

# ***A Possible Revision to Law – From a New Trend of Merger and Acquisition in Airline Industry under the Impact of the Pandemic***

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**Abstract:** Currently, antitrust is a major, but paradoxical issue in the U.S. airline industry. In one sense, the government wants to regulate and prevent airline mergers since it reduces competition, but the pandemic has made it difficult for small airlines to survive on the other. As smaller airlines slowly shut down due to an increase in the price of supply and decrease in demand, the larger airlines would have a greater grip on the market, so there would also be less competition, which can harm consumers' rights eventually by limiting their choices. It is necessary for governments to develop new ways for regulation while considering about the new circumstances. More specifically, the government needs to allow some airlines to merge with each other for survival and developments. Through examining one case between two airlines that happened recently in the U.S. and analyzing its benefits among the whole market, this article aims to identify this new problem and determine the right move to solve it. In the end, several possible solutions in terms of law would be projected.

**Keywords:** merge and acquisition, antitrust, law

## **1. Introduction**

### **1.1. Airline Industry in the U.S.**

The COVID-19 pandemic has a profound impact on the global economy through continuous lockdowns and restrictions, and the airline industry is perhaps one of the industries being affected the most by this unprecedented condition in history. Due to a damage on both supply and demand end, the aviation industry faces its greatest challenge ever, “in which the previous shocks look like minor incidents in comparison.” According to current predictions, COVID-19 will have a long-term impact on airline revenue as traffic revenue in 2040 is expected to be “6% below a pre-pandemic forecast.” As the restrictions have been loosened, “the possibility of price rising is likely to be a more prominent feature in coming years as commodity and other markets struggle with balancing supply and demand” [1].

The two most influential features in markets of the United States are market concentration and decreasing market share, and the Airline Industry, as a typical specimen of existing problems, undoubtedly inherits these features. Market concentration is an indicator of “the extent to which market shares are concentrated between a small number of firms” [2]. The HHI (Herfindahl-

Hirschman Index) measures the degree of market concentration by looking at the level of competition in the market. A HHI value of 2500 or above indicates the market is concentrated while the competition is less. One study in 2017 pointed out that “Even though the HHI value in 2017 for the whole market was 1489.3, indicating the industry as not greatly concentrated, the city-pair markets better reflect the condition” [3]. This 2017 study then quotes from a study conducted in 2015, demonstrating that “approximately 90 percent of all passengers traveled on city-pairs with HHIs exceeding 2,500, while about 40 percent have HHIs over 4,000” [4], which is much higher than the standard. With the four dominated airlines: United Airlines, Delta Air Lines, United Airlines, and Southwest Airlines, “together, they control over 80 percent of domestic air travel in the U.S.” [5]. And such conditions have become more and more severe as the pandemic further crashes small businesses.

## **1.2. Biden’s Antitrust Administration**

Most of the governments in the world realize the threat of the above issue and therefore have taken a lot of actions to suppress the growth of dominated companies in a market. The U.S., as one of the most capitalist countries in the world, has been continuously fighting against such issues as well. In November 2021, the present government led by President Biden passed an administration that strengthens law enforcement in antitrust to solve the two problems previously mentioned through encouraging more competitions. The executive order was referred to as a “whole-of-government competition policy,” in which “it charged more than a dozen other agencies to protect competition using their authority under a range of statutes” [6]. Even though the administration’s main targets were technology companies, it remains influential in the M&A deals in the U.S. airline industry. This is because the order's instructions were to “prevent consumer prices from rising and labor markets from becoming less competitive” [6]; the order aims to keep prices stable and employers' wages secure. Concentrated markets have already led to those problems in the U.S. airline industry and ignoring them will eventually result in uncontrollable situations. However due to these restrictions, mergers and acquisitions become increasingly unpredictable, making it more difficult for general airlines to operate effectively during the pandemic.

## **2. JetBlue’s Competition Strategy and the Challenges It Faces**

### **2.1. Case Description**

#### **2.1.1. About the Case**

On February 7, 2022, a merger deal was announced between Frontier Airlines and Spirit Airlines. Meanwhile, JetBlue Airways joined in as a rival bid in April. After consideration, Spirit Airlines eventually called off the original deal with Frontier and began to consider the merger with JetBlue Airways. Then a new deal between JetBlue and Spirit Airlines was announced the day after the original deal collapsed. “There is a possibility of reshaping the airline industry by putting pressure on the four dominant carriers of the country through this deal. Spirit would become the nation's fifth-largest airline after the acquisition, valued at \$3.8 billion” [7]. This deal, however, has the largest barrier in front of it from the government: it is likely to be rejected by the Department of Justice in accordance with the Biden’s Antitrust Administration Regulators. JetBlue has a record of being sued by The Department of Justice for its corporation with American Airlines at the airports in New York and Boston.

