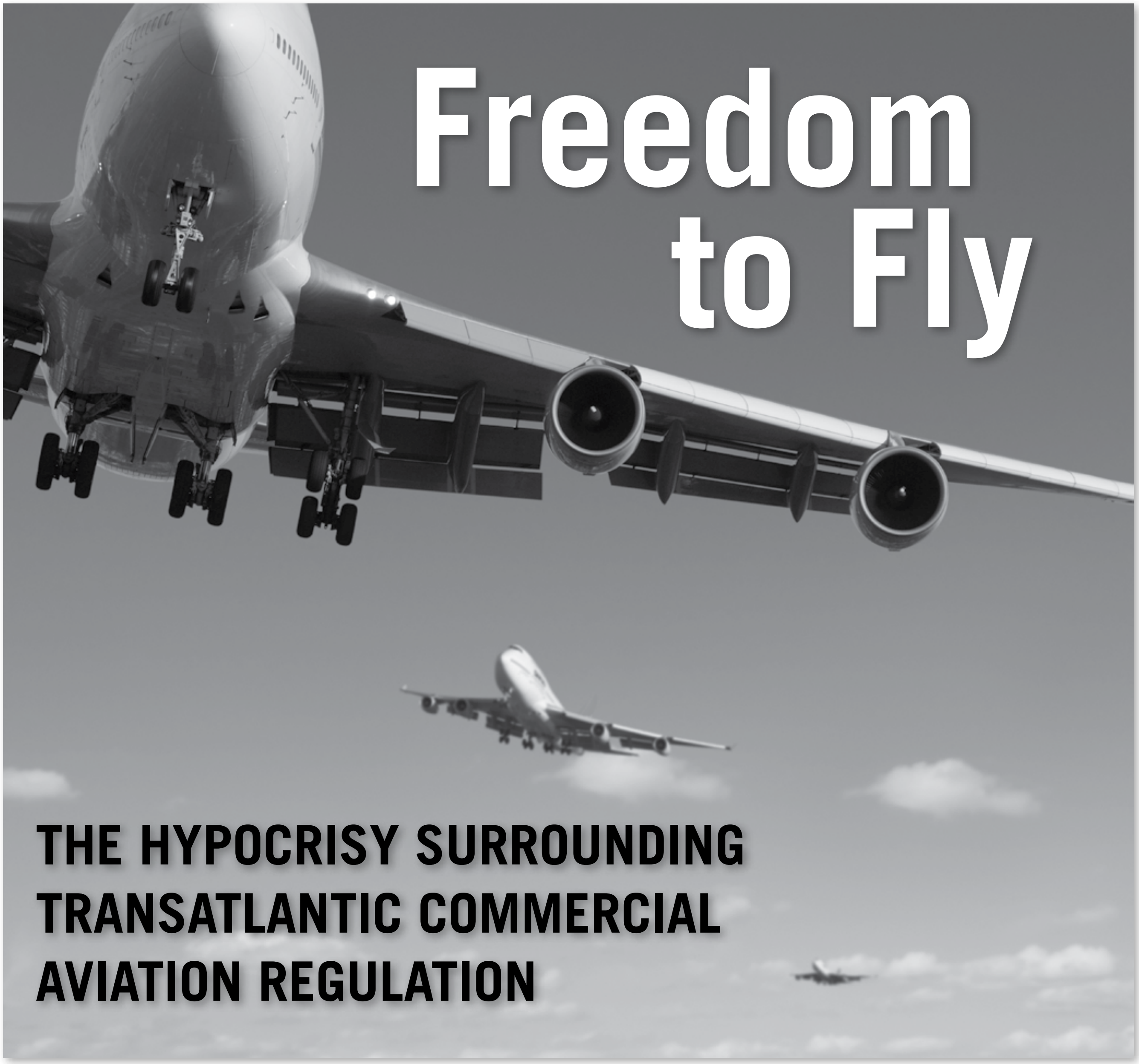

Freedom to Fly

THE HYPOCRISY SURROUNDING TRANSATLANTIC COMMERCIAL AVIATION REGULATION

By Taylor Strosnider*

On the cold morning of February 18, 2015, over 50 flight attendants and employees of the airline Norwegian Air Shuttle stood on the steps of the U.S. Department of Transportation's (DOT) offices in Washington, D.C. in protest of the agency's delay of Norwegian's foreign air carrier operating permit.[1] The sight was an unusual one: not only is it out of the ordinary to see airline personnel protesting outside of the DOT's headquarters, but Norwegian was, and still is, a carrier with only a handful of flights to and from the U.S. The permit being sought from the Federal Aviation Administration (FAA) had been pending for over a year, resulting in the entirety of Norwegian's U.S. operations being caught in a seemingly endless period of limbo.[2] FAA approval for the airline would allow it the long-sought opportunity to expand its transatlantic services to more cities throughout the country—each of them on state-of-the-art Boeing 787s, in contrast to the often decades-old aircraft used by existing carriers.[3] However, despite the protest, petition, and lobbying taking place in Washington, Norwegian still sits in limbo today awaiting formal authorization of its foreign air carrier permit. Moreover, a total of 38 U.S. senators signed a letter to the DOT urging the rejection of the airline's application.[4]

Despite the fact that increased competition on transatlantic routes would be an unqualified win for consumers—many of whom pay a minimum of $1,000 to fly across the Atlantic during the peak summer season—the senators' objections are for the most part on behalf of the American airline industry. After a full 30 years of often-devastating levels of competition from upstart airlines such as Southwest, jetBlue, and Spirit—which were in large part responsible for the collapse of airlines such as Pan Am and TWA, as well as a seemingly endless flow of red ink at the country's remaining "legacy carriers"—America's airlines are now faced with a scenario they have dreaded for years: the entry of Europe's low-cost carriers (LCCs) into the sphere of transatlantic travel, which has long been one of the industry's most lucrative cash cows. Indeed, Norwegian launched its North American operations with nonstop flights to Europe priced as low as $370, including all taxes and fees.[5] Even its lengthiest flight, the 5,500-mile stretch between Los Angeles and Stockholm, was initially priced at a roundtrip cost of $470—possibly the lowest cost-per-mile of any transatlantic flight in recent memory.[6]

