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Citation

Chen, S., Mendes de Leon, P. M. J., & Choi, J. (2025). Multiple approaches towards merger control: how to achieve regulatory convergence? A global perspective on the Korean Air-Asiana Airlines merger. *Air And Space Law*, 50(3), 257-284. doi:10.54648/aila2025029

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

Multiple Approaches Towards Merger Control: How to Achieve Regulatory Convergence? A Global Perspective on the Korean Air-Asiana Airlines Merger

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This paper contains a comparative analysis of five jurisdictions that implemented merger remedies in the Korean Air-Asiana Airlines merger case. It also examines how the European Union (EU) and United States of America (US) air transport competition and antitrust regulations, including rules on merger control, have been transplanted and applied by other jurisdictions. Currently, the international air transport industry lacks a foundation for regulatory convergence in these areas, which are, or should be, subject to the relevant theories and methods in order to achieve a more harmonized approach. In that context, the present paper specifically identifies relevant market definitions, market power assessments, and merger remedies in each of the five jurisdictions. It is concluded that the traditional divergent approaches are in urgent need of a common stance on the aforementioned, and other definitions and concepts.

Keywords: airline merger control, air transport competition, antitrust regimes, relevant market, remedies, enforcement

1 INTRODUCTION

Since the inception of antitrust and competition law,¹ the pursuit of a unified international antitrust regime through international coordination has remained the ultimate aspiration of scholars in both international and antitrust law.² Since the

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¹ In the present paper, the terms ‘antitrust’ and ‘competition’ law regimes will be used interchangeably. While in the US, reference is made to ‘antitrust’, the EU employs the term ‘competition’.

² Nevertheless, the international community has yet to achieve any antitrust treaty or establish a unified set of international antitrust rules due to deep differences in legal traditions, economic and cultural

deregulation of the aviation industry in the United States of America (US) in 1978,³ the European Union (EU), then European Economic Community (EEC) liberalization process which started in 1987 and was completed in 1992,⁴ the conclusion of 'Open Skies' agreements by the US since 1992,⁵ the US-EU Open Skies agreements on air transport of 2007, as amended in 2010,⁶ and similar inter-regional agreements,⁷ this sector has experienced rapid growth and deep integration.⁸

For a long time, air transport agreements between states have imposed, and continue to impose, strict nationality restrictions on airlines, surpassing, or bypassing, the typical concepts found in corporate law, making cross-border airline mergers relatively rare and leaving only a limited number of cases available for study.⁹ However, the establishment and activation of antitrust regimes in an increasing number of jurisdictions, controlling mergers between airlines within the same state or regional jurisdiction (the EU), has also triggered antitrust scrutiny across multiple other jurisdictions.

contexts, and the prioritization of national sovereignty over coordination render a truly international antitrust system an unattainable ideal. See Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1 U. Chi. Legal F. 277, 280 (1992).

³ While some argue true deregulation requires abolishing regulatory agencies, the US Airline Deregulation Act of 1978 granted airlines greater market freedom, intensifying competition. Antitrust enforcers adapted by shifting focus to airline and association practices, gaining valuable experience in the evolving landscape. See James W. Callison, *Airline Deregulation – Only Partially a Hoax: The Current Status of the Airline Deregulation Movement*, 45 J. Air L. & Com. 961, 991 (1980).

⁴ Unlike the US, the EEC pursued a gradual liberalization of the air transport market due to diverse social, economic, and regulatory conditions among Member States. Rather than full deregulation, the EEC focused on easing airline restrictions while promoting uniformity in aviation and competition policies to support a common transport policy. See Stacy K. Weinberg, *Liberalization of Air Transport: Time for the EEC to Unfasten Its Seatbelt*, 12 U. Pa. J. Int'l Bus. L. 433, 434 (2014).

⁵ The 1992 Open Skies Agreement signed with the Netherlands marked the promotion of the US to export its deregulation model, promoting competition and limiting government intervention to enhance consumer welfare. See James H. Cordes, *Flying the Open Skies: An Analysis and Historical Perspective of the US-Netherlands Bilateral Air Transport Agreement of September 4, 1992*, 6 Transnat'l L. 301, 304 (1993).

⁶ The core of the Open Skies Agreement between the EU and the US is the antitrust immunity for air transport agreements. It requires ongoing coordination between antitrust and regulatory authorities to seek consensus on competition issues. See Russell E. Tanguay, Jr., *The Future of the US-EU Agreement: A World of Open Skies?* 9 Issues Av. L. & Pol'y 341, 352 (2010).

⁷ Building on the EU and US lead, emerging markets like ASEAN have become the driving force to the open skies movement. While ASEAN's liberalization remains limited and lacks a unified antitrust policy, Member States are gradually fostering mutual understanding and trust in each other's competition frameworks. See Sarah Jane Fox & Rosida Ismail, *'The Skies the Limi!': Open Skies – With Limitations!* 4 Eur. J. Comp. L. & Governance 7, 38 (2017), doi: 10.1163/22134514-00401001.

⁸ While air transport antitrust policies have not fully converged, initiatives like the Open Skies Agreement have advanced international cooperation, transparency and mutual trust. See Roger P. Alford, *Promoting International Procedural Norms in Competition Law Enforcement*, 68 U. Kan. L. Rev. 1165, 1180 (2020).

⁹ In 2013, China Eastern and Qantas launched Jetstar HK and applied for a Hong Kong operating licence, which was rejected in 2015. Authorities emphasized that 'main place of business' involved specific aviation criteria beyond standard corporate factors. See Jae Woon Lee & Michelle Dy, *A Commentary on Jetstar Hong Kong Airways Decision Before the Air Transport Licencing Authority*, 46 H.K. L. J. 175, 176 (2016).

The merger case of Korean Air Lines Co., Ltd., hereinafter referred to as ‘Korean Air’, and Asiana Airlines Inc., hereinafter referred to as ‘Asiana’, is a rare and typical example of that instance. This case was reviewed and examined for four years in a total of fifteen jurisdictions.¹⁰ In these jurisdictions that judged the case, fourteen of which required regulatory review before approval. It illustrates the diverse approaches taken by different jurisdictions in assessing airline mergers. Among these jurisdictions, five conditionally approved the case,¹¹ while others either granted approval without reserve or deemed further notification unnecessary.¹² Hence, this paper focuses on the analysis and comparison of these five jurisdictions.

Section 2 adds an explanation of the challenges of airline merger control from an international perspective. It then examines how the Republic of Korea, hereinafter ‘South Korea’, as the origin of this merger case, strategically leveraged its experience from the US and the EU to achieve domestic consolidation while navigating competition from strong regional airlines with distinct industry focuses, while seeking to demonstrate fair market management by preserving opportunities for potential competitors. Finally, this section discusses how the proactive adoption by the South Korean competent authorities of merger remedies set a precedent for securing regulatory approvals in other jurisdictions, aiming to gain recognition and encourage emulation.

Section 3 provides a chronological analysis and comparison of the merger review decisions in China, the United Kingdom (UK), Japan and the EU identifying the incorporation and adaption of elements of EU and US competition law, in order to contribute to regulatory convergence, by latecomer antitrust jurisdictions. It also examines the new challenges the EU has encountered in applying the established principles and the potential risks through legal transplants may pose for other jurisdictions. Furthermore, as the last jurisdiction to approve this case, this section will also analyse the judicial attitude of the US.

Finally, section 4 summarizes the key findings of the preceding analysis, and section 5 provides concluding remarks.

¹⁰ See Korean Air, *Korean Air, Acquisition of 63.88% of the Stock of Asiana Airlines* (12 Dec. 2024), <https://news.koreanair.com/%eb%8c%80%ed%95%9c%ed%95%ad%ea%b3%b5-%ec%95%84%ec%8b%9c%ec%95%84%eb%82%98%ed%95%ad%ea%b3%b5-%ec%a7%80%eb%b6%84-63-88-%ec%9d%b8%ec%88%98/> (accessed 24 Mar. 2025). [translated by JC].

¹¹ The jurisdiction of the case was conditionally approved to cover South Korea, Japan, the EU, China and the UK.

¹² Turkey, Taiwan region, Thailand, Malaysia, Vietnam, Singapore, New Zealand, Australia, and the US have all approved this case or determined that further notification is unnecessary.

2 CASE BACKGROUND AND KOREAN LAW APPLICATION

2.1 THE INTERNATIONAL AIR LAW CONTEXT

Mergers between undertakings, including airlines, require a deeper integration of joint corporate bodies. Naturally, the level of integration is different from one combined structure to another.

Merger control in aviation as conducted by antitrust/competition authorities must also consider the relationship between the legal status, including the nationality, of the merged airlines because this relationship may raise questions pertaining to the nationality of the combined undertaking in cases where the merging airlines possess different nationalities.