### **2.1.2. About JetBlue and Spirit**

JetBlue Airways is an American low-cost airline that is famous for its lower fares. JetBlue has had 5 mergers in the past 8 years, which illustrates its ambition and developments. “Since launching service at Boston Logan in 2004, JetBlue has challenged the major airlines by offering lower fares and better service. It is also Boston’s leading airline, offering more flights out of Boston than any other airline” [5]. Through the merger with Spirit, JetBlue will become the fifth largest airline in the United States, “with a share of more than 10 percent of the market” [7]. With JetBlue's growth, the four dominated airlines are likely to offer more attractive services with more acceptable fees because of the competition JetBlue creates within this industry.

Spirit Airlines, similarly, is another famous American ultra-low-cost airline. But what makes it famous are the “bad comments” it receives for its services. Those services include but not limited to not providing food and not enough communication when there is a cancellation. Spirit Airlines has experienced financial difficulties during the pandemic, which made the shareholders seeking for an opportunity to merge with another airline to save the business.

### **2.2. A New Trend under the Pandemic and the Existing Barriers**

From the information above, a new trend in M&A deals in the American airline industry can be predicted. To reduce competition and save their business due to the pandemic, low-cost airlines in one country that are unwelcomed / have experienced financial difficulties tend to bid or merge with other budget airlines; and those large enough to cover the loss of the pandemic seek out opportunities to bid and merge with other businesses to expand and profit from the merger.

In addition to the new trend, an issue with the current legislation can be observed and classified. The government is likely to oppose the merger between Spirit Airlines and JetBlue because it results in the airline becoming another dominant in the country and reduces consumer choices. While the government is looking for more competition by limiting mergers and acquisitions, preventing companies from becoming larger, this is not the best move to stimulate competition, because most small businesses that were supposed to stop large companies from getting bigger would have difficulty surviving on their own during the pandemic. Because of this, the only option for them is either to merge with each other or to accept the offer from a middle-sized company. Not only will small businesses be unable to compete with dominated companies if the government bans mergers and acquisitions between small and middle businesses, but also many small businesses may die out.

### **2.3. A Classification of the Upcoming Challenges and Impediments for the New Trend**

The coming new trend is also accompanied by a series of challenges. Identifying and categorizing some challenges and their potential impacts that may serve as barriers to businesses merging with others under the new trends would be helpful. The first and the most important problem is the legality. If the government does not change the standard and measures for such conditions, the new possible trend will never be carried out, which will ultimately result in a more concentrated market and a lower market share, making the U.S. airline industry with more deformities. The second challenge is the public choice. Whether the public chooses to travel through the new airline or not is the ultimate measure that determines the future of the merged company. The new company must be more welcomed by the public to compete with the original dominant company. The third challenge is the sustainability of the development in the industry. Airline industry, evidently, remains the most potential and active market across the world even after the pandemic, which indicates the potential popularity of this deal by the public. The challenges above are all inter-connected, which will be analyzed one by one in detail in the following section.

### **3. An Analysis of the Conflict Between Biden's Antitrust Administration and Trends in Reality**

#### **3.1. The Wrong Target - Biden's Executive Order Should Not Be Used in Airline Industry**

The executive order is likely being overused in the airline industry as this order was originally used to fight against big tech companies. Technology has a much more different environment than the airline industry since there are 394 public companies and 492165 private companies with approximately 7.8 million employees [8]. In contrast, only 18 major airlines are running in the U.S. industry. For someone not familiar with aeroplanes, not more than 10 of the major airline names will ring a bell in the U.S. industry with less than a million employees. In the technology industry, since there are numerous companies, a competitive market can be ensured by strengthening law enforcement that blocks deals which can make a company bigger, thus protecting labors and consumers' rights. However, in the airline industry, the shutdown of one firm can provide the dominated four more power to control and influence the market, hence harming the right of consumers. Therefore, instead of leaving the gaps between small airlines and large companies grow bigger, the law should provide small airlines an opportunity to merge with other small airlines or even middle-sized airlines to form newer, more competitive, and more influential airlines to challenge the positions of the dominated four, forcing the larger airlines to progress sales of innovation and creativity within the industry. Those changes, very possibly, may bring benefits to the consumers and labors, which will be analyzed below. Just like a study has summarized in 2020, "employers' anticompetitive conduct in labour markets does not necessarily harm consumers" [9].

#### **3.2. A Promising Public Choice in the Future**

Both Spirit and JetBlue are low-cost airlines - this is their main competitiveness. And the tendency remains as the "companies tend to have lower prices and quality convergence for customers if the two parties produce a common product merge" [10]. Therefore, it is reasonable to believe that JetBlue Airways, after merging with Spirit, will continue to provide good and cheap services to its customers. This is both a tendency and a tradition for those two companies. Substantially, individuals who prefer cheaper ticket prices take most of the population. As a result, such new, large, low-cost airlines will be welcomed by the public.

