

United States of America
Before the
Department of Justice and Department of Transportation

Request for Information on Competition in Air Transportation
Docket No. ATR 103

Comments of the
Progressive Policy Institute

I. Introduction

The Progressive Policy Institute (PPI) submits these comments in response to the Request for Information (RFI) issued by the U.S. Department of Justice (DOJ) and U.S. Department of Transportation (DOT) on October 24, 2024, in docket number ATR 103.¹ The RFI seeks information on the “state of competition” in the air transportation industry. PPI’s comments address specific questions in the RFI that relate to markets for passenger air service (“passenger service”). In these markets, U.S. consumers and working families are directly affected by strategic business practices and consolidation, such as mergers, acquisitions, and joint venture agreements. Changes in competitive dynamics affect airfares and ancillary fees (“fees”), quality and innovation in technology and service, business models, and the reliability and stability of the air transportation supply chain.

PPI’s comments stress that competition in passenger service markets should be a priority for reframing competition policy in air transportation. Comments on the RFI from other organizations will focus on other parts of the air transportation supply chain, such as aircraft manufacturing, distribution of fare and schedule information, and labor markets. We encourage the agencies to consider how competition concerns in other markets can potentially create market power “bottlenecks.” Shocks to these bottleneck markets can cause cascading failures that affect the entire air transportation supply chain, including passenger air service. Recent examples include the Boeing 737 Max safety incidents and their impact on aircraft supply shortages and the flying public.²

PPI’s comments begin with an assessment of inter-agency coordination on airline consolidation. This section is responsive to Section 10 in the RFI. The comments then turn to consolidation in domestic markets and access by smaller ultra low-cost (ULCC) and regional carriers to essential inputs such as takeoff and landing slots and airport facilities such as gates. This section is responsive to Section 3 in the RFI. The final section addresses changes in passenger service markets that affect DOT’s grants of antitrust immunity (ATI) for joint-venture agreements in the

¹ Request for Information on Competition in Air Transportation, U.S. Dept. of Justice and U.S. Dept. of Trans., Oct. 24, 2024, <https://www.regulations.gov/document/ATR-2024-0001-0002>.

² Updates on Boeing 737-9 MAX Aircraft, Fed. Aviation Admin., Dec. 5, 2024, <https://www.faa.gov/newsroom/updates-boeing-737-9-max-aircraft>.

three major international alliances. This section is responsive to Section 2 in the RFI.

II. Competition Policy for U.S. Passenger Air Service Should Focus on Access and Choice

Between 2005 and 2015, there was an unprecedented wave of consolidation in U.S. passenger service markets. This restructuring left four major airlines, American, United, Delta, and Southwest, with outsized control of U.S. national and route-level markets. It is imperative, therefore, for antitrust enforcers and regulators to promote a regulatory framework that enhances the prospect of more, smaller, ULCC, and regional carriers. Access to a choice of convenient and competitively priced flights is critical for American consumers and working families.³ This is especially true for those that do not live near major airports or in cities without a choice of airports.

This policy goal should not stop at the U.S. border. Policymakers should take a close look at DOT's policy of liberally granting U.S. carriers immunity from the antitrust laws for agreements to coordinate on fares and schedules on some international routes in the global airline alliances. The consumer costs of these agreements, in the form of lost competition, are not always outbalanced by benefits elsewhere in the alliance networks. Again, this is especially relevant for flyers in locations that are "behind" and "beyond" the Star, SkyTeam, and oneworld alliances' gateway hubs in the U.S.

High concentration in passenger service markets carries a greater risk of harm to U.S. consumers. PPI's analysis illustrates the importance of a competition policy that focuses on three principles: holding the line on further concentration; promoting access to markets for smaller carriers; and ensuring flyer choice and access to competitive airfares, fees, and service quality. The DOJ has recently advanced a strong agenda to prevent airline consolidation that is harmful to consumers. The DOT has done the same on the consumer protection side, but has not made much progress on competition.⁴ PPI's comments stress that framing a coherent DOT competition agenda moving forward and fostering better coordination between the two agencies are important policy goals.