Indeed, the close relationship between the merged airlines may also raise questions pertaining to the nationality requirements which are laid down in Air Services Agreements (ASAs).¹³ Airlines operating international air services under ASAs must meet the nationality requirements drawn up in such ASAs. Such nationality requirements often, but not always, refer to ‘substantial ownership’ in terms of shares and ‘effective control’, in terms of management, of the airlines to be so designated by the states parties to the relevant ASA.¹⁴ Moreover, national laws frequently impose restrictions upon the licensing of air carriers on the basis of their nationality.¹⁵

2.2 SOUTH KOREA: THE FIRST FSC MERGER CASE

2.2[a] Overview

The process of this merger started in 2021 in South Korea.¹⁶ Korean Air concluded a contract to acquire a share of 63.88% of Asiana,¹⁷ which has further been

¹³ For instance, in 2000, the acquisition of KLM by British Airways failed. One of the crucial issues was whether KLM could still be regarded as a Dutch airline. The antitrust enforcement agency not only had to review the competition issues of the merger, but also had to consider whether the merged airline would change the ‘nationality’ under the bilateral or multilateral air transport agreements applicable to it. See Pablo Mendes de Leon, *New Phase in Alliance Building: The Air France/KLM Venture as a Case Study*, 53 ZLW 359, 373 (2004).

¹⁴ Substantive ownership refers to the degree of control and ownership that shareholders have over an airline in the hands of the airline company itself. It is usually understood as having ‘majority’ ownership of the airline’s shares, i.e., holding more than 50% of the voting rights shares. See Stefanie Horstke, *Air Carrier Ownership and Control Revisited at the Fifth Worldwide ICAO Air Transport Conference*, 28 Annals Air & Space L. 19, 25 (2003).

¹⁵ As further explained in s. 1.2.3 of Ch. 2 of *Introduction to Air Law*. See Pablo Mendes de Leon, *Introduction to Air Law* 59–79 (Kluwer Law International, 11st ed. 2022).

¹⁶ See KFTC, *Official Press Release – Report Registered on Merger Concerning Korean Air’s Acquisition of Stocks of Asiana Airlines* (14 Jan. 2021).

¹⁷ See KFTC, *Official Press Release – Conditional Approval of the Korean Air – Asiana Airlines Merger* (22 Feb. 2022).

reported as obliged by law.¹⁸ As this type of merger, which is designed to ‘acquiring or owning shares of any other company’ pursuant to Article 9 of the relevant Korean regulation,¹⁹ the reported merger became subject to the examination of the Fair Trade Commission of South Korea, henceforth referred to as KFTC.²⁰ This was recognized as the very first full service carrier merger case in South Korea.

The following section discusses the regulatory framework which has been applied to the present merger. It is followed by a detailed examination of the KFTC’s review.

2.2[b] *Applicable Regulatory Framework*

For any merger case in South Korea, the Monopoly Regulation and Fair Trade Act (Fair Trade Act) applies,²¹ which is supported by the Examination Standards for Corporate Consolidation of the KFTC.²² Since the initial enactment in 1980, the Fair Trade Act’s aim is to follow:

*[T]o prevent the abuse of market dominance by business entities and excessive concentration of economic power and to promote fair and free competition by regulating illegal cartel conduct and unfair trade practices, thereby encouraging creative business activities, protecting consumers, and promoting the balanced development of the national economy.*²³

Among others, Article 7 of the Fair Trade Act, describing restrictions on the establishment of mergers, played a significant role in this merger.

Under Article 7(4) of the Fair Trade Act of Korea, certain types of mergers are presumed to substantially restrict competition in a particular market. This presumption applies when a merger meets specific conditions, effectively shifting the burden of proof to the merging parties to demonstrate that their transaction will not harm ‘fair competition’ which term is no further defined in that act.²⁴

¹⁸ *Ibid.* See also Monopoly Regulation and Fair Trade Act of South Korea [Act No. 20239 6 Feb. 2024] Art. 11 titled Reporting on Business Combinations.

¹⁹ Monopoly Regulation and Fair Trade Act of South Korea [Enforcement date: 21 Jan. 2025] [Law No. 20712 21 Jan. 2025, Amendment to other laws] (Fair trade Act 2025) Art. 9(1).

²⁰ Examination Standards for Corporate Consolidation [Enforcement date: 7 Aug. 2024] [Fair Trade Commission Notice No. 2024-15 7 Aug. 2024, Partially Revised] (Examination Standard) I.

²¹ Fair Trade Act of South Korea has been revised numerous times. For this specific case, the one of 2020 applies. See Monopoly Regulation and Fair Trade Act (abbreviation: Fair Trade Act) [Enforcement date: 12 Aug. 2020] [Law No. 16998 11 Feb. 2020, Amendment to other laws].

²² Examination Standards for Corporate Consolidation, *supra* n. 20.

²³ Fair Trade Act 2020, Art. 1. This provision has existed since the first enactment of the Fair Trade Act in South Korea to the date.

²⁴ Fair Trade Act 2020, Art. 7(2). Despite the absence of a definition of ‘fair competition’, it is still possible to infer it based on the objective of the Fair Trade Act, as provided above.

One relevant basis for this presumption for the specific merger of Korean Air and Asiana is related to market share concentration. If the combined market share of the merging parties, including that of their affiliated companies, meets three specific criteria, the merger is presumed to be anti-competitive.

First, the combined market share must meet the threshold for a dominant market position, as defined by law.²⁵ Second, the merged entity must hold the highest market share in the relevant market following the merger.²⁶ Third, the difference between the market share of the merged firm and that of the second-largest competitor, excluding the merging parties, must be at least 25% points.²⁷ When these three conditions are satisfied together, the law presumes that the merger would create a dominant player with insufficient competitive constraints.²⁸ thereby increasing the likelihood of the abuse of market dominance prohibited by law.²⁹

These presumptions do not automatically lead to a prohibition, but they establish a default position of anti-competitiveness, making it more difficult for the merging parties to secure regulatory approval. In such cases, the KFTC may impose corrective measures, request detailed justifications (such as efficiency gains under Article 7(2)), or potentially disallow the merger altogether if competition concerns cannot be resolved.³⁰

2.2[c] *Result of the Examination*

2.2[c][i] Overview

The examination managed by the KFTC could result in a restriction or conditional approval of the merged entity. As assessed in the previous subsection, the Korean Air/Asiana merger has been conditionally approved. As to the international routes, the KFTC found that the merger was liable to limit competition on 26 out of 65 routes. Similar concerns applied to the operation

²⁵ Fair Trade Act 2020, Art. 7(4) sub1 Ga.

²⁶ Fair Trade Act 2020, Art. 7(4) sub 1 Na.

²⁷ Fair Trade Act 2020, Art. 7(4) sub 1 Da.

²⁸ Fair Trade Act 2020, Art. 7(4).

²⁹ Fair Trade Act 2020, Art. 3(2). This specific provision explicitly forbids market dominant player from engaging in any of the following abusive practices: unjustly determining, maintaining, or changing prices; unfairly controlling the supply of goods or services; unduly interfering with the business activities of other entities; unjustly obstructing the entry of new competitors; or engaging in conduct that may significantly undermine consumer welfare or eliminate competitors through unfair transactions.

³⁰ Fair Trade Act. 2020, Art. 16.

of 14 out of 22 routes. However, concerning the cargo transport and maintenance sector, the KTFC has not observed any concerning factor for disapproving the merger.

The conditional approval requires Korean Air to implement corrective measures as mandated by the KTFC. These measures fall into two categories: *structural* and *behavioural* remedies. In the case of the Korean Air/Asiana merger, both structural and behavioural remedies were imposed.

Structural remedies involve actions such as the divestment of subsidiaries or other assets to maintain fair competition, while behavioural remedies include price controls for a designated period to prevent unfair market dominance.³¹ As part of the structural measures, the airline was required to transfer airport slots and traffic rights to facilitate market competition. Meanwhile, the *behavioural* remedies included restrictions on price increases and a requirement to submit a plan for integrating the loyalty programs of both airlines.³² Once the structural measures were implemented, the obligation to implement behavioural measures was also to be terminated.³³ These corrective measures were implemented to mitigate competition concerns and ensure consumer protection in the post-merger market.³⁴

The KTFC assesses the case according to several factors. In its examination, the KTFC inspected the relevant market and limitations of the ‘fair competition’ concept caused by the merger.

2.2[c][ii] Characteristics of the Merger

The present merger resulted in horizontal, vertical, and mixed forms of mergers.³⁵ Depending on the types of the merger, different assessment mechanisms apply.³⁶ Below the table provides a detailed division made by the KTFC.

³¹ KTFC, *2025 Fair Trade System at a Glance* (KTFC 2025), at 12.

³² *Ibid.*, at 12; KTFC, *supra* n. 17, at 17.

³³ *Ibid.*, at 15.

³⁴ See Fair Trade Act 2020, Art. 16; KTFC, *supra* n. 17, at 18.

³⁵ See Examination Standard, II: Horizontal merger refers to a merger between companies that are in direct competition with each other; Vertical merger refers a corporate consolidation (hereinafter referred to as ‘companies under dependency relation of raw materials’) which locate in the adjacent stage in the production and distribution process which are from production of raw materials to production and sale of goods (including services); and ‘mixed merger refers to a merger other than a horizontal or vertical merger’, *supra* n. 20.

³⁶ *Ibid.*, at VI.

