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Examining Airlines Merger Control in the Post-pandemic Context: The Case of Korean-Asiana Airlines Merger

CHEN Shiqi
East China University of Political Science and Law (ECUPL), Shanghai, China
China Eastern Airlines Co., Ltd., Shanghai, China

Korean Air's acquisition of Asiana coincides with a period of significant transformations in the global political and economic landscape amidst the pandemic. This merger case underwent antitrust reviews in 15 jurisdictions, setting an unprecedented record in the history of global civil aviation industry. This paper examines the development and characteristics of the Korean air transport market, compiles the outcomes of 14 completed antitrust reviews, and primarily focuses on analysing five conditional approvals to assess deficiencies in airline merger control best practices and anticipate trends towards convergence in aviation antitrust regulation. This case is poised to become a landmark decision with far-reaching implications for cross-border mergers and acquisitions within the international air transportation.

Keywords: merger control, failed firm defence, relevant market, regulatory convergence, best practice

Introduction

On 16 November 2020, Korean Air, the largest air carrier in South Korea, officially announced a merger plan to acquire Asiana Airlines (Asiana), the country's second-largest airline (Korean Air, 2023). By the end of July 2024, the merger review of this case has spanned over 1350 days. Antitrust reviews had been completed in 14 out of 15 judicial jurisdictions during a period marked by immense challenges for the global aviation industry, including COVID-19, geopolitical events, and regional armed conflicts. On one hand, this merger, involving South Korea's two largest airlines, is one of the major recent mergers in the international air transport industry. On the other hand, the scope and significance of the merger surpasses the complexity of the case itself in the context of international aviation antitrust. This merger not only visually demonstrates the regulatory attitudes of antitrust enforcement agencies in different jurisdictions towards international air transport market but also serves to further enhance the interconnections between countries regarding antitrust measures, which is particularly valuable given the current geopolitical tensions.

The views expressed in this article are solely that of the author in her private capacity and do not necessarily reflect that of any association with which she is affiliated.

CHEN Shiqi, Ph.D. candidate in Public International Law, School of International Law, East China University of Political Science and Law (ECUPL); Deputy Senior Manager, Legal and Compliance Department, China Eastern Airlines Co., Ltd., Shanghai, China.

Review Progress and Difficulties

Background

After 2010, the international air transport industry embarked on a phase of rapid expansion, witnessing five consecutive years of sustained profit growth from 2015 to 2019 (IATA, 2018). The Asia-Pacific region emerged as a pivotal player in driving this remarkable growth trajectory. Before pandemic, airlines in Asia-Pacific area accounted for over one-third of the global air passenger market share, and certain domestic passenger routes in South Korea, Japan, and China ranked among the top five worldwide in terms of passenger volume (IATA, 2019). The Asia-Pacific region not only exhibits one of the highest passengers demands and capacities globally but also demonstrates a continuous growth trend.

Due to substantial variations in economic levels and resource endowments among countries, the Asia-Pacific aviation market demonstrates significant diversification, with both regional air transport and international transit operations holding important positions. The latter plays a crucial role for countries with limited domestic markets. In the Asia Pacific region, hubs in Singapore, Indonesia, Thailand, South Korea, and Japan have excelled in international connectivity in the world. The hubs and airlines of these countries are fierce competitors due to their close geographical proximity and similar market resource. In 2017, Seoul Incheon International Airport (ICN), the biggest airport in South Korean, ranked sixth in terms of international connectivity within the Asia-Pacific region (OAG, 2017). Korean Air, the largest airline in South Korea, ranks as the 34th largest airline globally (Skytrax, 2017). At that time, South Korea faced an urgent need to augment ICN's international transit capacity and upgrade domestic airlines to bolster the country's competitiveness in international aviation.

To achieve this goal, the new terminal of ICN has been put into operation in 2018. Meanwhile, Asiana, the second-largest airline in South Korea, is facing significant financial losses and actively seeking a suitable buyer to regain its strength. Unlike other types of businesses, the number of potential buyers for airlines is extremely limited. Moreover, the costs of resuming operations after a shutdown are prohibitively high. Therefore, airlines are unlikely to exit even during prolonged periods of reduced demand (The Secretariat of OECD, 2019). Hence, the best scenario would be to restore the former glory of Asiana through restructuring and achieve the status of two powerful airlines in one country.

