFK, do not consider those other airports to be meaningful alternatives . . .

*Id.* at para. 33.

<sup>134</sup> *Id.* at paras. 41, 43.

<sup>135</sup> FAA Announces Slot Changes at Newark Liberty International, *supra* note 58.

<sup>136</sup> Press Release, Dep't of Justice, United Airlines Abandons Attempt to Enhance its Monopoly at Newark Liberty International Airport, (Apr. 6, 2016), <https://www.justice.gov/opa/pr/united-airlines-abandons-attempt-enhance-its-monopoly-newark-liberty-international-airport> [<https://perma.cc/4B6S-HAZM>].

<sup>137</sup> *U.S. Airline Mergers and Acquisitions*, AIRLINES FOR AM., <http://airlines.org/dataset/u-s-airline-mergers-and-acquisitions/> [<https://perma.cc/T45C-ZCLS>].

airlines in the United States—sought to compete with the four largest airlines.<sup>138</sup> The merger would have allowed the combined airlines to become the fifth largest airline in the United States.<sup>139</sup> The Antitrust Division’s relevant market analysis followed its city-pair approach found in the 2013 American Airlines/US Airways merger: the relevant product market consisted of scheduled air passenger service, and the relevant geographic market consisted of city-pairs.<sup>140</sup>

The Antitrust Division held significant concerns regarding Alaska Airlines’s close relationship with American Airlines, who Virgin “aggressively competed with” on overlapping routes.<sup>141</sup> Alaska Airlines and American Airlines closely aligned themselves together through a code-sharing agreement, which was expanded during the Antitrust Division’s assessment of the merge.<sup>142</sup> The expanded code-sharing agreement enabled Alaska Airlines to market certain American Airlines flights on over 250 routes and enabled American Airlines to market certain Alaska Airlines flights on eighty routes.<sup>143</sup> The Antitrust Division alleged the code-sharing agreement incentivized Alaska Airlines and American Airlines to cooperate.<sup>144</sup> The Antitrust Division alleged the code-sharing agreement created a disincentive for Alaska Airlines to commence new services on routes served by American Airlines or, alternatively, to compete less aggressively on the shared routes.<sup>145</sup>

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<sup>138</sup> The major airlines—American Airlines, Delta Airlines, United Airlines, and Southwest Airlines—accounted for over 80% of domestic air travel. Alaska Airlines–Virgin Airlines Complaint, *supra* note 46, at para. 1.

<sup>139</sup> *Id.* at para. 1.

<sup>140</sup> *Id.* at paras. 29–30; US Airways Amended Complaint, *supra* note 41, at para. 25.

<sup>141</sup> Alaska Airlines–Virgin Airlines Complaint, *supra* 46, at paras. 3–4, 24.

<sup>142</sup> *Id.* at paras. 17–18.

<sup>143</sup> The initial code-sharing agreement, formed in 1999, only allowed Alaska Airlines to market American flights on eighty-eight routes. *Id.*

<sup>144</sup> Some of the routes within the code-sharing agreement overlapped, and both airlines offered competing nonstop services. The code-sharing agreement called for both airlines to sell each other’s tickets on the overlapping routes, providing the ability for the airlines to coordinate the offered services and facilitate collusion. *Id.* at paras. 19–20.

<sup>145</sup> The Antitrust Division argued the code-sharing agreement provides American Airlines with significant leverage over Alaska Airlines because Alaska Airlines “derives considerable value from using the American network to provide service throughout many areas of the United States it does not otherwise serve,” while American Airlines does not receive nearly as much value from the arrangement. *Id.* at para. 21.