III. The Need for Better Inter-Agency Coordination on Airline Competition Issues

U.S. competition enforcement and policy for passenger air service markets is overseen by both an antitrust enforcer (DOJ) and a sector regulator (DOT). It is important to note that the agencies apply different statutory mandates, standards of review, and remedies for restoring competition.⁵ The antitrust "no harm" to competition standard is far narrower than the regulatory "public interest" standard. The DOT's broader standard allows for more balancing of costs and benefits from consolidation and business practices that could be considered unfair methods of

³ See, e.g., Diana L. Moss, Can Antitrust Be Doing More to Protect Consumers? Dec. 10, 2024, <https://www.progressivepolicy.org/can-antitrust-be-doing-more-to-protect-consumers/>.

⁴ Nancy Scola, "I Didn't Do an About-Face on Pete Buttigieg. Buttigieg Did an About-Face on Me," Politico, Nov. 3, 2024, <https://www.politico.com/news/magazine/2024/11/03/pete-buttigieg-tough-on-airlines-00181436>.

⁵ See, e.g., Diana L. Moss, Antitrust Versus Regulatory Merger Review: The Case of Electricity, 2008 Rev. of Industrial Org. 32, at p. 241.

competition. As a result, tension and conflict between the stricter antitrust approach and more lax regulatory approach is not uncommon.

Indeed, the DOJ and DOT have been at odds on airline competition issues. Despite a priority on inter-agency coordination under the Biden administration’s “whole of government” approach, there has been minimal progress on this front.⁶ This has serious policy implications for the flying public. For example, the Biden DOJ took a proactive role in promoting competition and protecting consumers in domestic airline markets. Enforcement actions under Section 7 of the Clayton Act⁷ include successful injunctions against the Northeast Alliance (NEA) codeshare agreement between American Airlines and JetBlue Airways and the proposed merger of JetBlue and ULCC carrier Spirit. Federal district court opinions concluded that these transactions substantially lessened competition in city-pair passenger service markets, threatening higher airfares and less choice for consumers.⁸

In contrast, the DOT has not been proactive in utilizing its authority to prevent unfair methods of competition.⁹ While the DOT achieved several milestones in advancing *consumer protection* policy, the agency has been reluctant to flex its authority to promote competition. For example, in March 2023, the DOT took no independent agency action on the JetBlue-Spirit merger, instead issuing a short statement supporting the DOJ’s case to enjoin it.¹⁰ In the NEA matter, the DOT acted in January 2021, at the tail end of the first Trump administration.¹¹ The agency’s order included a number of required slot pair divestitures, hard-to-enforce bans on information-sharing, and hard-to-monitor carrier reporting requirements. By September 2021, the DOT was forced to “clarify” its position on the NEA, terminating its review in the wake of the DOJ’s antitrust case to enjoin the agreement.¹²

Finally, the DOJ took no enforcement action in the merger of Alaska and Hawaiian. In an apparent punt to the DOT, the agency issued a rare order conditioning the merger on a number of requirements.¹³ The order acknowledged that the merger created routes where a merged Alaska-Hawaiian was the only remaining nonstop competitor, or one of two remaining competitors. Yet the agency imposed a variety of consumer protection-type requirements involving rewards programs, seating, and compensation for delays. The order also required the merged carriers to

⁶ Executive Order on Promoting Competition in the American Economy, White House, Jul. 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁷ 15 U.S. Code §18.

⁸ *US v. American Airlines Group Inc.*, No. 23-1802 (1st Cir. 2024) and *U.S., et al. v. JetBlue Airways Corp. and Spirit Airlines Inc.*, Case 1:23-cv-10511-WGY (D. Mass., Jan. 1, 2024).

⁹ 49 U.S. Code §41712.

¹⁰ US DOT Statement on the Justice Department’s Lawsuit to Block Proposed JetBlue-Spirit Merger, U.S. Dept. of Trans., Mar. 7, 2023, <https://www.transportation.gov/briefing-room/usdot-statement-justice-departments-lawsuit-block-proposed-jetblue-spirit-merger>.