*Table 1 Types of Merger Identified in the Korean Air and Asiana Case*⁴³

<i>Relevant Market</i>	<i>Reporting Company</i>	<i>Counterparty</i>	<i>Type of Merger</i>
Air Passenger Transport	1) ³⁷	2) ³⁸	Horizontal
Air Cargo Transport	1)	2)	Horizontal
Airport-Based Line Maintenance	3) ³⁹	4) ⁴⁰	Horizontal
Airport-Based Aircraft Handling Services (<i>Ground Handling/Refueling/Air Cargo Handling</i>)	5) ⁴¹	6) ⁴²	Horizontal
Air Passenger Transport & Air Cargo Transport ↑ ↓ Aircraft Maintenance & Aircraft Handling Services			Vertical
Aircraft Maintenance (Excluding Line Maintenance), Pilot Training Services, In-flight Duty-Free Sales, etc.			Mixed

The KFTC determined that both airlines possess a dominant position in the relevant market. Based on the number of passengers in 2019, Korean Air and Asiana ranked first and second in South Korea's air passenger transport market and held forty-fourth and sixtieth positions globally.⁴⁴ Additionally, the merger also involves low-cost carriers, including Jin Air, which is ranked in the fourth place as a subsidiary of Korean Air, Air Busan, ranked the sixth place, and Air Seoul, ranked the eighth place, both subsidiaries of Asiana.⁴⁵ This ranking clearly indicated the market dominant position as Article 7(2) identifies as a practical restriction on the 'fair competition' approach.

Moreover, as a result of the merger, there was an overlap in a total of 119 routes, including sixty-five international passenger routes, twenty-two domestic passenger routes, twenty international cargo routes, six domestic cargo routes, and six other markets such as aircraft maintenance. With the combination of the strong

³⁷ 1) refers to Korean Air and Jin Air.

³⁸ 2) refers to Asiana Airlines, Air Busan and Air Seoul.

³⁹ 3) refers to Korean Air and Korea Airport Service, a subsidiary of Korean Air.

⁴⁰ 4) refers to Asiana Airlines and Asiana Airport, a subsidiary of Asiana Airlines.

⁴¹ 5) refers to Korea Airport Service.

⁴² 6) refers to Asiana Airport.

⁴³ KFTC, *supra* n. 17, at 3.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

position held by both airlines in South Korea, these figures became subject to the assessment of the KFTC.

2.2[c][iii] Identification of the Relevant Market

In the examination, the KFTC identified the relevant market in order to contextualize the merger. As to the international routes, the KFTC examined that the market should be defined based on the origin and destination principle, and considered each route as a separate market. For short- and medium-haul routes, only direct flights were taken into account. For the long-haul routes, one-stop connecting flights were also considered as potential substitutes.⁴⁶

As to the domestic routes, the market was defined by individual one-way routes between departure and arrival cities rather than round trips.⁴⁷ For domestic routes, such as the route between Seoul and Busan in South Korea, the presence of alternative transportation options, such as KTX (Korea Train Express) and SRT (Super Rapid Train), was considered when assessing competition.⁴⁸

2.2[c][iv] Assessment of Competitive Restrictions

Following the merger, Korean Air and Asiana were expected to hold a 48.9% market share in international passenger transport and a 62% market share in domestic routes involving Jeju Island.⁴⁹ Additionally, there were ten international routes and six domestic routes where the merged entity would have a complete monopoly.⁵⁰

The KFTC raised concerns about potential restrictions on competition caused by this high market concentration. This body conducted an economic analysis during the review found significant risks of fare increases across various routes. The estimated average fare increase after the merger is 26.3% for North America, 11.5% for Europe, 7.6% for China, 4.9% for Southeast Asia, and 2.9% for Japan.⁵¹ In the domestic market, fares are projected to rise by 12.4% for flights departing from Jeju and 9.9% for flights arriving in Jeju.⁵² This potential fare increase was perceived as a reduction in price competition, particularly on routes where alternative carriers are limited or non-existent.

⁴⁶ *Ibid.*, at 5.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at 6.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, at 7.

⁵² *Ibid.*

The KFTC also examined restrictions on competition per route. Its analysis identified twenty-six international routes and fourteen domestic routes with serious competition concerns.⁵³ Among the international routes, the affected North American routes include New York, Los Angeles, Seattle, San Francisco, and Honolulu. In Europe, Barcelona, Frankfurt, London, Paris, Rome, and Istanbul are expected to experience reduced competition. Similarly, routes in China (Zhangjiajie, Xi'an, Shenzhen, Qingdao, Beijing), Southeast Asia (Phnom Penh, Palau, Phuket, Jakarta, Cebu, Da Nang), and the Pacific region (Sydney, Guam) were also flagged for competition restriction risks.⁵⁴ The only Japanese route of concern is Busan-Nagoya.⁵⁵ In the domestic market, fourteen Jeju routes (including flights to Cheongju, Gimpo, Jinju, Gwangju, Busan, Yeosu, and Ulsan) appeared to face significant competitive restrictions due to the high combined market share of the merged airline.⁵⁶

However, certain routes were not considered to yield significant competition concerns. These include international routes where strong foreign competitors dominate the market, such as Uzbekistan Airways, MIAT Mongolian Airlines, and Vietnam Airlines.⁵⁷

Additionally, domestic routes such as Seoul-Busan and Seoul-Ulsan were deemed to be less impacted due to the presence of alternative high-speed rail options (KTX and SRT), which serve as viable substitutes for air travel.⁵⁸ Therefore, these routes were also not considered as limiting competition

2.2[c][v] Initially Imposed Corrective Remedies

To address concerns regarding reduced competition following the Korean Air-Asiana merger, the KFTC has implemented a series of corrective measures, including both structural and behavioural remedies.

Structural Measures: Slot and Traffic Rights Divestment

To ensure that new airlines could enter the market and compete effectively, the merged airline was required to return airport slots at major domestic and international airports, including Gimpo, Jeju, Incheon, and Gimhae Airports.⁵⁹ Additionally, the operation of traffic rights on eleven international routes must be relinquished to facilitate entry for other airlines.⁶⁰ These routes include Frankfurt, London, Paris, Rome, and Sydney,

⁵³ *Ibid.*, at 8.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, at 11 and 12.

⁵⁸ *Ibid.*, at 12.

⁵⁹ *Ibid.*, at 15.

⁶⁰ *Ibid.*, at 16.

where competition is particularly at risk. By redistributing critical slots and traffic rights in relation to such services, KFTC aims to reduce barriers to entry and encourage competition in both domestic and international markets.

Behavioural Measures: Fare and Service Restrictions

In addition to structural remedies, the KFTC has imposed behavioural restrictions to prevent the merged airline from engaging in anti-competitive practices. *First*, fare increases were restricted. Ticket prices were imposed not to be raised beyond the inflation rate based on 2019 fare levels.⁶¹ *Second*, seat capacity reductions were prohibited. This was for the number of available seats not falling below a designated threshold compared to 2019 levels.⁶² *Lastly*, service quality must be maintained, preventing unfavourable changes to seat spacing, free in-flight meals, mileage policies, and other passenger benefits.⁶³ These restrictions were designed to protect consumers from price increases and service deterioration while maintaining a fair competitive environment in the air transport industry.

2.2[c][vi] Finalized Corrective Remedies (December 2024 Decision)

The finalized corrective measures, issued by the KFTC in December 2024,⁶⁴ introduced significant changes compared to the initial decision in May 2022. These revisions were primarily structural adjustments related to slot and traffic rights divestments, improvements in compliance monitoring, and refinements to ensure that corrective measures aligned with foreign regulatory decisions.

One of the most notable updates pertained to the recognition of thirteen foreign regulators' corrective actions, including those from the European Commission and the US Department of Justice.⁶⁵ Under the initial KFTC decision, Korean Air was required to relinquish slots and traffic rights on several international routes to allow new competitors to enter the market in the post-merger period. However, by the time the KFTC finalized its decision, alternative airlines had already begun operations on certain routes as part of the corrective measures imposed by foreign regulators. For instance, T'way Air had already entered European routes, and Air Premia had begun operations on US transpacific routes.⁶⁶ As a result, the KFTC recognized these pre-merger market entries as fulfilling part of its structural remedy

⁶¹ *Ibid.*, at 17.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ KFTC, *Official Press Release – Korean Air – Asiana Merger Assessment Final Decision* (12 Dec. 2024).

⁶⁵ *Ibid.*, at 1. The official press release acknowledges fourteen regulators' decisions, including ones of the South Korea, EC and US. The final decision of the EC was made at the end of Nov. 2024, coinciding with the US Department of Justice's decision not to file any lawsuit around the same time.

⁶⁶ KFTC, *supra* n. 64, at 2.

requirements imposed initially,⁶⁷ leading to adjustments in the planned divestment of slots and traffic rights.