At the same time the code-sharing agreements were expanded to include more overlapping routes, Virgin Airlines provided the “fiercest” competition against American Airlines on more than twenty nonstop routes, many of which were in cities that American maintains a hub.<sup>146</sup> The Antitrust Division found it “no coincidence” that Virgin Airlines aggressively competed with American Airlines.<sup>147</sup> Virgin Airlines received “essential and scarce assets” to counteract the anticompetitive effects posed by the 2013 American Airlines/US Airways merger.<sup>148</sup> Virgin Airlines gained “a host of critical assets,” including airport gates and take-off and landing rights at key airports like LAX, Dallas Love Field, and Reagan National as a result of the settlement agreement.<sup>149</sup> This stiff competition on these routes forced American Airlines to offer lower prices and provide better service.<sup>150</sup>

The Antitrust Division alleged the code-sharing agreement between Alaska Airlines and American Airlines would likely have an anticompetitive effect on the Virgin–American overlap routes.<sup>151</sup> It argued that new entry or expansion into the markets would be unlikely to remedy the anticompetitive effects.<sup>152</sup> It alleged that significant entry barriers to airports exist including “difficulty in obtaining access to slots and gate facilities” and

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<sup>146</sup> The twenty nonstop routes comprised approximately two-thirds of Virgin’s entire network. *Id.* at paras. 24–25.

<sup>147</sup> *Id.* at para. 26.

<sup>148</sup> Press Release, Dep’t of Justice, Justice Department Requires Alaska Airlines to Significantly Scale Back Codeshare Agreement with American Airlines in Order to Proceed with Virgin America Acquisition (December 6, 2016), <https://www.justice.gov/opa/pr/justice-department-requires-alaska-airlines-significantly-scale-back-codeshare-agreement> [<https://perma.cc/2LKG-W75B>] [hereinafter Justice Department Requires Alaska Airlines].

<sup>149</sup> Alaska Airlines–Virgin Airlines Complaint, *supra* note 46, at paras. 25–26.

<sup>150</sup> For example, Virgin Airlines’s acquisition of the two gates at Dallas Love Field allowed Virgin to aggressively compete with American Airlines and forced American to lower prices, sometimes by more than fifty percent. *Id.* at para. 26.

<sup>151</sup> The Antitrust Division alleged that if the merger is approved with the code-sharing agreement, Alaska would likely “reduce capacity, decrease service quality, and/or raise prices on these routes” and in some cases it “may completely stop serving the routes with its own flights, instead simply marketing American’s flights between the destinations.” *Id.* at para. 31.

<sup>152</sup> Additional entry barriers include “the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; an unknown brand; and the risk of aggressive responses to new entry by the dominant incumbent.” Competitive Impact Statement at 8, *United States v. Alaska Air Grp., Inc.*, No. 1:16-cv-02377 (D.D.C. Dec. 6, 2016) [hereinafter Competitive Impact Statement].

difficulty of the new entries “attracting sufficient local passengers to support service” at airports that serve as another airline’s hub.<sup>153</sup> To remedy the likely anticompetitive effects, Alaska Airlines and Virgin Airlines entered into a consent decree with the DOJ.<sup>154</sup> The consent decree required Alaska Airlines to drastically reduce its code-sharing with American Airlines to “ensure that [it] will have the incentive to vigorously compete with American.”<sup>155</sup> First, Alaska Airlines was barred from marketing American flights (or allowing American to market Alaska flights) on Virgin/American overlap routes.<sup>156</sup> It also barred Alaska Airlines from code-sharing on routes where Alaska would otherwise likely launch new services that would compete against American Airlines.<sup>157</sup> Moreover, the settlement agreement required Alaska Airlines to seek approval before selling or leasing any gates or slots that Virgin Airlines gained in the American Airlines–US Airways divestiture two years prior, and Alaska Airlines was also barred from selling or leasing any part of the divested slots or gates back to American Airlines.<sup>158</sup> With the consent decree, the DOJ allowed the merger of Virgin Airlines and Alaska Airlines to proceed.<sup>159</sup>

