Antitrust in the Skies: The United and Olympic Airline Mergers

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“This is a true merger of equals, bringing together two strong companies and positioning us to succeed in a dynamic and highly competitive global aviation industry. This sets us on a path to create the world’s leading airline. . . .”

I. Introduction

Every year, top airline managers gather for the annual conference of the International Air Transport Association (IATA), a trade organization with members from 243 international airlines. Having lost a combined $42 billion and amassed $200 billion in debt over the past decade, the conversations between airline executives over cocktails at this event have likely grown increasingly grim. Even despite airlines’ recent strategy of combating losses through a myriad of newly-created fees for formerly-free services like baggage and inflight meals, it remains difficult for airlines to stay in the black. At the 2007 IATA conference in Vancouver, director general Giovanni Bisignani discussed what he perceived as the four greatest challenges facing the airline industry today: security, infrastructure costs, open skies, and the environment. Essentially, Bisignani pointed out what everyone in the room already knew: (1) in the post 9/11 world, security costs are growing; (2) the cost of fuel is prohibitively expensive and unpredictable; (3) airport usage fees are sky high and increasing; (4) airlines are bound by 60-year-old rules that direct when and where they can go; and (5) mandatory government “green” taxes that counteract

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3 Id.  
5 Grossman, supra note 2.
plane carbon emissions are now taking off around the world.\textsuperscript{6} Long story short, the commercial airline business is facing challenges from all angles to survive, let alone profit.

It is not surprising then that airlines are increasingly looking to merge with each other to counteract this problem. Airlines “seek to merge with or acquire other airlines to increase their profitability and financial sustainability, but must weigh these potential benefits against operational costs and challenges,” according to an industry report.\textsuperscript{7} The primary benefit for merging airlines is the cost reductions they can achieve as a merged company. Through a merger, airlines can (1) combine complementary assets; (2) eliminate duplicate activities; and (3) reduce capacity.\textsuperscript{8} There are also possibilities for increased revenues in the form of higher fares in existing markets and increased demand for more seamless travel to more destinations.\textsuperscript{9} The prospect of reduced costs and increased revenue is a siren call to many airline CEOs.

With these challenges and incentives, airline bankruptcies, mergers (and attempted mergers) are becoming a more common occurrence. Domestically, Delta Airlines completed its $2.8 billion acquisition of Northwest Airlines in 2008, forming what was the world’s largest carrier,\textsuperscript{10} and Southwest Airlines completed its purchase of AirTran in May 2011.\textsuperscript{11} This Article explores the 2010 merger of United Airlines and Continental Airlines—which usurped Delta’s briefly-held title as the world’s largest airline—as well as the failed merger of Greece’s two largest airlines, Olympic Air and Aegean Airlines, and the antitrust considerations associated with each of these transactions. Part II of this Article details the United and Continental merger, explaining pertinent portions of each airline’s corporate history over the past 10 years, which has

\textsuperscript{6} Id.
\textsuperscript{7} Airline Mergers: Issues Raised by the Proposed Merger of United and Continental Airlines, General Accounting Office Reports and Testimony, June 1, 2010.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
included multiple other unsuccessful merger attempts. Next, Part III describes the circumstances surrounding the failed combination of Olympic and Aegean, including the role the Greek financial crisis played in their desire to merge. Part IV compares the United/Continental and Olympic/Aegean mergers, first discussing the legal standards the United States government and European Commission (“EC”) employed in making their antitrust determinations, and then explaining key differences between the two unions—such as distinctions between the size and concentration of the U.S. and Greek/European airline markets, and Olympic/Aegean’s unwillingness to make compromises in light of the EC’s initial findings—that might explain the opposite outcomes. This section also proposes that Olympic Air and Aegean Airlines could aid their future chances of success, should either decide to attempt to merge with the other or another airline, by working more collaboratively with the EC to achieve compromises and reasonable alternatives. Finally, Part V concludes by suggesting that more airline mergers are likely to follow in the United States and abroad.