At the end of 2019, Hyundai Development Company (HDC) signed an equity purchase agreement with Kumho Group, the shareholder and ultimate controller of Asiana. The plan was to acquire 30.79% of Kumho Airlines' existing shares and increase Asiana's capital through new share issuance with compensation. However, due to the impact of the pandemic, Asiana's financial situation rapidly deteriorated. Consequently, HDC and its acquisition partner Mirae Asset Securities requested a second round of due diligence which was rejected, resulting in a deadlock in the acquisition process. Ultimately, in September 2020, it was announced that the acquisition had failed (Koo & Kim, 2019). Two months later, Korean Air announced its acquisition of Asiana. This merger was negotiated between the Korea Development Bank, Asiana's largest creditor and a state-owned bank, and Korean Air (Kim, 2020). This is an important reason for Asiana to be tough on HDC's requirements in such a difficult situation. The objective of establishing two powerful dominant airlines within South Korea has failed. The consolidation of Korean Air and Asiana will position Korean Air to achieve absolute dominance in South Korea's aviation industry.

HDC primarily operates in the construction and real estate development sectors, while its investments, as well as those of its affiliates, in the logistics and transportation industry are mainly focused on projects such as Seoul Chuncheon Highway, Jigae Namsan Urban Expressway, Busan Harbor Bridge, and Busan Container Terminal (HDC, 2024). However, it does not have any direct presence in the air transportation sector. On the other hand, Hanjin Group, which holds a controlling stake in Korean Air, possesses subsidiary businesses including Real Air, Air Korea, and Korea Airport Services Co., LTD. If Korean Air successfully acquires Asiana, it is anticipated to ascend into the ranks of the world's top 10 airlines based on size alone. Furthermore, this consolidation would effortlessly generate synergistic effects through an expanded market share, which is precisely discouraged by antitrust laws. The merging parties optimistically estimated the challenges, driven by the allure of substantial interests. Recently, scholars have highlighted the imperfections in the Korean government's decision-making process regarding this merger from a domestic legal perspective, which hinders the optimization of market competition and public welfare (S. Lee & H. Lee, 2024). However, these concerns are limited to South Korea's domestic antitrust law. When undergoing antitrust reviews in other relevant jurisdictions, the merger encountered more intricate challenges.

Multijurisdictional Merger Reviews and Obstacles

As the two largest airlines in South Korea, Korean Air and Asiana operate an extensive network of routes both domestically and internationally. In 2020, they collectively serve a total of 119 overlapping markets, including 65 international air passenger routes, 22 domestic air passenger routes, 20 international air cargo routes, 6 domestic air cargo routes, as well as additional markets such as aircraft maintenance and ground services (Korea Fair Trade Commission, 2022). Immediately after the announcement of the acquisition, Korean Air began antitrust reviews of the merger, covering 15 jurisdictions including Turkey, the Philippines, Taiwan, Thailand, Malaysia, Vietnam, Singapore, New Zealand, South Korea, Australia, China, the United Kingdom, Japan, the European Union, and the United States. Although this order does not align with Korean Air's filing sequence, it corresponds to the sequence in which the outcomes of the antitrust review are disclosed.

Among these jurisdictions, except for South Korea, the review process for the first ten was remarkably smooth. Following a preliminary assessment, the Philippines waived the need for a comprehensive merger review, while the remaining eight jurisdictions granted unconditional approvals. The antitrust enforcement agency in South Korea conducted a comprehensive evaluation of the overlapping domestic and international markets of merging parties, granting conditional approval in February 2022 with the aim to provide an illustrative example for remaining jurisdictions with potential impediments. After a comprehensive review spanning two to three years, China, the United Kingdom, Japan, and the European Union have successively granted conditional approvals, while the United States has not disclosed its review findings as the time of writing.

This merger case poses challenges for antitrust enforcement agencies. First, whether airlines, which incurred substantial losses as a result of the pandemic, meet the criteria for satisfying the failing firm defense? Second, for the airlines primarily involved in cargo and passenger transshipment traffic, does the conventional analysis based on city-pair or point-to-point approach truly uncover their impact on the relevant markets? Third, is there any alternative remedy for airline mergers apart from slot divestitures that is considered more reliable? And, would the rejection of a merger between two foreign airlines potentially provoke retaliatory measures?

Among the published reviews, only Malaysia has acknowledged Korean Air's unsuccessful company defense, while other jurisdictions either lack a comparable defense system or have determined that the case does not meet the criteria for a defense (Malaysian Aviation Commission, 2021). Obviously, affected by HDC's previous attempts, Asiana's bad financial condition is not the primary focus of the antitrust review. The five completed conditional approvals primarily address strategies for mitigating concentration post-merger by conditionally divesting slots, preventing freight monopolies, and facilitating the entry of new competitors.

Constrained by substantial ownership and effective control clauses in air transport agreements, the aviation industry allows very limited cross-border mergers (Walulik, 2019, p. 53, 251). Meanwhile, the principle of reciprocity also influences international air transport system (Walulik, 2019, p. 90). The current best practices in international aviation antitrust lack definitive solutions as a reference for countries on what kind of conditions are acceptable when there are no domestic competitors present, while without creating an unfair competitive disadvantage for the merging parties at the same time.