#### IV. CURRENT RELEVANT MARKET APPROACH LACKS THE ABILITY TO FULLY ASSESS A MERGER’S COMPETITIVE IMPACT

##### A. CITY-PAIRS DEFINE THE RELEVANT MARKET TOO BROADLY

The airline industry has changed drastically since the Deregulation Act. When deregulation occurred in 1978, 262 carriers ferried over 9 million passengers to 1,710 city-pair markets and transported over 320 million pounds of freight.<sup>160</sup> As of January 2018, 99 airline carriers ferried 743 million passengers on well

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<sup>153</sup> *Id.*

<sup>154</sup> Proposed Final Judgment at 1, *United States v. Alaska Air Grp., Inc.*, No. 1:16-cv-02377-RBW (D.D.C. Feb. 28, 2017) [hereinafter *Alaska–Virgin Consent Decree*].

<sup>155</sup> *Id.* at 5–6; Justice Department Requires Alaska Airlines, *supra* note 148.

<sup>156</sup> *Alaska–Virgin Consent Decree*, *supra* note 154, at 5–6.

<sup>157</sup> *See id.* The consent decree sought to reduce Alaska Airlines’s dependence on the code-sharing agreement and limit Alaska Airlines’s incentives to cooperate with American Airlines. Justice Department Requires Alaska Airlines, *supra* note 148.

<sup>158</sup> *Alaska–Virgin Consent Decree*, *supra* note 154, at 6.

<sup>159</sup> Justice Department Requires Alaska Airlines, *supra* note 148.

<sup>160</sup> *Commuter Air Carrier Traffic Statistics: 12 Months Ended June 30, 1978*, CIVIL AERONAUTICS BD., BUREAU OF OPERATING RIGHTS (June 30, 1980) at 1, <https://www.civilaeronautics.gov/traffic-statistics>

over 7,000 domestic markets.<sup>161</sup> However, of the ninety-nine air carriers, six airlines—American (18.3%), Southwest (18.2%), Delta (16.8%), United (14.9%), JetBlue (5.5%), and Alaska (4.8%)—control nearly 80% of the domestic passenger share.<sup>162</sup> Additionally, the rise of code-sharing agreements can lead to a consolidation of routes like those that the Antitrust Division held great concerns about in the 2016 Alaska Airlines/Virgin Airlines merger.<sup>163</sup>

Due to these changes in the airline industry, defining the relevant market solely based on the city-pair is no longer adequate on its own to define the relevant market. The 2013 American Airlines/US Airways merger analysis took a step in the correct direction in factoring consumer preference for particular airports in its city-pairs relevant market analysis.<sup>164</sup> The value that consumers place on their time and convenience influences their preference to travel to certain places within cities, rather than just the city in general.<sup>165</sup> The traditional city-pair approach to defining the relevant market captures an average of consumer preferences for traveling to a particular city; it does not capture those who seek to travel to specific airports within the cities.

Moreover, the city-pair approach fails to take account of LCCs' operation structures, which may have "focus cities" rather than a hub-and-spoke network.<sup>166</sup> The LCCs operate out of sec-

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babel.hathitrust.org/cgi/pt?id=mdp.39015024410295;view=1up;seq=1 (last visited Nov. 5, 2018).

<sup>161</sup> *Airline Activity: National Summary (U.S. Flights)*, BUREAU OF TRANSP. STATISTICS, DEP'T OF TRANSP., <https://www.transtats.bts.gov/> [<https://perma.cc/4FP7-2E84>]; *Fast Fact Sheet: City Pair Program (CPP) FY18 Contract Awards*, U.S. GEN. SERVS. ADMIN. (July 2017), [https://www.gsa.gov/cdnstatic/CPP\\_FY18\\_Fast\\_Facts.pdf](https://www.gsa.gov/cdnstatic/CPP_FY18_Fast_Facts.pdf) [<https://perma.cc/YC3H-YELY>] (describing a General Services Administration program that offers discounted air fares through eight airlines—United, American, Delta, Southwest, JetBlue, Hawaiian, Alaska, and Silver Airways—to 7,257 domestic markets).

<sup>162</sup> *Airline Domestic Market Share February 2017–January 2018*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/> [<https://perma.cc/7J9F-D3NV>].