To a Singaporean company that typically hires Thai pilots and crews willing to work for far less money and benefits than their often-unionized American and European counterparts.

In an interesting twist—one that is discomfiting to American officials—Norwegian's current FAA application is, in reality, seeking approval of a wholly owned subsidiary based out of Ireland, of all places, and operating under the name Norwegian Air International (NAI-Ireland). This peculiarity is one of the reasons American carriers are crying foul. Norwegian set up its Irish base of operations for the specific purpose of evading Norway's strict labor and tax laws—including the ability to hire pilots from third-party nations.[7] Indeed, NAI-Ireland does just that; the airline has outsourced its pilot recruitment to a Singaporean company that typically hires Thai pilots and crews willing to work for far less money and benefits than their often-unionized American and European counterparts.[8]

During the same week Norwegian's FAA protest took place, Delta Air Lines CEO Richard Anderson found himself in spin-control mode over remarks he made in reaction to a threat to U.S. airlines on an nearly exact-opposite front.[9] While NAI-Ireland threatens American carriers on the lower end of the transatlantic market, the so-called "Gulf Three"—Emirates, Etihad Airways, and Qatar Airways—threaten it at the high end. In a CNN interview, Anderson was asked about the short-term subsidies the American airline industry received following the 9/11 attacks, and noted:

> [I[t's a great irony to have the United Arab Emirates from the Arabian Peninsula talk about that, given the fact that our industry was really shocked by the terrorism of 9/11, which came from terrorists from the Arabian Peninsula, that caused us to go through a massive restructuring.[10]

Despite Anderson's subsequent apology, representatives of the Gulf Three remained outraged, with Emirates even claiming that his initial remarks were "deliberately crafted," presumably to paint the Gulf airlines in a negative light.[11] (In reality, not only did Qatar and the United Arab Emirates—homes to the three airlines—have no role whatsoever in the 9/11 attacks, the UAE subsequently joined America's "coalition of the willing" during its subsequent invasion of Iraq.)

