ENCLOSURE 1

Competition Act 2010 [Act 712]

Decision of Competition Commission

Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd.

31st March 2014

(No. MyCC.0001.2012)

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1. INTRODUCTION

1. The Malaysia Competition Commission ('the Commission') has decided that the addressees of this decision have infringed section 4(2)(b) of the Competition Act 2010 ('the Act') by entering into an agreement that has as its object of sharing of markets within the air transport services sector in Malaysia.

2. On 9th August 2011, MAS, AirAsia and AirAsia X Sdn. Bhd. ('AAX') entered into a Comprehensive Collaboration Framework ('the Collaboration Agreement') with the purported aim of sharpening the focus of core competencies, delivering better product and choice for customers and ultimately create greater value for all stakeholders.

3. The Commission considers AAX as an enterprise that forms a single economic unit with AirAsia. This is elaborated further down in this Decision and was not objected to by AirAsia.

4. The Commission had served its Proposed Decision on MAS and AirAsia on 6th September 2013. MAS and AirAsia responded with their written representations to the Commission on 17th October 2013 and 18th October 2013 respectively. The parties subsequently made their oral representations pursuant to section 37 of the Act before the Commission on 15th January 2014.

5. This Decision is arrived at after taking into consideration both MAS and AirAsia's written as well as oral representations.

6. The Collaboration Agreement involved Khazanah Nasional Berhad and Tune Air Sdn. Bhd. entering into a share swap agreement so that there will be cross-holding of shares resulting in Tune Air Sdn. Bhd. obtaining 20.5% stake in MAS and Khazanah Nasional Berhad obtaining 10% in AirAsia. It was also agreed between the parties that MAS was to be only a full-service premium carrier, while AirAsia and AAX will be regional low-cost and medium-to-long haul low-cost carriers respectively[1].

7. Clause 5 of the Collaboration Agreement states:

> *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 optimised. This may be undertaken by itself, or through a subsidiary or 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.*

[1]Source: The press release issued by MAS, AirAsia and AAX on the Collaboration Agreement dated 9th August 2011

5.5 For the purpose of this 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[2].

8. Clause 5 of the Collaboration Agreement expressly mentions that each airline will focus on their market area and thereby agree that they will not enter into the areas specifically allocated to their competitor. 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.

9. Although the purported main purpose of the Collaboration Agreement was to optimise efficiency and to increase all parties' respective competitiveness, the agreement also resulted in an outcome whereby Firefly (a wholly owned subsidiary of MAS) withdrew from the Kuala Lumpur-Kuching, Kuala Lumpur-Kota Kinabalu, Kuala Lumpur-Sandakan and Kuala Lumpur-Sibu routes (Sabah and Sarawak routes) leaving AirAsia to be the sole low cost carrier. Although this has been denied by MAS, the Commission came to the conclusion that the withdrawal from these routes was in line with the stated objects of clause 5.6 of the

[2]Source: Collaboration Agreement dated 9th August 2011, at pages 3 and 4

Collaboration Agreement whereby MAS has stated that it intends to review Firefly's operations.

2. THE ENTERPRISES SUBJECT TO THE PROCEEDINGS

2.1 The Enterprises Subject to the Proceedings

2.1.1 MAS

10. The relevant legal entity is Malaysian Airline System Berhad, a public listed company which has its registered office at 3rd Floor, Administration Building 1, MAS Complex A, Sultan Abdul Aziz Shah Airport, 47200 Subang, Selangor Darul Ehsan.

11. MAS commenced operating as a national flag carrier on 1st October 1972. Since then, MAS has continued to operate as a national flag carrier providing both domestic and international flight services[3]. The thirty (30) largest shareholders of MAS as at 18th March 2013 is as in Appendix 1 and Khazanah Nasional Berhad is the single largest shareholder holding 69.37%[4].