<sup>163</sup> See Alaska Airlines–Virgin Airlines Complaint, *supra* note 46, at para. 31. For a list of code-sharing agreements in effect, see generally *Code Share Report*, DEP'T OF TRANSP. (Feb. 2018), [https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/9141/february-2018-code-share-report\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/9141/february-2018-code-share-report_0.pdf) [<https://perma.cc/TU5L-7JDM>].

<sup>164</sup> US Airways Amended Complaint, *supra* note 41, at para. 29.

<sup>165</sup> *Id.* at para. 25.

<sup>166</sup> Virgin Airlines has focus cities from which it furnishes nonstop services to many destinations. These focus cities are not used by Virgin to transfer large quantities of connecting traffic. Competitive Impact Statement, *supra* note 152, at 4.



ondary airports within large metropolitan areas, otherwise called “adjacent airports.”<sup>167</sup> In 2009, travel to or from thirty-seven airports—primary airports to selected metropolitan areas, adjacent airports, and fringe airports—accounted for two-thirds of all domestic passenger trips.<sup>168</sup> Examples of adjacent airports include Dallas Love Field,<sup>169</sup> Chicago Midway International,<sup>170</sup> Houston Hobby,<sup>171</sup> Oakland International,<sup>172</sup> Burbank Airport,<sup>173</sup> St. Petersburg Clearwater International,<sup>174</sup> and Washing-

<sup>167</sup> Brueckner et al., *Airline Competition and Domestic U.S. Airfares*, *supra* note 42, at 1.

<sup>168</sup> Brueckner et al., *City-Pairs Versus Airport-Pairs*, *supra* note 107, at 4.

Table Three

	Primary airport	other core airports	fringe airports
Boston	BOS	MHT, PVD	
Chicago	ORD	MDW	
Cincinnati	CVG	DAY	
Cleveland	CLE	CAK	
Dallas	DFW	DAL	
Detroit	DTW	FNT	
Houston	IAH	HOU	
Los Angeles	LAX	BUR, LGB	SNA, ONT
Miami	MIA	FLL	PBI
New York	LGA	EW, JFK	HNP, ISP
San Francisco	SFO	OAK, SJC	
Tampa	TPA	PIE	SRQ
Washington, DC	DCA	IAD, BWI	

<sup>169</sup> Adjacent to DFW, and Southwest Airlines controls 91.96% of the passenger share. *Dallas, TX: Dallas Love Field (DAL)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/NK6A-C6R5>].

<sup>170</sup> Adjacent to Chicago O’Hare, and Southwest Airlines controls 95.77% of the passenger share. *Chicago, IL: Chicago Midway International (MDW)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/5RVC-N7FR>].

<sup>171</sup> Adjacent to George Bush Intercontinental Airport, and Southwest Airlines controls 92.96% of the passenger share. *Houston, TX: William P Hobby (HOU)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/9NE8-EZSZ>].

<sup>172</sup> Adjacent to San Francisco International Airport, and Southwest Airlines controls 72.74% of the passenger share. *Oakland, CA: Metropolitan Oakland International (OAK)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/H4US-3JTV>].

<sup>173</sup> Adjacent to LAX, and Southwest Airlines controls 73.28% of the passenger share. *Burbank, CA: Bob Hope (BUR)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/2PPR-5SRC>].

ton International Thurgood Marshall.<sup>175</sup> The Antitrust Division, in its analysis of the 2013 American Airlines/US Airways relevant market, began considering consumer preferences for city-pairs but not to the level needed to capture the full picture.