¹¹ Agreement with U.S. Dept. of Trans. Regarding Northeast Alliance Between American Airlines, Inc. and JetBlue Airways, Corp. Jan. 10, 2021, <https://www.transportation.gov/sites/dot.gov/files/2021-01/Agreement%20terminating%20review%20DOT-AA-B6%20with%20appendix%2011021%20website.pdf>.

¹² Clarification of Departmental Position on American Airlines – JetBlue Airways Northeast Alliance Joint Venture, U.S. Dept. Trans., Office of the Secretary, Sep. 21, 2021, <https://www.transportation.gov/sites/dot.gov/files/2021-09/NEA%20Notice%20Sept%2021%202021.pdf>.

¹³ U.S. Dept. of Trans., Agreement Regarding Merger Between Alaska Air Group, Inc. and Hawaiian Holdings, Inc. (Sept. 15, 2022), <https://www.regulations.gov/document/DOT-OST-2024-0084-0006>.

maintain airport access and capacity on certain routes, and to refrain from discriminating against competing interlining carriers. These conditions, however, do not directly or effectively address the competitive impact of the merger.

Recommendations:

Transparent and constructive coordination between government agencies is a hallmark of sound policy in any sector. PPI urges the DOT and DOJ to consider how to improve inter-agency coordination on airline competition issues. The agencies' handling of the Alaska-Hawaiian matter creates confusion around the DOT's use of consumer protection remedies to fix competition problems. Moreover, the DOT's approval of the anticompetitive NEA agreement without any apparent coordination with the DOJ put competition and the flying public at risk.

PPI suggests that an important outcome of the RFI is a transparent "roadmap" for how the agencies plan to coordinate on competition matters. This would aid business, competition and consumer advocates, and Congress in understanding the implications of different statutory standards and how the costs and benefits of consolidation are assessed and balanced under antitrust and regulatory reviews. Importantly, the "roadmap" would also explain the types of remedies that each agency considers effective for restoring competition in passenger service markets.

IV. Holding the Line on Consolidation and Fostering Entry in Domestic Markets

The U.S. markets for scheduled air transportation have been transformed since deregulation in the late 1970s. As shown in the figure below, there was significant entry of smaller airlines in the U.S. between 1979-1999.¹⁴ Between 2001-2024, however, a series of mergers reduced the number of operating U.S. carriers by 50%.¹⁵ Between 2008-2011 alone, the number of ULCCs fell from four to two.¹⁶ Today, there are four legacy carriers in the U.S. — American, United, Delta, and Southwest. After the merger of American and U.S. Airways in 2013, the top four carriers accounted for about 60% of passenger miles flown in the U.S.¹⁷ In 2024, the four largest legacy carriers control almost 70% of the national market.¹⁸ In city-pair route markets, concentration levels are often much higher, since not all airlines serve every market.

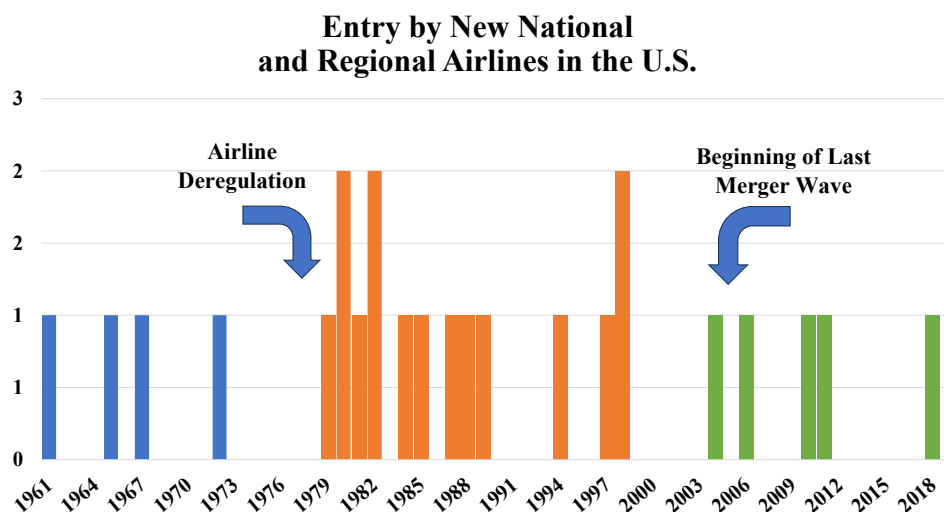
¹⁴ See, Diana L. Moss, Consumer Choice And Antitrust Pragmatism: Unpacking The JetBlue-Spirit Merger, Progressive Policy Institute, Nov. 21, 2023, <https://www.progressivepolicy.org/consumer-choice-and-antitrust-pragmatism-unpacking-the-jetblue-spirit-merger/>.