12. Fly Firefly Sdn. Bhd. which was formerly registered as MAS Sdn. Bhd., is a wholly-owned subsidiary of MAS. It first commenced its passenger flights services under the name of Firefly on 3rd April 2007. Firefly's flight services which are based in two hubs, namely the Sultan Abdul Aziz Shah Airport (in Subang) and the Penang International Airport, provide connections to

[3]Source : http://www.malaysiaairlines.com/my/en.corporate-info/our-story.html
[4]Source: MAS' Annual Report of 2012

various destinations within Malaysia, southern Thailand, Singapore and Sumatera in Indonesia.

13. Fly Firefly Sdn. Bhd. is not a party to the Collaboration Agreement but being a wholly-owned subsidiary of MAS, the latter has the autonomous power to review Firefly's flight services operations.

2.1.2 AirAsia

14. The relevant legal entity is AirAsia Berhad, a public listed company which has its registered office at B-13-15, Level 13, Menara Prima Tower B, Jalan PJU 1/39, Dataran Prima, 47301 Petaling Jaya, Selangor.

15. AirAsia was established in 1993 and commenced its operations in 1996. As at 16th April 2013, the list of AirAsia's shareholders is as in Appendix 2[5].

16. The Commission is of the view that AirAsia and AAX form a single economic unit as stated in the definition of "enterprise" defined under section 2 of the Act which states that:

> "*"enterprise" means any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be*

[5]Source: AirAsia's Annual Report of 2011.

regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market;"

17. The Commission relies on the European Commission's decision in *Europemballage and Continental Can v Commission case* in 1973[6], where it was held that:

"…*the circumstances that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously but in essential follows directives of the parent company*."

18. The applicable test is the test of control of which it is essential for the Commission to establish whether parties to the Collaboration Agreement are independent in their decision-making or whether one is able to exercise decisive influence over the other with the result that the latter does not enjoy 'real autonomy' in determining its commercial policy on the market.

19. For these purposes, it is necessary to examine various factors such as the shareholding that a parent company has in the

[6]Case 6/72 [1973] ECR 215

subsidiary company as well as the composition of the board of directors.

20. It is worthy to note that based on the information gathered by the Commission, AirAsia held 42,666,667 of AAX's shares[7]. AirAsia's Annual Report of 2011 also stated that the relationship between AirAsia and AAX is that they are companies with common shareholders and directors[8] with Tan Sri Dr. Anthony Francis Fernandes and Dato' Kamarudin Bin Meranun sitting in both[9].

21. Tan Sri Dr. Anthony Francis Fernandes and Dato' Kamarudin Bin Meranun are also the largest shareholders of Tune Air Sdn. Bhd.[10]. As listed in Appendix 2, Tune Air Sdn. Bhd. is the largest shareholder of AirAsia[11].

22. Tan Sri Dr. Anthony Francis Fernandes and Dato' Kamarudin Bin Meranun together are also the directors and majority shareholders of Aero Ventures Sdn. Bhd with collectively 99,229,541 of redeemable convertible preference shares which is approximately 71.24%.[12] Aero Ventures Sdn. Bhd. is the majority shareholder of AAX with 139,292,800 shares amounting to approximately 62.18%[13].

[7] Source: Companies Commission of Malaysia Search on AAX as at 30th June 2011
[8] Source: AirAsia's Annual Report of 2011 at pages 85 and 86
[9] Source: Companies Commission of Malaysia Search on AA as at 20th June 2011 and Companies Commission of Malaysia Search on AAX as at 30th June 2011
[10] Source: Companies Commission of Malaysia Search on AAX as at 29th September 2011
[11] Ibid
[12] Source: Companies Commission of Malaysia Search on Aero Ventures Sdn. Bhd. as at August 2011
[13]Source: The Companies Commission of Malaysia Search on AAX

23. In fact, as the founders of the AirAsia Group, both Tan Sri Dr. Anthony Francis Fernandes and Dato' Kamarudin Bin Meranun hold the positions as AirAsia's Group Chief Executive Officer and the Deputy Group Chief Executive Director respectively. Both of them also represented AirAsia and AAX in the Joint Collaboration Committee established under the Collaboration Agreement. Dato' Kamarudin Bin Meranun was also authorised to sign the Collaboration Agreement on behalf of AAX[14].