Merger Reviews of the Korean-Asiana Merger Case in Selected Jurisdictions

South Korea

On February 22, 2022, the Korean Fair Trade Commission (KFTC) conditionally approved the Korea-Asiana airlines merger, making South Korea the eighth jurisdiction to approve the case in chronological order. However, among the first seven jurisdictions that ratified, it, either unconditional approval was granted, or no submission of merger reports was required, there are relatively weak antitrust challenges. The remaining six jurisdictions' antitrust authorities maintain communication with the KFTC regarding this case and consider its approval opinions as indicative of expected attitudes towards approval by applicants.

In relation to the failing firm defense, Asiana has submitted evidence in compliance with the Monopoly Rules and Fair Trade Act (MRFTA) of Korea. However, considering Asiana's continued debt repayment and gradual improvement in performance following the conclusion of the pandemic, it is unlikely to face immediate bankruptcy according to the KFTC. Moreover, potential acquirers may express interest in acquiring it, thereby preventing its exit from the market.

After conducting a comprehensive examination, the KFTC has determined that the merger of these two biggest full-service airlines in this country potentially poses a significant risk in terms of impeding competition on 26 overlapping international routes and 14 overlapping domestic routes for air passenger transport. However, it does not pose risk to competition within other relevant markets such as international and domestic air cargo transport and aircraft maintenance, etc.

In response to significant concerns regarding anti-competitive practices in aforementioned relevant markets following the merger, KFTC has implemented both structural and behavioral relief. Structural relief measures include conditional transferring slots and air traffic rights of the parties to new entry airlines, along with the implementation of behavioral remedies prior to the completion of structural relief measures. These behavioral remedies include constraining fare increases on each route, prohibiting reduction in supply, ensuring service quality aspects such as seat spacing and complimentary baggage allowance, as well as forbidding any detrimental alterations to route miles (Walulik, 2019, p. 90).

In general, jurisdictions tend to opt for divesting slots as a customary practice when implementing structural relief in cases of airline mergers or joint ventures. If the transfer is conditional rather than an immediate practice, it becomes challenging to achieve the same impact as a moment of stripping. Conditional transferring slots and air traffic rights as a merger remedy measure are relatively infrequent in the antitrust practices observed across various jurisdictions. KFTC further explained that when new entry airlines enter the relevant routes, if one of the Parties holds a market share of 50% or higher, slots of routes in which passenger number has increased following the merger could be transferred. Conversely, when either party has a market share below 50%, the number of transferring is limited to reducing the combined market share of the two airlines to less than 50% (Walulik, 2019, p. 90).

China

On December 26, 2022, the Ministry of Commerce of the People's Republic of China (MOFCOM) conditionally approved the Korean-Asiana airlines merger case, making it the tenth jurisdiction to complete the antitrust review (MOFCOM, 2022a).

In relation to the failing firm defense, China's current legislation does not include such rules. However, some Chinese scholars believed that the failing firm defense aligns with the exemption stated in the original Article 28 of China's anti-monopoly Law, which is the Article 34 of the current version, particularly when the concentration of operators serves the public interest (Wang, 2010). The Article 34 provides:

> Where a concentration of undertakings has or may have an effect of precluding or restricting competition, the anti-monopoly enforcement body of the State Council shall make a decision to prohibit the concentration. However, if the undertakings are able to prove that the positive effects of the concentration on competition evidently outweigh the negative effects thereof or that the concentration is compatible with public interest, the anti-monopoly enforcement body of the State Council may decide not to prohibit the concentration.

Nevertheless, it should be noted that the Anti-Monopoly Law only provides examples of social public interests such as energy conservation, environmental protection, and disaster relief; other potential situations are not clearly defined. After extensive discussion on amendments to the anti-monopoly law, China's legislator and anti-monopoly law enforcement authority has yet to provide a clear elucidation of the failing firm defense within the framework of the anti-monopoly law and its practical implementation. Therefore, strictly speaking, the provision in Article 34 cannot be directly applied to Asiana's insolvency or potential bankruptcy, which MOFCOM did not mention either.

MOFCOM looked at 2019 data and defined the relevant market in this case as China-South Korea air routes, within which nine Chinese air passenger carriers, one Chinese air cargo carrier, two American air cargo carriers, and two South Korean low-cost airlines with limited size are competitors. MOFCOM conducted a comprehensive analysis of the 17 overlapping air passenger routes within the scope of relevant market operated by merging parties, revealing that following the merger, absolute dominance would be held by the two sides in 13 of these routes. Moreover, due to high market entry barriers, limited opportunities exist for potential new competitors to emerge, especially in South Korea. Consequently, MOFCOM's merger remedy measures primarily encompass conditional transferring slot pairs in nine routes and air traffic rights in four routes, sustaining of flight capacity, provision of non-discriminatory air passenger support services to Chinese airlines, and adherence compliance commitments for post-merger operations (MOFCOM, 2022b).