II. United We Fly: The Merger of Continental and United

The story of United and Continental’s 2010 merger begins a decade earlier, and with another U.S.-based airline: US Airways. United’s business was solid when it began talks in spring 2000 to buy a troubled US Airways. The deal with US Airways collapsed the following year, however, because the Bush administration hinted that the arrangement “would not pass regulatory muster.” Following this announcement, United Airlines CEO Glenn Tilton remarked to The Denver Post that the government might take a different view of a United/US

Airways merger now because “legacy” carriers such as United no longer set industry-wide prices because the industry competition had gotten too fierce. Still, Tilton did not indicate that he specifically foresaw any mergers on the horizon for United.

With the perennial problems in the airline industry, however, United did not want to go it alone. United began discussing a possible merger with Continental Airlines in 2007. Unlike United’s failed merger attempt with US Airways in 2001, analysts said that Continental would be a preferred partner for United because the tie-up would be more easily blessed by antitrust regulators, given the relatively minimal overlap in the airlines’ networks. Just days before the merger announcement in 2008, however, Continental walked away. The Continental board had reconsidered based on United’s poor financial health and the market’s soaring fuel prices. Jeffery A. Smisek, president and CEO of Continental, would later say that this decision to break off the discussions with United was the right one at the time, but also indicated that he would be open to “defensively bulk up,” indicating his willingness to merge with another airline.

Unsurprisingly, even though the two airlines had not yet merged, the possibilities for collaboration between United and Continental did not die with their failed 2008 merger. Instead, the very next year, Continental began working closely with United and other airlines on setting prices and schedules for international service, and appealed to the Justice Department for

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15 Id.
19 Id.
20 Id.
21 Continental sought antitrust immunity to cooperate with United and other Star Alliance member airlines, including US Airways, Lufthansa, and Air Canada. The Star Alliance is the world’s largest airline alliance, and was established in 1997 by five global airlines, including United. Star Alliance Organisation, Star Alliance, http://www.staralliance.com/en/about/organisation/ (last visited Apr. 18, 2011).
antitrust immunity for these partnerships. Specifically as between United and Continental, however, the two had additionally agreed to sell seats on each other’s U.S. flights, to combine customer lounges, to consolidate operations at airports served by both, and to work together on procurement. This essentially amounted to a quasi-merger, and the Justice Department recognized that, and reacted to it as such. The DOJ found that such an arrangement would go beyond the normal “code-sharing” deals between airlines that typically involve reciprocal sales and mileage programs. Instead, the DOJ said that it could closely resemble a merger, though both had assured the DOJ that they would maintain their separate domestic networks, and make separate decisions as to pricing, scheduling and sales in the U.S.

The Transportation Department had given preliminary approval to the proposal, but the DOJ opposed the request for antitrust immunity. The DOJ argued that anything beyond limited antitrust immunity for airlines could hurt competition on other routes between the U.S. and foreign countries, and also raise fares domestically. Robert Doyle, an antitrust attorney in Washington, D.C., said that he was not surprised by the DOJ’s reaction to the request. “It’s open-ended immunity for any deal they decide to do,” he said. In turn, Continental Airlines pointed to the poor economy as justification for the proposal. The government was no doubt suspicious given the merger discussions between the two airlines from the prior year.

Without the antitrust immunity to closely collaborate with another airline, United became determined to find a merger partner. United Airlines and the new, larger US Airways, seen as

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23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
the two biggest advocates of consolidation in the U.S. airline industry, once again initiated merger discussions in April 2010 to create the world’s largest airline.\textsuperscript{30} Though much had changed since the last attempt, overwhelming antitrust concerns still remained.\textsuperscript{31} Because each airline had a large presence at nearby airports in a major metropolitan area, a United/US Airways merger would still have involved significant reduction of competition in major markets.\textsuperscript{32}