While the impetus for Anderson's remarks remains a mystery, his remarks on whole clearly illustrate the problem presented by the Gulf Three. Each of them is owned by an oil-rich Middle Eastern state happy to pour billions of petrodollars into making them the *ne plus ultra* of the commercial aviation world, with amenities the "legacy" American carriers—each of which is a publicly traded company with far less fiscal freedom—can't possibly afford to match. This state of affairs was not a significant problem when the Gulf Three limited themselves to flying directly between the Middle East and U.S.—American carriers only fly a handful of routes between the two regions—but the status quo recently changed: via roundabout means, Emirates recently secured approval for nonstop flights between New York's John F. Kennedy Airport ("JFK") and Malpensa Airport in Milan ("MXP"). To state that this new route presents a problem to the legacy carriers would be putting it quite mildly—as Delta's CEO's on-air tirade amply demonstrated. In a nutshell, the U.S. airlines are receiving simultaneous body blows, delivered by Norwegian at the low end and the Gulf Three—Emirates in particular—at the top.

Both situations present the legacy carriers with a bitter irony: since 1979 they have each broadly encouraged the signing of "Open Skies" agreements with various foreign nations. The philosophical basis for such accords rests primarily on free-market economics, and their impetus stems from a lengthy history of U.S. airlines being systematically denied an adequate number of landing slots at key international airports. This is almost entirely due to favoritism towards current or former flag carriers for various nations, Europe's in particular. At London's Heathrow Airport, for instance, British Airways alone held over 40% of its takeoff and landing slots as recently as 2004, while the Star Alliance—then composed of 15 airlines, most of which offered flights to London—held a lowly combined 25% of its slots.[12]

The American carriers eventually achieved many of their Open Skies objectives. For example, in 2007 a large alliance of European Union carriers agreed to the broadest such agreement to date.[13] The problem now, however, is the fact that their attitude can perhaps best be described as "do as we say, not as we do." After spending over 35 years championing broader slot availability at foreign airports for American carriers, both the U.S. government and the carriers themselves are decrying open-skies philosophies in two ways: by virulently opposing Emirates' adoption of a route between the U.S. and Europe, as well as engaging in unequivocally hypocritical actions in its continual denial of slots to Norwegian—which has launched the website "Open Our Skies" in protest of the FAA's "new interpretation" of the U.S.-EU Open Skies Agreement.[14] Meanwhile, Delta CEO, Richard Anderson has changed his tune considerably, and now calls for "fair skies, not open skies."[15] This paper will analyze the situations faced by Norwegian and Emirates, and discuss whether the U.S. government is defying its own agency-issued guidance in its challenges to the two airlines.

OPEN SKIES AND THE LUCRATIVE TRANSATLANTIC MARKET

The U.S. Department of State defines "Open Skies" as:

> [Agreements] between the United States and other countries [which] expand international passenger and cargo flights by eliminating government interference in commercial airline decisions about routes, capacity and pricing. This frees carriers to provide more affordable, convenient and efficient air service to consumers, promoting increased travel and trade and spurring high-quality job opportunity and economic growth. Open Skies policy rejects the outmoded practice of highly restrictive air services agreements protecting flag carriers.[16]

Nearly 600 flights cross the North Atlantic everyday, most carrying a full load of business-class travelers who have paid between $4,000 and $8,000 for the privilege of flying in a seat that can be converted into a bed.[17] The movement of people from the United States to Europe is constant, so much so that British Airways has now instituted daytime flights between JFK and Heathrow on what has long been a redeye-only route.[18] The profitability of transatlantic routes has spurred airlines to shift away from using the wide-body aircraft that formerly dominated them; today even single-aisle Boeing 757s are routinely flown across the Atlantic, along with "smaller" wide-bodies such as the Boeing 767 and 787.