The United Kingdom

The Competition and Markets Authority (CMA) of the United Kingdom conditionally granted the case as the 11th jurisdiction completing the review on March 1, 2023. This follows a decision issued by the CMA on November 14, 2022, which believed that this merger has resulted in or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom. Thereafter, further consultations between the airlines and the CMA resulted in an acceptable undertaking in Phase 1.[1]

The failing firm defense need to meet the criteria for "exiting firm" test in English law, was examined by the CMA based on the evidence provided by the parties. The conclusion drawn was that Asiana did not satisfy the exiting firm scenario and would not necessarily become a significantly diminished competitive participant. As addressed in CMA's guidance on merger assessments during the Coronavirus (COVID-19) pandemic, the pandemic has not brought about any relaxation of the standards by which mergers are assessed or the CMA's investigational standards (CMA, 2020). Therefore, it is imperative for CMA to assess whether the proposed merger will potentially lead to a significant diminution of competition in any of the relevant markets within the United Kingdom.

In terms of air passenger services, the CMA focused on examining competition specifically on the London-Seoul route, adopting the methodology used by the European Commission's "point of origin/point of destination" (O&D) city pair approach utilized in previous analogous cases. When it comes to air cargo services, CMA adopts different analytical methods and considers competition in each direction of the route separately, to assess the transportation of goods between South Korea and the Europe, both from the UK to Korea and vice versa. Presently, Korean Air and Asiana Airlines are the exclusive providers of direct air services. When considering indirect flights as well, these two airlines collectively possess the largest market share subsequent to their merger. For air cargo services, the situation is remarkably similar.

Considering British Airways' reluctance to resume air services between London and Seoul, the CMA has decided to introduce British airline as competitors. The commitments as merger relief measures proposed by both parties have been accepted: The merging parties enter into an agreement with Virgin Atlantic Airways Limited (VAA) to transfer and provide assistance at Heathrow Airport and Incheon International Airports, enabling VAA to operate the London-Seoul route. If VAA fails to enter the specified route within the designated timeframe, the merging parties will make available slots to an alternative prospective entrant or alternative prospective entrants, as well as assisting it or them in entering the relevant market (CMA, 2023).

Japan

Nearly a year after receiving approval from the CMA, merger reviews in three jurisdictions—Japan, the European Union, and the United States—have experienced significant delays. Eventually, Japan became the first jurisdiction to break its silence by conditionally approving the merger on January 31, 2024 (JFTC, 2024a).

Japan's Antimonopoly Act does not directly address the failing firm defense. But by developing and enforcing the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination

[1] See CMA, *Decision on relevant merger situation and substantial lessening of competition* (ME/6924/21), https://assets.publishing.service.gov.uk/media/63b6fb7cd3bf7f612bc37e2c/SLC_Decision_Korean_Air_Asiana-14_November_2022-Non-confidential_version.pdf (accessed on 28 July 2023).

("the M&A Guidelines"), the failing firm defense is regarded as one of the determining factors to consider whether the effect of a business combination may be substantial to restrain competition, like other factors such as import, entry, etc (JFTC, 2023; OECD, 2009). Although the final decision did not explicitly acknowledge Asiana's financial position as meeting the criteria for the failing firm defense, it is worth noting that the JFTC conducted a comprehensive examination of the matter and did not find evidence to suggest that Asiana's financial difficulties could alleviate or effectively control the competition restrictions resulting from the merger.

In conducting the competition analysis, the JFTC also adopted the O&D city pair approach to define the relevant market and scrutinized the 10 overlapping air passenger routes between Japan and South Korea operated by merging parties. The investigation revealed that following the merger, both parties would hold a market share ranging from 50% to 75% on seven of these routes. Additionally, the JFTC took into account the potential influence exerted by low-cost carriers in the relevant market subsequent to the consolidation of these two full-service airlines. Ultimately, based on its findings, the JFTC concluded that this merger would impede competition within the pertinent air passenger market.

For air passenger traffic, considering the domestic transport capabilities of freight forwarders in Japan and South Korea, the JFTC conducted an analysis on competition in the Japan-South Korea and South Korea-Japan air cargo markets. The conclusion drawn was that the merger would significantly restrict competition within the relevant markets.

Finally, the commitment accepted by the JFTC closely resembles that of the CMA. In relation to the air passenger transport, as part of the merger conditions, slots should be transferred to a designated airline within a specified timeframe. If this transfer is unsuccessful within the given time period, they should then be made available to non-specific airlines. Additionally, support and assistance should be provided to the airline accepting these slots. Regarding its air cargo transport, Asiana has agreed to transfer it to a third party with whom the merging parties will enter into a block space agreement for its passenger aircraft belly business in order to ensure competitive cargo rates. Furthermore, each of these measures will involve appointing a monitoring trustee responsible for overseeing their implementation and providing regular reports to the JFTC (2024b).