It soon became clear, however, that United was merely using US Airways in a ploy to attract Continental back to the bargaining table. Only a month later, in May 2010, United and Continental announced their agreement to merge in a deal that would create the world’s largest airline.\textsuperscript{33} The new, combined United/Continental is the jumbo jet of airlines: the largest passenger air operation in the world (though they prefer the term “leading” instead of “largest”). The combined airline features ten global hubs, flies 5,675 daily departures to 372 different airports across the globe, employs a workforce of almost 90,000, and will serve 144 million passengers per year.\textsuperscript{34} The merged United and Continental instantly became the market-share leader in six of the ten largest air travel markets in the U.S.\textsuperscript{35} Both sides were pleased with the union. “We are creating an airline here today that has a far brighter future than either of us individually could’ve ever created on our own,” Continental CEO Jeff Smisek told NPR’s “All

\begin{itemize}
\item \textsuperscript{31} Id.
\item \textsuperscript{32} United operates a hub at Dulles International Airport outside Washington, D.C., and US Airways is the largest carrier at nearby Reagan National Airport. At Reagan National Airport, US Airways had a pending deal with Delta to obtain more gates and additional landing and takeoff rights. \textit{Id.}
\item \textsuperscript{35} Dan Reed, \textit{United, Continental Plan Merger}, USA TODAY, May 3, 2010, at 6A. These markets include New York, Chicago, Los Angeles, San Francisco, Houston, and Washington. \textit{Id.}
\end{itemize}
Smisek also stressed that the merger, and the sheer size of the new operation, would benefit consumers as well.37

No sooner had the merger been announced than financial analysts, legislators, and regulators began to express concerns over price increases and other adverse effects. In nearly all of the articles announcing the merger plan, economists and other analysts provided commentary that the merger would almost certainly mean higher airfares for customers.38 Scott Sonenshein, a Rice University business professor, told The New York Times, “As a consumer, you will have less choices, fewer routes, higher prices and more fees.”39 Aaron Gellman, a professor at Northwestern University’s Transportation Center, shared similar concerns with USA TODAY. “You’ll get higher prices . . . plus a lower propensity to innovate,” he said.40

Nonetheless, most also anticipated that United and Continental would face few antitrust objections. United and Continental separately shared no hubs, and were not in significant “head-to-head” competition as horizontal competitors on many routes domestically or internationally.41 Beyond the facial analysis of each company’s assets and how they compare to each other, analysts like Vaughn Cordle at AirlineForecasts ran market-concentration formulas similar to those that regulators use to reveal the antitrust implications of a merger and did not see any red flags.42 Others noted that “legacy” airlines like United and Continental have faced extraordinary pressure from low-fare airlines like Southwest Airlines and JetBlue Airways, and have had to cut

37 Id.
38 Dan Reed, United-Continental Merger Plan Raises Fears of Rising Ticket Prices, USA TODAY, June 21, 2010.
40 Dan Reed, United, Continental Plan Merger, USA TODAY, May 3, 2010, at 6A.
41 Id.
42 Id.
prices over the past decade to remain competitive. The implication being that if United and Continental were to take advantage of their consolidation at the expense of customers, customers could always choose the low-cost airlines instead. Even so, United and Continental both service many destinations, particularly in the international arena, that low-cost carriers like Southwest and JetBlue do not.

In any case, the merger announcement in April 2010 also set off the usual response in Washington and elsewhere, with legislators and even members of state government fighting against the merger where they believed it could hurt their constituents. Once United and Continental gave assurances that they planned to retain all ten of their combined hubs, the legislators’ battle shifted to antitrust allegations, and to protecting local consumers who frequented those hubs from facing decreased choice or higher prices. Representative James Oberstar (D-Minn.), the chairman of the aviation subcommittee of the House Transportation Committee, claimed in a May 5, 2010 letter that the deal would pressure other large U.S. carriers to merge, ultimately leaving consumers with less service and higher fares. At an antitrust subcommittee hearing on the merger, Senator Herb Kohl (D-Wis.) stressed that while the major airlines face competitive pressures and high costs, the government must “insure that airline consolidation does not diminish the competitive choices for air travelers.”