Another crucial update involved enhancing compliance monitoring. To improve oversight of the imposed corrective measures, the KFTC delegated monitoring responsibilities to the Korea Fair Trade Mediation Agency (KFTMA).⁶⁸ Such delegation of powers marked a significant shift from direct KFTC supervision to a dedicated agency, ensuring more independent and specialized enforcement of the merger conditions. Additionally, Korean Air was required to establish a compliance monitoring committee within ninety days of the merger's completion, by March 2025.⁶⁹ This committee is tasked to ensure the merged airline's full compliance with the remedies imposed. The establishment of external compliance monitoring mechanisms reflects a move toward stronger, long-term regulatory enforcement, ensuring that Korean Air adheres to its commitments.⁷⁰

The KFTC demanded further adjustments pertaining to seat supply obligations, which were initially left undefined in the 2022 decision. The final measures explicitly mandated that Korean Air-Asiana must maintain at least 90% of the seat capacity offered in 2019 on key routes.⁷¹ This requirement was implemented to prevent artificial reductions in seat availability, which could have been used as a strategy to limit competition and increase fares.

Additionally, the KFTC introduced new remedies regarding discontinued routes. The initial corrective remedies imposed on the merged airline to return slots or traffic rights were based solely on the voluntary application of replacing airlines.⁷² For discontinued routes due to commercial non-viability and operational inefficiencies, it would have been difficult to find alternative airlines wishing to utilize the slots and rights.⁷³ Therefore, the KFTC modified the remedy for the merged airline to require the return of slots and rights, without requiring another airline to assume those slots.⁷⁴

⁶⁷ See s. 2.3.3.5.

⁶⁸ See Fair Trade Act Art. 97-2. This provision was newly added in the 2023 amendment. The KFTMA was established to facilitate the resolution of unfair trade disputes, adapt to evolving economic and industrial environments, and promote a culture of fair competition. See also KFTMA, *Purpose of Establishment*, https://www.kofair.or.kr/home/content.do?menu_cd=000004 (accessed 19 Mar. 2024).

⁶⁹ On 6 Mar. 2025, a compliance monitoring committee was established as a result of the Dec. 2025 decision of the KFTC, based on an MoU between the KFTC and Ministry of Land, Infrastructure and Transport of South Korea. See MOLIT, *Official Press Release – Korean Air – Asiana M&A Compliance Monitoring Structure Established* (6 Mar. 2025).

⁷⁰ MOLIT, *supra* n. 69, at 2.

⁷¹ *Ibid.*, at 3.

⁷² *Ibid.*, at 6.

⁷³ Both Korean Air and Asiana already ceased their operation in routes such as Seoul-Palau. As to the route of Busan-Beijing, Asiana discontinued its operation in the winter of 2019 and would entirely give up the slot from 2025. However, Korean Air did not discontinue the route.

⁷⁴ MOLIT, *supra* n. 69, at 6.

Lastly, the KFTC imposed a cap on foreign slot transfers. This was to address concerns that different airlines might separately acquire domestic and international traffic rights in a way that could excessively drain Korean Air's foreign airport slot allocations.⁷⁵ Under the final decision, the merged airline could not be forced to surrender more foreign airport slots than necessary so that the effect of the remedy does not become disproportionate.

3 RESPONSES FROM OTHER JURISDICTIONS

3.1 CHINA: OVERLOOKED TRANSFER MARKETS AND LENIENT SLOT DIVESTITURE

As noted in the KFTC's review, the merging airlines operate their international services in eighty-five overlapping markets, including sixty-five international passenger routes and twenty international cargo routes, accounting for more than 70% of their total market share.⁷⁶ These markets fall within jurisdictions that are considered the most challenging for merger review. In particular, twenty-six routes from South Korea to North America, the EU, China, Southeast Asia, and Japan have raised competitive concerns, with the merged airlines' market share ranging between 65% and 100%. Since the KFTC approved the merger in February 2022, there has been a significant breakthrough in China.

Although the merging parties are both Korean airlines, their operations on China-South Korea routes encompass nearly the entire market between the two states. The concentration of market power following the merger is expected to produce a direct competitive impact on major Chinese airlines.

In 2019, the two airlines operated China-South Korea routes covering key Korean cities, including Seoul, Busan, Daegu, and Jeju, as well as more than twenty-five major Chinese cities such as Beijing, Shanghai, Guangzhou, Xi'an, Shenzhen, Qingdao, Shenyang, and Zhangjiajie. The merged airline will hold a majority market share on routes such as Seoul-Shanghai, Seoul-Beijing, Seoul-Guangzhou, and Seoul-Qingdao, while achieving an almost monopolistic position on routes like Seoul-Hangzhou, Seoul-Shenzhen, Seoul-Nanjing, Seoul-Xi'an, and Seoul-Zhangjiajie. Is such a substantial capacity deployment merely to accommodate passenger travel between Seoul and cities in China? In fact, South Korea leverage limited air traffic rights and builds Incheon International Airport,

⁷⁵ *Ibid.*, at 7. For instance, when domestic slots and international traffic rights are acquired by different competing airlines, an issue may occur. If an Airline A took over the domestic airport slot at Incheon Airport, but Airline B took over the traffic rights for a certain route, they both could potentially demand a foreign airport slot transfer from the merged airlines.

⁷⁶ See Korea Fair Trade Commission, *KFTC Gives Conditional Approval to Korean Air-Asiana Airlines Merger* (22 Feb. 2022), https://www.ftc.go.kr/viewer/synap/skin/doc.html?fn=BBS_202203220922560750&rs=/viewer/synap/preview/ (accessed 4 Jan. 2025).

hereinafter referred as ICN, a critical gateway between Asia and North America as a national air hub strategy.⁷⁷ The main competitors are Shanghai Pudong Airport (PVG) in China and Narita International Airport (NRT) in Japan.⁷⁸

As far back as 2004, the General Administration of Civil Aviation of China, hereinafter referred to as the Civil Aviation Administration of China (CAAC), and the Shanghai government jointly formulated the *Shanghai Aviation Hub Strategic Plan* and highlighted the ‘three-step’ roadmap to make Shanghai an international aviation hub. In 2016, Shanghai enacted the *Regulations on Promoting the Construction of an International Transportation Centre*, which enshrined in subnational legislation the goals of enhancing airport infrastructure, strengthening the route networks of main hub carriers, and supporting the development of air logistics transit hubs.⁷⁹

In August 2024, the CAAC and the National Development and Reform Commission of the CAAC, hereinafter referred as NDRC, issued the *Guiding Opinions on Promoting the Construction of International Aviation Hubs*, requiring the improvement of the intercontinental connectivity and global radiation capacity of China’s major airports, including PVG.⁸⁰ Hence, in this merger, the main concern of Chinese competitors is not about competing for passengers traveling between China and South Korea, but rather preventing the merged airline from gaining an advantage in connecting transportation services between China and the US, or even between China and Europe.

On 26 December 2022, nearly two years after the initial application was received, the merging parties ultimately reached an agreement with China’s state Administration for Market Regulation, that is, the national antitrust authority in China, hereinafter referred to as the SAMR, after several rounds of revisions to their commitment proposal. The merger was granted conditional approval based on the final commitments submitted in China, which include the conditional return of certain slots and air traffic rights, the maintenance of service levels, the continuation of interline and codeshare agreements, the assurance of fair access, and a commitment to pricing regulations to prevent anti-competitive fare increases. These conditions are enforceable for ten years from the merger’s closing.⁸¹

⁷⁷ See Tae Won Chung, Yong Joo Lee & Hyun Mi Jang, *A Comparative Analysis of Three Major Transfer Airports in Northeast Asia Focusing on Incheon International Airport Using a Conjoint Analysis*, 33 Asian J. Shipp. Logistics 237, 237 (2017), doi: 10.1016/j.ajsl.2017.12.007.

⁷⁸ *Ibid.*, at 238.

⁷⁹ See Standing Committee of the Shanghai Municipal People’s Congress, *Regulations of Shanghai Municipality on Promoting the Construction of an International Shipping Center* (31 Dec. 2024), <https://jtw.sh.gov.cn/2024ndfxfg/20250102/21732ff197b540f98b5fa940e49393cc.html> (accessed 22 Jan. 2025).

⁸⁰ See CAAC and NDRC, *The Guiding Opinions on Promoting the Construction of International Aviation Hubs* (31 Jul. 2024), https://www.caac.gov.cn/PHONE/XXGK_17/XXGK/SYZCFBJD/202408/P020240828606187893511.pdf (accessed 1 Feb. 2025).

⁸¹ See SAMR, *Announcement of the State Administration for Market Regulation on the Antitrust Review Decision Regarding the Conditional Approval of Korean Air’s Acquisition of Asiana Airlines’ Equity* (26 Dec. 2022),

Comparing the merger review conclusions in China and South Korea reveals a high degree of similarity in the definition of relevant markets for air passenger services and the assessment of the merging parties' market power. The Korean Air and Asiana merger case marks China's first conditional approval of an airline merger. In its decision, SAMR drew on the EU's experience in airline merger control, yet certain aspects of the case go beyond established precedents.

3.1[a] *Defining Relevant Market*

Both China and South Korea adopted the Origin and Destination approach, hereinafter referred as O&D approach, defining the relevant geographic market for air passenger services based on non-stop and round-trip routes between given city pairs. Unlike the KFTC, the SAMR took a more narrow interpretation approach by limiting the relevant market to only the overlapping routes of the merging parties.⁸² However, both jurisdictions assessed the substitutability of connecting routes in the same way, focusing on alternative options for China-South Korea routes rather than conducting a comprehensive evaluation of the merging airlines' entire global networks. As a result, they failed to recognize that China-South Korea routes themselves are part of the broader substitute market for China-US routes.