The city-pair approach also fails to take into account the practices of merged airlines to reduce their capacity, subsequently reducing competition at certain airports and hubs.<sup>176</sup> The traditional method of defining the relevant market through city-pairs fails to consider the competitive effect the merger will actually have on airports. In the wake of previous mergers, airlines significantly cut back service and took down airline hubs.<sup>177</sup> From 2007 to 2012, major airlines reduced scheduled flights by up to 18%.<sup>178</sup> In contrast, the LCCs and Southwest Airlines increased their scheduled flights by 41%.<sup>179</sup> Post-merger downsizing has led to severe reductions in service to some airports, including a 63.1% decrease at Delta's Cincinnati hub, a 40.1% decrease at US Airways's Pittsburgh hub, and a 35.5% decrease at Northwest's Memphis hub.<sup>180</sup>

#### B. SLOT-CONTROL CAN RARELY BE USED TO DEFINE THE RELEVANT MARKETS

If the Antitrust Division limits itself to assessing only FAA-imposed capacity restraints to determine the anticompetitive effect

<sup>174</sup> Adjacent to Tampa International, and Allegiant Airlines controls 100% of the passenger share. *St. Petersburg, FL: St Pete Clearwater International (PIE)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/5F6Z-4YJF>].

<sup>175</sup> Adjacent to Reagan National, and Southwest Airlines controls 69.59% of the passenger share. *Baltimore, MD: Baltimore/Washington International Thurgood Marshall (BWI)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/TNX6-GRC7>].

<sup>176</sup> US Airways Amended Complaint, *supra* note 41, at para. 4.

<sup>177</sup> DIANA L. MOSS, AM. ANTITRUST INST., DELIVERING THE BENEFITS? EFFICIENCIES AND AIRLINE MERGERS 12 (2013), <https://poseidon01.ssrn.com/delivery.php?ID=916073065102100076110005011117092007031005031068030005011121065010111069127089125109050018100005055097010095121103091118073004055038014069012114119102025014118019036079067002008074025105064069019020113109067122029016121088069075017111090002067092005&EXT=pdf> [<https://perma.cc/J6EH-SZH3>].

<sup>178</sup> The major airlines are American, United, Alaska, US Airways, AirTran, and Delta. U.S. DEP'T OF TRANSP., OFFICE OF INSPECTOR GEN., *Aviation Industry Performance: A Review of the Aviation Industry, 2008–2011*, App. Fig. 23, at 28 (Sept. 24, 2012), <https://www.oig.dot.gov/sites/default/files/Aviation%20Industry%20Performance%5E9-24-12.pdf> [<https://perma.cc/2M37-4TAL>].

<sup>179</sup> The LCCs include Allegiant, Spirit, JetBlue, and Frontier. *Id.*

<sup>180</sup> *Id.* at 12.

of an airline merger, it will grossly limit the markets it can review. At the time the Antitrust Division completed its competitive assessment of United's attempt to buy Delta's runway slots at Newark Airport, the FAA controlled the amount flights in and out of Newark Airport by categorizing it as a Level 3 airport.<sup>181</sup> The FAA's capacity control regulations for Level 3, and even Level 2, airports create entry barriers for airlines to expand or enter the market.<sup>182</sup> However, the FAA regulates the capacity of only a miniscule number of airports in the United States: three at Level 3 and four at Level 2.<sup>183</sup> The airports for which the FAA imposes capacity regulations account for less than 1% of commercial airports in the United States.<sup>184</sup>

In the future, the number of airports whose capacity is regulated by the FAA may increase with the increased number of passengers flying within the United States. The International Air Transport Association projects that 7.8 billion people per year will use air travel by 2036, doubling from the 4 billion passengers that traveled by plane in 2017.<sup>185</sup> Passengers on U.S. flights increased nearly 3% in the span of one year, totaling approximately 743 million passengers.<sup>186</sup> While the Antitrust Division should include consumer preference for a particular airport to define the relevant market, it should apply a different analysis for airports whose capacity is not regulated by the FAA.

## V. A HYBRID AIRPORT-RELATED/CITY-PAIR ANALYSIS IN THE MODERN AGE

As the airline industry becomes more consolidated, the Antitrust Division will need to incorporate airports into the relevant market definition. The city-pair approach can continue to be used to define the relevant market, especially on the routes with only one airport within a city.<sup>187</sup> However, the Antitrust Division

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<sup>181</sup> *FAA Announces Slot Changes at Newark Liberty International*, *supra* note 58.