43 Mouawad and de la Merced, supra note 39.
44 Turbulence Ahead for Airline Deal?, Muzeview Research, LLC, available at http://ropesgray.com/popofskycommentsantitrustairlines?PublicationTypes=d22f8b16-736c-4f83-a532-c787f320b42b. Ropes & Gray partner Mark Popofsky, who co-chairs the firm’s antitrust practice, said that this argument—that low-cost carriers would ensure airfare pricing remained competitive—succeeded with the last administration in allowing the Delta/Northwest merger. Id.
United and Continental faced other hurdles, both domestically and internationally, as well. Because of the global scope of the merger in United’s service to Europe and membership in the worldwide Star Alliance airline partnership that included Europe-based airlines, the EC also needed to approve the merger. In July 2010, the EC did so. The EC found that the two airlines had hubs in different U.S. cities, their networks were complementary, and, therefore, the merger would lead only to small, incremental increases in the market shares of the parties. The EC further stated that the complementary nature of their routes could be said for their routes between the U.S. and Europe, and that the combination of the carriers “will not give rise to concerns on any specific route.”

Significantly, in August and September 2010, United and Continental reached settlements in three lawsuits filed by three shareholders who opposed the merger and a District Court judge in the Northern District of California dismissed an antitrust lawsuit filed by “current and future purchasers of airline tickets,” respectively.

Most importantly, the Justice Department approved the proposed merger of United and Continental in late August 2010, clearing the path for the megadeal to close by October. All that United and Continental had to do to win the antitrust approval from the U.S. government was to lease slots for eighteen round-trip flights to Southwest Airlines at New Jersey’s Newark Liberty International Airport beginning in March 2011. Justice Department officials were likely under pressure to follow the precedent set by the 2008 merger of Delta and Northwest, which focused on routes where the merging carriers competed head-to-head, which was only a

49 Id.
50 Id.
51 Alison Grant, Continental, United Settle Investor Suits, CLEVELAND PLAIN DEALER, Aug. 5, 2010, at C2.
54 Id.
minor concern in the merger of United and Continental because of their largely complementary route maps. The agreement to give the eighteen slots to Southwest Airlines in Newark was only required because the Justice Department was uneasy with the fact that the pre-merged Continental already controlled 60 percent of air traffic out of Newark.

Although United and Continental have not yet made any broad price increases as a result of the merger, both have tried to modestly bump up prices. In March 2011, American Airlines, United Airlines, and the not-yet-combined Continental Airlines attempted to raise prices for round-trip flights by $10, but the prices did not stick because other airlines did not match them. The following week, Southwest Airlines, citing the rising cost of fuel, raised its prices by $10 on round-trip airfare on a Monday, and by midday Wednesday American Airlines, United, and JetBlue had matched the $10 price increase. As United and Continental spend the next year combining their companies and operations, and as the cost of fuel continues to rise, more price increases may lie in the future for United’s “friendly skies.”

III. Greek Tragedy: The Failed Merger of Olympic Air and Aegean Airlines

Many in Greece, including its two largest air carriers—Olympic and Aegean—have been hard-hit by the Greek financial crisis. In March 2010, European Union leaders were

55 Id.  
56 Id.  
59 Other airlines in Greece—such as Athen Airways, Hellenic Imperial Airways, Sky Express, and Aegean Aviation—are significantly smaller and split their operations between scheduled and chartered flights. [AIRINES IN GREECE – AEGEAN AIRLINE, OLYMPIC AIR, ATHENS AIR, SKY EXPRESS, MORE](http://gogreece.about.com/od/domesticairlines/Air_Travel_Domestic_Airlines_In_Greece.htm) (last visited Apr. 23, 2011). Athens Airways was founded in 2009 and is the only airline of those mentioned supra that has aspirations of ever competing on the same level as Olympic Air and Aegean Airlines. Id.  
60 Olympic Air is the largest airline in Greece by destinations served. [OLYMPIC AIR – LIST OF AIRLINES](http://listofairlinesintheworld.com/Olympic+Air) (last visited Apr. 21, 2011). Aegean Airlines is the largest Greek airline by number of passengers carried, 6.6 million in 2009, but is generally considered the second-biggest airline
supportive of an agreement to use funds both from Europe and from the International Monetary Fund (IMF) to help financially-crippled Greece.\textsuperscript{61} The financial crisis was set into motion with the global economic downturn following years of unrestrained Greek government spending, easy lending, and failure to implement financial reforms.\textsuperscript{62} Greece’s government has since enacted a number of remedial measures—including a tax hike on fuel—that have also affected the operations of Olympic Air and Aegean Airlines.\textsuperscript{63}

