

CONSUMER CHOICE AND ANTITRUST PRAGMATISM: UNPACKING THE JETBLUE-SPIRIT MERGER

By **Diana L. Moss**

Vice President and Director of Competition Policy

November 2023

The merger of JetBlue and Spirit has surfaced novel issues for airline competition in U.S. passenger markets, where concentration is often high and smaller carriers face a high hurdle in getting a foothold. As with previous airline mergers, the prospect of reduced competition following a JetBlue-Spirit merger raises concerns about higher fares and lower quality. But it is also an important case of first impression. If the merger goes through, JetBlue will likely dismantle ultra-low-cost carrier (ULCC) Spirit, cutting budget-conscious travelers' national U.S. ULCC flying options in half. This is a far cry from European passenger markets that feature many more low-cost carriers. As an important dimension of competition, consumer choice is highly visible in the airline sector. The idea that less choice is bad for consumers does not require the complex fact-finding and analysis that is typical in contested merger proceedings. Rather, it is a practical application of the premise that a substantial loss of competition hurts consumers simply by taking away their options. Viewed through this lens of antitrust "pragmatism," JetBlue-Spirit could open up bandwidth for new precedent that a loss of choice is as harmful to consumers as higher prices or lower quality. When taken together, these harmful effects make a powerful case for why denying the JetBlue-Spirit merger would maintain competition and protect consumers. To take a deeper dive into how PPI is thinking about consumer choice, antitrust pragmatism, and airline competition, please read on.

AIRLINE MERGERS AND CONSUMER CHOICE

The merger of U.S. airline carriers JetBlue and ultra-low-cost carrier (ULCC) Spirit, if it succeeds, will be the seventh major U.S. airline merger in the last two decades.¹ Put another way, at this pace of consolidation, the U.S. will have lost a domestic airline carrier about every 33 months since the mid-2000s. A merger of JetBlue and Spirit would combine the sixth and seventh largest airlines by market share, leapfrogging Alaska to land in fifth place behind the top four: Delta, American, Southwest, and United.

Despite their positioning as smaller domestic airlines, a merger of JetBlue and Spirit highlights two recent shifts in U.S. airline merger enforcement. It is the first time the U.S. Department of Justice (DOJ) has sought a full-stop injunction for an airline merger on the grounds that it will substantially reduce competition under Section 7 of the Clayton Act.² This stands in contrast to previous airline mergers where the government settled with remedies, such as slot or gate divestitures. The DOJ's unwillingness to accept a fix in JetBlue-Spirit is another in a series of

¹ "U.S. Airline Mergers and Acquisitions," Airlines for America, January 17, 2023, <https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/>.

² 15 U.S. Code § 18.

moves that reveal the Biden administration’s more aggressive stance on reining in consolidation.³

The DOJ’s challenge of the JetBlue-Spirit merger is also notable for another reason. JetBlue intends to eliminate Spirit, reconfiguring the trademark yellow planes and raising fares.⁴ As one of only two national U.S. ULCCs, the merger eliminates about 50% of this market segment.⁵ This is a markedly different landscape than in Europe, which features many more low-cost carriers from which consumers can choose. ULCCs are disruptive players, providing a vital source of choice for budget-conscious travelers. These options will be dramatically scaled back when JetBlue retires the Spirit model. The DOJ’s case tees up consumer choice as an essential element of competition, extending traditional concerns that an airline merger can raise fares and degrade service quality.

The court could look askance at the DOJ’s claim that the loss of Spirit will hurt consumers by reducing consumer choice. Or it could widen the antitrust aperture by giving credence to how a loss of competition manifests harmfully in fewer options for consumers. The case for why a loss of choice is bad for consumers does not require voluminous data and complex economic models. As such, it is by far the *most* practical application of the premise that mergers that substantially reduce competition are illegal. Viewed through the lens of antitrust “pragmatism,” a positive judicial finding for the government in JetBlue-Spirit on the issue of consumer choice could free up bandwidth for advancing stronger merger enforcement.

RIISING CONCENTRATION IN THE DOMESTIC AIRLINE MARKET

The last wave of domestic airline mergers — including United-Continental, Delta-Northwest, and American-USAir — increased concentration in the domestic passenger air service market. As of mid-2012, the four largest airlines controlled about 57% of the national market, which increased to 68% in mid-2022.⁶ This slow hemorrhage of domestic carriers has tightened the Big 4 airline oligopoly, with little meaningful entry of new carriers. Since the last major swath of mergers in the mid-2000s (see figure), the entry of new carriers has reverted to levels in the pre-deregulation era.⁷ This brings into sharp focus how entry is equally stunted by artificial regulatory barriers *and* high levels of concentration that are the outgrowth of weak merger control.