A TALE OF TWO AIRLINES, PART I: NAI-IRELAND

The sizable frequency of transatlantic routes is exactly what NAI-Ireland wants to capitalize on. Its fleet of Boeing 787s—notable for their medium-size passenger capacity and remarkably ahead-of-the-curve fuel efficiency—plays a large role as well, allowing it the flexibility to generate profits even with low ticket prices thanks to healthy demand and the efficiencies of scale it can achieve. That is, assuming the FAA sees fit to grant it the airport slots it needs to fully thrive.

Created by the Department of Transportation Act of 1966,[19] the FAA has evolved into an agency wielding formidable power within the global-aviation sphere. While Congress maintains its right to keep the agency's rulemaking in check—sometimes to the extent of circumventing it entirely—the FAA has nonetheless come to broadly dictate how commercial aviation should be regulated and controlled on a worldwide level. Its powers include administration over air traffic control, aircraft and aircraft engine standards, airmen certificates, air carrier operating certificates, airport operating certificates, and research on aviation safety.[20] The FAA also has immense power in terms of how foreign carriers conduct business within the U.S.[21] As an independent agency, the FAA's rulemaking processes ostensibly center on "public interest" when considering the certification of a new foreign carrier for operation to and from the U.S. As is typically the case under traditional *Chevron* guidelines, American courts broadly defer to their decisions.[22] Under FAA rules, a commercial airline may not operate civil aircraft without a valid "airworthiness certificate."[23]

Clearly, airlines that fail to meet the FAA's regulatory standards should not be granted certificates to operate within the U.S., but this has never been an issue for NAI-Ireland: its entire fleet of 787s is nearly brand-new, and the FAA has never cited it for airworthiness problems. Instead, the FAA apparently objects to the airline's operational structure—a dubious proposition at best, and quite possibly a brazen abuse of its authority at worst.

The corporate structure of Norwegian Air Shuttle ASA is complicated,, but on the other hand it's common in the industry for airlines and lessors to structure themselves in a similar fashion as Norwegian .[24] The company currently has two wholly owned subsidiaries: NAI-Ireland and Norwegian Long Haul.[25] As of this writing, Norwegian Long Haul offers service into JFK and Ft. Lauderdale from Stockholm and Oslo.[26] The question, however, is why the FAA continues to bar NAI-Ireland—a subsidiary of the same airline—from obtaining a valid operating permit for U.S. service, and whether this course of action exceeds the FAA's mandate. Further, it raises the question of whether the agency is engaging in unambiguous protectionism for U.S. airlines.

The reasoning behind the FAA's decision almost certainly begins and ends in Ireland, where it elected to incorporate its budget-priced subsidiary.[27] Ireland plays a surprisingly significant role in the aviation industry, for two key reasons: its corporate tax rate is highly favorable compared to most other European countries, and the former "Celtic Tiger" has emerged as a hub for aircraft finance.[28] A number of airlines wishing to purchase additional aircraft tap into London's capital market for financing purposes and subsequently register their new acquisitions in Ireland.[29] Ryanair, Europe's largest airline, has used this capitalization structure with tremendous success.[30] But here's the rub: no other airlines engage in this means of acquisition and proceed to employ their Norwegian-branded, Irish-registered 787s on transatlantic routes.[31]

With new four Boeing 787s ordered and possibly more to come,[32] NAI-Ireland had planned to use their Irish-registered aircraft to connect American cities from major European hubs—though not necessarily Norway[33]—until the FAA grounded its efforts.[34] Powerful lobbying organizations such as Airlines for America have been wielding their considerable influence to prevent the European LCC model from hopping the pond.[35] Indeed, the idea of NAI-Ireland's $350 transatlantic flights are precisely what scares the industry, given the virtual certainty of American carriers having to lower their prices to compete.

Still, Norwegian's actions in forming NAI-Ireland have given U.S. government officials considerable grist to chew on. Thanks to both its "evasion" of Norway taxes as well as its use of "cheap" Asian flight crews, the narrative that's emerged inside the Beltway is that the company is circumventing the spirit, if not the literal text, of the current Open Skies agreement between the U.S. and EU.[36] Nonetheless, the reader will likely not find a single statement in the plain language of the multilateral Open Skies Agreement between the two indicating what precisely Norwegian Air Shuttle has done with its Irish subsidiary that is contrary to any part of the Open Skies Agreement.