Aegean Airlines reported in a May 2010 public statement that it expected heavy deficits for two years.\textsuperscript{64} Managing Director and CEO Dimitris Gerogiannis claimed at a Star Alliance CEO meeting in Brazil that Aegean was beginning to see “a significant effect” on demand and yields in its entire network, and he said the situation was rapidly deteriorating.\textsuperscript{65} Gerogiannis said that in spite of the difficulties, “a merger with Olympic is the only way for us to survive. It is impossible to sustain two full-service carriers in such a small country as Greece.”\textsuperscript{66}

Gerogiannis pointed out that a combined Aegean and Olympic would be smaller than other regional airlines, such as TAP Portugal or Austrian Airlines.\textsuperscript{67}

In early 2010, Aegean and Olympic agreed to merge their assets into one airline.\textsuperscript{68} Gerogiannis was confident that the merger would be approved by the European Commission, stating in late spring 2010 that he expected the approval was as little as two to five months

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\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Jens Flottau, Aegean Faces Sharp Revenue Losses from Greek Financial Crisis, AVIATION DAILY, May 17, 2010, at 5.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
away. The EC’s response in August 2010 was not quite what Gerogiannis had predicted. The EC’s initial inquiry found that the deal presented “serious competition concerns.” These competition concerns stemmed from the EC’s determination that the new company would have “very high, if not monopolistic, market shares on all domestic routes and on a number of international routes where both parties [currently] operate.”

In response, Aegean managing director and CEO Dimitris Gerogiannis emphasized that this merger was not a profit-driven move, but characterized it instead as a “viability issue.” Joaquin Almunia, the EC’s vice president in charge of competition policy countered that the EC “must make sure that consumers and businesses will continue to have a competitive choice of airline services in Greece, both as regards fares and routes.” Despite the negative initial forecast, the EC then launched an in-depth inquiry with the assurance that the initial inquiry’s result would not prejudice the investigation’s final decision regarding the merger.

In January 2011, the EC announced that it would prohibit the merger between Olympic and Aegean. After the more thorough investigation, the EC found that the combination would create problems regarding competition and would harm consumers. Specifically, the EC found

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69 Id.
72 EC Opens Antitrust Probe into Aegean/Olympic Merger, TENDERS INFO, Aug. 4, 2010 (available on LexisNexis).
74 Id.
that Aegean and Olympic competed head-to-head on key flights, and that the merger would have eliminated effective competition on nine crucial routes within Greece, affecting the four million passengers who travel on these particular routes each year. Beyond that, the EC additionally concluded that there were “no realistic prospects” that a new player would be able to enter the Greek market and challenge the combined force of the two companies.

The most significant “deal-breaker” for the EC, however, was Olympic and Aegean’s failure to propose any remedies that would directly address the EC’s concerns over the combined company’s high market share. Aegean and Olympic had rejected the EC’s suggestion that the airlines relinquish part of their fleet or one of their two brand names to new entrants, and counter-offered that they would instead be willing to release slots in Athens and other airports. The EC clarified that their concerns were not over a lack of slots (there are plenty), but rather that no other companies could realistically enter the market. Aegean and Olympic could not, or were unwilling to propose a larger-scale solution or compromise that would address the EC’s principal concern that the merged airline would have too high of a high market share. “[W]hen there is no effective remedy proposed . . . we [are] obliged to block the transaction,” Almunia remarked in a March speech at a conference on EU merger regulation policy.

