IN THE COURT OF APPEAL MALAYSIA

(APPELLATE DIVISION)

CIVIL APPEAL NO.: W-01(A)-31-01/2019

BETWEEN

MALAYSIAN AIRLINE SYSTEM BERHAD ... APPELLANT

AND

COMPETITION COMMISSION ... RESPONDENT

[IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(APPELLATE AND SPECIAL POWERS DIVISION)
(APPLICATION FOR JUDICIAL REVIEW NO.: WA-25-82-05/2016

In the Matter of Order 53 Rules of Court 2012 and other relevant provisions;
And

In the matter of an application for an Order of Certiorari;

And

In the Matter of Section 25 and Schedule to the Courts of Judicature Act 1964;

And

In the Matter of the Competition Act 2010;

And

In the Matter of the Competition Commission Act 2010;

And

In the Matter of the decision of the Competition Appeal Tribunal dated 18.2.2016.

BETWEEN

COMPETITION COMMISSION … APPLICANT

AND

1. COMPETITION APPEAL TRIBUNAL
2. MALAYSIAN AIRLINES SYSTEM BERHAD
3. AIRASIA BERHAD … RESPONDENTS]

HEARD TOGETHER WITH

IN THE COURT OF APPEAL MALAYSIA

(APPELLATE DIVISION)

CIVIL APPEAL NO.: W-01(A)-32-01/2019

BETWEEN

AIRASIA BERHAD ... APPELLANT

AND

COMPETITION COMMISSION … RESPONDENT

[IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(APPELLATE AND SPECIAL POWERS DIVISION)
(APPLICATION FOR JUDICIAL REVIEW NO. WA-25-82-05/2016

In the Matter of Order 53 Rules of Court 2012 and other relevant provisions;
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BETWEEN

COMPETITION COMMISSION … APPLICANT

AND

1. COMPETITION APPEAL TRIBUNAL
2. MALAYSIAN AIRLINES SYSTEM BERHAD
3. AIRASIA BERHAD … RESPONDENTS]

CORAM:

HANIPAH FARIKULLAH, JCA

LEE SWEE SENG, JCA

MOHD. SOFIAN ABD. RAZAK, JCA

JUDGMENT OF THE COURT

[1] These two appeals by the Malaysian Airline System Berhad ("MAS") and AirAsia Berhad ("AirAsia") raise an interesting issue on whether the Competition Commission of Malaysia ("MyCC") still has the locus to pursue its application for Judicial Review after the Malaysian Aviation Commission Act 2015 ("MAVCOM Act") has come into force and has taken over the regulating of economic matters relating to the civil aviation industry including competition issues.

[2] Related to that is the *locus* of the MyCC to apply for Judicial Review of a decision from its own appellate body, that of the Competition Appeal Tribunal ("CAT").

[3] Substantively this appeal shall also deal with the meaning of an agreement which has the object of market sharing and the application of the deeming provision that such an agreement has an anti-competitive object under s. 4 of the Competition Act 2010 [Act 712] ('the Act") and if so whether the relief from liability under the Net Economic Benefit Exemptions under s. 5 of the Act would apply to the facts.

Collaboration Agreement

[4] A Collaboration Agreement ("Agreement") between MAS and AirAsia as well as AirAsia X Sdn Bhd ("AirAsia X") was entered into on 9.8.2011, before the coming into force of the Act. For all practical purposes, AirAsia and AirAsiaX shall be referred to collectively as "AirAsia".

[5] The provisions that may be caught by the Act were made to be conditional upon antitrust clearance by the MyCC as at that time the Act had not come into force and no one would be able to then predict with reasonable certainty, in what form the current s. 4 and s. 5 of the Act would be like with respect to prohibited agreement and relief from liability respectively.

[6] The Federation of Malaysian Consumers Association ("FOMCA") wrote a letter to the MyCC dated 24.2.2012 to complain that under the Agreement in the context of a Share Swap Agreement between MAS and AirAsia, there would no longer be any competition and that this may lead to an increase in fares for passengers. They were concerned that after the signing of the Agreement, Firefly had stopped flying some 4 Routes to East Malaysia from Kuala Lumpur - Kuching, Kuala Lumpur - Kota Kinabalu, Kuala Lumpur - Sandakan and Kuala Lumpur - Sibu routes. FOMCA perceived what had taken place as a surrendering of these East Malaysian Routes by MAS to AirAsia.

[7] The MyCC started its investigation under s. 14 of the Act where it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Act.

[8] For the purpose of this dispute, it was agreed that MAS and its wholly-owned subsidiary Firefly shall be regarded as a single enterprise, as despite their separate legal entity, both form a single economic unit within which the subsidiary does not enjoy real autonomy in determining its actions on the market. See the definition of "enterprise" in s. 2 of the Act.

[9] Before the coming into force of the Act on 1.1.2012, it was perfectly lawful to discuss possible collaboration and even to make it conditional upon getting the relevant antitrust clearance or exemption under s. 5 Relief from Liability or s. 6 Individual Exemption or s. 8 Block Exemption, once the Act comes into force.

[10] Conversely, it was open to the parties to compete with each other until they both bleed if they had wanted to. Indeed, from some of the minutes of MAS produced before us, there were some indications that it was at one stage a case of no holds barred with the language of a battle cry being used to describe the strategy for an all-out competition with AirAsia such as that of a "war chest" being set aside for this purpose to the tune of USD100 million and fanciful names from the comic strips like Robin and Batman and even the movie character of Darth Vader to paint the sting of the strategy.

[11] MAS and AirAsia, the Appellants herein, were taking steps to apply for the necessary reliefs or exemptions and as there were no Guidelines issued then for such an application, and faced with the many requests for more information, the parties finally decided to abandon their conditional Agreement and terminated it with the execution of a Supplemental Agreement dated 2.5.2012.

[12] The MyCC did not issue any Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements until 2.5.2012, the same date as when the Supplemental Agreement was entered into terminating the conditional collaboration, which was made subject to antitrust clearance. The power to issue the Guidelines is pursuant to s. 66 of the Act.

[13] It is not disputed that the Agreement is a horizontal agreement within the meaning of s. 2 of the Act in that it is an agreement between enterprises, each of which operates at the same level in the production or distribution chain. Having formed the opinion that the horizontal agreement has the object of significantly preventing, restricting or distorting competition in any market for goods or services, the MyCC then proceeded to inform MAS and AirAsia on what is the market that they were referring to, which is the aviation service industry.

[14] In a case where the MyCC properly invokes the deeming provision of s. 4(2)(b) in that a horizontal agreement to share market or sources of supply is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services, the burden then shifts to the parties to prove that the exemptions in s.5 of the Act apply to relieve them of liability.

Before the Competition Commission

[15] The Appellants' arguments that s. 4 of the Act had not been properly invoked on account of the conditional nature of the Agreement did not find favour with the MyCC, which took the view that the conditional Agreement had to be immediately terminated come 1.1.2012 when the Act came into force.

[16] The MyCC took the stand that the Agreement had been in operation for the period from the date of coming into force of the Act i.e. 1.1.2012 to 2.5.2012, when the Agreement was terminated with the execution of the Supplemental Agreement dated 2.5.2012.

[17] The MyCC also was of the view that the "market" had been clearly defined and that the focus of the complaint that the MyCC wanted the parties to answer was with respect to the 4 Routes, i.e. Kuala Lumpur - Kuching, Kuala Lumpur - Kota Kinabalu, Kuala Lumpur - Sandakan and Kuala Lumpur - Sibu Routes.

[18] The MyCC found a causal link between the implementation of the Agreement and the withdrawal of Firefly from these 4 Routes, ceding these Routes to AirAsia.

[19] The MyCC found both parties, the Appellants herein, liable under the prohibition of s. 4 of the Act and imposed a fine of RM10 million on each of the Appellants, MAS and AirAsia.

Before the Competition Appeal Tribunal

[20] The parties appealed to the CAT and the CAT allowed their appeals and set aside the decision of the MyCC. The CAT held that the MyCC had misconstrued s. 4 (2) of the Act and misapplied the deeming provision. It also held that the MyCC had failed to establish that the Agreement has as its object to share market. Moreover, the MyCC had failed to define the relevant markets and that the Agreement was a conditional agreement which was not implemented as the parties had wanted the clearance from the MyCC before proceeding with any

implementation of any proposals arising from the exploration of the various areas where they could collaborate for their mutual benefit and that of the consumers.

[21] The CAT held that since there was no market sharing in the Agreement with an anti-competitive object within the meaning of s. 4(1) of the Act to begin with, the deeming provision of having an anti-competitive object under s. 4(2) had been wrongly invoked.

[22] The CAT further held that the withdrawal by Firefly from the 4 Routes was a business decision by MAS to cut further losses and that there was no causal link to the Agreement. These 4 Routes were in fact, taken over by MAS and all these took place before the Act came into force.

Before the High Court on a Judicial Review Application

[23] The MyCC then applied to the High Court to quash the CAT's decision by way of a judicial review application. The learned High Court Judge agreed with learned counsel for the MyCC that he may be permitted to look at documents such as the minutes of the Board meetings of the parties before the Act came into force to examine the prevailing competition between the parties before the Agreement was entered into.

[24] The High Court in reviewing the said documents, came to the conclusion that there would no longer be any competition between MAS and AirAsia after the Agreement as Clauses 1, 2, 5 and 7 read as a whole engender the parties to explore ways of collaboration and that there was no requirement to define the "market" under s. 4 of the Act before there could be a finding of an anti-competitive conduct.

[25] The learned High Court Judge further held that the fact of Firefly having ceased flying the 4 Routes soon after the Agreement was signed was proof that the parties had implemented what was said to be conditional under the Agreement.

[26] The learned High Court Judge also held that there was market sharing by virtue of Clauses 1, 2, 5 and 7 of the Agreement, which provided that AirAsia shall re-focus on becoming a Low-Cost Carrier ("LCC") while MAS will re-focus to become a Full-Service Carrier ("FSC") in spite of the argument of the parties that LCC and FSC are just different business models of the respective companies.

[27] The High Court quashed the decision of the CAT and reinstated the decision of the MyCC and against that decision, the parties, MAS and AirAsia, appealed to this Court.

[28] The parties MAS and AirAsia shall be referred to as the Parties or the Appellants or by their abbreviated names and the MyCC by its abbreviated name or as the Respondent, for the purpose of this appeal.

[29] Two preliminary issues were taken by the Appellants in these two appeals heard together. The first was whether the MyCC has the locus to pursue the Judicial Review Application after the MAVCOM came into force and with that, the amendment effected to the Act where the Act no longer applies to matters under the MAVCOM Act.

[30] The second was whether the MyCC has the locus standi to apply for a Judicial Review of the decision of the CAT in that it was a "person who was adversely affected by the decision" of the CAT.

Whether the MyCC has the *locus standi* to pursue the Judicial Review Application after the MAVCOM came into force

[31] The MAVCOM Act came into force on 1.3.2016 and from that day, the MyCC's jurisdiction and powers pertaining to the regulation of economic and commercial matters relating to the civil aviation industry in Malaysia, including issues relating to competition, came to an end by nothing less than an amendment to the First Schedule of the Act where it excludes the MyCC from matters under the MAVCOM Act. The amendment was effected via the Competition (Amendment of First Schedule) Order 2016 effective 1.3.2016.