³ Cecilia Kang and David McCabe, “Biden Administration Unveils Tougher Guidelines on Mergers,” *New York Times*, July 29, 2023, <https://www.nytimes.com/2023/07/19/technology/guidelines-tech-mergers-antitrust.html>.

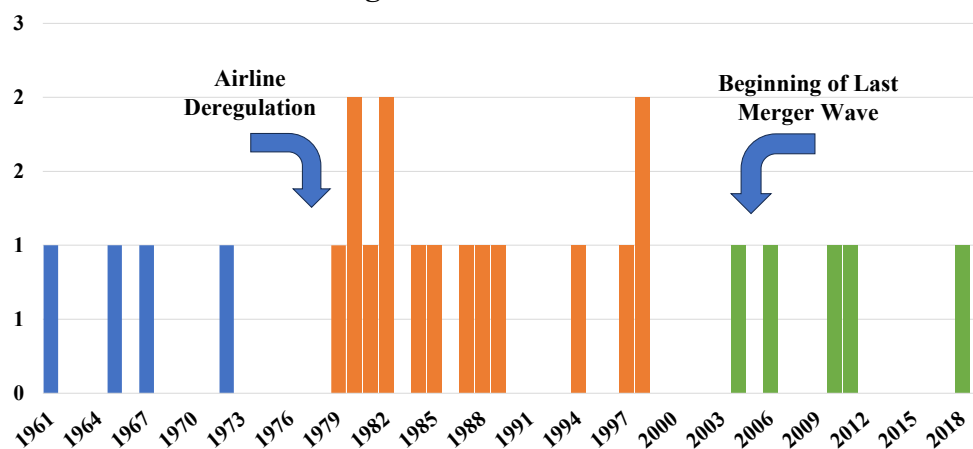
⁴ U.S., et al. v. JetBlue Airways Corp. and Spirit Airlines, Inc., Complaint, Case 1:23-cv-10511 (D. Mass., March 7, 2023), at PP. 57.

⁵ As of July 2023, JetBlue had a market share national of 5.5%, based on passenger revenue miles. Spirit’s market share was 5.0%. See, TranStats, Airline Domestic Market Share (August 2022-July 2023), U.S. Department of Transportation, Bureau of Transportation Statistics, <https://www.transtats.bts.gov/>.

⁶ TranStats, Airline Domestic Market Share (August 2022-July 2023), U.S. Department of Transportation, Bureau of Transportation Statistics, <https://www.transtats.bts.gov/>; and TranStats, Carrier Snapshots (August 2011-July 2012), U.S. Department of Transportation, Bureau of Transportation Statistics (queried for top airlines), <https://www.transtats.bts.gov/carriers.asp>.

⁷ *List of Airlines of the United States* (with an FAA-issued operators certificate), Wikipedia (queried Nov. 11, 2023), https://en.wikipedia.org/wiki/List_of_airlines_of_the_United_States.

Entry by New National and Regional Airlines in the U.S.



Rising domestic concentration has driven developments beyond antitrust concerns around airline mergers, codeshare agreements, and “swaps” of takeoff and landing slots between the large carriers. High market concentration also limits access by smaller carriers to slots and gates. Moreover, the dominance of U.S. carriers in the international alliances (Star, SkyTeam, and oneworld) has enhanced their control of travel *outside* the U.S.⁸ The suite of competition issues swirling around high concentration highlights two major policy imperatives.

First, it brings home the importance of a policy “toolkit” approach to promoting competition in the U.S. airline sector. Antitrust enforcement is one tool, but other policies, especially in the wheelhouse of the U.S. Department of Transportation (DOT), should play a complementary role. Second, the magnitude of airline competition issues also makes the case for why policy coherence in promoting competition is essential for supporting markets and protecting consumers.

CONSUMER CHOICE AS A BELLWETHER OF COMPETITION

The DOJ’s move to block the JetBlue-Spirit merger is a response to upward trending concentration in U.S. airline markets. The lawsuit alleges three major anticompetitive effects. One, the merger eliminates head-to-head competition between the two rivals on numerous city-pair routes. Two, the merger strengthens incentives for the fewer carriers left in the wake of the merger to tacitly collude, rather than compete hard on the merits. Third, the merger removes one of two major national U.S. ULCCs, leaving only one option for budget-conscious travelers.