The European Union

Shortly after the JFTC announced its decision, the European Commission (the Commission) conditionally approved the merger case on February 13, 2024 (The European Commission, 2024).

Regarding the failing firm defense, a similar situation can be observed in both the European Union and Japan. Although the European Union Merger Regulation (EUMR) does not explicitly address the failing firm defense rule, it takes into account whether the acquisition is the sole viable option to maintain the acquired party's assets in the market when assessing its competitive impact. As the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the EU Horizontal Merger Guidelines) provided, determine whether the failed firm defense is met in a merger case, three conditions need to be met:

(1) the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking,

(2) there is no less anti-competitive alternative purchase than the notified merger, or,

(3) in the absence of a merger, the assets of the failing firm would inevitably exit the market (The European Commission, 2004).

The Commission has issued two documents containing substantial remarks in this case: one in May 2023, when the Statement of Objections was sent by the Commission regarding the Korean-Asiana Airlines Merger Case, and another in February 2024 for its approval decision. It remains unclear from publicly available information whether the merging parties have invoked a failing firm defense. However, neither document explicitly addressed whether the merging party applied or satisfied the criteria for failing firm defense, thereby at least implying that it did not consider Asiana's financial difficulties to have a significant impact on the competitive implications of the merger.

In its statement of objections, the Commission expressed concern about reduced competition for air passenger services on four routes between South Korea and France, Germany, Italy and Spain, and that the merger would reduce competition in the provision of cargo transport services between all of Europe and South Korea. Following an in-depth investigation, the Commission confirmed the speculation. To address these concerns, the merger relief measures proposed by the Korean Air were eventually accepted.

The Korean Air has proposed to transfer some of its air traffic rights, slots, and other necessary assets to a Korean airline, T'way Air, before completing the merger to enable it starting flight operations on these four overlap routes. In terms of air cargo, the divestment of Asiana's global cargo business is promised. Furthermore, it is crucial that the buyer possesses the capability to effectively operate the divested business and compete with the combined company.

Analysis and Comparison

Shortcomings of Best Practice in Airlines Merger Control

Best practice for airlines merger control. "Best practice" typically refers to a soft law method of addressing social, economic, and environmental challenges by providing exemplary models for future action (Dickerson, 2010). Usually, in the absence of a consensus on a unified convention, advocating for the adoption of best practices often serves as an optimal compromise.

International intergovernmental organizations, such as UNCTAD and WTO, have endeavored to facilitate the internationalization of antitrust or competition laws across different countries. However, due to a lack of global consensus, the establishment of a unified antitrust or competition convention remains a distant goal so far. In this regard, the OECD has demonstrated unprecedented pragmatism by not pursuing a unified convention, but rather aiming to introduce the best practices of competition authorities.

For decades, the OECD competition Committee combining the practical experience of the United States and the European Union, has engaged in discussions and published research reports on practice and ideas of member states regarding how to effectively examine the main competition issues in air transport, while making efforts to convince non-OECD states such as China to adopt its methodology.

In 1999, the OECD published a document summarizing how member states, particularly the US, the European Union, the United Kingdom, and Australia, evaluated the competitive impact of airline mergers and alliances. The OECD has specifically introduced the "city-pair" approach as a comprehensive method for defining relevant markets, acknowledging the strengthening impact of airlines' market position resulting from

rationalizing hub-and-spoke structures, considering restrictions on airport capacity such as slots and gate facilities for new entrants, and recognizing slot divestitures as a popular remedial measure despite their associated drawbacks (The Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy of OECD, 2000).

In 2014, the OECD reiterates the use of "city-pair" as the general approach to assess the relevant market and highlights a new trend in which the US evaluates competition impact through three levels: network, country-pair, and city-pair. Simultaneously, the OECD systematically organizes key aspects of competition oversight during airline mergers: competition authorities across different countries focus on overlapping routes between merging parties, the effectiveness of structural reliefs such as slot, gates, and/or routes divestitures in alleviating concerns, and proposing regular assessments by competition authorities regarding merger impact on competition (The Directorate for Financial and Enterprise Affairs, Competition Committee of OECD, 2014).

Both OECD member countries and non-member countries have predominantly adhered to the aforementioned analytical approach, as evidenced by the 14 published review outcomes in this case. In other words, the best practices on airline merger control advocated by the OECD are widely acknowledged.

Failing firm defense as an unenforceable rule. The failing firm defense originates from the legal practices in the United States. In the context of US legislation, if a company is in serious financial distress, there is a high probability of bankruptcy or failure to successfully restructure, and there are no other potential buyers, then allowing the company to be acquired by a competitor, even if it may result in a monopoly or reduce competition, may be regarded as not violating the relevant law (Correia, 1996). In other jurisdictions, the legislative intent on failing firm defense is similar to that of the United States, though the criteria vary.