¹⁵ Data & Statistics: U.S. Airline Mergers and Acquisitions, Airlines.org, Sep. 18, 2024, <https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/>.

¹⁶ Id.

¹⁷ Carrier Snapshots, Transtats Database, U.S. Dept. of Trans, Bureau of Trans. Statistics, queried for Sept. 2014. <https://transtats.bts.gov/>.

¹⁸ Id., queried for Sept. 2024.



As shown in the figure above, greenfield entry of smaller carriers slowed significantly after the mergers of major U.S. legacy carriers in the mid-2000s. This was likely the result of higher concentration, which raises barriers to market entry. A fringe of smaller, ULCC, and regional carriers currently account for the small portion of the national U.S. airline market not controlled by the legacies. These carriers are, by in large, a success story. For example, the ULCCs made significant gains in market share from 2014-2024.¹⁹ Between 2016-2024, the legacy airlines only marginally expanded the number of markets in which they operate. In contrast, Frontier, Spirit, JetBlue, Alaska, and SkyWest expanded the number of markets in which they operate by 25-80%.²⁰

These trends confirm that smaller airlines inject important competitive discipline in domestic passenger service markets. They also offer different business models, such as the unbundled ULCC “fare + fee” model. As PPI has noted, this model provides an essential alternative for budget and leisure travelers to the pricing model of the full-service carriers.²¹ Policies that keep barriers to entry low and ensure a level playing field are essential for promoting entry by smaller carriers. This means holding the line on further consolidation in domestic markets.

For example, mergers and agreements that eliminate head-to-head competition or increase incentives for carriers to coordinate on route-level pricing are particularly harmful for consumers. Moreover, research shows that some airlines have had difficulty delivering on the cost savings and consumer benefits that were promised as the result of large mergers.²² This “double whammy” has increased the level of regulatory scrutiny of domestic airlines mergers over the last decade.

Cost reductions often promised in airline mergers include right-sizing aircraft to routes,

¹⁹ Id.

²⁰ Id.

²¹ Antitrust Pragmatism, *supra* note 14.

²² Diana L. Moss, Delivering the Benefits? Efficiencies and Airline Mergers, *Am. Antitrust Inst.*, Nov. 21, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547673.

improving gate and hangar utilization, and consolidating operations. But frequently encountered problems in past mergers include integrating IT systems, frequent flier programs, and unionized workforces.²³ In 2011, one airline expert famously noted: "There is no evidence that [airline mergers] deliver more cost-efficiency."²⁴ Consumer benefits promised in previous mergers were also often overestimated.²⁵ These include better capacity management and enhanced connectivity in the combined network, such as more destinations and round-trip options, converting interline into single line service, and reducing service in unprofitable markets.²⁶

Retrospective analysis of the Delta-Northwest, United-Continental, and Southwest-AirTran mergers shows, however, that enhanced connectivity is elusive. Between 2007-2009 and 2012, for example, merged airlines generally cut routes on airport pairs served before the merger and added as a result of the merger.²⁷ This should come as no surprise. No business, including an airline, would voluntarily stay in a market that is unprofitable. As a result, promises of increased connectivity in airline mergers are viewed skeptically by the DOJ.