[32] That jurisdiction over the civil aviation industry now vests with MAVCOM effective 1.3.2016. The Judicial Review Application was filed by the MyCC on 3.5.2016 when it no longer has the capacity to do so.

[33] The Judicial Review relates to matters that the MyCC no longer has jurisdiction over with respect to an agreement that is said to be anti-competitive in the civil aviation service market in Malaysia.

[34] From that date of 1.3.2016, the MyCC cannot be said to be a person "adversely affected by the decision" of the CAT within the meaning and purpose under O 53 r 2(4) ROC.

[35] In the English Court of Appeal case of **Greaves & Anor v Boston Borough Council** [2014] EWHC 3950, it was held that the applicant in a Judicial Review Application must continue to retain a sufficient interest in the proceedings. See also the Singapore Court of Appeal case of **Inland**

Revenue Commissioners v National Federation of Self Employed and Small Businesses [1982] AC 617.

[36] If there is a right to apply for Judicial Review, that right has become vested on MAVCOM. There is no saving provision under the MAVCOM Act with respect to matters pending or rights that have accrued to MyCC.

[37] It stands to reason that it is MAVCOM that must now pursue the Judicial Review Application and not MyCC by applying to be substituted as a party.

[38] Learned counsel for the MyCC referred to the Federal Court case of **Lim Phin Kian v Kho Su Ming** [1996] 1 MLJ 1 but that case can be distinguished in that the issue was whether the right to appeal there had abated. There a judgment of the High Court was under appeal and when the notice of appeal was filed incidentally was also the creation of the Court of Appeal and so it was argued that the appeal lay not in the Federal Court but to the Court of Appeal. His Lordship Edgar Joseph Jr FCJ opined as follows at p 19:

> "Accordingly, applying a purposive interpretation to s 17 [Courts of Judicature (Amendment) Act 1995], it is my view that Parliament intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the same has been brought whether on or before *or even after* such date, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the same. This interpretation has the great merit of being simple, clear and uniform and should – subject to one qualification which I shall deal with in the final paragraph of this judgment – certainly avoid the

> sort of manifest injustice to litigants in the position of the present appellant to which I have referred and discussed. It is, therefore, the interpretation which I would adopt."

[39] However, here the issue is not where the accrued right to pursue an appeal should be filed but who is the proper party to pursue the Judicial Review Application.

[40] Assuming that there was a right to file the Judicial Review Application that right had been vested in MAVCOM by operation of law with effect from 1.3.2016.

Whether the MyCC has the locus standi to apply for a Judicial Review of the CAT's Decision

[41] The MyCC is a body corporate established pursuant to s. 3 of the Competition Commission Act 2010 [Act 713]. The powers and functions of the MyCC are contained in ss.16 and 17 of the Competition Commission Act. The MyCC also has the power of investigation and enforcement under Part III of the Competition Act.

[42] Clearly, the MyCC is a quasi-judicial body judging from its powers and functions under Part III relating to investigation and enforcement and Part IV relating to decision making, especially the conduct of hearing for the purpose of determining whether any enterprise has infringed any prohibition under the Competition Act.

[43] In our considered view, after the MyCC makes a finding under s. 40 of the Act, it has no personal interest in the proceeding save to assist

the CAT in an appeal before it by an aggrieved party. It becomes functus officio as far as the proceeding is concerned. We agree with learned counsel for AirAsia in her submission that a quasi-judicial body cannot review the decision of its own Appellate Tribunal.

[44] Under the statutory scheme of the Act, the CAT is the appellate authority of the MyCC. Therefore, the MyCC must give due deference to and respect for its superior's appellate decision and abide by the decision of the CAT. For the MyCC to ignore or challenge the decision of its own appellate authority would be administrative insubordination of a kind repugnant to the whole statutory scheme of the Act. Parliament may by express provision provide a further avenue for the MyCC to challenge the decision of its own appellate authority but it has not seen it fit to do so in this case.

[45] The MyCC, in exercising its quasi-judicial functions of weighing the evidence before it and coming to a decision that is enforceable under the law, takes a neutral and impartial stand before its appellate authority in the CAT and its task is to assist the CAT to arrive at a fair and just decision. It takes no partisan stand and has no personal or official interest in the confirmation or reversal of its order handed down in its quasi-judicial capacity.

[46] As such, the MyCC cannot be "a person who is adversely affected by the decision" within the meaning of Order 53 rule 2(4) of Rules of Court 2012 ("ROC") and thus cannot apply for a Judicial Review of its own Appellate Tribunal under the Act.

[47] Learned counsel for the MyCC said that the locus to apply for a Judicial Review of the CAT's decision stems from s.3(3) of the Competition Commission Act, where the MyCC may sue and be sued in its name. That of course, is a general provision and to determine whether one has the right to challenge the decision of its own Appellate Tribunal, one must look into the Act to see if there is a specific provision for such a challenge or to look at the Act as a whole and see if that right is consistent with the scheme of the Act.

[48] Learned counsel for AirAsia traced this principle that a quasi-judicial body cannot challenge the decision of its own Appellate Tribunal to the rule of administrative discipline and judicial decorum. It was further submitted that if such judicial/administrative discipline and decorum is not followed, it would create an unwholesome state on the area of quasi-judicial functions and quasi-judicial bodies will be at risk of abandoning the core principle of fair adjudication.

[49] We were referred to the case of **The Assistant Provident Fund Commissioner & Ors v West Coast Petroleum Agency & Ors** W.P.(C) No. 32393 of 2011 dated 12 January 2012, where the Kerala High Court relied on the judgment of **District Executive Officer v State of Kerala** (1991(1) KLT 390) as follows:

> "8. **Since petitioners have acted as a quasi-judicial authority, they cannot be permitted to act as parties, whatever be the sequence of events.** Having fulfilled one role, the other role should not be available. That was justification enough for the appellate authority to have interceded.
>
> 9. There is another and an equally fundamental objection to permitting petitioners to maintain actions. **If a subordinate authority is to challenge**

the decision of a superior authority, that would be an unwholesome state in areas of quasi judicial functions. In *Bhopal Sugar Industries v Income Tax Officer* AIR 1961 SC 182, the Supreme Court held that when a subordinate authority in the hierarchy does not adhere to, or abide by the decision of a superior authority, its action cannot be justified.

…..

10. If the petitioners are permitted to assume a dual role, that would be permitting them to abandon the core principle of fair adjudication and judicial discipline. Such a course cannot be assented to." (emphasis added)

[50] See also the cases of **Divisional Forest Officer v Pushpan** (1983) KLT 951, **Mohtesham v Spl Director, Enforcement directorate & Anor** AIR [2007] SC (Supp) 1656 and **Regional Provident Fund Commissioner v Employees Provident Funds Appellate Tribunal** A.S.T. 273 of 2014 and A.S.T. 212 of 2014.

[51] We find merits in the above jurisprudence. The MyCC functions as a quasi-judicial body when determining infringement of prohibitions under Part II of the Act, having the indicia of such a body as expounded in the Federal Court case of **Tenaga National Bhd v Bandar Nusajaya Development Sdn Bhd** [2017] 1 MLJ 689 at pp 700-701 and **Anandarajah & Ors v Jayadevan** [1971] 2 MLJ 8 at p 10, compendiously summarised by learned counsel for AirAsia as follows:

(a) Has a statutory duty to act judicially in arriving at its decision;

(b) Accords the accused persons notice of and be sufficiently informed of the nature of the accusations made against him;

(c) Accords the accused person or interested parties the right to be heard before arriving at its decision (as opposed to making decisions based on policy considerations solely);

(d) Makes findings of fact;

(e) Does acts which affects the rights of individuals;

(f) Carries out its duties in good faith and in an unbiased fashion and/or

(g) The Statute/Regulations provide for an appeal against the "decision" of such a body.

[52] We have no doubt that upon a perusal of the Act and the Competition Commission Act 2010, the MyCC is a quasi-judicial body performing quasi-judicial functions when it exercises its powers in deciding whether there is an infringement of any prohibition under Part II of the Act.

[53] The CAT is the body that has the exclusive jurisdiction to review the decisions of the MyCC, which includes its Interim Directions, Findings of Non-Infringement and Findings of an Infringement as provided under s. 44 of the Act.

[54] We agree with the Appellants that the MyCC having had its decision reversed by the CAT, it is thereafter untenable for the MyCC as a disinterested quasi-judicial body to then allege that the CAT had erred and to file a Judicial Review against such a decision.

[55] The anomaly and dissonance become clearer when one considers the jurisdiction of review given to the CAT even when the MyCC has made a finding of non-infringement. In the event that the CAT should remit the matter to the MyCC under s. 58(2)(a) of the Act, it would be untenable for the MyCC to apply for a Judicial Review of CAT's decision. Likewise, if the CAT should impose or revoke, or vary the amount of, a financial penalty under s. 58(2)(b) of the Act, it would be quite incongruent for the MyCC to apply for review of its Appellate Tribunal's decision which under s. 58(3) is final and binding on the parties to the appeal.

[56] If that were permissible, it would erode the impartiality and neutrality expected of the MyCC when it is adjudicating whether there has been an infringement.

[57] However, assuming for a moment that this Court had been wrong on the issue of a lack of locus on the part of the MyCC to challenge the decision of the CAT by way of a Judicial Review application and also for completeness as well as for the further development of competition law in Malaysia, we shall also consider the merits of the appeal by the Appellants.

Whether upon the coming into force of the Act the parties must forthwith terminate the Collaboration Agreement

[58] We must keep in the forefront of our mind that the Agreement was perfectly proper before 1.1.2012, before the Act came into force. In other words, whatever was the arrangement of the Parties on how they should compete or not compete was not the business of the law then but was a matter within the contractual arrangement and agreement of the Parties.

[59] Come 1.1.2012, it must mean that the Parties are no longer bound by their contractual arrangement or agreement and may choose to dismantle whatever they had agreed before.

[60] It would also mean that if they let the status quo remain without further collaboration, it would not have been anything wrong for the arrangement or agreement had been entered into before the Act came into force. The important thing is that they are no longer bound contractually to maintain the status quo subsisting before the Act came into force. Statutorily they cannot enter into further agreement which would be anti-competitive as referred to in s. 4 of the Act.

[61] What the Act prohibits is that from 1.1.2012 onwards, parties cannot enter into an agreement, referring to a fresh agreement, which has the effect of preventing, restricting or distorting competition.

[62] What then of past agreements entered into? Clearly, it can no longer be binding in spite of what the parties had agreed contractually because the Act by its very operation had made not only the agreement

unenforceable but that parties would be infringing the Act if they enter into fresh agreements or continued to agree to maintain the current agreement entered into before.

[63] The fact that the parties let status quo remain does not necessarily mean that they are continuing to agree to maintain the status quo without more.

[64] Status quo, as the term suggests, is to allow a prior previous state to remain and continue into the current, without any attempt to interfere with it.