Generally, the purpose of the failing firm defense is to avoid the social and economic losses caused by the bankruptcy of a company, while protecting the interests of the company and the rights and interests of shareholders. However, there is a lack of effective legislation that clearly defines what constitutes a failing firm or provides explicit standards for the failing firm defense test in the US, while other jurisdictions face the same issue (Lopez-Galdos, 2016). The rule of the defense primarily relies on case precedents and merger guidance documents to elucidate. This situation gives rise to significant judicial uncertainty in the application of the failing firm defense, particularly when considering airlines.

Different from other industries, limited by high operational costs such as fixed assets, fuel, and human resources, most airlines worldwide face challenges in maintaining annual profitability. To make matters worse, the recovery timeline for airlines from airspace closures and significant increases in supply chain costs caused by the pandemic and geopolitical conflicts remains uncertain. Furthermore, the exit costs incurred by airlines are exorbitantly high. Between 2019 and 2021, a total of 145 airlines worldwide ceased operations due to significant financial burdens and mounting debts (IATA, 2022). Due to formidable exit barriers, some airlines are actively pursuing mergers and acquisitions as a strategic measure to navigate difficulties brought by pandemic and economic recession. Therefore, it is challenging to ascertain whether an airline satisfies the criteria for being classified as a failed company solely based on its financial difficulties and the absence of a potential buyers.

For instance, Aegean/Olympic II in 2013 stands as a rare case where the European Union has successfully identified it as meeting the conditions for failing firm defense since the Greek economy has fully devastated by the sovereign debt crisis (The EU Commission, 2013). In a sense, Aegean/Olympic II has set a precedent for

airlines to invoke the defense of failed companies, which other countries, both within and beyond the EU, can learn from. However, it is evident that the global pandemic has not inflicted an irreparably devastating blow on the world, as most nations have gradually recovered from COVID-19. It would be unrealistic to employ the Aegean/Olympic II standard as justification for attributing industry woes and economic downturn solely to the pandemic.

In this merger case, Malaysia, Singapore, South Korea, Australia, and the United Kingdom assessed whether Asiana Airlines met the criteria for a failed company. Among them, Singapore and Australia clearly state that Asiana did not meet the failing firm criteria, and only Malaysia considered Asiana Airlines as a failing firm (CCCS, 2021; ACCC, 2022). China, Japan, and the European Union also considered Asiana Airlines' financial status during merger review. Given the failed firm defense standards are so high, Asiana failed to persuade antitrust enforcement agencies that it can meet the criteria of failing company defense, even if it does lack sufficient funds for maintaining fleet operation. Even in the US, airlines are not allowed to invoke failed firm defense if they can restructure under the bankruptcy law (Gifford, 2017). Predictably, this merger case will also fail to pass the failed firm test in the US.

Limitations of conventional methods for defining relevant markets. The airlines merger review across the 15 jurisdictions in this case follows a consistent methodology: defining the relevant market by O&D city pair approach, evaluating the merging party's influence and position by market shares, then assessing the competitive impact of the merger on said market. This enables to determine whether merger relief measures are necessary to mitigate potential competitive harm or if preventive actions should be taken to avoid irreversible damage. This is the best practice and a typical manifestation of regulatory convergence in airlines merger control.

Despite their similar names, the concept of O&D city pair approach in airline merger control differs from the concept of O&D fare structure in airline revenue management. In revenue management, the fare structure of O&D focuses on monitoring and managing ticket expenditures by passengers for their actual trips, without considering connecting points along the way. This allows for flexible calculation of local and transfer passenger flows between origin and destination (Yeoman, 2017). On the other hand, the O&D city pair approach refers to a mechanized analysis of passenger flow, fares, and route capacity between each city to analyze competition in air transport-related markets. Although there exist subtle variations in the approaches to competition analysis within the air transport market, member countries of the OECD have essentially achieved a consensus and widely adopted this analytical methodology (OECD, 2014).

The rapid growth of the aviation industry has prompted both the United States and European Union to acknowledge the limitations associated with exclusively focusing on direct flights between cities when it comes to data analysis. This includes considering network effects of hub-and-spoke airlines and substitutability among nearby airports (OECD, 2014). While both the US and EU have acknowledged these factors in their horizontal merger guidelines and practical cases, they have yet to develop a quantifiable calculation method to calculate the network effect, supply-side situation, or transit ability. Consequently, it is often encountered in the merger control review process that an authority perceives a potential serious damage in competition within its jurisdiction's relevant market due to a merger. However, when examining data for every single route, the situation may not be as evident, making it challenging to substantiate any issues with the transaction and identify precise methods of merger relief.