80 EUROPEAN UNION NEWS, supra note 77.
81 Id.
82 Jens Flottau, European Commission to Block Aegean, Olympic Merger, AVIATION DAILY, at 2.
83 Speech by Joaquin Almunia, Vice President of the European Commission for Competition Policy, to EU Merger Regulation Policy Conference (Mar. 11, 2011) (available on LexisNexis).
This was the third decision in six years in which the EC had banned a horizontal merger to protect consumers and ensure competition in the marketplace.\textsuperscript{84} In recognizing the profound effect that the financial crisis has had on the Greek airlines, Almunia confirmed that the EC was aware that the decision could put the two airlines in a difficult position, but maintained that the EC has “the duty to block mergers that would put competition and consumers at risk.”\textsuperscript{85}

The Olympic and Aegean leaders disagreed with the decision, and warned that the denial of the merger would not only have negative effects on Greek and other European consumers, but would also benefit the Greek airlines’ foreign competitors.\textsuperscript{86} Though both companies appealed the decision,\textsuperscript{87} Olympic chairman Yiannis Karakadas has since hinted that Olympic might merge with or acquire nearby Cyprus Airways.\textsuperscript{88} Meanwhile, Aegean expects to keep losing money throughout 2011 because of poor economic conditions, increasing fuel prices, and its planned investment in international expansion.\textsuperscript{89}

\textbf{IV. U.S. and E.U. Government Approach to Analyzing Horizontal Mergers}

Mergers are covered by multiple sections of United States antitrust law: the Sherman Act where a merger anticompetitively restrains trade (because mergers involve agreements) or for mergers that create a firm with monopoly power, the FTC Act and the Clayton Act.\textsuperscript{90} Most important of these in considering prospective horizontal mergers among competitors is section 7

\textsuperscript{84} ANSAMED, \textit{supra} note 75. Since 1989, the EC has looked into more than 4,500 mergers and has only prohibited twenty. \textit{EUROPEAN UNION NEWS, supra} note 77. The most recent instance involving an airline was in 2007 when the EC rejected a proposed merger between Ryanair and Air Lingus in Ireland. Ryanair and Air Lingus Case, \textit{European Commission}, \url{http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4439} (last visited May 11, 2011).
\textsuperscript{85} Id.
\textsuperscript{86} Jens Flottau, \textit{EC Blocks Aegean/Olympic Merger to Forestall “Quasi-Monopoly,” AVIATION DAILY}, at 5.
\textsuperscript{87} REUTERS, \textit{supra} note 79. The companies said that the decision was “founded on the wrong basis.” \textit{Id.}
\textsuperscript{88} \textit{Olympic Air Boss Does Not Rule Out Cyprus Merger}, ANSAMED, Apr. 8, 2011 (available on LexisNexis). Cyprus Airways is majority controlled by the Cypriot state, and has seen losses mount in recent years from competition by lower-cost airlines on its most profitable routes. \textit{Id.} As United and Continental had tried to do before they considered a merger, Olympic and Cyprus have made a code-sharing agreement. \textit{Id.}
\textsuperscript{89} \textit{Aegean Airlines to Keep Losing Money in 2011}, ANSAMED, Mar. 16, 2011 (available on LexisNexis).
\textsuperscript{90} Einer Elhauge and Damien Geradin, \textit{GLOBAL COMPETITION LAW AND ECONOMICS} 800 (2007).
of the Clayton Act, which provides that: “No person shall acquire the whole or any part of the assets of another person where in any line of commerce or in any section of the country the effect of such acquisition may be substantially to lessen competition to tend to create a monopoly.”

Firms may want to acquire another firm to (1) increase capacity; (2) acquire assets that they feel are needed to achieve economies of scale or scope; or (3) to create efficiencies.

Sometimes, however, firms may want to acquire rivals simply to eliminate the competitor and gain market power, and this is why the United States and EC evaluate all proposed mergers to determine the merger’s market impact. In the United States, the Department of Justice and the Federal Trade Commission (FTC) share responsibility in considering mergers, but a clearance policy ensures that only one of the particular agencies reviews a transaction. The primary goal of the antitrust enforcement agencies is to figure out how to separate mergers that are beneficial from mergers that are anti-competitive, and to allow the ones that are efficient to proceed, while blocking and condemning the exclusionary mergers.