[65] The Act does not require the parties to immediately upon the coming into force of the Act, enter into an agreement to forthwith terminate any agreement that would now be caught by the Act.

[66] It would only be fair to proceed from the premise that the parties do not conduct their affairs to breach a new Act that has come into force with respect to a matter that was perfectly proper before the date of coming into force of the Act. There would be an infringement if the parties enter into fresh collaboration that is prohibited under s 4 of the Act in the context of this case.

[67] The Act does not require the Parties to do the opposite to what they were doing as in competing head on the moment it is 1.1.2012 and thereafter. Whatever is the status quo is no longer binding on the Parties. To continue in it by default is not an infringement of the Act unless it is expressly prohibited by the Act as in the Act requires the parties to revert to status quo ante. That is not what the Act requires.

[68] Parties would of course, in due course enter into a termination of whatever may be deemed to be anti-competitive for fear that the "sins" of omission might be just as serious as that of commission. However, unless the MyCC can show by evidence that the Parties had committed positive acts whether pursuant to a previous agreement or a fresh agreement, there is no infringement of the Act merely because the status quo had not been changed.

[69] The important thing is that the Parties are no longer bound by the status quo with the coming into force of the Act. For the inertia of the status quo to continue is no offence unless the Parties had agreed to maintain the status quo.

[70] To interpret the continuation of the status quo until the Supplemental Agreement was entered into to formally terminate the collaboration as an infringement of the Act would be to apply the Act retrospectively to the extent of requiring nothing less than a termination agreement which must be produced the moment the clock struck 0001 hour on 1.1.2012! That would be lamentable, if not ludicrous!

[71] Coming back to the facts of this case, the 4 Routes, which is the sole focus of the MyCC's decision, were withdrawn or stopped by MAS before the Act came into force. Even then, what was withdrawn or stopped was the use of Firefly Jet (introduced in 2011) for these 4 Routes and not FireFly Turboprop (which started in 2007).

[72] The evidence before the MyCC and the CAT was that MAS took over and continued those 4 Routes. It was the CAT's finding of fact that MAS stopped the 4 routes some 10 months from January 2011 as it was

running at a loss. After Firefly Jet stopped these routes, MAS took over these routes and were in fact, competing head-on with AirAsia and actually making more money flying the 4 routes than AirAsia.

[73] So, where is the agreement not to compete or to share market when they were competing with each other on the 4 Routes? So, where is the infringement?

[74] Surely the Act does not prevent a company and in this case, an airline from discontinuing a loss-making route or to stop flying those routes using its jet aeroplane under its wholly-owned subsidiary but to continue the same 4 Routes under its parent company MAS.

[75] The status quo here existing from 1.1.2012 until 2.5.2012 when the Supplemental Agreement was signed to officially and formally terminate the Agreement was not a case of the Parties contractually agreeing to maintain the status quo but a case where the Parties let it continue with no one being obligated to maintain or terminate it.

[76] The Act must be interpreted reasonably and in fact, in many jurisdictions, there was more a focus on education both before and after the Act had come into force so that parties do not inadvertently find themselves entangled in what was never intended by them to infringe the Act and more so when they had made it subject to antitrust compliance and had attempted to apply for exemptions under the Act when as yet there was no published guidelines or forms made available by the MyCC.

[77] The burden of proof must be on the MyCC that before the Supplemental Agreement of 2.5.2012 terminating the collaboration, the

Parties were actively collaborating and not merely allowing the inertia of the status quo to remain. In the absence of any evidence of continuing collaboration, the MyCC cannot use the Supplement Agreement of 2.5.2012 as terminating a continuing infringement of the Act from 1.1.2012 to 2.5.2012.

[78] To interpret it that way would mean that if the Parties cannot produce such a termination agreement, then they are damned and if they could, then they are still damned for the period of 1.1.2012 until the termination agreement is executed and produced. The only thing that could save them would be to produce the termination agreement come 0001 hours into 1.1.2012!

[79] That was not what was intended by the Act, both from the express words used in the Act as well as from the explanations made by the Minister in the Hansard.

[80] That would for all practical purposes, make the Act retrospective in effect, punishing from day one of the enforcement of the Act actions which were perfectly proper before the Act was enforced merely because the status quo was allowed to continue and that there was no reverting to status quo ante.

[81] Take for example, an agreement entered into between the school bus drivers who, for the sake of this argument, had agreed on the rates to charge for each student based on the length of the journey and that charges would have to continue to be imposed even during the mid-term and the end-term holidays.

[82] Come 1.1.2012 and at that time, the new school term would be starting, the school bus driver would very well continue with the rates, which they might had agreed previously when it was perfectly proper to discuss the rates and agree on it among themselves and even with their association of bus drivers.

[83] The Act does not require the school bus drivers to charge a different rate now to show that they had broken free from what has become from 1.1.2021 a competitive regime. They are free to charge a different rate provided their customers agree and their customers would readily agree if they charge a lower rate than previously or have some other favourable terms thrown in like no charges during the school holidays or no charges when the schools are closed because of any pandemic.

[84] However, should they continue to charge the same as what was agreed, that is no offence for that agreement is no longer binding on them for the simple reason that the Act has come to overrule their previous agreement and indeed to make it an offence if they continue to agree to be bound. By letting the status quo remain does not necessarily mean that they are continuing with what is now an infringement for so long as they are not legally bound to maintain it. Thus, they may even lower the rates they charge if minded to or even to increase it depending on their costs and time of departure and comfort in the journey as in drinks and food being served and educational programme being played during the bus journey.

[85] To say that come 1.1.2012, any practice that could previously be justified is now punishable for infringing the Act if the status quo is allowed

to remain, without more, would be to apply the Act retrospectively. The Act itself makes the anti-competitive act not binding on the parties and that is enough to excuse the parties unless the parties want to continue to be bound by it, in which case it would have to apply for the necessary exemptions under the Act.

[86] There is no evidence produced by the MyCC to show that the Parties had continued to be bound by whatever arrangement they had entered into prior to 1.1.2012 or that they continued to have fresh collaboration under the framework of the Agreement.

[87] In the absence of new arrangements within the framework of the Agreement, the Parties must be taken to have abandoned the Agreement and then to formally terminate it on 2.5.2012 with the signing of the Supplemental Agreement.

Whether the Collaboration Agreement was at all material time a Conditional Agreement subject to approval of the MyCC before it could be implemented

[88] The Parties were careful to be on the right side of the competition law and had engaged antitrust legal experts to advise them. It is clearly written in Clause 4.1 of the Agreement that any proposals arising from the collaboration are subject to antitrust clearance from the relevant authorities. That is both prudent and permissible.

[89] How else can one navigate the labyrinth of the competition law, which one knows would introduce a new paradigm into the playing field,

so to speak, without making the provisions conditional upon and premised on the prior approval of, in this case, the MyCC?

[90] In fact, AirAsia engaged Competition law experts in Allen & Overy to advise them and AirAsia was advised to act independently until all appropriate or desirable clearance or approvals were obtained from the necessary or desirable regulatory agency. See AirAsia's Board minutes of 23.8.2011 at Common Core Bundle Vol 1 p 1724.

[91] Allen & Overy also prepared antitrust protocol and guidelines for the Joint Collaboration Committee. See Common Core Bundle Vol 2 p 671.

[92] It cannot be that for cases where a conditional collaboration had been discussed and put into writing before the Act has come into force, it would immediately with the coming into force of the Act, attract liability when there was no implementation of the conditional collaboration.

[93] If that be so, then there would be no incentive to apply for reliefs or exemptions as the applicant would run the risk of being punished with fines for having committed an offence under the Act if the application is rejected.

[94] It does not appear to make business or commercial sense to allow for application for reliefs from liability under s. 5, which must of necessity be premised upon an agreement that had been entered into or to be entered into, only to run the risk of immediately attracting liability if no relief from liability is allowed.

[95] It would be tantamount to punishing someone for thinking aloud without any action being implemented. Even the criminal law does not punish *mens rea* without the necessary *actus res*.

[96] Likewise, if an application for individual exemption is not allowed under s. 6 or a block exemption under s. 8, then similarly, liability would immediately be attached to the applicant based on the disclosure of the agreement stated to be conditional!

[97] The Exemption Application Procedure issued by the MyCC at para 1.3 makes a distinction between an agreement entered into but not implemented and one entered into and implemented as well as another category of agreement yet to be entered as follows:

> "The applicant is also required to identify the provision(s) deemed restrictive and highlight the same for the MyCC's attention.
>
> The applicant is also required to indicate whether the agreement in issue:
>
> (a) is entered into but not implemented;
> (b) is entered into and implemented; or
> (c) has yet to be entered into.
>
> If an agreement has been implemented, the applicant should provide details of its implementation."

[98] A conditional agreement would presumably come under an agreement entered into but not implemented until and unless the approval of the MyCC is obtained for the provisions that may ordinarily be caught by the Act.

[99] Alternatively, if one takes the view that there is no agreement until and unless the approval of the MyCC is obtained, then it can be said that the agreement has yet to be entered into.

[100] The fact that there are at least 3 different types of exemption that may be applied for in terms of individual, group or bulk exemption would give rise to the inference that if nothing in the agreement is implemented or put into effect yet in that it is conditional on getting the approval for exemption from the MyCC, then the mere act of entering into a conditional agreement cannot be caught by the Act.

[101] In fact, para 4.1.3 of the MyCC Exemption Application Procedure requires of an applicant that had entered into a written agreement to enclose a copy of the agreement.

[102] However, the learned High Court Judge did not think so. He observed as follows:

> "[102] The other relevant factors which the Tribunal has not given sufficient consideration is the fact that on 30.12.2011, a day before Competition Act 2010 came into effect, MAS and on behalf of AirAsia, in relation to the Collaboration Agreement, has sent a letter to the Commission requesting for an exemption under section 6 or 8 of the said Act. The reasonable inference here is that MAS and AirAsia from the very beginning, are aware that the Collaboration Agreement has the anti-competitive object."

[103] Attempting to apply for exemption under the Act does not necessarily mean that the Appellants had proceeded on the basis that the Agreement was anti-competitive. The Act being new, the Appellants are

entitled to proceed from a position of acting on an abundance of caution, even an over-abundance of it and to tread cautiously.

[104] Even assuming that some provisions like Clause 7 of the Collaboration Agreement may be considered to be anti-competitive, they were made subject to approval or exemption from the MyCC. There is no evidence that the Appellants had proceeded to implement the terms explored in the Agreement.

[105] We agree with learned counsel from AirAsia that competition law recognises conditional agreements as a legitimate way for companies to plan and obtain prior antitrust clearance or exemption before they are implemented.

[106] It stands to reason that upon the coming into force of the Act, the Appellants immediately applied for exemption for the simple reason that they could not have applied earlier before the Act came into force. After the Act has come into force, appreciating that a new competition paradigm now operates and the Act making provisions for such an exemption to be applied for, the Appellants in seeking to conduct their business in accordance with the Act, quickly put in their exemption application. Surely it cannot be a case of dammed if one applies for exemption and dammed if one does not apply for an exemption.