<sup>182</sup> *See Slot Administration – Schedule Facilitation*, *supra* note 52.

<sup>183</sup> *Slot Administration – U.S. Level 3 Airports*, *supra* note 55; *Slot Administration – U.S. Level 2 Airports*, *supra* note 58.

<sup>184</sup> Combined, Level 2 and Level 3 airports account for 0.85% of commercial airports in the United States. *See Airport Statistics*, *supra* note 61.

<sup>185</sup> Simon Meyer, *Why the Aviation Sector Cannot Build Itself Out of the Capacity Crisis*, INT'L AIRPORT REV. (Mar. 1, 2018), <https://www.internationalairportreview.com/article/67140/aviation-capacity-crisis/> [https://perma.cc/5J7M-58KF].

<sup>186</sup> *Airline Activity: National Summary (U.S. Flights)*, *supra* note 161.

<sup>187</sup> For example, McCarran International Airport is the only commercial airport to serve Las Vegas. *See Las Vegas, NV: McCarran International (LAS)*, BUREAU

should analyze airports within certain city-pairs that have multiple airports with differing consumer demand. For city-pairs that have more than one commercial airport highly sought by consumers, the Antitrust Division should include a second relevant market definition in its analysis.<sup>188</sup>

#### A. TARGETING AIRPORTS FOR THE AIRPORT-RELATED RELEVANT MARKET ANALYSIS

The FAA already has a system in place that the Antitrust Division could use to determine which cities need a more narrowly defined relevant market: data from its NextGen modernization program.<sup>189</sup> The FAA has identified twenty-one metroplexes—geographic areas that include several commercial and general aviation airports in close proximity serving large metropolitan areas—for its modernization program and prioritized thirteen of the metroplexes.<sup>190</sup> The FAA targeted the particular metroplexes because “improved performance could benefit not only the region, but the entire [National Airspace System].”<sup>191</sup> The FAA lists the airports within each of the metroplexes in its analysis.<sup>192</sup>

The Antitrust Division can use the FAA’s breakdown of the different metroplexes to limit the scope of individual airports it will want to analyze as a separate relevant market. The prioritized metroplexes contain seventy-two airports, and the Antitrust Division can reduce that number further, if it desires, by deter-

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OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/airports.asp?pn=1> [<https://perma.cc/8BCJ-JEA6>].

<sup>188</sup> See US Airways Amended Complaint, *supra* note 41, at paras. 27, 29, 31.

<sup>189</sup> The FAA implemented its NextGen program in 2007 to modernize the U.S. air transportation system with the goal of increasing the “safety, efficiency, capacity, predictability, and resiliency” of aviation in the United States. *What is NextGen?*, FED. AVIATION ADMIN., [https://www.faa.gov/nextgen/what\\_is\\_nextgen/](https://www.faa.gov/nextgen/what_is_nextgen/) [<https://perma.cc/U54Q-NWVR>] (last modified May 7, 2018). The FAA implements “innovative technologies, capabilities, and procedures” to modernize the aviation industry. *Id.*

<sup>190</sup> *Metroplexes*, FED. AVIATION ADMIN., <https://www.faa.gov/nextgen/snapshots/metroplexes/> [<https://perma.cc/AWV9-YUFV>] (last modified Sept. 7, 2018) (follow “List of Metroplex locations”).