The approach in the United States specifically for airlines mergers is to first analyze the extent of likely anticompetitive effects from reducing competition in relevant markets. In the airline industry, the market is defined by both cities and airports, leading to the calculation of an overall measure of industry-wide market concentration, or the Herfindahl-Hirschman Index

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92 Elhauge and Geradin, supra note 90.
94 Under the Hart-Scott-Rodino Act, parties planning a merger above a certain size must notify U.S. enforcement agencies before consummating the merger. Elhauge and Geradin, supra note 90, at 800–02.
96 Elhauge and Geradin, supra note 90.
For a merger analysis, the government would look at 1) the market share of the particular airline acquiring the other airline; 2) the market share of the airline being acquired; and 3) what comprises the rest of the market. The government next considers the likelihood that other airlines entering these markets would counteract any anti-competitive effects. Then, the government would look at any efficiencies that a merger could bring. Finally, the government considers whether one of the airlines proposing to merge would fail and its assets exit the market in the absence of a merger.

In the case of United and Continental, the government found that the merger would bring little overlap among each of the airlines’ top five domestic markets, and that there was sufficient competition from other airlines in almost all of these markets. United and Continental also successfully argued that their assets were complementary, and that because of their individualized strengths in the global market, they could create a larger, more seamless travel experience for the consumer as a merged company. Finally, the previous decade was an extremely challenging one for all airlines—and for United in particular—and the government was likely sympathetic to the many ups-and-downs that United’s business had experienced.

98 Id.
100 Id.
101 Id.
102 Id.
103 Julie Johnsson, Merger with Continental Would Retain Chicago Home, Apr. 23, 2010, at C21. Essentially, in the markets where Continental was strong, United was not present, and in the markets where both had a presence, the presence was very minimal. Id.
104 Antitrust Concerns Unlikely to Block a 2010 United-US Airways Merger, TRAVEL & LEISURE CLOSE-UP, June 4, 2010 (available on LexisNexis). As discussed supra, the only requirement to win government approval was that United/Continental lease about twenty gates to Southwest Airlines at the Newark airport. Julie Johnsson, Antitrust Regulators OK United-Continental Deal, CHI. TRIB., Aug. 28, 2010, at C8.
The EC’s antitrust merger analysis is similar to that of the U.S. The original EC Treaty, however, does not contain any provisions regarding merger approvals.\textsuperscript{107} Though the EC initially relied on Articles 81 and 82 of the treaty to stop problematic mergers, the Council of Ministers achieved authority over mergers with the EC Merger Regulation (ECMR), which was enacted in 1989.\textsuperscript{108} The ECMR was last updated in 2004 through Council Regulation (EC) No. 139/2004\textsuperscript{109} and designed to make the EU regulations more akin to what is used in the U.S.\textsuperscript{110} The approach for analyzing horizontal mergers under this updated rubric is to first define the relevant product market and geographic markets.\textsuperscript{111} As in the U.S., this includes considering the HHI level and changes in HHI to indicate fluctuation in competition as a result of a merger.\textsuperscript{112}

The EC then does a competitive assessment of the merger, taking account of the efficiency or

\textsuperscript{107} Elhauge and Geradin, \textit{supra} note 90, at 803.
\textsuperscript{110} Elhauge and Geradin, \textit{supra} note 90, at 803.