In addition, the SAMR followed the EU's approach by classifying passengers based on their willingness to pay for services and their sensitivity to travel time.⁸³ In its final review decision, the SAMR did not conclude that passenger segmentation had any meaningful impact on the definition of the relevant market, ultimately focusing solely on the delineated geographic market.

3.1[b] *Market Power Assessment*

When assessing the market power of the merging airlines, the SAMR focused on their market shares and placed significant emphasis on the impact of air traffic rights and slots on market power.

Regarding the operation of traffic rights, the absence of an Open Skies agreement between China and South Korea has resulted in a highly limited regulated number of available rights, primarily concentrated on routes between

https://www.samr.gov.cn/fldys/tzgg/ftj/art/2023/art_bcb24582268d47c8acd5c29bb76e759b.html (origin in Chinese, accessed 3 Jan. 2025).

⁸² *Ibid.*

⁸³ See Eugenio Olmedo-Peralta, *Market Definition and Conditions to Ensure Competition in the European Market for Air Transport Services: An Analysis of Past and Upcoming Merger Cases*, 4 Mkt. & Competition L. Rev. 87, 102 (2020).

ICN and specific Chinese cities.⁸⁴ To address competition concerns, the merging airlines committed to returning some of their traffic rights on four routes, including Seoul-Xi'an, Seoul-Zhangjiajie, Seoul-Shenzhen, and Seoul-Beijing, upon request from new Korean entrants, ensuring that their market share remains below 50%.

Regarding slots, as the overlapping routes involving ICN and international airports in Beijing and Shanghai, available time slots in those airports are highly scarce. Pursuant to the review result, and upon request from new entrants, the merging airlines committed to conditionally returning some certain number of slots on nine routes, including Seoul-Zhangjiajie, Seoul-Xi'an, Seoul-Beijing, Seoul-Shanghai, Seoul-Shenzhen, Seoul-Changsha, Seoul-Tianjin, Busan-Qingdao, and Busan-Beijing. The specific number of returned slots is determined based on the current market share of the merged airline. Notably, the conditions for slot divestitures are highly restrictive. New entrants must replicate the same routes almost exactly to qualify for the allocated slots, unlike the KFTC, which requires the merging parties to proactively reserve sufficient slots on key routes for potential entrants, rather than waiting for unsuccessful applications before returning them. The slot divestiture commitment is valid for ten years.⁸⁵

Before 2023, slot management in China was handled by regional administrations of the CAAC. Since then, the authority has been centralized under the Slot Management Committee of the CAAC. Overall, China lacks formal regulations on slot divestitures specifying designated recipients, leaving gaps in the implementation of such commitments. Therefore, the successful execution of the merger relief measurements about slot divestitures in this merger case will require further support from the Slot Management Committee.

3.2 UK: PROTECTIONISM OR RECIPROCAL TRADE

Before Brexit in January 2020, merger cases meeting the jurisdictional thresholds of the EU Merger Regulation were overseen by the European Commission. During the eleven-month transition period following Brexit, the UK remained subject to EU competition law, though the Competition and Markets Authority, hereinafter referred to as CMA, the UK's primary competition regulator, gradually assumed responsibility for certain domestic competition reviews. From 2021 onwards, the CMA fully exited the EU's antitrust framework and quickly showed

⁸⁴ For instance, in 2019, nearly 70% of all available air traffic rights between China and South Korea were allocated to routes connecting ICN with Beijing, Shanghai, or other airports in China. See Luo Zhiyu, *Considerations in the Allocation of China-South Korea Air Traffic Rights* (28 May 2019), <https://news.carnoc.com/list/494/494873.html> (accessed 1 Feb. 2025).

⁸⁵ See SAMR, *supra* n. 81.

a more assertive approach to merger control.⁸⁶ While UK and EU competition laws were largely aligned prior to Brexit, growing divergences in national interests have since disrupted this convergence. This merger case serves as a clear illustration of that shift.⁸⁷

In June 2020, South Korea and the EU signed a Horizontal Agreement on air transport, which, while complying with existing air traffic rights restrictions imposed by EU Member States, allows Community carriers to operate flights to South Korea from any EU airport. This agreement enhanced the transparency access to the South Korea-EU market.⁸⁸ After Brexit, air transport relations between South Korea and the UK are governed by the ASA originally signed in 1984 and amended in 1996, 2001 and 2014, unaffected by the South Korea-EU horizontal agreement. Under this agreement, third and fourth freedom traffic rights are permitted, with limited fifth freedom rights, and a restricted number of traffic rights are mutually allocated.⁸⁹ Therefore, air transport between the UK and South Korea remains subject to stringent regulatory oversight.

Against such a background of jurisdictional authority and air traffic rights regulation, the CMA has generally aligned with the EU's regulatory approach in its review of this case. However, it has adopted a more assertive stance in ensuring reciprocity in the allocation of air traffic rights.

On 1 March 2023, the CMA granted conditional approval for the merger. According to disclosures from both the KFTC and the CMA, the merging airlines operate only one direct flight route between London and Seoul in the UK-South Korea market, which was also the relevant passenger air transport market defined by the CMA in this case. Prior to the merger, this route was served by Korean Air, Asiana, and British Airways. However, by the time of the merger, British Airways had already ceased operations on this route,⁹⁰ making the merged airline the sole remaining carrier.

This outcome underscores the most significant impact of Brexit on the case – the UK's exit from the EU internal air transport market and Community carriers lost their unrestricted access to the UK aviation market.⁹¹ Once all UK airlines

⁸⁶ Gavin Bushell & Emma Whyte, *EU Merger Control: Life Without the UK – Brexit and Beyond*, 20 Competition L.J. 25, 28 (2021), doi: 10.4337/clj.2021.01.03.

⁸⁷ See Elaine Dunne, *Alignment or Divergence? An Analysis of UK and EU Competition Law Post-Brexit With a Particular Focus on Merger Control*, 22 Hibernian L.J. 96, 122 (2023).

⁸⁸ See Agreement between the European Union and the Republic of Korea on certain aspects of air services, OJ L 363/3 (12 Oct. 2021), Art. 2.

⁸⁹ See Air Services Agreement between the Government of the United Kingdom and the Government of the Republic of Korea, TS No. 47 (1984), Art. 3.

⁹⁰ See CMA, *Decision on Relevant Merger Situation and Substantial Lessening of Competition Regarding the Anticipated Acquisition by Korean Air Lines Co., Ltd. of Asiana Airlines Inc.*, ME/6924/21, at 25.

⁹¹ See Michael Goldman & Ulrich Schulte-Strathaus, *Brexit: A Transatlantic Aviation Perspective*, 30 Air & Space L. 1, 19 (2017).

withdrew from the route, the UK-South Korea market became exclusively dominated by Korean carriers. The CMA sought to prevent such an outcome. The CMA found that even with alternative one-stop flights via EU hubs operated by Finnair, Lufthansa, and Air France-KLM, these services could not exert sufficient competitive pressure on a direct route. The merger significantly reduced market competition, effectively granting Korean carriers control over pricing in a market that included the UK.⁹²

The CMA made an unprecedented decision, selecting Virgin Atlantic as the exclusive remedy-taker for Korean Air's slots on the London Heathrow Airport, hereinafter referred to as LHR-ICN route, unless Virgin Atlantic would decline to enter the route, in which case Korean Air must offer the same slots to other eligible competitors.⁹³ As the designated remedy-taker, Virgin Atlantic was deemed suitable for four key reasons:

- (1) No significant commercial ties with the merging parties,
- (2) Sufficient financial resources, management expertise, and technical capability to compete on the London-Seoul route and sustain long-term operations,
- (3) Ability to obtain the necessary traffic rights, licenses, and government approvals to ensure regulatory compliance, and
- (4) Strong incentives and commitment to maintaining and developing the route, fostering effective competition with the merged airline.⁹⁴

These four reasons can also be considered as the requirements for 'eligible competitor'.⁹⁵ However, upon closer examination, none of these criteria are unique to Virgin Atlantic. For instance, other Korean airlines with no equity ties to the merging parties could also qualify as potential competitors. The fundamental distinction between potential competitors and Virgin Atlantic appears to be the nationality of the airline.

3.3 JAPAN: LIMITED ANTITRUST JURISDICTION IN THE FACE OF FIERCE COMPETITION

Under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, the Japan Fair Trade Commission (JFTC) is the Japan's antitrust enforcement authority responsible for reviewing merger cases. Japan formally incorporated

⁹² See CMA, *Decision on Relevant Merger Situation and Substantial Lessening of Competition of the Anticipated Acquisition by Korean Air Lines Co., Ltd of Asiana Airlines Inc.*, ME/6924/21 30 (14 Nov. 2022).

⁹³ See CMA, *Decision on the Acceptance of Undertakings in Lieu of Reference Regarding the Anticipated Acquisition by Korean Air Lines Co., Ltd. of Asiana Airlines Inc.*, ME/6924-21 2 (1 Mar. 2023).