Recommendations:

Changes in the structure of U.S. airline markets over the last decade highlight the importance of holding the line on further increases in market concentration and fostering market entry and footholds for smaller carriers. PPI urges the DOJ and DOT to consider these factors in evaluating public comment on the RFI. PPI encourages the DOT to work with the DOJ on developing a new and more efficient market design for takeoff and landing slot allocation at congested airports. Smaller carriers require slots to enter and compete in markets and a fair shot at obtaining slots is essential.

PPI also encourages the DOT to engage with airport authorities and carriers on common use gate policy that can increase access by smaller rivals. It is also vital to focus on policy on maintaining competition in the ULCC segment of the market. This means opposing consolidation that eliminates ULCCs and smaller carriers and avoiding sweeping junk fee policies that may inadvertently imperil the unbundled "fare + fee" model that budget and leisure travelers rely on for their flying needs.

V. Antitrust Immunity for Global Airline Alliances

International issues have worked their way onto the domestic airline competition radar screen in the last several years. Major U.S. carriers play a much larger role in the three global airline alliances after a decade of domestic consolidation between 2005-2015. This necessarily highlights the DOT's policy toward granting immunity (ATI) from the U.S. antitrust laws for coordination among alliance carriers.²⁸ ATI allows competing carriers in the international

²³ Id.

²⁴ See, Paul Stephen Dempsey, Airline Alliances, Inst. of Air & Space Law, 2011, <https://www.mcgill.ca/iasl/files/iasl/ASPL614-Alliances.pdf>.

²⁵ Delivering the Benefits? *supra* note 22.

²⁶ Id.

²⁷ Id.

²⁸ Airline Alliances, *supra* note 24. Coordination arrangement in increasing order of cooperation among carriers are: (1) interlining with carrier partners (i.e., transferring passengers traveling on connecting itineraries), (2) sharing

alliances to coordinate pricing and scheduling on overlap routes. Grants of ATI under the DOT's authority shields carriers from conduct that would otherwise violate the U.S. antitrust laws.²⁹ This loss of head-to-head competition from coordination, however, can potentially increase benefits to consumers in the larger alliance network. There are currently 23 active immunized alliances.³⁰

Requests for ATI are based on various potential benefits, such as expanded capacity at alliance hubs,³¹ integrated itineraries on connecting routes, service to more city-pair markets, and competition for cities behind and beyond gateways and other alliances.³² Most requests for ATI over the last 25 years were granted by the DOT, supported by positive economic research in the 1990s. The DOJ, however, took a different view. The agency warned of the anticompetitive effects of ATI, including in Aloha-Hawaiian (2002)³³ and in American-British Airways (2009), where fares were predicted to increase on transatlantic routes.³⁴ The DOJ has also recommended remedies when a grant of ATI harms competition, including route "carve-outs" in the 1990s and slot divestitures in the oneworld (2008) and Delta-Aero Mexico (2016) cases.³⁵

With domestic consolidation, growth of the alliances, and pressure from the DOJ, the DOT has more recently denied immunity. This includes Air France/KLM (2013), citing a reduction in the number of competitors and enhanced incentives to restrict capacity on a key route.³⁶ In 2016, the DOT tentatively denied immunity to American and Qantas, rejecting public benefits claims.³⁷ The DOT's growing skepticism on ATI, however, was slow to acknowledge economic research in the 2000s showing that the economic costs of ATI are not necessarily outweighed by its benefits.³⁸

Among the consumer costs from ATI identified by newer economic research is the loss of: head-

frequent flyer programs, (3) codesharing, (4) coordinating pricing and schedules, and (5) engaging in almost fully integrated revenue and profit-sharing joint-venture type coordination.

²⁹ 49 U.S. Code §§ 41,308-309. The U.S. DOT grants ATI in order to approve an otherwise anticompetitive agreement that meets the statutory public benefit test.

³⁰ List of Active Antitrust Immunized Alliances (Updated 10/19/2022), U.S. Dept. of Trans., https://www.transportation.gov/sites/dot.gov/files/2022-10/Active-ATI-cases-list-2022_Oct_f1.pdf.

³¹ See e.g., Joint Application of Virgin Atlantic Airways, Ltd., Docket No. OST-2013-0068, Dept. of Trans., Apr. 8, 2013, <https://www.regulations.gov/document?D=DOT-OST-2013-0068-0001>.