Somewhat bizarrely, the push in Washington to bar NAI-Ireland from commencing service became so forceful last year that Congress circumvented the FAA—presumably for not acting quickly enough—to pass language in an omnibus spending bill directing the DOT to grant NAI-Ireland an operating permit only if it does not violate the Open Skies Agreement.[37] Both industry lobbyists and Norwegian welcomed the language—the only problem being that the two sides disagree entirely as to its interpretation. And while Congress intervened in the context of meddling with the terms of a spending bill, it has yet to take any conclusive steps to fix—or end—the impasse. Meanwhile, the American consumer remains stuck paying sky-high transatlantic plane ticket prices for the foreseeable future.

A TALE OF TWO AIRLINES, PART II: EMIRATES

On December 17, 2014, the Italian Supreme Administrative Court ruled to allow Emirates to continue with its Milan-to-New-York route. The decision predictably caused a firestorm at Assaereo, the Italian equivalent of Airlines for America, which

represents flagship carrier Alitalia and other smaller Italian airlines.[38] Their basic fear is the same as the one NAI-Ireland presents for American carriers: competition. While it is perhaps surprising that the Emirati airline successfully gained certification from the Italian Civil Aviation Authority to operate the route, the more salient question is why Emirates faced so little opposition in the U.S.—at least if one takes into account Norwegian's travails. The sets of circumstances differ considerably, to be sure, but nevertheless, one can argue that both airlines violated the spirit—if not the literal language—of the Open Skies Agreement.

Emirates' situation is an unusual one, and to explain it some historical context is necessary. In 1944 a total of 52 nations signed the Convention on International Civil Aviation, better known as the Chicago Convention.[39] It established what are known today as the Freedoms of the Air, of which nine exist.[40] However, only the first five were put into broad effect. The first freedom allows an airline to fly over a foreign country unencumbered; the third and fourth authorized international service between two points; and so forth. The eighth freedom turned out to be not so free: officially called "consecutive cabotage," it is defined as:

> [The] right or the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State.[41]

Emirates' JFK-MXP flight clearly fits the Eighth Freedom. The problem? Cabotage is widely illegal, with the exception of certain flights within the EU.[42] In the U.S. it's long been illegal, and yet government officials allowed Emirates to introduce a cabotage flight in the U.S.

The likely reason for the exception is both simple and cynical: greed. The UAE is one of the world's leading producers of oil, and it is thus in American's best interests to maintain strong ties with them. It's a sign of prestige at American airports to see an Emirates jet, most likely an Airbus A380, the largest of them all, parked at a surprisingly large number of U.S. airports. Given the political clout of Emirates in the American decision making process—so as to avoid aggravating a key oil supplier—the airline faced little opposition stateside when receiving its foreign air carrier permit from the FAA to begin flying to the U.S., and to later service the Milan route with its airport slot at JFK. Unlike the NAI-Ireland case, the fight has taken place entirely in Europe inside the Italian administrative court system.

Milan is no exemption on the profitability of transatlantic routes. It is Italy's largest city by GDP, with ample room for growth as the airport remains somewhat small in size when compared to other more established European airports, and as Milan begins to grow out of the recent EU recession hit relatively hardest by the financial sector of its countrymen.[43] What seemingly frightens Assaereo is the threat against the Italian airlines from continuing to capitalize on what is already a profitable route for them. Furthermore, as a member of Skyteam,[44] Alitalia has the opportunity to operate the route and participate in profit sharing with its alliance partner Delta Airlines, which also services a New York–Milan flight.[45] In contrast, Emirates participates in no profit-sharing with another airline that serves Milan as Alitalia does with Delta on this particular route—nor does it engage in much profit- or code-sharing anywere else.