⁹⁴ *Ibid.*, at 4.

⁹⁵ *Ibid.*, at 5.

merger control into its legislation in the 1980s, making it one of the first states in East Asia to implement merger control. Throughout the development of its antitrust framework, Japan's approach has been significantly influenced by EU competition policy and continually developed in response to this.⁹⁶

In January 2024, Japan conditionally approved the merger between Korean Air and Asiana. The approval document reveals that, like the European Commission, JFTC's evaluation primarily focused on factors such as whether market concentration would increase, potential price hikes, possible declines in service quality, or harm to consumer welfare. The assessment examined whether the merger would significantly reduce market competition or create a dominant market position, signalling an approach which is similar to the one adopted by the EU.

According to the JFTC, the merged airline will control 50–70% of the market share on seven routes, including Osaka-Seoul, Sapporo-Seoul, Nagoya-Seoul, Fukuoka-Seoul, Osaka-Busan, Sapporo-Busan, and Fukuoka-Busan. To address the potential negative effects on market competition, the JFTC agreed to the commitments made by the merging airlines, which involve transferring some of the slots on these seven routes to other airlines upon request within a ten-year period.⁹⁷ In a manner similar to the approach taken by China's SAMR, the JFTC delayed the enforcement of slot divestitures, preventing immediate competitive disadvantage for the merging airlines while allowing room for potential competitors to enter the market.

From the perspective of the JFTC, is this seemingly appropriate decision the one that best balances and protects Japan's aviation market?

From an industrial structure standpoint, due to the limited domestic market capacity, Japanese and Korean airlines must engage in 'intense competition' in the international transport market, fully embracing the spirit of 'making a mountain out of a molehill'.⁹⁸ For example, in 2019, the international route revenue of Japan Airlines and Korean Air accounted for 36.8% and 52.46% of their total annual revenues, respectively.⁹⁹ While Korean Air is more dependent on international route revenue, Japan Airlines' reliance on this income is also gradually

⁹⁶ See Etsuko Kameoka & Mel Marquis, *Recent Developments in Japan's Merger Control System*, 2010 Eur. Competition L. Ann. 287, 290 (2010).

⁹⁷ See JFTC, *Summary of the Review Results of Korean Air's Acquisition of Shares in Asiana Airlines, Inc.* (31 Jan. 2024), https://www.jftc.go.jp/houdou/pressrelease/2024/jan/240131_kiketsu_gairyaku.pdf (accessed 2 Feb. 2025) (origin in Japanese).

⁹⁸ See Hidenobu Matsumoto & Rogier Lieshout, *Effects of South Korean Air Carriers' Network Developments on Route Choice Behaviour of Travellers Departing from Japan*, in *Air Transport in the Asia Pacific* 30 (Routledge 2014).

⁹⁹ See Japan Airlines, *JAL Report 2019* (30 Apr. 2020), https://www.jal.com/en/sustainability/report/pdf/index_2019.pdf (accessed 16 Aug. 2024). See Korean Air, *Consolidated Financial Statement* (31 Dec. 2019), https://www.koreanair.com/content/dam/koreanair/footer/about-us/investor-relations/financial-information/details/2019_consolidated_en.pdf (accessed 16 Aug. 2024).

increasing.¹⁰⁰ The international transit market, particularly for Chinese passengers connecting through Japan or South Korea to Europe and the US, is a key area of competition for airlines based in these two states. Once completed, the merged airline will be able to consolidate its global network and capacity, strongly challenging the competitive position of Japan's airlines in the international transit market.

According to traditional merger control theory, it is necessary to first define the relevant market in merger reviews, which also limits the jurisdictional scope of the reviewing authority. If the JFTC were to break free from traditional thinking and, instead of defining the relevant market based on the route network, adopt a perspective similar to the 2023 version of US Merger Guidelines – starting from the impact of the merger on competition rather than defining relevant market – could it assert jurisdiction over international air transport services that do not harm domestic market competition and do not involve the country as a transit point?¹⁰¹ Unfortunately, this issue does not appear to have been considered by the JFTC in this case.

3.4 EU: PARTIAL CARGO DIVESTITURES

3.4[a] *Merger Control in the EU*

In the EU, mergers are dealt with in EU Regulation 139/2004 on *the control of concentrations between undertakings*, henceforth also referred to as the EU Merger Regulation (2004).¹⁰² It applies to mergers having an EU dimension, that is, where there is an acquisition of control in relation to a venture involves:

- (1) a world-wide turnover of the merging partners of at least EUR five billion plus an individual EU wide turnover of at least each of at least two parties of over EUR 250 million; *or*

¹⁰⁰ As of the time of writing this article, the 2024 annual report of Korean Air has not yet been released. However, according to the 2023 annual report, the sales amount of its international routes already accounted for 83.4% of the total sales. See Korean Air, *Consolidated Financial Statements For The Years Ended December 31, 2023 and 2022* (5 Mar. 2024), https://www.koreanair.com/content/dam/koreanair/footer/about-us/investor-relations/financial-information/details/2023_consolidated_en.pdf (accessed 25 Mar. 2025). In its 2024 annual report, Japan Airlines clearly stated that it will increase its capacity investment in international routes, expecting steady demand growth. See Japan Airlines, *JAL Report 2024* (1 Aug. 2024), https://www.jal.com/en/sustainability/report/pdf/index_2024b.pdf?20241011 (accessed 25 Mar. 2025).

¹⁰¹ Under the US antitrust scheme, defining the relevant market is not an necessary requirement as the first step in merger reviews. Emphasizing competition analysis based on the defined market boundaries may lead to courts limiting the defendant's market share below a threshold without fully analysing the agreement itself or its potential impacts, thereby avoiding a thorough review of the case. See Johnny Shaw, *Avoiding Market Definition under Section 1 of the Sherman Act*, 88 Fordham L. Rev. 1133, 1141 (2019–2020).

¹⁰² Implementing Regulation: Commission Regulation 802/2004 implementing Council Regulation 139/2004 amended by Commission Regulation 1033/2008 including Annexes listing forms for notification of mergers, and Notices and Guidelines explaining procedures, assessment and market definitions.

- (2) a total worldwide turnover of more than EUR 2.5 billion plus a rather detailed test pertaining to the EU based turnover. This condition will most probably always be met in airline mergers.

The concerned undertakings must notify anticipated mergers to the EU Commission which can either prevent them from being implemented or approve them with or without attaching conditions to the approval. The EU Commission can prevent the merger from being implemented or attach conditions to its implementation if it creates or strengthens a dominant position impeding competition in the EU. The substantive test upon which the Commission can block a transaction is if it:

would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.¹⁰³

If the EU Commission finds that ‘effective competition’ is affected, it may impose remedies. Remedies include slot divestiture at congested airports at one of the two or the two origin and destination airports. Because practice shows that slot divestiture has not always yielded the desired pro-competitive results, the EU Commission adopts a more interventionist role with respect to the implementation of such remedies.

Other remedies concern: freezing of capacity by the airlines which are subject to competition review; price constraints so as to avoid predatory pricing; introduction of requirements on mandatory engagement into blocked space agreements and interlining with new entrant airlines; access to Frequent Flyer Programmes and Computer Reservation System (CRS), now known as Global Distribution Systems (GDS) by new entrant airlines or competitor airlines; relaxation of limitations with respect to the performance of fifth and sixth freedom rights on services from within the EU to points outside the EU and *vice versa*.

The EU Commission’s competencies in competition cases, including mergers, having an external dimension in the sense that at least one non-EU air carrier is involved is governed by EU Regulation 1/2003 as amended by EU Regulation 411/2004 extending the EU competition rules to air transport between the EU and third countries.¹⁰⁴ As a result, the EU Commission has enforcement powers concerning air services between points in the EU and points outside the EU.

The EU Commission may have to rely on the ‘effects’ doctrine developed mainly by US courts in their anti-trust cases, pursuant to which those US courts asserted

¹⁰³ See the European Parliament, *Competition Policy* (1 Apr. 2024), <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy#:~:text=Under%20the%20EC%20Merger%20Regulation%20%28EC%29%20No%20139%2F2004%2C,must%20be%20declared%20incompatible%20with%20the%20common%20> (accessed 27 Feb. 2025).

¹⁰⁴ Council Regulation (EC) No 411/2004 of 26 Feb. 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries, OJ L 68 (6 Mar. 2004).

jurisdiction over acts of foreign nationals committed abroad but having effects in the US marketplace.¹⁰⁵ It is an extended form of the ‘objective territorial principle’.¹⁰⁶

Indeed, the concept of ‘extraterritorial jurisdiction’ plays a significant role in the air transport sector because of the cross-border character of the operation of air services, and, as a corollary, because airline transactions are made in foreign places. Hence, the operation of all air transport services having an effect on the EU market is subject to EU competition rules, following which non-EU undertakings may be made subject to the EU competition law regime.¹⁰⁷ Many states across the world applying their competition law regimes to the operation of international air services have adopted the ‘effects’ doctrine in their national legislations.¹⁰⁸

3.4[b] *EU Merger Cases With an International Dimension*

The merger between the French carrier Air France SA, *Société Anonyme*, henceforth referred to as Air France), and the Dutch carrier KLM Royal Dutch Airlines NV, *Naamloze Vennootschap*, henceforth referred to as KLM has been the first case in which the EU Commission has been confronted with a merger between two EU airlines of different nationalities. In 2003, they formed a rather complicated structure designed to match the commercial interests of the two companies with traditional nationality requirements.