In this case, due to the industrial economic structure, geographical location, and limitations of the hinterland market scope, the development of the civil aviation transport industry in South Korea cannot solely focus on direct flights. Instead, it necessitates a robust emphasis on transit business. In this setting, Korean Air stands out as an exceptional carrier renowned for its seamless transfer services, as well as its main hub, the Incheon International Airport, excel as providers of air transfer services. Despite operating with a fleet of fewer than 160 aircraft, it competes fiercely with major international airlines on the routes it serves (Korean Air, 2023). Unfortunately, of the five jurisdictions that have accepted the commitment, only the United Kingdom has addressed the competitive implications on routes that cover a wider range of routes than point-to-point (i.e., routes from Europe to Korea), and none of the other countries has considered the transiting capacity of the merging parties. For instance, the transit volume of passengers carried by Korean Air from China to other countries via Seoul and vice versa is not considered in China's assessment. If the number is significant enough, it would be appropriate to include a specific Chinese city and a certain foreign city outside South Korea in the relevant market.

Slot divestitures cannot mitigate the competitive damage after merger. Despite the absence of compulsory provisions in national laws, slot divestitures have emerged as a prevailing practice in numerous countries, serving as the primary structural remedy for airline mergers for air passenger transport.

In the context of airline deregulation, facilitated by open skies agreements among the US, EU, and other countries, antitrust authorities in these jurisdictions tend to optimize resource allocation among airlines and typically adopt relief measures, rather than impede airline mergers. However, as major airlines continue to expand their size and influence across different countries, coupled with the growing recognition of the necessity for airline re-regulation, numerous jurisdictions have gradually come to realize that slot divestitures are insufficient in effectively balancing market forces within a timely manner. In fact, if there is not enough perfect transfer network and passenger flow, even if some slots are released, other airlines will not take over, but in a short time, the choice of passengers will be reduced, and the fare will not be lower.

For instance, the US antitrust enforcement agencies regard slots as intangible assets of airlines. When airlines merge, if these assets are not divested, a competitor would not be able to discipline a merger-generated increase in market power, and if the merged company retains the right to use the divested intangible assets, it is likely to bring competition risks (Antitrust Division of US Department of Justice, 2022). Although the Merger Remedies Manual in 2020 containing this view has been invalid after 2022, in the recent two years, the applicant still regards slot divestitures as an important commitment content in the joint venture case of American Airlines and JetBlue Airways and the acquisition case of Spirit Airlines by JetBlue Airways, which were successfully prevented by the DOJ. It at least means that the US believes that this traditional relief method has limited effect, and there is no better way to maintain competition order except to prevent the transaction.

In the Korean-Asiana airlines merger case, for the air passenger transport business, South Korea, China, Japan, UK, and EU all accepted slot divestitures as the main merger relief measure. Among them, Korea and China have stipulated the transfer procedure of slots and imposed requirements for the recipient without specifying a time limit for the transfer. However, they did not explicitly mention the identity of the recipient. On the other hand, Japan, UK, and EU have clearly identified which airline will assume control of the slots released by the merging party. It suggests that these five jurisdictions are contemplating strategies to vitalize these stripped-down slots. If the merger airlines are the sole operators on a particular route, assuming it is either highly

unpopular or only the merger airlines can ensure its success, eliminating them from the market may not necessarily attract new competitors. Hence, perhaps ensuring the receiver's position could be deemed advantageous.

Changes and Trends in the Regulatory Convergence of Airlines Merger Control

OECD and its active member states continue to demonstrate exemplary leadership in aviation antitrust matters, while the air transport agreement enables countries to embrace the principle of reciprocity and strive for mutual comity. For now, there remains a prevailing trend towards regulatory convergence in aviation antitrust. It is worth noting that, international air transportation involves economic sovereignty of countries, thus making it intricately intertwined with political ecology. The Korean-Asiana airlines merger case indicates potential future developments in aviation antitrust regulatory cooperation, encompassing two key changes.

First, the utilization of the principle of reciprocity is progressively influenced by national interests. In this particular case, the United States is the only jurisdiction that may have uncertainty for this case. The United States undergoes a long process of tangle to strike a delicate balance between its competition policy and international comity. Since 1998, US and South Korea have implemented open skies policies, allowing for an unrestricted number of designated airlines and extending route authorizations beyond point-to-point connections (U.S. Department of State, 2001). Compared to general international air transport market access requirements, the threshold for designated airlines to enter US-South Korea routes is relatively low. From this perspective, it can be said that this case and mergers among US carriers are similar.