What was kept relatively quiet from consumers throughout the administrative proceedings was Alitalia's newest venture with another Emirati airline, Etihad Airways. Etihad had not only began a code-sharing campaign with Alitalia for passengers to conveniently transit through Rome en route to the Middle East, Etihad had further purchased a 49% stake in Alitalia.[46] Luckily for Emirates, the purchasing of the stake in Alitalia on behalf of Etihad took place in the midst of the pending appeal of before the Supreme Administrative Court in Italy- almost four months after the original regional administrative court's decision in Lombardy to bar the Emirates operation.[47]

CONCERNS RELATED TO THE U.S.--EU OPEN SKIES AGREEMENT

A growing number of concerns surrounded the Open Skies Agreement since its 2007 signing. One involved the percentage ownership of airlines, and the potential to allow foreign investors to own more than the current allotment of no more than 49.9% of an American carrier.[48] Predatory pricing, a "free for all" transatlantic competitive environment,[49] and the possibility of waning profitability for the American carriers[50] top the list of current concerns for what the 2010 Protocol and the original 2007 Open Skies Agreement bring to the minds of those heavily invested in the aviation industry. Rightfully so, considering that North American and Europe make up 64% of the world's global employment in aviation.[51] Although potentially negative for the commercial aviation industry from a price-stabilization perspective, consumers should be particularly excited at the prospect of such low transatlantic fares. On the other end, wealthy travelers who readily pay full price for first- or business-class tickets should be enthralled by ideas like Etihad's latest volley in the high-end aircraft accommodations: The Residence, the equivalent of a small apartment on-board. It comes equipped with an en-suite, private bathroom; a private living room; a real queen-size bed; and a butler to cater to one's every whim.[52]

The entrance of foreign carriers into the transatlantic market is among the largest concern for carriers in the United States.[53] With this emergence of foreign airlines, especially in Europe, there is a strong pressure for the U.S. to remove barriers to the market for emerging strong global competitors.[54] This urge to remove barriers is seen in direct correlation with the current situation with NAI-Ireland. With the liberalization of the U.S. barriers to entry, comes a growing competitive environment for the American carriers to provide the same service at such a low, more competitive, price point.[55]

CEO of Irish carrier Ryanair, Michael O'Leary, has begun toying with the idea of the $12 transatlantic ticket for Americans and Europeans to affordably cross the Atlantic;[56] in March 2014, the Ryanair board approved plans to commence transatlantic flights by the Irish ultra-budget airline.[57] Are American carriers really in a position to compete with prices such as this?

Furthermore, will American carriers begin to scream foul as they claim the existence of predatory pricing and the steadfast position against predatory pricing as held in *Brooke*?[58] This argument will hardly hold water considering that the *Brooke* dealt with an oligopoly setting,[59] and the transatlantic commercial aviation market is anything but an oligopoly with the current number of carriers. The fear for this price competition came from the large number of aircraft orders that were expected for delivery in 2007 given that "in the event demand growth in services takes a downward path, large scale new deliveries could force airlines to enter into cutthroat competition just as airlines are beginning to make a profit . . ."[60]

Competition within the aviation industry consists of the business and leisure markets.[61] For the business sector, the passenger typically flies on the company's dime, so the price conscious passengers show little concern for the fare, and more concern for the service provided.[62] Even more so for the demand for business class is rising as the economy rebounds, and many well-established international are begging to answer the call for those companies that require executives to travel in business and first class.[63] However, for the leisure market, which NAI-Ireland would mainly serve, there is a great demand for lower fares.[64] The leisure market merits a different kind of competition where the fare is the utmost of consideration, while other aspects such as facilitates may only play a part in the passenger's consideration to fly on the carrier.[65] Specifically, the American legacy liners can make an argument for the FAA to continue its stringent regulating of the transatlantic market so that "mushroom" airlines that undercut pricing of the larger carriers do not upset the current price balance in the market.[66] However, leisure flier can seemingly enjoy the low fares while the startup airline attempts to gain a loyal consumer base during its relatively short existence, with Norwegian already serving the Untied States for nearly two years now, they have established a relatively enduring and expanding presence.

Europe has always had a far more liberal stance on the commercial aviation market than their counterpart across the Atlantic.