[107] We see no good reason to disturb the finding of fact of the CAT that the Agreement was indeed conditional upon getting the approval or exemption from the MyCC where the relevant provisions which may be said to be anti-competitive are concerned and that such a conditional agreement does not infringe the Act.

Whether the Collaboration Agreement is prohibited under s. 4 of the Act as long as the object is anti-competitive without the need to prove the effect of the Agreement

[108] The nub of the complaint before the CAT was that the case revolved around one question, to wit, whether the Agreement has the object of market sharing. To determine the object of the Agreement, it was the MyCC's stand that the CAT only have to focus on one document, to wit, the Agreement itself. In other words, by confining itself to that issue, the MyCC case would fall should the CAT hold that the Agreement, agreed to be a horizontal agreement, does not have a significant anti-competitive object in that there was no sharing of the "market" or that even if there is the Appellants had made out a case under s. 5 of the Act for the exemption to apply.

[109] The MyCC, in its Guidelines on Chapter 1 Prohibition: Anti-competitive Agreements ("the Guidelines") explained its approach to the "object" clause as follows:

> "**2.13**. In general, the MyCC will not just examine the **actual common intentions of the parties to an agreement but also assess the aims pursued by the agreement** in light of the agreement's economic context. If the "object" of an agreement is highly likely to have a **significant anti-competitive effect,** then the MyCC may find the agreement to have an anti-competitive "object".
>
> **2.14. Once the anti-competitive** "**object" is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement."** (emphasis added)

[110] Granted the line between cooperation and anti-competition may be blur with the result that some cooperation may by its very nature be anti-competitive, Parliament had intervened in the introduction of a "deemed" provision in s.4(2) as follows:

> "Prohibited horizontal and vertical agreement
>
> 4. (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the **object or effect of significantly preventing, restricting or distorting competition in any market for goods or services**.
>
> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—
>
> (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
>
> (b) **share market** or sources of supply;
>
> (c) limit or control—
>
> (i) production;
> (ii) market outlets or market access;
> (iii) technical or technological development; or
> (iv) investment;
>
> (d) or perform an act of bid rigging,
>
> **is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services**.
>
> (3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition." (emphasis added)

[111] The word “deemed” is, of course, a very powerful word. It brings into being a factual situation which may not in reality be there. It has the effect of creating an event or situation which ordinarily and in reality, is not even there. Lewison in **The Interpretation of Contracts** (5th Ed) at para 14.12 stated that where a deeming clause is used, it would usually be conclusive as to the deemed meaning or consequence.

[112] We are familiar in cases of substituted service of summonses where the act of advertisement and posting at the last known premises of the person to be served with a legal process would be deemed served irrespective of whether the person to be served had actually seen the notice of the document served in the posting at his last known address or the advertisement in a newspaper.

[113] The person may even bring evidence to show that he could not have seen the posting as he was overseas or that he does not read or could not read the national newspaper in the language in which the notice of service was published. Whatever evidence is to the contrary would not be effective in rebutting the “deemed” facts.

[114] Thus in **Amanah Merchant Bank Bhd v Lim Tow Choon Amanah Merchant Bank Bhd v Lim Tow Choon** [1994] 1 MLJ 413 SC the Supreme Court considered a clause in a guarantee providing for the service of notices which contained a ‘shall be deemed to be served’ provision. The clause assumes critical importance because a notice of demand, necessary to found a cause of action against the guarantor, must be properly served on the guarantor.

[115] Mohamed Dzaiddin SCJ (later CJ) held that the words 'shall be deemed' in the clause meant 'shall be regarded as'. His Lordship considered the cases of **Canadian Imperial Bank of Commerce v Haley** (1979) 100 DLR (3d) 470 and **R v Westminster Unions Assessment Committee; ex parte Woodward & Sons** [1917] 1 KB 832 where in the circumstances of the cases, the deeming provision was not meant to be a presumption and was therefore not something that was rebuttable. The deeming provision was conclusive as to the deemed meaning or consequence and the defendant was precluded from showing otherwise.

[116] However, for a "deemed" clause to be triggered the conditions set for it to operate must be strictly complied with because of its inherent bias in producing a certain set result.

[117] The Federal Court in **Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)** [2016] 3 MLJ 689 cautioned against interpreting a "deemed" provision in a manner that may lead to injustice or absurdity. Justice Azahar Mohamed FJ (now CJM) observed as follows:

> "**[48]** As a starting point, the meaning of the word 'deemed 'in cl 5 of the SPA can be seen by referring to the *Oxford English Dictionary* (Vol 111 D-E, Reprinted 1969): Deemed, is defined as, among others, thought and supposed. According to *KJ Aiyer's Judicial Dictionary* (13th Ed), the word 'deemed 'is used in various senses. Sometimes it means 'generally ' regarded; at other times it signifies 'taken prima facie to be', while in other cases it means 'taken conclusively to be'. More importantly, the learned author also stated that the meaning to the word 'deemed 'must depend upon the context in which it is used.
>
> **[49]** In this context, in the case of *Lafarge (Aggregates) Ltd v Newham London Borough Council* (2005) 2 Lloyd's Rep 577, it was held that the word

‘deemed ’can mean ‘presumed until the contrary is proved’, but it can also be used as a word of definition, stating how matters are to be regarded definitively for the purposes of the contract or document in question.

[50] In *Marshall (Inspector of Taxes) v Kerr* [1993] STC 360, Peter Gibson J in delivering the judgment of the English Court of Appeal said:

> For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.”

…..

[52] In our judgment, if something is ‘deemed ’in a situation where it is clearly wrong or inappropriate, which would lead to injustice or absurdity the application of the deeming provision should be limited to the extent needed to avoid such injustice or absurdity.”

[118] Here in s. 4(2)(b) of the Act, the “deemed” provision is with respect to an agreement that has as its object to share market and that agreement is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

[119] Parliament has provided that the very nature of an agreement which seeks to share market has a constraint which is intrinsically anti-competitive in that it has negative effects on the market and thus prohibited under s.4 of the Act.

[120] The negative impact may be on the price, quality or quantity of goods and services.

[121] We accept that "object" and "effect" are alternative and not cumulative requirements for it is "…object **or** effect…." (emphasis added). They are to be read disjunctively. To read it otherwise would do violence to the word "or" and indeed transform its meaning altogether. See the Court of Appeal cases of **Union Insurance (M) Sdn Bhd v Chan You Young** [1991] 1 MLJ 593 and **Eversafe Sdn Bhd v Megarina Sdn Bhd** [2006] 4 MLJ 271.

[122] In the case of **Societe Technique Miniere v Maschinenbau Ulm** Case 56/65 [1966] ECR 235, at p. 249; [1966] CMLR 357, at p. 375, the Court of Justice there was dealing with an almost identical provision in the precursor to the Treaty of the Functioning of the EU ("TFEU") where their Article 101(1) reads:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their **object or effect the prevention, restriction or distortion of competition** within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." (emphasis added)

[123] It was held that the fact that these are not cumulative but alternative requirements indicated by the conjunction "or" leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied.

[124] The words in bold above are the words that are found in our equivalent of their Article 101(1) TFEU, which is our s.4(1) and (2) of the Act. Indeed, the Honourable Minister when introducing the Bill in the Dewan Rakyat had alluded to the fact that we had looked to other jurisdictions and had drawn best practices from jurisdictions in UK, EU, US and Singapore.

[125] Once the object is significantly anti-competitive, it is unnecessary to show or prove that the agreement will have an appreciable adverse effect on competition. It is only when the object of the agreement is not

clear with respect to its anti-competitive intent or purpose that there is required the need to examine if the agreement might have an anti-competitive effect.

[126] We are also mindful of the approach taken in **GlaxoSmithKline Services Unlimited v Commission** Case C-501/06 P etc [2009] ECR I-9291, where the Court of Justice said at para 58 that, in order to decide whether an agreement is restrictive by object:

> "…regards must be had inter alia to the context of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part."

Whether the object of the Collaboration Agreement was to share "market"

[127] The Agreement had, as its ostensible object under Recital 1.2(b), the establishing of a framework under which the Parties will explore possibilities for mutual cooperation in accordance with the terms and conditions of the Agreement. The cooperation is premised on Recital 1.2(a) where it is set forth the basis of the cooperation as follows:

> "1.2 Whereas this Agreement is premised on the following:
>
> (a) MAS operates an airline business as a **full-service carrier** while AirAsia and AirAsiaX operate airline business as **low-cost carriers**." (emphasis added)

[128] Evidently, a cooperation between two competitors is not necessarily bad for consumers and indeed, any benefit in terms of costs

savings may be passed down to consumers. Cooperation can leverage on economy of scale such as joint purchases of fuel, service and maintenance of the aircrafts, training of personnel including pilots and air-hostesses, collaborative sharing of flight schedules where customers would have more choices as to the time of departure, to mention but a few.

[129] Whilst a declaration of intent is never final nor conclusive, the Court must nevertheless proceed from the basis as stated by the Parties and then see whether what was intended to be implemented would meet its stated objectives. After all, parties had agreed to subscribe to the "Overarching Principles for Collaboration" in Clause 3.1 as follows:

> "The parties wish to explore the possibilities of collaboration in order (sic) achieve the following:
>
> (a) to be able to **utilise each other's respective core competencies, optimise efficiency and increase all parties' competitiveness to the benefit of consumers**; and
>
> (b) To become more able to compete effectively with other industry players." (emphasis added)

[130] As pointed out by the CAT:

> "81. The Commission took cognizance that there are alliances made between airlines which may be pro-competitive such as code sharing, revenue and cost sharing, coordination of capacities, route and schedule planning, coordination of marketing, etc. Such alliances would not involve any market sharing agreements or even joint management control of competing companies. The Commission, however, concluded that the said

CA is more than a mere alliance agreement because of the existence of Clause 5 which in their view by nature anti-competitive.

67. In the context of this case, it was beyond an alliance arrangement as there was a clause on market sharing which by its nature anti- competitive. Further to this, the Collaboration Agreement proceeded to set up a JCC which in effect provides joint management and access to both parties' information and management to ensure that clause 5 is implemented."

[131] Clause 5 of the Collaboration Agreement describes the business model of the parties as follows:

"BUSINESS MODEL PRINCIPLES

5.1 Subject to clauses 4 and 9, each party confirms that it intends to focus, or re-focus, as the case may be, on its respective core competencies in the business segment in which its original business model was or would have been optimized. This may be undertaken by itself, or through a subsidiary or affiliate. For the purposes hereof, an affiliate. For the purposes hereof, an affiliate of a party is a corporation the financial results of which, by virtue of a party's interest in that corporation's equity, that party is entitled to equity account its relevant share of that corporation's financial results.

5.2 In the case of MAS, it intends to focus on being a full-service premium carrier ("FSC").

5.3 In the case of Air Asia, it intends to focus on being a regional low-cost carrier ("LCC").

5.4 In the case of Air Asia X, it intends to focus on being a medium-to-long haul LCC.

5.5 For the purposes of the Agreement, the parties will mutually discuss and agree, within three months from the date of this Agreement, based on value proposition to the market, the appropriate definitions of FSC and LCC for the implementation of the matters under this Agreement.