⁸ Diana L. Moss, “Revisiting Antitrust Immunity for International Airline Alliances,” American Antitrust Institute Mar. 28, 2018, https://www.antitrustinstitute.org/wp-content/uploads/2018/03/AAI_Revisiting-Antitrust-Immunity_R-2.28.19.pdf.

When a merger works to obstruct the competitive process, antitrust enforcement is designed to stop it in its incipency, or before it is consummated.⁹ Merger control is, therefore, a first line of defense to rising concentration and market power by preventing the emergence of dominant firms and tighter oligopolies. This scenario is the best tutorial on the importance of consumer choice, or the ability to access options regardless of price. Advocates for a consumer choice framework argue that it is superior to antitrust's traditional "price and efficiency" paradigms.¹⁰ They say that choice "asks the right question," by recognizing that consumers "do not just want competitive prices — they want options."¹¹

Consumer choice as a bellwether of competition is bolstered by numerous examples. Take Live Nation-Ticketmaster, which holds an excess of 70% of the live events ticketing market. Fans, who pay exorbitant ticket fees as a result of this monopoly, complain bitterly about their lack of choice in ticketing providers.¹² Also consider genetically modified (GMO) herbicide-tolerant or insect-resistant crop seed. Bayer, Dow, and Syngenta hold dominant shares in GMO seed markets for corn, canola, cotton, and soybeans. This means that growers have little, if any, choice if they want to switch seed technologies.¹³ They, too, pay handsome prices for GMO seed to just a few, large agricultural biotechnology providers.

There are more examples. But suffice to say, we do not need complex analysis to predict — as we do with higher prices or lower quality — that consumers are harmed by a lack of choice. And until JetBlue-Spirit, antitrust has not directly considered how a merger that harmfully reduces choice for consumers is one of several valid reasons for blocking it. This is the embodiment of antitrust "pragmatism," or the idea that less competition directly impacts consumers, simply by taking away their options.

AIRLINE COMPETITION AND THE ULTRA-LOW-COST CARRIERS

The merger of JetBlue-Spirit and the earlier, aborted deal between Frontier and Spirit, drew needed attention to consumer choice as a metric of competition. Both mergers would eliminate one of two major U.S. ULCCs. Spirit and Frontier serve budget-conscious travelers with nonstop routes into cheaper, secondary airports and markets anchored by destinations in, among other areas, Florida, Mexico, and Central and South America. With this focus, the ULCC model differs fundamentally from how the full-service airlines price. Unlike "bundled" full-service pricing, Spirit and Frontier employ a "fare+fee" model that breaks out the airfare from fees for ancillary services such as bags, priority boarding, seating, and other features.

⁹ Peter C. Carstensen and Robert H. Lande, "The Merger Incipency Doctrine and the Importance of 'Redundant' Competitors," *2018 Wisconsin Law Review* 783 (2018), <https://ssrn.com/abstract=3134480>.

¹⁰ Robert H. Lande and Neil W. Averitt, "Using the 'Consumer Choice' Approach to Antitrust Law," *74 Antitrust Law J.* (2007), at p. 178, <https://ssrn.com/abstract=1121459>.

¹¹ Lande and Averitt, "Using the 'Consumer Choice.'"

¹² Diana L. Moss, "Busting the Live Nation-Ticketmaster Monopoly: What Would a Break-Up Remedy Look Like?" American Antitrust Institute, July 11, 2023, <https://www.antitrustinstitute.org/work-product/busting-the-live-nation-ticketmaster-monopoly-what-would-a-break-up-remedy-look-like/>.

¹³ Kristina Kiki Hubbard, "The Sobering Details Behind the Latest Seed Monopoly Chart," *Civil Eats*, January 11, 2019, <https://civileats.com/2019/01/11/the-sobering-details-behind-the-latest-seed-monopoly-chart/>.

The ULCC fare+fee model allows consumers to shop for air travel with more flexibility. This is important for budget-conscious travelers, where dollars not spent on checked bags or advance seating can be redirected to a rental car or hotel. The mergers of Frontier-Spirit and JetBlue-Spirit would eliminate one of two major ULCC players, or 50% of the market, leaving consumers with one option. This would likely result in higher fares and lower quality, and even the eventual disappearance of the ULCC fare+fee model altogether.