The eighth freedom of flight grants the right of cabotage, meaning that a foreign carrier can operate domestically within the borders of the foreign territory.[67] In accordance with the 2007 Open Skies Agreement Article 3 paragraph 1 (c) (i), airlines of the United States have the right to fly from Europe to the United States via "intermediate points in any EU Member State."[68] The EU has granted the U.S. this intra-EU traffic right, however, there is no comparable right for European carriers to operate within the United States.[69] Despite the EU's willingness to grant U.S. airlines intra-Union traffic rights, the U.S. remains steadfast in their "25% percent" rule, which does not allow for any domestic airline to have more than 25% of foreign voting stock ownership.[70] This remains an issue for the EU, because from the EU's perspective there should be a mutual benefit for both sides of the Atlantic to enjoy all rights and benefits granted to parties by the Open Skies Agreement.[71] However, this does not remain a "deal breaker" for EU,[72] as the Union still signed the 2010 Protocol.[73]

Europe has always had a far more liberal stance on the commercial aviation market than their counterpart across the Atlantic.[74] From the view of European carriers, they would like to have the right to service between the EU and the United States, and further that right for service within the United States.[75] To state bluntly, European carriers would like the same privilege of foreign domestic service American carriers can enjoy in the EU. Although the eighth freedom of flight is not widely practiced in the EU, it is likely not exercised for strategic reasons.[76] The last idea that American carriers want to put in the minds of their European competitors is the thought that they deserve the same right to operate domestic service in the United States. Furthermore, the impression of a third protocol to the Open Skies Agreement that allows for foreign carriers to operate in the United States is a growing concern for airlines.[77] The question remains, how far is too far when it comes to liberalizing the market?

THE TEXAS CONNECTION: OIL AND UNIQUE TRANSATLANTIC FLIGHTS

Texas enjoys the ability to market itself as a state that can connect one major oil-producing jurisdiction to another major oil producing epicenter anywhere in the world. Departing from Houston alone, there are a number of airlines that solely operate service and market their routes as connecting oil capitals. From Houston's George Bush Intercontinental Airport, these routes include Singapore Airlines service to Moscow,[78] Scandinavian Airlines service to Stavanger, Norway,[79] Emirates service to Dubai,[80] and Qatar Airways service to Doha.[81] Singapore Airlines service is a clear example of how useful the fifth freedom of flight is, by strategically connecting to foreign destinations en route to the home country, as Emirates did with New York and Milan. Singapore saw an opportunity to operate on a route that would connect two energy hubs in the world, and capitalized on it using the Chicago structure that allowed for the fifth freedom for the route between Houston-Bush and Moscow-Domodedovo.[82] Furthermore, Emirates has expanded service beyond Houston and has begun servicing Dallas as well—utilizing yet another jumbo A380,[83] with the articles already being published stating that Austin might soon see service within the decade.[84] Furthermore, Qatar openly marketed their service from Houston to Doha as "linking the world's energy capitals."[85]

The economic environment in Texas clearly services well for foreign competition, and with Scandinavian's Stavanger, Norway service, it remains an open question whether Norwegian will expect its served there along with whether or not the airline will begin their own service to Texas to undercut Scandinavian's Stavanger route. In the event NAI-Ireland is able to obtain a permit from the FAA, they will have much lower operating costs than their other Scandinavian competitor, and there is no reason why another foreign carrier would not want to begin this profitable service for consumers in the oil and gas industry. Emirates could also entertain the idea of connecting either Houston or Dallas to its potential newfound secondary home at Milan-Malpensa to give consumers in Texas another option to cross the Atlantic. Though both of these hypotheticals have not been subject to the limelight quite yet, they continue to open the possibility of continued competition for consumers to utilize—all resulting from the Chicago structure and what an Open Skies Agreement as to offer.

CONCLUSION

Although the situation surrounding NAI-Ireland and Emirates differs in many ways, they share two crucial aspect in common; they are likely harbingers of the future of air travel—similar to how American carriers finally upgraded their international business-class sections to include flat-bed seating—and they serve as a reminder that sovereign territories still hold the right to regulate their own airspace.[86] Even today, the rules defined at the 1944 Chicago Convention allows for states to decide on the regulatory environment of their own airspace.[87] Despite the age of the Chicago Convention, its force still remains the pinnacle for countries to retain their aviation sovereignty. Both the United States and Italy have multiple bilateral and multilateral open skies agreements with various foreign jurisdictions—once again thanks to this Chicago Convention.