#### **3.3. The Sustainability of the Development of Airline Industry with the New Trend**

The traditional transportation methods of the U.S. such as railroads and roads, are relatively unpopular towards the newer generation. Traveling by air then becomes perhaps the only choice for those who want to save time. With the reopening of businesses in most of the states, the commercial prospect is likely to be bright for the airline industry. Not only this deal between Spirit and JetBlue would be welcomed by people, but also other low-cost airlines would also regain its vitality in the future once they can survive this pandemic, which possibly the only way is through mergers.

### **4. Possible Solutions, from the Legal, Governmental, and Democratic Perspectives**

Based on the analysis above, the consequences this merger may bring remain positive, not only to the market, companies themselves, but also the public and even other industries with similar situations. Below are several solutions to these problems and similar conditions in the future.

#### **4.1. A Revision to Law**

An editing to the law as well as the executes order is needed to further regulate markets. As proven

in 3.1, not every market should be regulated the same way due to different circumstances. In this regard, different industries require different rules for regulation: legislation should specify what those exceptions and differences are based on different markets. The U.S. commercial airline industry, for instance, should be subject to much stricter regulatory oversight once any of the four dominated airlines starts a M&A. Airlines that take less share of the market share, however, are encouraged to enter M&A deals with each other and as a result, they will face fewer regulatory hassles. Unlike the previous example, technology businesses are always expected to face much more restrictions from regulators, regardless of their size. Even though it is impossible to state all conditions in a law or an executive order, the existence of differences and exceptions should at least be directly acknowledged in the administration so that when the regulatory organisation processes similar cases, they will not consider cases in other industries as precedents.

Additionally, penalty standards are needed for convenient control and the dignity of the law. The department of justice should pursue civil and administrative charges against businesses that violate such rules.

#### **4.2. Establishment of a Committee for Regulators**

Only a change in the legislation is far from enough. As the government set it to be a “whole-of-government competition policy,” there can be disagreements among government agencies and even abuse of companies by those agencies. Biden’s executive order has established an “advisory Committee for Aviation Consumer Protection to ensure fair representation of consumers, State and local interests, airlines, and airports with respect to the evaluation of aviation consumer protection programs” [11]. However, this committee seems to represent the interests of customers with no business aspects of the concern. As a result, it is necessary to establish a new committee to address the interests of the airline market and ensure the development of the economy. This committee should share the power with the advisory committee. Due to their such power, both organisations can check, cooperate, and balance one another, which can lead to more objective, fair, and double-win outcomes.

The new committee should have the authority to investigate any transaction between airlines or mergers that can possibly change the environment of the market and be responsible for the potential consequences of each business transaction. The committee is directly under the control of the federal government and the Whitehouse, and therefore should be independent from the Department of Justice and the state government in terms of how it conducts investigations; but it must report the new trends and to the DOJ, the federal government, and the Whitehouse for any potential beneficial revision in legislation.

#### **4.3. An Open Public Hearing**

In terms of its competition and cooperation with the advisory committee, which in turn was as well established by a high-level government. It would be best if a superior court hearing was held in the open due to the procedure of justice. The advisory, representing the short-term interest of the public, would serve as a rival to the new committee which represents the nations and public long-term interest. The superior court should give an initial decision about whether this case can be further discussed by measuring different figures that reflect the impact it has on the overall economy and consumers’ interests.

While the superior court has the power to listen to opinions on both sides during a hearing, the public also has the right to understand the information about each condition and their impacts on not only the nation but also the public itself.

During the first hearing at the superior court, the superior judges have the right to decide whether this condition has met the basic standard. A public hearing can then take place after the basic standard



has been met so that everyone in the country can choose the side, they believe will bring the greatest benefit to them and the country. In a hearing that everyone in the nation may be watching, both committees can and should speak up on behalf of the party they represent.

## 5. Conclusion

The changes brought about by COVID-19 will remain long-lasting, even if most industries gradually return to pre-pandemic levels. In the U.S., there is a new general trend in mergers and acquisitions, which is that small airlines tend to merge with each other to save themselves and reduce competition, thereby increasing one's size. However, this new, sustainable trend may be falsely block by the executive order that mainly targets other industries, even though it ensures the consumers' rights by keeping the competitive businesses alive. It may be necessary to revise the law and executive order to regulate the deals in the airline industry by establishing a new committee that considers the benefits the market can gain through each deal. This article aims to discover a new trend and identify the legal problems behind it, thus providing a possible solution. Ultimately, by pointing out this issue, more markets and industries with similar circumstances can be identified and solved by using new solutions instead of relying solely on black-and-white strategies.

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