> 5.6 MAS intends to review Fly Firefly Sdn. Bhd. operations, and MAS's short-haul FSC business may be undertaken by itself and/or through a new MAS subsidiary ("Sapphire") and MAS has the flexibility to re-designate capacity, assets and resources from Fly Firefly Sdn. Bhd. to form Sapphire."

[132] It would not be fair, in the absence of supporting evidence, for the MyCC to conclude that clause 5.6 of the Agreement was intended to be a provision for the Appellants not to compete with each other. It is a reasonable explanation by the Appellants that the clause was inserted to make it clear that MAS had intended to pursue the Project Sapphire.

[133] Quite apart from the fact that these provisions were subject to antitrust clearance by the MyCC, a detailed analysis of the terms and conditions showed the consistency of the intention of the Parties to explore the possibilities of collaboration in order to be able to utilise each other's respective core competencies as well as to optimise efficiency and increasing all Parties' competitiveness in line with their declared object as stated in Clause 3.1 above.

[134] What is of pertinent importance is that finally, the MyCC in its Final Decision, had zeroed in on the withdrawal of the East Malaysian routes by Firefly, referred to here as the 4 Routes, as the only evidence of implementation. However, as found by the CAT, these 4 Routes were taken over by MAS and they continued to compete with AirAsia on these 4 Routes and in any event, the withdrawal was before the coming into force of the Act.

[135] There was no agreement on market sharing in Clause 5. The Agreement was not one that restricted either MAS or AirAsia from

providing services on any route and thus cannot be properly characterised as a market sharing agreement.

[136] Even in Clause 7, the Parties were exploring collaboration to allow a better flow and feed to consumers on routes that were not overlapping and even that had not been implemented as it was subject to the approval of MyCC. Clause 7 reads:

> "7. Flow, Feed
>
> 7.1 Subject always to clauses 4 and 9, MAS and AirAsia shall as soon as practicable:
>
> (a) assess the viability of enabling selective **interlining** passengers transiting from AirAsia points of origin to MAS flights, where MAS (and/or Sapphire, as the case may be) does not operate any overlapping route; and
>
> (b) assess the viability of enabling **selective interlining for passengers transiting from MAS** (or Sapphire, as the case may be) **points of origin to AirAsia flights**, **where MAS** (and.or Sapphire, as the case may be) **does not operate any overlapping route;**
>
> and if either of clauses 7.1 (a) or (b) is assessed as viable, agree on a plan to implement the same in the shortest possible time frame to achieve operational feasibility.
>
> 7.2. It is envisaged that such **interlining** shall be conducted for a group of selected routes initially and, if successful, may be expanded further across the networks of MAS and AirAsia, and possibly even AirAsia X, provided there is no existing overlapping route by MAS and/or Sapphire in such an interlining arrangement.
>
> 7.3. **The intent of this flow or feed traffic arrangement is to ensure maximum connectivity and passenger convenience across the network of MAS** (and/or Sapphire, as the case may be), **of AirAsia and of**

AirAsia X, where MAS does not have an overlapping route with AirAsia or AirAsia X in the provision of such flow or feed traffic.

7.4. AirAsia shall use commercially reasonable efforts to accommodate such interlining arrangements to the extent that its operations and services are not materially and adversely impacted." (emphasis added)

[137] The focus of Clause 7 is to provide a better flow and feed to consumers and not on avoiding overlapping routes. In fact, the concept of "interlining" is particularly beneficial to both the airlines and its consumers precisely where there are no overlapping routes with its competitor.

[138] The learned author Steven Truxal in **Competition and Regulation in the Airline Industry**, Routledge 2012 at pp121-122 explained the concept of "interlining" as follows:

"A key feature visible in the workings of the airline industry is the interlines agreement. Interlining is an agreement between two carriers, under which each carrier may accept the other's tickets in exchange for transport. Passengers therefore have the opportunity to travel with a ticket issued by one carrier on flights operated by any number of other carriers worldwide. The arrangement is fundamental to the operation of the industry from both a corporate and competition perspective. From Abeyratne's perspective:

> Airlines have developed both a corporate strategy and a competition strategy to cope with competition. Both these strategies are becoming increasingly complementary rather than mutually exclusive, which they were at the inception of the airline industry.

With few exceptions, interline agreements are now inherent in the airline industry. They support operation of the industry, connecting nearly all carriers by means of indirect cooperation. The external motivation for this is the benefit it brings not only to consumers, but also to the industry's

> growth and stability. If a flight is delayed or cancelled, it is generally fairly simple for an airline to rebook its passengers on other carriers to ensure they are expedited to their final destinations. Thus, the interline agreement, when the required capacity aboard the other airline is available, prevents costly 'gridlock' in transport systems."

[139] With the greatest of respect, it was a misreading of the "Share Swap Agreement" to say that the Agreement had led to the signing of the Share Swap Agreement. In any event our Act does not regulate merger control and there is no requirement that a corporate exercise like a Share Swap Agreement must first obtain the MyCC's approval.

[140] The Share Swap Agreement between AirAsia's major shareholder, Tune Air Sdn Bhd and MAS shareholder, Khazanah Nasional Berhad resulting in the former holding 20.5% in MAS and the latter holding a 10% stake in AirAsia, was the incentive for the Agreement.

[141] It stands to reason that when both Parties have cross-shareholding in each other that it becomes more imperative to pool resources together to leverage on each other's strength and core competencies so as to maximise benefit to consumers and not to continue further in an irrational competition where the pricing of the tickets cannot be sustained in the long run without injuring oneself. One must not forget to think of being more resilient to withstand the rigours of competition with other international airlines as a matter of national pride for the whole must surely be better and stronger than the sum total of its parts.

[142] In fact, Parties were hopeful that had the MAVCOM come into existence, then under the MAVCOM Act, which only came into force on

1.3.2016, they would have applied for and obtained the necessary exemption to explore areas of collaborative cooperation for the mutual benefit of each other and the consumers especially in the context of a Share Swap Agreement. It was perceived that MAVCOM, being set up to regulate economic matters relating to the civil aviation industry, would be more in tune with the heartbeat of the aviation industry where competition in the light of a Share Swap Agreement is concerned, bearing in mind national interest as well.

[143] Thus on 11.5.2017 MAVCOM published its decision with respect to a Joint Venture Agreement between All Nippon Airways Co., Ltd. and United Airlines, Ltd in the following terms:

> "1. The Joint Venture Agreement ("JVA") entered into by the abovementioned parties falls within the scope of section 49 of the Malaysian Aviation Commission Act 2015 [Act 771]. The JVA involves commercial cooperation between All Nippon Airways Co., Ltd. and United Airlines, Ltd. where they coordinate marketing strategies and operations including the determination of prices on affected routes which include Origin & Destination ("O&D") city-pairs between Malaysia and North America.
>
> 2. Following assessment of the JVA, the Commission, by virtue of sections 50 and 51 of Act 771, grants an individual exemption to the JVA from the section 49 prohibition of Act 771 for a period of five (5) years from 11 May 2017 to 10 May 2022."

[144] When the MAVCOM Act came into force, at the same time, there was an amendment effected to the FIRST SCHEDULE [Section 3] of the Act to take matters relating to the aviation industry outside the purview and jurisdiction of the MyCC.

[145] Returning to mainstream, as the Act had not come into force then, there was no prohibition on such an exploration of a possible collaboration to benefit one's customers. At any rate, competition need not be irrational competition for it to be worthy of its name. Exploring "flow and feed" in routes connectivity can only benefit consumers and not harm them.

[146] What is most important is that the MyCC finally descended on the 4 Routes as the subject of the complaint that the Parties had to answer. Even if the object of Clauses 1, 2, 5 and 7 were anti-competitive, they were all subject to approval by the MyCC when the Act should come into force, and before the Act came into force there was no law prohibiting such exploration of the terms of collaboration.

[147] The MyCC had not shown how the Appellants had intended to share market by carving out routes or avoiding overlapping routes when the Agreement was entered into before the Act came into force and specifically made to be conditional upon the MyCC's approval.

[148] Moreover, the brunt of the MyCC complaint against the Appellants is the withdrawal of Firefly from the 4 Routes but that has been shown to be effected before the Act came into force. In its place MAS continued to ply those 4 Routes in place of its wholly-owned subsidiary Firefly.

[149] The MyCC had not at the end of the day proved that the Appellants had proceeded to share the market, presumably in the 4 Routes singled out as the subject of complaint, or that the Appellants continued to pursue this after the Act had come into force.

Whether the "market" had been properly defined by the MyCC

[150] We agree that to activate such a powerful evidential tool, the conditions for its application must be strictly complied with, always careful to avoid any injustice or unfairness that may come in the wake of a deemed conclusive anti-competitive consequence. Here it is with respect to the "market" that is said to be shared.

[151] The requirement of "**significantly** preventing, restricting or distorting competition in any market for goods or services" behooves the MyCC to define what the "market" is so as not to be fixated over what is "de minimis". The learned authors Richard Whish and David Bailey in **Competition Law** Seventh Edition OUP 2012 at p 120 observed as follows:

> " ……there is no need to prove anti-competitive effects in the case of object restrictions does not mean that there is no quantitative component to object analysis at all. There is a rule that any restriction of competition must be appreciable: **even a restriction of competition by object could fall outside Article 101(1) if its likely impact on the market is minima**l. Furthermore, as a jurisdictional matter, an agreement infringes Article 101(1) only if it has an **appreciable effect** on trade between Member States: again, therefore, **some quantitative analysis** may be required before determining that Article 101(1) is infringed. **Because of the need to prove appreciability, it is necessary for the Commission to define the relevant market even in a case involving an object restriction**." (emphasis added)

[152] That requirement to specify and identify the "market" is imbedded in the very "deemed" provision on the prohibition as follows:

"4. (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of **significantly** preventing, restricting or distorting competition in **any market for goods or services**.

(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—

(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;

(b) **share market** or sources of supply;....." (emphasis added)

[153] With the greatest of respect to the learned High Court Judge, we are unable to agree with his finding that the identification and definition of the relevant market by the MyCC is irrelevant or that it is not a prerequisite to invoking s. 4(2) of the Act as was so held at paragraph [93] of his GOJ as follows:

"**[93]** The imposition to identify the relevant market is not the prerequisite in invoking the deeming provision under subsection 4(2). Here, the Tribunal has taken into account irrelevant consideration as well as misapplied subsection 4(2)."

[154] It is not a case of CAT putting words into the clear wordings of the statute as held by the learned High Court Judge at paragraph [94] of his GOJ but that it is a requirement of the provision itself as highlighted above, without which the 'deemed" effect cannot be applied. It is also consistent with the jurisprudence in other jurisdictions like the EU which had inspired our s. 4(2) of the Act.