The Council of State has already ruled in favor of Emirates, yet in retrospect, and according to Article 1 of the Chicago Convention, a state does have the sovereign rule to regulate its own airspace.[88] Had the Council of State applied a Chicago Convention test rather than one that incorporates the 2007 Open Skies Agreement, Emirates could have seen an unfavorable outcome. The EU must fully define whether member states, or the economic union, control the airspace above their respective countries. A gray area now exists as to how the "Single European Sky" initiative brought forth in 2004 for by the European Parliament[89] affects Article 1 of the Chicago Convention or Article 6 of the 2007 Open Skies Agreement.[90] However, from a legal perspective, "carriers of [member states] of the EU cannot have a European nationality since the EU does not have the sovereign status of a state."[91] Regardless of the influence with Etihad's stake in Italian flagship carrier, Alitalia, Etihad cooperated with Article 20 of the Open Skies Agreement, which does not allow for non-member states to own more than 49.9% total equity of a European carrier.[92] Etihad played the game according to the provisions of the Open Skies Agreement to break into the European market, rather than immediately beginning service as Emirates has done. Luckily, on appeal, the Council of State felt the need to apply a test provided by the Open Skies Agreement, rather than one that would encompass the *ad coelum* legal argument behind Article 1 of the Chicago Convention.[93]

The supposed circumventing of Norwegian labor standards and taxes should not be a concern for the governing FAA, nor should they be taken under consideration for NAI-Ireland's application for an airline foreign air carrier permit to service U.S. markets. Despite "Norwegian" being placed in the name of the airline, the aircraft are Irish and were granted an Air Carrier Operating License by the Irish Commission for Aviation Regulation as well as an Air Operator's Certificate by the Irish Aviation Authority.[94] The question of why the aircraft were registered in Ireland should not be considered as circumventing any Norwegian law; it is a conscious business practice about which the Irish authorities are well-aware, with NAI-Ireland's potential to operate the majority of its business mainly outside of Ireland. Further, there is no indication that Norwegian has breached any U.S. law or regulation, again questioning this lengthy delay in NAI-Ireland's foreign air carrier permit.[95] Airline names need not literally define their operations. If they did, Southwest Airlines would have had to change its name years ago, among many other examples. Because it was up to the Irish government's discretion to grant Norwegian's operating permit, the airline should thus be considered as Irish, not as some sort of shifty Norwegian corporation. The Irish government capitalized on an opportunity to collect the duties imposed on aircraft registered in their country, and there was no mention of care in any known documentation regarding the name "Norwegian Air Shuttle" painted on the side of its aircraft.

Furthermore, the FAA is failing to uphold the Open Skies Agreement by not granting NAI-Ireland a permit to operate.[96] As discussed above, every variation of the Open Skies Agreement and its amending protocols has a consistent call for the opening of the commercial aviation market to allow for more competition.[97] NAI-Ireland is continually being stalled, and the airline is suffering as a result.[98] Given the facts of the matter, Norwegian has the capacity to bring a case against the FAA for causing undue harm against the airline for failing to grant an operating permit when all procedures have been met.[99] An airline should not be punished for outsmarting a regulatory agency within the boundaries of the agency's own ambiguous regulations.[100] Rather than argue, American carriers such as Delta Air Lines could very well similarly adopt a similar flag-of-convenience approach by registering their aircraft in Ireland to take advantage of the Open Skies Agreement.

What scares the political giants in the American aviation world is the idea of European competition entering the market with newer aircraft at a lower price. If anything, this newfound competition will likely result in American carriers to lessen their profit margins in order to continue to operate at their current capacity.[101] If there is one aspect of the regulatory environment that mimics the same fight Howard Hughes had in the Senate War Investigation Subcommittee when disclosing Senator Ralph Owen Brewster's intent to merge Pan American Airways and TWA,[102] it's that money continues to dictate and influence the aviation world, both domestic and abroad, all under the auspice of increased competition for the consumer.

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