24. This gives an overall view of the relationship between the two enterprises which suggests that AirAsia is able to control AAX's conduct in the market. The Commission takes the view that AirAsia exercises decisive control over AAX, in a way that AAX is not independent in making its own decisions and therefore AirAsia and AAX is a single economic unit.

25. The parties did not dispute this finding of the Commission.

[14] Source: Minutes of a Special Board of Directors' Meeting of AAX held on 9th August 2011

3. PROCEDURE

3.1 The Inquiry

26. Due to public outcry over the Collaboration Agreement, the Commission on its own initiative examined the Collaboration Agreement entered into by the parties. Nevertheless, since the Collaboration Agreement was executed before the Act came into effect which was on 1st January 2012, the Commission only conducted its inquiry as well as its formal investigation after the Act was enforced.

3.2 The Complaint

27. A letter of complaint was received by the Commission on 24th February 2012 from the Federation of Malaysian Consumers Association ('FOMCA')[15] against the cooperation between MAS and AirAsia.

3.3 Notice Issued to MAS and AirAsia

28. The Commission had issued a written notice pursuant to section 18 of the Act to MAS and AirAsia on 4th April 2012 stating that the Commission is investigating the Collaboration Agreement entered into by the parties and that the Commission is seeking further information from them.

[15] FOMCA is an organization registered under the Societies Act 1966

3.4 The Investigation

29. By virtue of section 14(1) of the Act, the Commission is empowered to conduct any investigation as the Commission thinks expedient where there is a reason for the Commission to suspect that any enterprise has infringed or is infringing any prohibition under the Act.

30. Further, the Commission also has the power to conduct an investigation of any enterprise, agreement or conduct that has infringed or is infringing any prohibition of the Act[16] following receipt of a complaint.

31. The Act came into force in Malaysia on 1st January 2012 and applies to agreements or conduct which commenced, or continued, after that date. In this case, the Collaboration Agreement was entered into prior to 1st January 2012 and remained in force until it was terminated via a Supplemental Agreement dated 2nd May 2012.

32. However, the Commission can have regard to the circumstances arising before 1st January 2012 when investigating the conduct that continued after 1st January 2012.

33. The same position was taken by the United Kingdom Competition Appeal Tribunal in the case *Napp Pharmaceutical Holdings Limited v DGFT*, whereby it was held that:

[16]Section 15 (1) of the Competition Act 2010.

> *"in a case such as the present it is impossible to understand the situation as it was during the period of alleged infringement … without also understanding how that situation arose as a result of facts arising before [*the date of commencement of the UK legislation*.] In our view it is relevant to take facts arising before [*the date of commencement of the UK legislation*] into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on and after that date."*[17]

34. Subsequent to the Collaboration Agreement being entered into by the parties, MAS withdrew Firefly's operations in the following routes[18]:

- Kuala Lumpur-Kuching (KUL-KCI)(ceased on 30th October 2011);
- Kuala Lumpur-Kota Kinabalu (KUL-BKI)(ceased on 30th October 2011);
- Kuala Lumpur-Sandakan (KUL-SDK)(ceased on 4th December 2011); and
- Kuala Lumpur-Sibu(KUL-SBW)(ceased on 4th December 2011).

35. Given the possibility that these withdrawals of the services of Firefly from the routes stated above was based on the Collaboration Agreement, the Commission decided to pursue an investigation pursuant to section 14(1) of the Act.

[17]Case No 1001/1/1/01 [2002] CAT 1, paragraph 217

[18]Source: http://firefly.com.my/popups/kul-jet.html and *Nota Perbincangan Khas Berhubung Operasi Penerbangan MAS dan AAX* prepared by the Ministry of Transport dated 23rd December 2011

36. In their written as well as in their oral representations in response to the Commission's Proposed Decision, MAS and AirAsia argued that the abovementioned routes' cancellations and the execution of the Collaboration Agreement occurred before the Act came into force. MAS further argued that the Commission applied the Act unconstitutionally as it cannot apply the Act retroactively to conduct that occurred before 1st January 2012.