In short, Air France and KLM set up a holding company, called Air France-KLM S.A., absorbing all of the existing Air France and about 49% of the KLM shares. The remaining shares (about 50%) of the KLM shares are held by Dutch institutions, including the Dutch state. This holding company manages two operating companies, namely, Air France and KLM. The principal place of business of

¹⁰⁵ See *United States v. Aluminum Co. of America* (Alcoa), 148 F.2d 416 (1945) in which Alcoa, a US company trading with Canadian and European aluminium producers in such a fashion that the aluminium market was monopolized by the transactions between these companies, was said to have violated the US Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§1–7).

¹⁰⁶ See LibreTexts, *Important Doctrines of Nation-State Judicial Decisions*, https://biz.libretexts.org/Bookshelves/Civil_Law/Foundations_of_Business_Law_and_the_Legal_Environment/33%3A_International_Law/33.03%3A_Important_Doctrines_of_Nation-State_Judicial_Decisions#:~:text=The%20principle%20of%20objective%20territoriality%20is%20fairly%20simple%3A,a%20direct%20and%20foreseeable%20impact%20in%20another%20nation (accessed 27 Feb. 2025).

¹⁰⁷ In Case 89/85 *Wood Pulp*, ECR 5193 (1988) the Court ruled that agreements concluded outside of the EU, even by undertakings which are established outside of the EU, may be considered to have an effect upon trade between the Member States if they are implemented within the EU so as to having an effect on the functioning of the EU market.

¹⁰⁸ For the Republic of Korea, see the *Monopoly Regulations and Fair Trade Act*, No. 4198 (1990), as discussed by Youngjin Jung, *Korea's Competition Law and Policies in Perspective*, 26(3) Nw. J. Int'l L. & Bus. 687, 728 (2006), and for Brazil, Law No. 12,529, Art. 2, as explained in: *Brazilian Antitrust Law* (Law N.º 12,529/11): 5 years (2017).

Air France is Paris, and that of KLM remains in Amstelveen, The Netherlands.¹⁰⁹ So far, this regime has worked well in practice in terms of maintenance of international traffic rights operated by the two airlines.

The EU Commission defined effective control as ‘the power, direct or indirect, actual or legal, to exercise decisive influence on an airline’.¹¹⁰ In other words, all of the legal and actual circumstances, including, the composition of the airline’s management, the legal and factual power to appoint the members of the Board of Directors and the Chief Executive, as well as the impact of these factors on the day-to-day management of the airline are crucial.

The EU Merger Regulation also applies to mergers with a ‘Community dimension’ between non-EU airlines. Thus, the European Commission has reviewed the United/USAir,¹¹¹ Delta/PanAm,¹¹² Singapore Airlines/Virgin,¹¹³ and Swissair/South Africa¹¹⁴ joint ventures under the EU regime. In such mergers between non-EU air carriers, the EU Commission relies on the so called ‘effects’ doctrine. The operation of air services having *an effect on the EU market* may be made subject to the EU competition law regime.¹¹⁵ Many states across the world applying their competition law regimes to the operation of international air services have adopted the ‘effects’ doctrine in their national legislations.¹¹⁶ From this perspective, the merger between Korean Air and Asiana has been assessed by the EU Commission.

3.4[c] *The Korean/Asiana Merger as Scrutinized under the EU Merger Regulation*

On 24 February 2024, the EU Commission approved the acquisition of Asiana by Korean Air, subject to compliance with remedies. These include:

- Korean Air will divest Asiana’s global cargo operations, including cargo aircraft, slots, traffic rights, flight crew, and other employees, as well as customer cargo contracts. The purchaser of Asiana’s cargo operations must demonstrate that it can carry out Asiana’s cargo operations ‘in a viable manner and to compete effectively with the merged company’.¹¹⁷

¹⁰⁹ For more details, see Pablo Mendes de Leon, *A New Phase in Alliance Building: The Air France/KLM Venture as a Case Study*, 53 ZLW 35953 Zeitschrift für Luft- und Weltraumrecht, 359–385 (2004).

¹¹⁰ See s. XI of the *Swissair/Sabena* decision (1995).OJ L 239 (19 Jul. 1995), at 25.

¹¹¹ Case M. 2041.

¹¹² Case M. 130.

¹¹³ Case M. 1855.

¹¹⁴ Case M. 1626.

¹¹⁵ In Case 89/85 *Wood Pulp*, *supra* n. 107.

¹¹⁶ For the Republic of Korea, see the *Monopoly Regulations and Fair Trade Act*, No. 4198 (1990), as discussed by Jung, *supra* n. 108, at 686–728.

¹¹⁷ See the European Commission, *Commission Approves the Acquisition of Asiana by Korean Air, Subject to Conditions* (13 Feb. 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_761 (accessed 27 Feb. 2025).

- As to passenger commitments, Korean Air is obligated to transfer the necessary assets to enable it to start flight operations on the four overlap routes to a rival airline, the Korean air carrier T'Way. Korean Air has committed not to complete the merger until T'Way has started operating on the four overlapping routes, Seoul – Barcelona, Seoul – Frankfurt, Seoul – Paris Charles de Gaulle Airport (CDG) and Seoul – Rome Airport (FCO).¹¹⁸

The implementation of said commitments will be strictly monitored by the EU Commission.

On 28 November 2024, the EU Commission granted final approval for this merger. The approval gives Korean Air permission from thirteen out of fourteen relevant jurisdictions. The fourteenth jurisdiction is the US, as to which *see* section 3.5 below.

In the *Etihad/Alitalia* merger of 2014, the investment was made by a non-EU carrier,¹¹⁹ scrutiny of nationality conditions of Alitalia under EU Regulation 1008/2008 is called for.¹²⁰ A number of factual aspects of the merger, among which the intention of opening new strategic routes and the composition of the board of directors are decisive in identifying who has the effective control of the airline.¹²¹ On 14 November 2014, the EU Commission has also cleared the *International Consolidated Airlines Group (IAG)/Aer Lingus* take over, subject to conditions. IAG had to offer slots at London Gatwick airport and concessions pertaining to the carriage of passengers connecting to long haul flights to competing carriers in order to take away competition concerns.¹²²

Hence, the Commission imposes restrictions on the merger with the purpose of remedying the potential anti-competitive effects of the venture. The approach is similar to that adopted in airline alliance cases.¹²³

3.4[d] *Strategic Considerations*

Mergers and take-overs are increasing in an era of consolidation of the airline industry. This trend is fuelled by the need for investments. Consolidation starts receiving a global touch by the stakes purchased by non-European airlines into

¹¹⁸ *Ibid.*

¹¹⁹ *See* EU Commission Case No. COMP/M.7333 *Etihad/Alitalia* (2014).

¹²⁰ *See* the above *Swissair/Sabena* case.

¹²¹ *See* A. Trimarchi, *A Comparative Critique of the Laws on Ownership and Control of Airlines. Is Commercial Aviation still at the Crossroads?*, LL.M. Thesis, Leiden University (2016).

¹²² *See* EU Commission, Press Release of 14 Nov. 2014. Similar conditions, i.e., the surrender of slots at London Heathrow and the provision of connections to competing airlines, were agreed upon in the acquisition of British Midland (BMI) by IAG, on 30 Mar. 2013.

¹²³ *See* the overview of EU competition developments published twice per year in the magazine *Air & Space Law*.

European airlines. Competition authorities are challenged to examine these transactions from a competition law but also from a broader strategic point of view.

3.5 US: SILENT CONSENT

3.5[a] *Merger Control in the US*

Pursuant to section 7 of the Clayton Act,¹²⁴ the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) are authorized to investigate airline mergers to assess whether the transaction ‘may substantially lessen competition, or tend to create a monopoly’.¹²⁵ When the transaction triggers the threshold for an antitrust review, the merging parties will report the proposed transaction to both agencies. After the initial review through an inter-agency approval process, the DOJ and FTC will not only determine whether the transaction raises antitrust concerns requiring further examination but also decide which agency will conduct the review.¹²⁶

Usually, the DOJ is responsible for anti-trust enforcement in the field of air transportation. For instance, in 2013, that Department initiated an antitrust lawsuit against the merger of American Airlines and US Airways. Eventually, all parties reached a settlement, and the merger was successfully completed.¹²⁷ The DOJ would consider whether the significant reduction in market competition caused by the merger will directly affect prices and service quality, thereby having a negative impact on consumers.¹²⁸

3.5[b] *Experience in the Merger Control of Overseas Airlines Companies*

The DOJ has blocked some merger cases of American airlines. For instance, in 2024, the DOJ filed an antitrust lawsuit to prevent JetBlue from acquiring Spirit Airlines and succeeded.¹²⁹ However, according to the publicly available information, the DOJ has

¹²⁴ Pub. L. 63–212, 38 Stat. 730, enacted 15 Oct. 1914, codified at 15 U.S.C. §§12–27, 29 U.S.C. §§52–53.