³² See, e.g., Terry Maxon, DOT approves antitrust immunity for Continental, Star Alliance partners, Dallas News, Jul. 10, 2009, <https://www.dallasnews.com/business/airlines/2009/07/10/dot-approves-antitrust-immunit>.

³³ Order Approving Agreement and Granting Antitrust Immunity, Docket No. OST-2002-13002, Dept. of Trans. Sep. 30, 2002, <https://www.regulations.gov/document?D=DOT-OST-2002-13002-0014>.

³⁴ Joint Application of American Airlines, Inc., Docket No. OST-2008-0252, Dept. of Trans. Dec. 21, 2009, <https://www.regulations.gov/document?D=DOT-OST-2008-0252-3374>.

³⁵ Joint Application of Delta Air Lines, Inc., Docket No. OST-2015-0070, Dept. of Trans., Nov. 4, 2016, <https://www.regulations.gov/document?D=DOT-OST-2015-0070-0074>. *Id.* at 17-18.

³⁶ Order to Show Cause, Joint Application of Air Tahiti Nui, Docket No. OST-2013-0077, Dept. of Trans. Mar. 28, 2014, <https://www.regulations.gov/document?D=DOT-OST-2013-0077-0014>.

³⁷ Order to Show Cause, Joint Application of American Airlines, Inc, Docket No. OST-2015-0129, Dept. of Trans. Nov. 18, 2016, <https://www.regulations.gov/document?D=DOT-OST-2015-0129-0031>.

³⁸ See, e.g., William Gillespie & Oliver M. Richard, Antitrust Immunity Grants to Joint Venture Agreements: Evidence from International Airline Alliances, U.S. Dept. of Justice, Antitrust Division, Economic Analysis Group Discussion Paper, EAG 11-1, 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1764083.

to-head competition on international routes; access by non-alliance carriers to interlining with alliance carriers at gateways; and services elsewhere in the alliance network.³⁹ These effects are particularly important for U.S. consumers. Entry by smaller, non-allied carriers is the only way to inject competition on concentrated immunized alliance routes and at U.S. alliance gateway hubs. But it remains difficult. Between 2007-2016, for example, there were only small changes in combined alliance carrier shares on major immunized routes and U.S. gateways became more concentrated as a result of domestic consolidation.⁴⁰ This discourages new entry on routes and increases the risk that smaller, non-allied carriers will be foreclosed from interlining at alliance hubs.

Recommendations:

PPI's analysis of antitrust immunity for the global airline alliances shows that competition policy governing international travel can have direct effects on U.S. consumers. It also highlights the tensions between antitrust and regulatory policy resulting from different standards of review. PPI urges the agencies, therefore, to develop a coherent, coordinated policy approach on ATI that focuses on the importance of entry by smaller carriers and providing choice to flyers.

This approach includes considering the effects of ATI on U.S. behind- and beyond-the-gateway markets in the DOT analysis. The DOT should also conduct three-year reviews of ATI and require that carriers quantify the realized benefits of immunized coordination. Finally, the agencies should commission a current study of the costs and benefits of ATI to provide a sound basis for DOT policy moving forward.

Respectfully submitted:

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Dated: January 7, 2025

³⁹ See, e.g., James Reitzes & Diana Moss, *Airline Alliances and Systems Competition*, 45 Houston Law Rev. (2008); W. Tom Whalen, A Panel Data Analysis of Code-Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets, 30 Rev. of Industrial Organization (2007); and Volodymyr Bilotkach & Kai Hüschelrath, Balancing Competition and Cooperation: Evidence from Transatlantic Airline Markets (Discussion Paper No. 15-059, August 2015), <http://ftp.zew.de/pub/zew-docs/dp/dp15059.pdf>.

⁴⁰ Diana L. Moss, Alliances and Antitrust Immunity: Why Domestic Airline Competition Matters, American Bar Association, Air & Space Law, Spring 2019, https://www.americanbar.org/content/dam/aba/publications/air_space_lawyer/Spring2019/asl_moss.pdf.