37. The Commission considered this argument but is unable to agree as it is undisputed that these routes were cancelled after the parties had entered into the Collaboration Agreement. The Commission therefore is of the view that these routes were cancelled pursuant to clause 5 and clause 5 had in fact continued to remain in effect until 1st May 2012 which was five (5) months after the Act came into force.

38. The position espoused by the Commission is consistent with the judgement in the *Napp Pharmaceutical Holdings Limited v DGFT* above which is reproduced hereunder:

> *"…In our view it is relevant to take facts arising before [*the date of commencement of the UK legislation*] into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on and after that date.*"

39. Thus, the Commission is entitled to take into account the existing conduct that was done by the parties which led to the sharing of markets which had continued after the Act came into force.

40. MAS and AirAsia further submitted that the Commission engaged in a selective reading of the Collaboration Agreement and misinterpreted the nature of the Collaboration Agreement particularly clause 5.6. The parties also argued that the Collaboration Agreement was no more than an agreement to explore potential areas of future cooperation between the parties, subject to obtaining any appropriate and desirable prior antitrust clearance.

41. The Commission considered the whole of the Collaboration Agreement and not only clause 5. Clause 9 of the Collaboration Agreement stated that a Joint Collaboration Committee ('JCC') shall be established by the parties to administer and manage all issues and matters pertaining to the Collaboration Agreement.

42. Clause 9.4 further provides that the JCC shall consist of six (6) members initially which includes the top management officials of MAS, AirAsia and AirAsia X. Essentially, the JCC acts as an avenue for the parties to implement clause 5.

43. The parties did not dispute that the JCC was set up pursuant to the Collaboration Agreement and subsequently pursuant to the Supplemental Agreement of 2nd May 2012, this JCC was also dismantled.

44. The Commission had taken into consideration the Collaboration Agreement in its entirety in particular clause 5 and clause 9 which specifically provide for market sharing and the establishment of a joint management committee which is involved

in decision-making process in two (2) different enterprises which, in the view of the Commission is clearly anti-competitive.

45. Based on these facts and coupled with the clauses contained in the Collaboration Agreement, it is clear that the Collaboration Agreement had the "object" of significantly preventing, restricting or distorting competition in the market which is an infringement under section 4(2) of the Act.

46. The Supplemental Agreement was then entered into by the parties on 2nd May 2012 to alter the terms of the initial Collaboration Agreement signed on 9th August 2011.

47. The Supplemental Agreement was to unwind the cross-holding of shares and revert to the original structure of shareholdings of both companies, disband the JCC, as well as remove clause 5 of the Collaboration Agreement. The parties now only agreed to focus on exploring and setting up joint-venture companies to provide aircraft component maintenance support and repair services, and to set up a special-purpose vehicle for procurement with the aim of saving cost.

48. A list of the main documents referred to by the Commission in its investigation is outlined hereunder:

(i) The Collaboration Agreement entered into by MAS, AirAsia and AAX dated 9th August 2011;

(ii) The Supplemental Agreement entered into by MAS, AirAsia and AAX dated 2nd May 2012;

(iii) The press release issued by MAS, AirAsia and AAX on the Collaboration Agreement dated 9th August 2011;

(iv) Minutes of MAS Special Board Meeting dated 9th August 2011;

(v) Minutes of a Special Board of Directors' Meeting of AAX held on 9th August 2011;

(vi) Bain & Company Presentation on MAS/AirAsia: Comprehensive Collaboration Framework at MAS Board of Directors Briefing dated 9th August 2011;

(vii) Minutes of MAS Board Meeting dated 19th April 2010;

(viii) Project Riesling & Firefly (TP) Business Plan dated 23rd July 2010;

(ix) *Nota Perbincangan Khas Berhubung Operasi Penerbangan MAS dan AirAsia X* prepared by the Ministry of Transport dated 23rd December 2011;

(x) The Companies Commission of Malaysia Search on MAS;

(xi) The Companies Commission of Malaysia Search on AirAsia;

(xii) The Companies Commission of Malaysia Search on AAX;

(xiii) MAS' Annual Report of 2012;

(xiv) AirAsia's Annual Report of 2012;

(xv) Financial Statements of MAS of 2012; and

(xvi) Financial Statements of AirAsia of 2012.