[155] Thus at paragraph [89] of its ground of decision, the CAT stated as follows:

> "[89] The Commission did not give **any reason or analysis for its decision concluding the the purported object of the CA is market sharing**. Even if it is a deeming provision the onus is on the Commission to establish that the object of the CA is to share the market. It is observed that in the Final Decision the Commission did not or failed '**to identify the relevant market**'. Identification of relevant market is integral in any competition inquiry. The case of *Europemballage and Continental Can Corporation v Commission Case* 6/72 [1973] ECR 215 explains the importance of the identification of relevant market.
>
> > '... The definition of the relevant market is **of essential** significance, for the possibilities of competition can only be judged in relation to **those characteristic of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products**'**."** (emphasis added)

[156] Learned counsel for the Appellants said it cannot be generally that the agreement was to share "market" as in the routes. We agree that the "market" must be defined with sufficient particularity because the market can cover a broad spectrum in the airlines industry and not just merely routes as in point of origin and destination. The need is more imperative because the MyCC must show that the Agreement must **significantly** affect competition in the market for services.

[157] Airlines may cooperate with each other in areas where there would be economy of scale and reduction of costs as for example in engineering and maintenance of the airlines, training of pilots and stewards and stewardesses, in-flight food catering and beverages, in-flight entertainment, purchase of fuel, transport of cargo, to mention but a few.

[158] The MyCC recognises this and even adverted to alliances between airlines and code sharing for example in their final decision. Support for this proposition can be found in more mature jurisdictions where competition law has taken roots such as in the European Union. In the **Maersk Air/SAS (Scandinavian Airlines System) Competition Case**, it was observed as follows:

> "(28) To establish the relevant market in the air transport cases, the Commission applies the so-called 'point of origin/point of destination' (O&D) pair approach. According to this approach, every combination of a point of origin and a point of destination should be considered to be a separate market from the customer's viewpoint....."

[159] Likewise, in **EasyJet Airline Co. Ltd v Commission**, the Origin & Destination approach was confirmed by the European Court as follows:

> "For the purposes of defining the relevant product market in this case the Commission carried out an analysis of demand-side substitution. The contested decision records that, in the case of passenger air transport, the Commission's view was that the product market should be defined according to the O&D method, whereby **each route between a point of origin and a point of destination is treated as a separate market**." (emphasis added)

[160] The relevant "markets" are the markets for the provision of passenger air services between the identified routes. See para 39 of **CCS 400/002/06. Qantas Airways/British Airways.**

[161] It is only after having identified the relevant market that the respondent MyCC can assess whether a particular conduct (or agreement) is anti-competitive in nature. See **Europemballage and**

Continental Can Corporation v Commission 6/72 [1973] ECR 215 and **MyCC's Guidelines on Market Definition.**

[162] The learned High Court Judge had said that the reference of the CAT to the case of **Europemballage and Continental Can Corporation** (supra) had been misplaced as follows:

> **"[96]** In addition, the case of ***Europemballage and Continental Can Corporation v Commission Case 6/72*** referred to by the Tribunal can readily be distinguished as the case does not deal with anti competitive agreement but abuse of dominant position in which market definition is pertinent.

[163] Whilst **Europemballage** case (supra) was one involving an abuse of dominant position and not an anti-competitive agreement, we see no valid ground for this distinction as the general principle of market definition should cut right across any consideration involving the market. After all, the definition of "dominant position" in s. 2 of our Act involves a reference to "market" as follows:

> "dominant position" means a situation in which one or more enterprises possess such significant power i**n a market** to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors" (emphasis added)

[164] Likewise, in s.10(1) of our Act, it is provided as follows with respect to abuse of "dominant position" where the same expression in s.4(1) of the Act is being used as highlighted below for emphasis:

"10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in **any market for goods or services**." (emphasis added)

[165] In fact, the word "market" in competition legislation is a technical term and it is defined in s.2 of the Act. The Respondent MyCC had made vague references to the "market", revealing its lack of analysis of the relevant market before invoking the "deemed" provision. Such references as highlighted by learned counsel for AirAsia are as follows:

"(a) Page 792, Part C (Vol. 3) Record of Appeal:

"1. by entering into an agreement that has as its object of sharing of markets within the **air transport services sector** in Malaysia."

(b) Page 794, Part C (Vol. 3) Record of Appeal:

"8. It is the Commission's finding that this clause sets out the intention of the parties or "object" of the parties to share the market in relation to **sectors and categories of aviation services.**"

(c) Page 808, Part C (Vol. 3) Record of Appeal:

"49. The Collaboration Agreement is clearly an agreement entered into by the parties to share the market in relation to **aviation services**." (emphasis added)

[166] As pointed out "aviation services" is too broad and wide-ranging including airport management, in-flight catering, baggage handling, ground handling, pilot training, aircraft maintenance, repair and overhaul or MRO and engineering.

[167] "Aviation service" under the MAVCOM Act 2015 is defined to include the carriage of passengers, mail or cargo for hire or reward by air

and the provision in Malaysia of any of the ground handling services as specified in the Second Schedule.

[168] From the evidence referred to by the MyCC, the brunt of the complaint were the 4 Routes but then MAS had made a business decision to stop flying those routes via its wholly-owned subsidiary Firefly which had flown its jets for these 4 Routes and had made losses. Firefly, through its jet aircraft, had stopped flying these 4 Routes even before the Act came into force.

[169] What is more pertinently important was that, in its place, MAS had continued on these 4 Routes, taking over from its wholly-owned subsidiary Firefly, which had used its Jet aircraft rather than Turbo aircraft.

[170] At paragraphs 79-88 at pages 813 and 814, Part C (Vol.3) Record of Appeal, the MyCC had referred to FSC and LCC as the relevant markets but these cannot be for, they are just models of doing business with respect to the 4 Routes.

[171] Assuming that by the relevant "market" is meant the Origin/Destination pairs in the 4 Routes, there was no carving out of the 4 Routes as in being shared between MAS and AirAsia. Rather both parties continued to compete after MAS took over the 4 Routes from Firefly and this is borne out by the evidence of the revenue generated by both MAS and AirAsia for the period of 1.1.2012 to 2.5.2012 for these 4 Routes. Neither was there a ceding of the 4 Routes by MAS to AirAsia. On the contrary, there was competition between MAS and AirAsia over the same 4 Routes.

[172] So, it became very telling when the MyCC was assessing the financial penalty to be imposed on MAS and AirAsia, the MyCC relied on Origin/Destination pairs as the relevant markets and perhaps by the relevant "markets" the MyCC meant the 4 Routes. See paragraphs 79 to 88 at pages 821 to 824 Part C (Vol. 3) Record of Appeal.

[173] The clear incontrovertible evidence for this is found in the very methodology that the MyCC had used in imposing the fines on the parties by reference to the revenue generated by both the parties on these 4 Routes. There was revenue generated to the tune of RM 241 million for MAS and RM185 million for AirAsia for the period from 1.1.2012 when the Act came into force to 2.5.2012 when the Supplemental Agreement was executed. That can only mean that both MAS and AirAsia were not ceding anyone of the 4 Routes to each other but that both were keeping the 4 Routes for themselves and competing with each other.

[174] These 4 Routes were taken over by MAS from its wholly-owned subsidiary Firefly and the evidence led was that MAS and AirAsia were competing head-on for these 4 Routes. So, instead of no competition for these 4 Routes there was intense and healthy competition.

[175] There was no evidence that the Appellants had agreed on the pricing for the flights from the point of origin to the point of destination. It is not disputed that whilst MAS flies from KLIA, AirAsia flies from LCCT, though both airports are in Sepang. Learned counsel for AirAsia emphasised the fact that there was no study made by the MyCC on Airport Substitutability in that while MAS operated from its hub in KLIA, AirAsia operated largely on a point-to-point system from the then LCC Terminal.

The MyCC had not explained or substantiated why both airports were considered to be under the same relevant "market".

[176] To avoid duplication for the routes the Appellants may collaborate with each other on the flight scheduling and timetable of departure. Ultimately the passengers get to choose which flight they want to be in; whether with the MAS Full-Service Airline or the AirAsia LCC Airline where there are no frills and you pay for your food and drinks.

[177] There are enough differentiating facilities like convenience of accessing the airport and checking in, change in flight time, leg space and luggage weight and economy class seats to provide meaningful choice to a passenger desirous of travelling the 4 Routes.

[178] No market investigation was done by the MyCC to assess the impact of the points of differentiation in the services provided between a FSC and LCC since this is an important factor for price-sensitive and time-sensitive travellers, assuming for a moment that these are not different models of doing the same business. See **COMP/AT.39595, Continental/United Lufthansa/Air Canada ("Star Alliance Case")**.

[179] There is merit in AirAsia's argument that insofar as the 4 Routes are concerned, no market investigation was done to assess whether one-stop routes offered by the airlines (e.g. KUL - BKI - KCH) are direct or remote substitute to the direct routes. See **The Star Alliance Case**.

[180] The concept of "substitutability" is a relevant factor in defining the "market" as it is found in the definition of "market" itself in s.2 of the Act as follows:

> "means a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are **substitutable for,** or otherwise **competitive with**, the first-mentioned goods or services;" (emphasis added)

[181] We agree with the Appellants' submission that the Agreement was merely a framework agreement under which the Parties agreed to explore a variety of opportunities for co-operation (subject to obtaining any necessary and desirable antitrust approvals). The Collaboration Agreement was not an agreement which restricted either party from providing services on any route and therefore cannot be properly characterised as a market sharing agreement;

[182] Parties were free to fly the same 4 Routes or any routes for that matter and far from carving out the 4 Routes or any routes, the Parties were free to compete with each other for there were many points of differentiation for them to do so, especially when one looks at the purpose of the travel with respect to whether it was for business or leisure. Generally business travellers are less price-sensitive as compared to leisure travellers for there is someone to pass the costs of the flight tickets to in terms of billing of customers and clients in the case of business travel.

[183] Even if for argument sake there was an intention in the object of the Agreement to share market as in points of origination and destination there is no evidence that these were continued to be pursued after the Act had come into force.

[184] It would be altogether different if the agreement were entered into after the Act had come into force. In such a case the very act of expressing one's intent without carrying it out appears to be infringing the Act unless one makes it conditional upon getting the MyCC's approval.

[185] Assuming for a moment that the Agreement is caught by s.4 of the Act, the MyCC must then proceed to consider if the parties had proved that the exception in s. 5 applies in the circumstances of the case.

Whether even if the object of the Agreement is anti-competitive under s. 4 of the Act, have the Appellants proved the exception or exemption of a net economic benefit under s. 5 of the Act

[186] An agreement that infringes s. 4 of the Act, in that it falls within the scope of its prohibition, may come within the exemption of s. 5 if it does not have an appreciable adverse impact on competition in that the parties are able to demonstrate that the agreement yields a net economic benefit to the consumers and hence is excluded or exempted under s. 5 of the Act.

[187] Whilst the analysis under the "object" limb of s.4 of the Act focuses on the objectives of the agreement, the analysis under the "effect" limb focuses on the actual economic effects of the agreement.

[188] Once the 'deemed" provision is validly invoked, all that the evidential tool does is to bring into existence a situation which would not come into being otherwise. It dispenses with the party, in this case the MyCC, having to prove the effect of the Agreement. It is as if the object of

significantly preventing, restricting or distorting competition in the market for the services has been proved.