With the Aegean and Olympic merger, the EC found too high of an impact in market concentration in the already highly concentrated Greek airline market based on its analysis of current HHI levels.\footnote{See Introductory Remarks at the Press Conference on the Aegean Airlines/Olympic Decision, \textit{EUROPEAN UNION NEWS}, Jan. 26, 2011 (available on LexisNexis).} In conducting the second prong of the analysis—looking at the competitive assessment of the merger—the EC was particularly troubled by the lack of other competitors who could enter the market, and by Aegean and Olympic’s unwillingness to work with the EC to achieve a solution that would address this issue.\footnote{Nigel Parr, Neil Cuninghame, and Mats Johnsson, \textit{Up in the Air: European Commission Blocks Airline Merger}, NEWSTEX, Mar. 4, 2011 (available on LexisNexis).} The Greek airlines only offered to give up airport slots, which were not in short supply, but refused the EC’s request that they surrender part of their fleet or either airline’s branding for a new entrant.\footnote{Olympic Air, Aegean to Appeal EU Merger Block, \textit{REUTERS}, Mar. 2, 2011, available at http://www.reuters.com/article/2011/03/02/uk-greece-olympic-idUSLNE72105P20110302.} Based on this, even with only a rudimentary understanding of the EC’s antitrust framework, it is not hard to understand why the EC prohibited this merger. Furthermore, even in the midst of a Greek financial crisis and with the Greek airline executives characterizing the merger as a “viability issue,”\footnote{EC Opens Antitrust Probe into Aegean/Olympic Merger, \textit{TENDERS INFO}, Aug. 4, 2010 (available on LexisNexis).} the EC was likely not persuaded by any kind of “failing firm” defense\footnote{Similar to the “Failing Firm” defense recognized in the DoJ/FTC Horizontal Merger Guidelines, the EC has been willing to clear “rescue mergers.” However, the EU rarely grants mergers of this type. Parisi, supra note 108, at 15.} because Olympic and Aegean are continuing to survive, and even expand, in spite of their diminished profits.\footnote{Jens Flottau, \textit{Aegean Faces Sharp Revenue Losses from Greek Financial Crisis}, \textit{AVIATION DAILY}, May 17, 2010, at 5.}

Still, it is curious that United and Continental were allowed to combine in the United States to form the world’s largest airline, yet two fledgling airlines in Greece in the midst of the...
Greek financial crisis were not permitted to come together. Viewed side-by-side, the decisions do not seem to make sense, but the fundamental differences between the market definition in each of the analyses explains why one deal was approved while the other was declined. Unlike in the American market where many large airlines fly similar domestic routes, each European nation has only one to two airlines that fly to major European cities. For this reason, the Greek airline merger would not have posed competitive problems for flights between Greece and other countries, but rather would have substantially impacted competition within Greece itself. Because the market definition for the Greek airlines is smaller, they each have a significantly larger share within that market.

By contrast, even as the world’s largest airline, the new United has ample competition from as many as twenty other airlines, some of which have cheaper tickets and offer more specialized service. The United and Continental CEOs’ argument that “legacy” airlines like United no longer set industry-wide prices is true, and compelling. Even when the new United tried recently to raise prices, it was not able to do so until other airlines (importantly, starting with a “non-legacy” airline) independently raised their own fares.

Compared to the many players in the U.S. airline market, Olympic and Aegean virtually own Greece’s airspace. There is currently no other airline in Greece that could pose any viable competition to a merged Olympic and Aegean Airlines. As one example, the aggressive low-cost carrier Ryanair has not yet penetrated the Greek market despite having a strong presence throughout the rest of the EU. Unlike in the U.S., the Greek airlines do not have direct competition from a carrier like Ryanair or Southwest who would consistently out-price them. Even with this clear problem, neither airline was willing to offer any solutions that would possibly allow a new competitor to enter the marketplace.
Thus, the effect of the Olympic and Aegean merger on the Greek airline marketplace would pose far greater risks than the merger of United and Continental does domestically or abroad. Should Olympic and Aegean attempt to merge in the future—with each other or other airlines—they would need to be much more deferential to the EC’s requests and more willing to offer concessions to get a merger approved.

V. Conclusion

As the cost of doing business as an airline continues to increase, more airlines will look to mergers as a way to minimize costs and maximize efficiencies. In both the United States and Europe, governments have recognized the fundamental challenges of operating an airline. Given these challenges, the U.S. government and the EC have become much more comfortable with the merger of major air carriers, so long as the combination does not have negative effects on airline market concentration that would harm consumers. The U.S. government has approved the creation of the world’s largest airline twice within the past five years, under both Republican and Democratic administrations, and with minimal objection. While the EC is generally stricter in considering mergers than the U.S., recent history within the EU and its local airline industry suggests that airline mergers are becoming much more common there as well. Both the U.S. government and the EC must remain wary of airline mergers, however, because as more airlines merge, it will become that much harder for a smaller entity to survive or enter the market. Despite these concerns, and the many differences between the American and European air carriers, mergers and attempts to merge in this industry will nonetheless continue because all the world’s airlines are facing the same challenges in a constantly bumpy industry.