<sup>191</sup> *Id.* The prioritized metroplexes include: Atlanta, Charlotte, Cleveland–Detroit, D.C., Denver, Houston, Las Vegas, North Texas, Northern California, South Central Florida, and Southern California. *Id.*

<sup>192</sup> See, e.g., *Metroplex – Houston*, FED. AVIATION ADMIN., <https://www.faa.gov/nextgen/snapshots/metroplexes/?locationId=9> [<https://perma.cc/JHL7-4ZCR>] (last modified July 14, 2018) (The Houston Metroplex contains David Wayne Hooks Memorial Airport, William P. Hobby Airport, George Bush Intercontinental Airport, and Sugar Land Regional Airport.).

mining which airports serve above a certain amount of passengers.<sup>193</sup> Even if the Antitrust Division decides to assess the HHI for the seventy-two airports within the metroplexes, it would take less time compared to the 1,008 city-pairs analyzed in the 2013 American Airlines–US Airways merger.<sup>194</sup> The FAA has already used time and resources to pinpoint areas where it has greater concerns about capacity so it can make improvements, a process similar to when it established slot controls.<sup>195</sup>

The Antitrust Division can save its resources and build off the work already completed by the FAA. It can use the metroplexes highlighted by the FAA as a basis for determining consumer demand for each of these airports. The Antitrust Division has already analyzed Washington, D.C., which the FAA has identified as a metroplex, and has determined which airports consumers seek to depart from and travel to.<sup>196</sup>

Once the Antitrust Division defines the relevant market based on the airport, it can use data gathered by the DOT to determine the market power at the individual airports.<sup>197</sup> For example, Southwest Airlines controls 91.96% of the market share at Dallas Love Field, an airport within the North Texas Metroplex,<sup>198</sup> and 69.59% of the market share at Baltimore/Washington International Thurgood Marshall Airport, an airport within the Washington, D.C., metroplex.<sup>199</sup> The airline with the next highest share at the Baltimore airport is Spirit Airlines, and it only provides service for 7.66% of the passengers in Baltimore.<sup>200</sup> Additionally, the Antitrust Division could assess passenger preferences for which airports passengers prefer within a certain metroplex if the FAA or those in the airline industry

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<sup>193</sup> See *Metroplexes*, *supra* note 190.

<sup>194</sup> See US Airways Amended Complaint, *supra* note 41, at App. A.

<sup>195</sup> See *Metroplexes*, *supra* note 190.

<sup>196</sup> See US Airways Amended Complaint, *supra* note 41, at paras. 30–31; *Metroplex – D.C.*, FED. AVIATION ADMIN., <https://www.faa.gov/nextgen/snapshots/metroplexes/?locationId=7> [<https://perma.cc/BBJ4-GYPN>] (last modified Sept. 7, 2018).

<sup>197</sup> See *Airline Activity: National Summary (U.S. Flights)*, BUREAU OF TRANSP. STATISTICS, <https://www.transtats.bts.gov/> [<https://perma.cc/C5H8-N9C7>].

<sup>198</sup> *Dallas, TX: Dallas Love Field (DAL)*, *supra* note 169; *Metroplex – North Texas*, FED. AVIATION ADMIN., <https://www.faa.gov/nextgen/snapshots/metroplexes/?locationId=6> [<https://perma.cc/W92U-CNY4>] (last modified Sept. 7, 2018).

<sup>199</sup> *Baltimore, MD: Baltimore/Washington International Thurgood Marshall (BWI)*, *supra* note 175; *Metroplex – D.C.*, *supra* note 196.

<sup>200</sup> *Baltimore, MD: Baltimore/Washington International Thurgood Marshall (BWI)*, *supra* note 175; *Metroplex – D.C.*, *supra* note 196.

have not already conducted this assessment.<sup>201</sup> Booking data and passenger choice surveys can help establish consumer preferences.<sup>202</sup>

B. NON-SLOT ENTRY BARRIERS TO DETERMINE AN  
ANTICOMPETITIVE EFFECT AT AIRPORTS

The Antitrust Division can still assess the anticompetitive effects of a merger by analyzing factors at the airport itself once the agency defines the relevant market as a particular airport. Slot controls are not the only entry barriers that airlines face when trying to enter a new airport. The airports themselves might create entry barriers in the way they allocate gates and terminal space.