In recent years, the United States is in urgent need of revitalizing its national economy through enhanced government control. In 2021, the United States issued an Executive Order on Promoting Competition in the American Economy, aiming to reduce consolidation across various sectors, including civil aviation (The White House, 2021). Subsequently, DOJ successfully blocked the Northeast alliance between American Airlines and JetBlue Airways, as well as JetBlue Airways' acquisition of Spirit Airlines. Regarding the Korean-Asiana airlines merger, if DOJ were to treat domestic and foreign airlines equally, it should impede this merger. However, explaining the competitive harm caused by this merger poses a challenge. Even if DOJ accepts the commitments made by the merging airlines, if there are no other Korean airlines capable of competing with merged Korean Air, or any American carriers are willing to enter into competition on US-Korea routes, traditional relief measures including slot divestitures cannot effectively alleviate competitive harm. Therefore, this merger presents a predicament for DOJ. It would be unwise for DOJ to undermine its national competition policy by accepting Korean Air's promise, as it would be unfair towards US carriers considering their domestic airline joint ventures and mergers were just blocked.

Second, some jurisdictions have initiated efforts to articulate their perspectives based on best practice initiatives. The Korean-Asiana airlines merger case stands out as a rare instance where antitrust scrutiny has been conducted simultaneously in multiple countries, offering a comprehensive comparative analysis of national reviews. This case has presented numerous significant instances in terms of the articulation of opinion.

For instance, this case is the first competition-related merger case dealt by any competition authority or sector regulator in Malaysia (MAVCOM, 2021). Despite its limited experience, Malaysia made a commendable effort to conduct a comprehensive analysis of the case within the framework of its own competition laws and expeditiously arrived at independent conclusions five months prior to South Korea's decision. Malaysia's active

decision in this contentious case demonstrates the determination of its competition regulator to assert itself as an active participant in international air transport.

Another example is China. After approximately 18 months of soliciting opinions and engaging in repeated discussions, MOFCOM ultimately introduced an unprecedented condition in China to this case: the requirement for slot divestiture imposes additional obligations on carriers to undertake slots based on the current slot coordination rule, thereby significantly diminishing the immediate impact of consolidation relief. Currently, China has made substantial efforts to promote enforcement of antitrust laws in the field of people's livelihood and strives to stimulate market vitality (Ni Tai, 2024). With unwavering confidence in the operational capabilities of Chinese carriers, MOFCOM permitted the merged South Korean flagship carrier to continue competing in this market to encourage fair competition—a stance that holds praiseworthy value among major air transport nations in the current environment.

In the short term, the first key change could have a very direct impact on recent global merger reviews of similar airline mergers, including this case. In the long run, the second key change will gradually enhance the contains and propositions of international aviation antitrust regulatory dialogue, thereby significantly impacting the general trend of regulatory convergence. Numerous countries that previously had limited involvement in enforcing antitrust laws in aviation industry will progressively clarify their policy stands and fully participate in international antitrust coordination through practice and vocalization on analogous cases, probably producing some new ideas or aviation market analysis method.

Protectionism in Airlines Merger Control

Undoubtedly, the airline industry enjoys the highest level of protection globally, benefiting not only from provisions such as the nationality and air traffic rights clauses in treaties but also from various restrictions on foreign investment imposed by different countries on their civil aviation sectors.

However, in the past, mergers between airlines within the same country or regional economy would typically prioritize the stance of the home country or regional economy when it came to other jurisdictions. For instance, in 2004, Air France and KLM merged to form Air France-KLM, while US Airways and American Airlines merged in 2013. These two mergers led to the establishment of the world's largest airlines at that time. They were primarily focused on local merger reviews and swiftly obtained approval from antitrust authorities abroad.

The frequent occurrence of geopolitical events and the significant impact of the pandemic on the civil aviation industry have prompted many countries to revert to protectionism. However, international air transport must be based on reciprocity. Rejecting a merger of foreign competitors without reasonable grounds may hinder the development of domestic airlines. As a result, protectionism in the airline industry will be more implicit and exercising greater caution when considering mergers with foreign airlines. For instance, the CMA of the United Kingdom especially designated a UK carrier as primary candidates for divesting slots in this case, rather than just simply prevented the merger.

Conclusion

The case has now reached its most critical juncture, awaiting the announcement of its fate by the US. There is a Chinese proverb known as "a leaf knows autumn", which signifies that the sight of a fallen leaf indicates the arrival of autumn. This case vividly exemplifies the consequences of international aviation antitrust regulation

convergence and highlights the times' unique characteristics. It illustrates the challenges and predicaments transnational airlines may encounter in the current international anti-monopoly landscape, while also shedding light on the trajectory of international aviation merger coordination oversight. The dynamics in the global air transport market have significantly evolved, rendering traditional airline merger control best practice outdated and necessitating regulatory adaptation to national air transport market realities. This case would become an important milestone event, since then the international aviation antitrust will welcome more qualified participants in the dialogue, let us wait and see.

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