The prospect of higher fares, lower quality, and a loss of choice for consumers has not deterred airlines from recycling the age-old defense for airline consolidation. That is, by growing larger through mergers, they can compete better with other, bigger, airlines. Should the court accept this rationale in Jet-Blue-Spirit, it would put the U.S. airline industry on the slippery slope of ever-larger mergers. Evidence from past mergers shows that the claimed benefits of bigness rarely materialize. Merged airlines often fail to deliver on long-term promises to initiate service on new routes, or offer more frequent service. Rather, they operate in markets only if they are profitable, and leave them quickly if they are not.¹⁴ These failed defenses to anticompetitive airline mergers further elevate consumer choice as an important metric of competition.

THE OUTCOME OF JETBLUE-SPIRIT, AND BEYOND

As we await the outcome of the JetBlue-Spirit merger trial, it bears repeating that antitrust enforcement can only reach a slice of the competition problems in the airline sector. The reality is that the competition problem is too big and complex an issue for antitrust to solve alone. The DOT has a critical, but underutilized, regulatory role in promoting airline competition. The agency's move to block the transfer of operating certificates in JetBlue-Spirit was the first coordinated DOJ-DOT effort to block an airline merger.¹⁵ More coordination, and more consistent coordination, between antitrust enforcers and sector regulators is vital.

Redesigning the Federal Aviation Administration's program for allocating takeoff and landing slots should also be a policy priority. A redesign of the slot allocation program for LaGuardia, Reagan Washington National, and John F. Kennedy airports would prevent large legacy carriers from "babysitting" valuable slots and, instead, get them into the hands of airlines that can inject meaningful competition.¹⁶ Exploring "common" gates is also a way to improve access to airport facilities by smaller carriers—a policy that has already been implemented at some airports.¹⁷

Another major policy tool for promoting competition is close scrutiny of airline joint ventures. With a less rosy outlook for pushing mergers through, carriers have turned to coordination

¹⁴ Letter from the American Antitrust Institute to the U.S. Department of Justice, Assistant Attorney General Kanter *Re: Antitrust Review of the Spirit Airlines-Frontier Airlines Merger*, American Antitrust Institute, April 5, 2022, https://www.antitrustinstitute.org/wp-content/uploads/2022/04/AAI_Spirit_Frontier_Letter-to-DOJ_4.5.22.pdf.

¹⁵ USDOT Statement on the Justice Department's Lawsuit to Block Proposed JetBlue-Spirit Merger, U.S. Department of Transportation, March 7, 2023, <https://www.transportation.gov/briefing-room/usdot-statement-justice-departments-lawsuit-block-proposed-jetblue-spirit-merger>.

¹⁶ Comments of the U.S. Dept. of Justice, Notice of Petition For Waiver of the Terms of the Order Limiting Scheduled Operations at LaGuardia Airport And Solicitation of Comments on Grant of Petition With Conditions, FAA-2010-0109 (Mar. 24, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/04/14/257463.pdf>.

¹⁷ Susan Stellin, "Sharing Catches on at Airports," *New York Times*, November 7, 2011, <https://www.nytimes.com/2011/11/08/business/at-airports-a-new-strategy-is-catching-on-sharing.html>.

agreements such as codeshares that eliminate incentives to compete through revenue-sharing and other mechanisms. Agreements to coordinate, but stop short of full metal integration, are a good way to accomplish *de facto* mergers. The DOJ recently prevailed in its suit to stop the American Airlines-JetBlue (Northeast Alliance) codeshare—a strong signal that the government is onto this strategy.¹⁸ On the other hand, the DOT has a long history of approving airline joint ventures and granting antitrust immunity for airlines to coordinate.¹⁹ This policy needs a makeover, starting with higher standards for evidence that the benefits of immunity outweigh the cost of eliminating competition.

As antitrust enforcement, DOT regulatory policy, and airport planning issues evolve, we will keep a close eye on how policies work together to advance competition in the U.S. airline sector. For now, we await an important decision in JetBlue-Spirit that will set the stage moving forward. The high-profile loss of consumer choice in airline mergers make them a good proving ground for antitrust “pragmatism,” which has significant implications for other consumer-facing markets.

¹⁸ U.S. v. American Airlines Group Inc. and JetBlue Airways Corp., Opinion, Case 1:21-cv-11558-LTS (D. Mass., May 19, 2023).

¹⁹ “Reassignment of Schedules at Newark-Liberty International Airport,” Federal Aviation Administration (U.S. Department of Transportation), *Federal Register* 86, No. 179, (September 20, 2021): 52285, <https://www.govinfo.gov/content/pkg/FR-2021-09-20/pdf/2021-20399.pdf>.