[189] Under s. 4(3) any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

[190] What has been proved cannot be unproved or rebutted but rather that the party liable for infringement of the prohibition may endeavour to show that the exclusions or exemptions apply in the circumstances of the case under s. 5 of the Act. These exclusions or exemptions are often called the Net Economic Benefit ("NEB") Exclusion in the language of competition law.

[191] If the exemptions apply then the party liable for the infringement of the prohibition is relieved of the prohibition that had otherwise kicked in to find for an offence. Our s. 5 of the Act is clearly inspired by the equipollent provision Article 101(3) of the TFEU as a comparison below would show.

[192] Article 101(3) of the TFEU reads:

> "3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> — any agreement or category of agreements between undertakings,
>
> — any decision or category of decisions by associations of undertakings,
>
> — any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[193] Our s. 5 of the Act is only cosmetically different but substantively and substantially the same as Article 101(3) of the TFEU as follows:

"**Relief of liability**

5. Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:

(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;

(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.."

[194] As observed by the learned authors Richard Whish and David Bailey in **Competition Law** (supra) at p 119:

> "……where the parties to an agreement that is restrictive by object wish to assert that it could produce efficiency-enhancing effects, they can do so only by proving that it satisfies the criteria of Article 101(3), the burden of proof being on them to prove that this is so. Having decided in *Competition Authority v Beef Industry Development Society Ltd* that an agreement between beef processors in Ireland to reduce overcapacity Case C-209/07 [2008] ECR I-4529, [2009] 4 CMLR 310 by encouraging some of them to withdraw from the market restricted competition by object, the Court of Justice said that the agreement could be defended only under Article 101(3)."

[195] Airlines often enter into cooperation or alliances with each other or one another and they may amongst others agree on scheduling, pricing, sales and marketing, service policies and other matters to improve the overall quality of the service offered to passengers on their existing routes.

[196] After all the long title of the Act declares that that it is:

> "An Act to promote economic development by **promoting and protecting the process of competition,** thereby **protecting the interests of consumers** and to provide for matters connected therewith." (emphasis added)

[197] In fact, too much of a good thing may be bad as in this case, too much of a competition may lead to irrational competition where the competitors bleed to death in the process of annihilating one another out of the market that is already generally regarded as very competitive in an industry which involves heavy capital investment, low profit margin and high risk where the variable costs of fuel is concerned.

[198] The Act has to step in to prevent an abuse of dominant position for instance in s. 10 where for example the dominant player may try to engage in predatory pricing referred to in s. 10(2)(a) or any predatory behaviour towards competitions prohibited under s. 10(2)(f). Though that may initially benefit consumers in the short-term resulting from cheaper ticket pricing yet when the competitor has been driven out of the market, the dominant player would then jack the ticket price! In the longer run it is the consumers that will suffer.

[199] The Act is not against collaboration, joint-ventures, cooperation and alliances. It is against anti-competitive agreement and conduct which net result is that the consumer suffers. There is a place for competitive collaboration and cooperation or collaborative competition that would confer benefits on the consumers.

[200] Not all collaboration is anti-competition and indeed cases in other jurisdictions involving exemptions have resulted in their Competition Tribunals' findings that there are significant NEB for the exemptions to apply.

[201] The learned author Steven Truxal in **Competition and Regulation on the Airline Industry - Puppets in Chaos**, Routledge 2012 at p119 observed as follows:

> "Airlines have devised and adopted several tactical and strategic commercial measures over the past three decades, with the **expressed objective of increased competitiveness and economic efficiency,** e.g. mergers, global alliances, codeshare and block-space agreements, franchising, links between frequent flyer programmes, management contracts, and joint ventures in catering, ground handling and aircraft

> maintenance. These multilateral cooperative ventures and agreements come as responsive 'solutions' to the regulation and the perceived impediment to the industry's economic objectives. The two key benefits to tactical and strategic alliances are **expanded and optimized route networks, cost reductions in maintenance and operational activities**, or so-called 'one-roof initiatives'." (emphasis added)

[202] Whilst the author was speaking in the context of international airlines competition, the same holds true for airlines operating nationally and competing nationally as well.

[203] These strategic measures are categorised alternatively as: 'cost sharing ventures, asset pools, pro-rate agreements, codeshare agreements, feeder, marketing alliances, joint ventures, integrated feeder and equity stakes' (B. Kleymann and H. Seristo, **Managing Strategic Airline Alliances,** Aldershot: Ashgate, 2004 pp. 12–15.

[204] Both the MyCC, the CAT and the Courts are entitled to look at similar collaboration involving other airlines both for what is commonly practised in the industry and also with respect to some empirical studies and investigation done in other jurisdictions involving different degrees of cooperation, collaboration, joint-ventures, strategic alliances, code sharing, flow and feed seamless connectivity and the like.

<u>Whether there are significant identifiable technological, efficiency or social benefits directly arising from the Agreement</u>

[205] We agree with the submission of learned counsel for AirAsia that the Agreement is a comprehensive specialisation agreement intended not only to operate cost-effective and efficient networks, but also foster

cooperation in a wide range of other aspects relating to the air service industry in Malaysia –

(a) The areas recognised in the Agreement for potential cooperation encompass maintenance, repair and overhaul, ground-handling, training, catering and cargo;

(b) the parties proposed to establish procurement, training and ground handling joint ventures in order to maximise and help realise the possible efficiencies under the collaboration and to ensure long-term benefits.

[206] There is thus nothing wrong for the parties under Clause 7 of the Agreement, to agree to assess the viability of flow or feed traffic arrangement across the networks of MAS, AirAsia and AirAsia X. We agree with learned counsel for AirAsia that the flow or feed traffic arrangement would have been to the consumers' benefits by ensuring maximum connectivity, optimising geographical coverage and broader network and passenger convenience.

[207] As the 4 Routes are overlapping, it makes sense to avoid parallel or close-to-parallel flight timings, giving more choices and hence flexibility to consumers arising from a better spread of scheduled flight timings on the overlapping routes. Such a proposed collaboration would potentially allow for increased frequency and connectivity on the 4 Routes at least, if not for other connecting routes. See para 38 of **Alliance Framework Agreement between Scoot Pte. Ltd. And Tiger Airways Singapore Pte.Ltd. CCS Case No. 400/002/14 Scoot/Tiger Airways.**

[208] It stands to reason that the "out-of-market efficiencies" of the collaboration and Agreement would benefit broader markets other than the relevant identified markets relevant to the MyCC's Final Decision.

[209] We agree with the Appellants that the Agreement was actually pro-competitive. As they say in economics, costs is always passed down to the consumers and the converse is true in that savings in costs would be a benefit passed down to consumers in terms of improved offering and reduced costs. We are dealing with a highly competitive industry and one must think not only in terms of being competitive nationally but also internationally.

Whether the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition

[210] The benefits and efficiencies would not have been possible without some level of cooperation between the parties, whether one calls it competitive collaboration or collaborative competition! So long as efficiencies may be generated from the 4 Routes which are overlapping or even from other existing Routes, the MyCC should take such efficiency into consideration. See para 36 of the **Alliance Framework Agreement between Scoot Pte. Ltd. And Tiger Airways Singapore Pte. Ltd. CCS Case No. 400/002/14 Scoot/Tiger Airways.**

[211] In that case, the Competition Commission of Singapore ("CCS") was satisfied that Scoot Pte. Ltd. and Tiger Airways Singapore Pte. Ltd. have established that the Net Economic Benefit exclusion applies to the

cooperation between the two parties under the Alliance Framework Agreement on the existing routes operated by them.

[212] This was in spite of the fact that the parties have entered into an Alliance Framework Agreement, pursuant to which the parties agree to cooperate in relation to, among others, "scheduling, **pricing**, sales and marketing, service policies, and other matters to improve the overall quality of service offered to passengers on the parties' respective operations." (emphasis added)

[213] The scope of the CCS's decision was limited to the Proposed Cooperation notified to CCS, specifically, the Proposed Cooperation between Scoot and Tigerair Singapore on the 42 routes across their existing networks, excluding the routes between Singapore and Australia.

[214] The parties were cooperating across their existing routes and there were even 3 overlapping routes. See para 14 of Notification of Decision. Here, in the instant case, there were only 4 Origin and Destination Pair routes in the impugned 4 Routes involving overlapping routes that were singled out as being anti-competitive and thus prohibited under s. 4 of the Act. The focus must thus be on the 4 Routes and nothing more.

[215] However the Net Economic Benefit need not be confined to that which arises under the 4 Routes but may extend to an overall benefit to customers as a whole.

[216] Here where the 4 Routes are concerned there is no agreement on the pricing of the tickets. It is left to each party how they would want

to price it: as for LCC it may start very low for travellers that book very early for their flight and as the seats get filled up the price would gradually increase.

[217] Much would depend for all airlines on how quickly seats are filled up for the airline to decide on when to up the next tier of pricing as an incentive for booking early and planning one's journey earlier. Some airlines may not allow any change of departure date and time especially the LCC whereas the FSC may allow for such changes with the imposition of a fee.

[218] As FSC had business class seats for travelling in the 4 Routes the seats would be priced differently.

[219] There is thus a healthy competition where the pricing of seats are concerned and at the same time the consumers get to choose when to travel as there are now more flights being spaced out in the course of the day.

[220] Benefits would also flow to the customer arising from better schedule of flight timings with increased frequency, capacity coordination and connectivity.

[221] Without cooperation the increase in capacity would not likely occur. There is every reason to eliminate action of parallel or close-to-parallel flights which does not help the airlines unless both are flying at full capacity.

Whether the detrimental effect of the agreement on competition is proportionate to the benefits provided

[222] We are inclined to agree with the Appellants that the overall benefits of the collaboration and Agreement would have outweighed and compensated any detriments (which are denied) they may have to competition. If allowed to run its course, the collaboration and Agreement would have been able to maximize consumer benefits in the medium to long run.

[223] We are more than confident of this NEB being passed down to consumers for after all, MAS is owned by the Khazanah, the investment arm of the Malaysian Government and AirAsia with its tag line of "Now Everyone Can Fly" has done a transformative work in making flying more affordable to the people since its emergence in the Malaysian market.

[224] The Court can take judicial cognisance of the fact that the airlines industry is a highly competitive industry and if costs savings are not passed on to consumers in the form of reduced ticket pricing, given the international operation of airline competition where one cannot afford to price oneself out of the market, consumers would be discerning enough to source for cheaper fares elsewhere.

[225] If it is hard empirical evidence that the MyCC was looking for, then we think more time should have been given for the collaboration and Agreement to take effect.

[226] After all the emphasis of the MyCC should be on education, at least for some initial years from the date of enforcement of the Act and in

any event the Agreement is itself subject to antitrust approval by the MyCC before the Parties can execute the strategic measures contained in it.

[227] From a pure economic perspective, we agree that a significant identifiable long-term efficiency and social benefits would have arisen from the collaboration and Agreement in satisfaction of the four-point criteria in s. 5 of the Act and the analytical framework for a relief of liability. It would not be unfair to say that the collaboration and Agreement, if given the opportunity to take its course, would have had the attributes to qualify for relief of liability.