¹²⁵ See *2023 Merger Guidelines* (18 Dec. 2023), <https://www.justice.gov/atr/merger-guidelines> (accessed 27 Feb. 2025).

¹²⁶ See FTC, *How Mergers are Reviewed*, <https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review> (accessed 27 Feb. 2025). Also See US Government Accountability Office, *Antitrust: DOJ and FTC Jurisdictions Overlap, but Conflicts are Infrequent* (3 Jan. 2023), <https://www.gao.gov/products/gao-23-105790> (accessed 21 Feb. 2025).

¹²⁷ See Mathew Drocton, *Searching for the Sweet Spot: An Analysis of the American-US Airways Merger*, 65 Case W. Res. L. Rev. 487, 489 (2014).

¹²⁸ See Catherine A. Peterman, *The Future of Airline Mergers After the US Airways and American Airlines Merger*, 79 J. Air L. & Com. 781, 790 (2014).

¹²⁹ See DOJ, *Justice Department Statements on District Court Decision to Block JetBlue's Acquisition of Spirit Airlines* (16 Jan. 2024), <https://www.justice.gov/archives/opa/pr/justice-department-statements-district-court-decision-block-jetblues-acquisition-spirit> (accessed 22 Feb. 2025).

never blocked mergers between foreign airlines. This is usually because when reviewing such cases, the DOJ will closely coordinate and exchange views with the antitrust enforcement agencies of the relevant judicial districts. Under the premise of policy transparency, mutual trust, and no adverse competitive impact on the US market, it will recognize the anti-monopoly review opinions of the home country, which reflects the principle of international comity.¹³⁰

3.5[c] *Approval Without Condition*

In the case of the merger between Korean Air and Asiana, the DOJ was the last antitrust enforcement agency to complete its review. However, after the DOJ became aware of the relief conditions in the five above mentioned jurisdictions, especially the EU, it did not reach any settlement agreement with the merging parties. Hence, the completion of the review was not conditional but was expressed by not filing an antitrust lawsuit.¹³¹

4 REGULATORY COORDINATION AND VARIABILITY

Antitrust law and enforcement thereof originated in the US and was further developed through continuous legislation and practice, including case law in the EU. A good number of states have implemented competition and antitrust provisions from the US and the EU into their own legal systems.¹³² Driven by the Open Skies agreements, the US and the EU have adopted a converging approach towards antitrust enforcement in the aviation sector, whereas many other jurisdictions' antitrust laws and enforcement have been influenced by the regulations and practices in these (the US and EU) jurisdictions.

The above analysis raises the question of whether regulatory convergence has truly emerged in the international air transport industry and whether this field will be the first to witness the establishment of an international antitrust treaty.

¹³⁰ For instance, in the review of the merger case of Air France and KLM in 2004, the DOJ and the European Commission exchanged information and viewpoints on the case. This not only enhanced the efficiency of the review but also increased mutual understanding between the two jurisdictions regarding this case. Eventually, the DOJ stated that the merger had no significant impact on the US market and was of great significance to the European market, and thus did not raise any doubts about the merger. See Alexander Svetlicinii, *Cooperation Between Merger Control Authorities of the E.U. and the U.S.: A Viable Solution for Transatlantic Mergers*, 7 U.C. Davis Bus. L.J. 171, 185(2006).

¹³¹ See Jeong Jiseong, *Korean Air Has Crossed The Last Gateway To The Merger of Asiana Airlines* (3 Dec. 2024), <https://www.mk.co.kr/en/business/11184002> (accessed 25 Feb. 2025).

¹³² Legal transplants do not entail a wholesale replication of another country's antitrust laws but often follow a selective approach. Legislators may adopt a shopping method, choosing the most suitable foreign provisions that align with the overarching objectives of their antitrust legislation. If a foreign rule fits within the broader framework and policy goals of the host country's competition law, it is more likely to be incorporated into domestic law. See Wang Lei & Krizic Ivo, *Beyond Legal Transplant: China's Shopping Around Approach and Formation of Anti-monopoly Law*, 40 World Competition 505 (2017), doi: 10.54648/WOCO2017030.

Some scholars argue that a successful implementation of a competition law regime depends on the host state's or jurisdiction's ability to support the institutional structures which are necessary for enforcement.¹³³ More importantly, however, the effectiveness of competition and antitrust regimes in the aviation sector depends on whether the host state possesses an industry foundation, as explained below, which is comparable to that of the legislation and other legal and policy instruments employed by the exporting jurisdiction.

The Korean Air-Asiana merger case suggests that regulatory convergence in air transport antitrust has been effective in jurisdictions with similar market structures and legal policies, whether indigenous or transplanted, but are less suited to those with fundamentally different industry compositions and competitive dynamics. And, as the economic structure of the jurisdiction 'exporting' legislation, including case law and practices like remedies, evolves, previously methods may no longer align with new market realities. The following four factors elucidate this statement.

Firstly, the definition of the relevant market in airline mergers should not be limited to the traditional O&D approach. The approach to defining the relevant air transport market should be a 'toolbox', where antitrust enforcement agencies select different methods based on the specific industry structure, so as not to overlook international transfer services where the country serves as a transit point or transports domestic passengers to third countries.

Secondly, using the scope of the relevant market to limit the jurisdiction of merger control could lead to biased competition assessments. Both the SAMR and the JFTC's decisions in this case rigorously referred to the past experiences of the US and EU, but failed to comprehensively evaluate the actual competitive situation, potentially leaving future competitive harm unresolved.

Thirdly, in addition to market share on specific routes, what other quantitative data can reflect an airline's market power? In the Korean merger case, the merged airline holds a dominant or monopolistic position on many international routes, including five routes to North America, six to Europe, five to China, six to Southeast Asian countries, one to Japan, and three to Oceania. The fourteen jurisdictions that have reviewed the merger all focused on the competition situation of these routes and unanimously concluded that the merger would weaken competition.¹³⁴ However, with the continued development of air transport worldwide, many states impose social responsibility requirements on domestic airlines.

¹³³ See Ma Tay-Cheng, *Legal Transplant, Legal Origin, and Antitrust Effectiveness*, 9 J. Comp. L. & Econ. 65, 65 (2013), doi: 10.1093/joclec/nhs032.

¹³⁴ See Korea Fair Trade Commission, *KFTC Gives Conditional Approval to Korean Air-Asiana Airlines Merger* (22 Feb. 2022), https://www.ftc.go.kr/solution/skin/doc.html?fn=1f7961a040b1aacebe29bdb699a024385bfb36f7de879e5868cda40b09f15602&rs=/fileupload/data/result/BBSMSTR_000000002402 (accessed 4 Jan. 2025).

Maintaining certain routes may not always be profitable but could serve purposes such as poverty alleviation and maintaining diplomatic relations. The absence of potential competitors in these markets may not necessarily be due to a shortage of slots or traffic rights but because these routes are not considered profitable. Therefore, a high market share does not necessarily equate to high market power.

Fourthly, the form of remedial measures has evolved based on the need to control competitive harm made by specific mergers. In this merger case, five jurisdictions implemented merger remedies, with South Korea, Japan, the UK, and China all opting for *slot divestitures*. However, the procedures for releasing slots varied among these four jurisdictions, with most opting for delayed releases, while only the UK required an immediate release. This difference is directly related to the competition dynamics in these jurisdictions, as the imbalance of competition in the UK-South Korea market made the need for slot release more urgent. Furthermore, the EU, due to its internal air transport market, has many potential air passenger competitors but lacks heavyweight competitors in air cargo that could match the merged airline. As a result, the EU decided to carve out Asiana's cargo business and transfer it to another Korean cargo airline, that is Air Incheon.¹³⁵

5 CONCLUSION

The US and the EU not only demonstrated regulatory convergence, but also inspired many other jurisdictions. The antitrust regimes of the US and the EU became widely transplanted, which contributed to fostering a broader regulatory consensus globally. However, it should be noted that this consensus merely affirms the framework of airline merger review, rather than establishing a unified approach to specific methodologies. With the continuous development of international civil aviation, the business models and competitive landscapes of many emerging aviation transportation markets are quite different from those of traditional markets.

After the COVID pandemic, the international air transport market pattern is undergoing significant adjustments. An increasing number of airlines subject to multi-jurisdictional regulatory oversight are expected to pursue consolidation. Meanwhile, the existing experience is gradually revealing its shortcomings. The international community urgently needs to have a broad discussion on the best practices for controlling airline mergers. It is necessary to enrich and expand key concepts such as the definition methods of relevant markets, key assessment indicators for market power of international air transport enterprises, and the specific connotations of the principle of 'fair competition'.

¹³⁵ See the European Commission, *Commission Approves Air Incheon as the Purchaser of Asiana's Global Cargo Freighter Business Offered by Korean Air* (13 Feb. 2024), https://ec.europa.eu/commission/presscorner/detail/en/mex_24_6122 (accessed 14 Feb. 2025).