Deregulation has not made the process easier for airlines to gain access to airports even though the litmus test to certify new airlines has been made easier.<sup>203</sup> Incumbent airlines can use their established foothold within airports to deter the entry of new airlines.<sup>204</sup> This could be done by limiting the amount of gate space available, either through long-term exclusive leasing of the gates or by preventing the airports from expanding their capacity by building more facilities.<sup>205</sup>

The Antitrust Division can analyze facilities lease agreements between the airport and the merging airlines to determine the anticompetitive effects of a merger.<sup>206</sup> Some airlines have exclusive lease agreements with airports that allow an airline to control the use of certain airport facilities and prevent any other airline from accessing those facilities.<sup>207</sup> While airports have begun to incorporate additional ways to terminate the exclusive agreements when an airline under-utilizes a facility, the Anti-

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<sup>201</sup> Consumer choice surveys may establish which airports are preferred.

<sup>202</sup> One model, using booking data, found that distance played a factor in where passengers preferred to fly from. For every 1% increase in distance, the likelihood of the passenger flying from that airport decreased by 4%. Another study found that the “surface-access” journey time is a key determinative factor in airport preference. James Wiltshire, *Airport Competition*, 1.2 INT’L AIR TRANSP. ASS’N ECON. BRIEFING, no. 11, at 13–14 (2013).

<sup>203</sup> John Sabel, *Airline–Airport Facilities Agreements: An Overview*, 69 J. AIR L. & COM. 769, 778 (2004).

<sup>204</sup> *Id.* at 779.

<sup>205</sup> *Id.*

<sup>206</sup> The key elements of leases and how they affect entry include exclusivity of use, the length of the contract, and the ability it may give the airline to prevent airport construction projects in the form of “majority-in-interest” clauses. *See id.* at 776, 782, 787.

<sup>207</sup> The facilities include terminal space and gates. *Id.* at 785.

trust Division can still assess the agreements currently in effect.<sup>208</sup>

Additionally, the long terms of leases force new airlines to wait until the lease either expires or the airport determines a facility is under-utilized before they can access the related airport facilities, which can take time on its own. Lease agreements for airport facilities traditionally span from fifteen to thirty years, and state law allows some agreements to continue longer.<sup>209</sup>

Thus, the terms of the lease agreements with the airports can indicate the ability for future airlines to enter or expand in an airport. Combining the agreements made by airlines before a merger occurs can have a disproportionate impact on competitiveness because the incumbent airlines could have an even stronger foothold within airports that consumers might prefer over others in the nearby area. The Antitrust Division has begun to assess gate access for LCCs in markets with stiff entry barriers, but it should continue to scrutinize access at airports beyond just slot controls.<sup>210</sup>

## VI. CONCLUSION

With the consolidation of major airlines into a group of only five and consumers seeking more specific services, it is time the Antitrust Division adjusts how it defines the relevant markets. Consumers no longer seek out tickets to particular cities if they have other options; rather, they will seek to save time and travel to airports within cities. For certain cities with more than one airport that consumers are willing to travel to and from, the Antitrust Division should not only use city-pairs to define the relevant market. The airport itself should constitute its own relevant market. This approach will allow the Antitrust Division to obtain a fuller assessment of the anticompetitive impact of future airline mergers.

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<sup>208</sup> DFW incorporated a clause in its agreements for gates in its new terminal to allow another carrier to use the unused facilities of the tenant airline. *Id.* at 787; Bryon Okada, *Dallas/Fort Worth Airport Wants to Shorten Exclusive-Use Gate Leases*, FORT WORTH STAR-TELEGRAM, Oct. 19, 2003, at 8B.

<sup>209</sup> For example, New York state law allows lease agreements not to exceed forty years. Sabel, *supra* note 203, at 787.

<sup>210</sup> The disruptive gate divestitures at Boston Logan, Chicago O'Hare, Dallas Love Field, LAX, and Miami International served to expand service to airports with entrenched, traditional carriers. *See* Competitive Impact Statement, *supra* note 152, at 10–12; Alaska–Virgin Consent Decree, *supra* note 154, at 3–4, 6.