[228] After all, it is not rocket science nor does it require any prophetic insight to anticipate the following as painted by learned counsel for AirAsia:

(a) Increased ability to invest in further developing innovative products and service offerings to consumers at competitive prices, arising from the synergies that would be achievable through the collaboration and Agreement.

(b) Ability of the Parties to reduce capital expenditure, through avoiding the purchase of new aircraft training simulators;

(c) Ability of the Parties to obtain lower training rates, whilst achieving high quality training at a preferred schedule through outsourcing training activities which were previously in-house;

(d) Ability of the Parties to simplify their respective businesses, focusing instead of core operations (for example, active line pilots will be able to focus their time on flying rather than working as instructors);

(e) Sharing of best practices through joint training initiatives;

(f) Improved customer experience resulting from standardised staff customer service training.

[229] One cannot deny the incentive arising from the synergies achievable under the Agreement, enabling the Parties to focus on improving their respective service offerings in terms of value for money air fares, and more innovative products and services, which will stimulate trade and tourism into Malaysia, generate more business for the country's tourism industry and enhance international trade opportunities. Increased airline traffic would in turn bring broader economic benefits for Malaysia, including investments in airports, leisure and tourism. It is a case of if you want to travel fast, you travel alone (where there is no competitor) but if you want to travel far, you travel together (where there is a healthy collaboration between competitors). In the airline industry it is more a case of either both arrive together or not at all!

[230] We do not think it is a fanciful conjecture to say that any increased volumes of international and regional inbound and outbound aircraft traffic passing through Kuala Lumpur, would further strengthen Kuala Lumpur's status as a major global airline hub and resulting in flow-on economic benefits for associated businesses and industries in metropolitan Kuala Lumpur and beyond.

[231] Bulk and an integrated joint procurement would increase one's negotiating power and this is especially beneficial in the price-sensitive area of purchasing aircraft fuel without necessitating excessively cumbersome and prohibitively complex structures and ring-fencing arrangements. In such a situation the administrative burdens of designing, implementing, monitoring and periodically revising such complex arrangements would substantially reduce the likely efficiencies and cost savings that would otherwise accrue to both MAS and AirAsia and the benefits to Malaysia.

[232] We are further in agreement with the Appellants' submission that the limited detrimental (if any) effect of the collaboration and Agreement on competition in Malaysia is proportionate to the benefits provided.

[233] There is hardly any detrimental impact on competition in Malaysia as the areas of intended co-operations between the Parties are essentially complementary and given the international operations, the purchasing benefits under the procurement joint venture, would have had very little impact on suppliers in Malaysia. In fact, most of the products purchased by the Parties are from suppliers around the world.

[234] The reality on the ground or rather in the air is that any savings in terms of costs arising out of the synergetic and symbiotic cooperation would go towards a more competitive airfare as the Parties would have continued to compete with each other in addition to vigorous and effective competition from a variety of airlines including:

(a) full-service carriers such as Singapore Airlines, Japan Airlines, Cathay Pacific, Qantas, Thai Airways, Garuda

Indonesia, Air China, Philippine Airlines, Korean Air, Silk Air, Bangkok Airways, Thai Wings; Virgin Australia;

(b) low-cost carriers such as Berjaya Air, Malindo Air, Virgin Australia (Australia), JetStar (Australia), Tiger Airways (Singapore), Scoot (Singapore), JAL Express (Japan), Jeju Air (Korea), Lucky Air (China), Nok Air (Thailand), One-Two-Go (Thailand), Spirit of Manila Airlines (Philippines), Valuair (Singapore), Air India Express (India), Best Air (Bangladesh), Cebu Pacific Air (Philippines), Jet Airways / Jet Lite (India), Lion Air (Indonesia).

[235] As pointed out by learned counsel for AirAsia, we cannot shut our eyes nor ignore the fact that airlines with substantial operations in the Asia-Pacific region are increasingly forming integrated alliances, cooperative arrangements and joint ventures similar to the collaboration and Agreement, as well as establishing new operations or expanding existing operations.

[236] The airline industry is especially sensitive and susceptible to global economic shocks, natural disasters (eg. earthquakes and floods) and even a pandemic (as currently experienced) that have further dampened consumer demand, if not to completely ground some airlines.

[237] The escalating aircraft fuel prices and the emerging prevalence of competing airline alliances would pose as an external threat to Malaysia's robust aviation industry. It would be fair to say that, under the collaboration and Agreement between MAS and AirAsia, any significant efficiencies would go to providing significant long-term benefits to

Malaysian consumers and the broader aviation, tourism and leisure industries in Malaysia.

[238] Even if the solid figures and calculations are lacking for the moment, this is certainly a case where the decision of the MyCC can be reviewed in the not too distant future where the picture would have become clearer amidst the constantly evolving aviation environment, and now with the benefit of hindsight, the current pandemic that had thrown a spanner into the whole works!

[239] Under the scheme of the Act, it would appear that if the relief of liability under s. 5 is proved by the Parties or that the MyCC is of the opinion that the exemption should be granted in that the Agreement is one to which s.5 applies then an individual exemption may be issued by the MyCC subject to the provisions of s.7(1) and (2) of the Act.

[240] There is thus, nothing preventing the MyCC from investigating afresh either pursuant to a fresh complaint or even on its own initiative if it has reasonable ground for believing that there has been a material change of circumstance since it gave its decision or that there are reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.

<u>Whether the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the services</u>

[241] LCCs are now becoming like FSCs particularly for short-haul flights. LCCs now have wider range of flight timings throughout the day

and the option and flexibility of top-up services like on-board meals, entertainment options. The dividing line of differentiation has now become more blurred as a result. One key differentiation seems to be that LCC tends to use airports that are further away from the city because they are cheaper and so the lower costs of embarkation and disembarkation could be passed to the consumers in terms of cheaper fares in the pricing of tickets. The downside would be that the consumers may then have to take additional transport to get to their final destination and thus more inconvenience and longer time taken. However more price-sensitive travellers going on vacation and travelling for leisure may not mind that.

[242] The cooperation in the 4 Routes will not eliminate competition in respect of a substantial part of the service in question.

[243] Coordination of airlines business activities could be in relation to routings, frequencies, aircraft types, product specifications, aircraft configurations, connection requirements and other aspects of their operation and marketing of routes covered by it. See para 9 and 10 of CCS Case Number: **CCS 400/002/06.Qantas Airways/British Airways** where it was concluded that cooperative joint venture intended to maximise consumer benefits and to operate cost-effective and efficient networks are not prohibited as they are not anti-competitive and that they do yield a Net Economic Benefit to the consumers.

[244] The collaboration and Agreement would have enabled MAS and AirAsia to operate their respective business models more efficiently, save costs, achieve synergies and pass on cost savings to consumers in the form of enhanced product offerings and more competitive fares.

[245] We agree that any detrimental effect of the collaboration and Agreement would have been minimal and would be far outweighed by benefits to MAS and AirAsia, consumers and the Malaysian economy.

[246] At any rate the Agreement was only at its conditional agreement stage and if the MyCC does not give its approval, the Agreement would have to be disbanded.

Whether all the four criteria set out in s. 5 of the Act have been met to relieve the parties of liability

[247] Assuming the device of a conditional agreement is not available to the Parties and that they were in reality implementing the Agreement with full-force, we are more than satisfied that the four criteria of s.5 of the Act are satisfied and the collaboration and Agreement qualified for relief of liability under the Act.

[248] We agree with learned counsel for AirAsia that airlines joint ventures of the type contemplated in the collaboration and Agreement are not uncommon and, where they result in competitive benefits which outweigh competitive detriments, they are unlikely to contravene the underlying ethos of competition law.

[249] The days of irrational competition have given way to many in the airlines industry exploring harnessing on one another's strength, confident that the whole is always ideally better than the sum total of its parts and thus achieving their common objectives of ensuring that consumer welfare is promoted and enhanced and that there is a more efficient allocation of resources in society.

[250] We are cognisant of the fact that a number of jurisdictions in the Asia-Pacific region and Europe have provided immunity to similar collaborative airline arrangements in which exemptions in respect of integrated airline alliances have recently been granted where demonstrable competitive benefits outweighed potential competitive harm.

[251] In the **Star Alliance Case** COMP/AT.39595, Continental/United/ Lufthansa/Air Canada it was concluded as follows:

> "149. In light of the final commitments offered by the parties, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end."

[252] In the CCS's decision involving Qantas in **Qantas & British Airways Restated Joint Services Agreement** CCS 400/002/06 it was concluded as follows at page 29:

> "93. The Commission is of the view that the Agreement between the Parties, in particular, clauses relating to the co-ordination of prices for air passengers, falls within the ambit of the section 34 prohibition of the Act. However, taking into consideration that the Agreement brings about net economic benefit to Singapore, the Commission is of the view that the Agreement is excluded from the Act."

[253] In respect of another of the CCS's decision involving Qantas in **Qantas & Orangestar Cooperation Agreement** CCS 400/003/06 it was observed at page 36:

> "129. … Although the Agreement between the Parties falls within the ambit of the section 34 prohibition of the Act, the Commission is of the view that the Agreement brings about economic benefit to Singapore. The Agreement is therefore excluded from the Act."

[254] Learned counsel for the Appellants submitted that in finding that the parties are relieved from liability in respect of the collaboration and Agreement, the MyCC will be acting in accordance with international best practice in antitrust enforcement and regulation consistent with other jurisdictions in weighing the benefits and detriments. That resonates with us and we are more than confident that in so doing the MyCC will be charting the right direction for the development of Malaysian competition law.

Whether this is a fit and proper case for the High Court to quash the decision of the CAT in a Judicial Review Application

[255] It must not be forgotten that the challenge against the decision of the CAT is by way of judicial review and it must be shown that the decision of the CAT to set aside the decision of the MyCC is irrational, unreasonable or otherwise illegal.

[256] We are more than satisfied that the CAT had correctly interpreted the law and properly applied it to deal with the complaint which finally boiled down to the 4 Routes. See the cases of the Federal Court in **Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd (FC)** [2010] 8 CLJ 629 and **Petroliam Nasional Bhd v Nik Ramli Nik Hassan (FC)** [2003] 4 CLJ 625.

[257] We are not convinced that the CAT had taken into consideration irrelevant matters and that it had failed to consider relevant matters.

[258] We find that the threshold has not been reached by the MyCC in this Judicial Review application, even assuming for a moment that they have the proper locus to file the application.

[259] We were therefore, unanimous in allowing the appeals of both the Appellants, MAS and AirAsia, and we set aside the decision of the High Court dated 20.12.2018 and reinstated the decision of the CAT dated 18.2.2016 which set aside the decision of the MyCC dated 31.3.2014.

[260] We awarded costs of RM 30,000.00 to each Appellant to be paid by the Respondent subject to allocator.

Dated: 18 October 2021.

Sgd
LEE SWEE SENG
Judge
Court of Appeal
Putrajaya

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Date of Decision: 27 April 2021.