4. APPLICATION OF SECTION 4 OF THE ACT

4.1 Infringement of section 4(2)(b) of the Competition Act 2010

49. The Commission is satisfied that MAS and AirAsia by entering into the Collaboration Agreement to share the market have infringed section 4(2)(b) of the Act. The Collaboration Agreement is clearly an agreement entered into by the parties to share the market in relation to aviation services.

50. Section 4 of the Act states that;

"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; or

(d) 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.

4.2 Legal Assessment on the Collaboration Agreement

Agreement between Enterprises

51. The Collaboration Agreement is an agreement within the definition of the Act which states;

"any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises and

includes a decision by an association and concerted practices."[19]

52. The three signatory parties, MAS, AirAsia and AAX are enterprises within the meaning specified under section 2 of the Act;

"any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market."[20]

53. Nevertheless, as described above, for the purposes of the Act, the Commission finds that AirAsia and AAX are part of a single economic unit ultimately controlled by AirAsia.

4.3 Restriction of Competition by Object (Market Share)

54. The Commission in its Guidelines on Anti-Competitive Agreements relating to prohibition under section 4(2)(b) states that:

"*3.25. It is important to note that section 4(2) of the Act treats certain kinds of horizontal agreements between enterprises as anti-competitive. In these situations, the agreements are deemed to "have the object of significantly, preventing,*

[19]Source: Section 2 of the Competition Act 2010
[20]Source: Competition Act 2010

restricting or distorting competition in any market for goods or services." This means for these horizontal agreements, the MyCC will not need to examine any anti-competitive effect of such agreements. The agreements which are deemed to be anti-competitive include:

(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; or
(d) perform an act of bid rigging".

55. Although it has been stated that there is no need for the Commission to prove the subjective intention of the parties, it is worth looking at the facts prior to the agreement being signed to assist the Commission with its decision.

56. From the documents gathered by the Commission throughout its investigation, it was clear that prior to the Collaboration Agreement being implemented, MAS' subsidiary, Firefly, was formed to compete directly with AirAsia in the domestic market.

57. Facing fierce competition from Firefly, AirAsia's domestic market share had dropped drastically. Therefore, rather than face

further competition, the Commission is of the view that the Collaboration Agreement was entered into by the parties to maximise their commercial revenue by sharing markets. The Commission is of the view that the Collaboration Agreement entered into by MAS and AirAsia has the object of preventing, restricting or distorting competition between the signatory parties by allocating markets between them.

58. The restriction of competition here is obvious; MAS and AirAsia have agreed not to compete with each another, either themselves or through their subsidiaries thus eliminating any possibility of competition between the parties. The Collaboration Agreement allows both airlines to operate freely within separate market segments and it provides them the freedom to impose higher prices to maximise profitability without any competition. This will eventually leave consumers to face the increased likelihood of higher airfares and fewer choices.

59. MAS and AirAsia in their representations also contended that the Commission did not conduct a proper "*object*" analysis in that the Commission did not consider the relevant market(s), did not adopt the appropriate market definition and did not consider the relevant economic context in ascertaining the likely purpose or "*object*" underlying the conduct in question.

60. According to MAS, the Commission also did not conduct any "effects" analysis in arriving at the proposed decision. MAS also argued that there had to be an examination on the actual and potential competition that would have existed between MAS and

AirAsia in the absence of the Collaboration Agreement as well as an objective analysis of the impact of the agreement on competition on the market should have been conducted.

61. The Commission's Guidelines on Anti-Competitive Agreements clearly states that there is no necessity for the Commission to prove "effect" of the agreement once an "object" agreement under section 4(2) is proven. Paragraphs 2.13 and 2.14 of the said Guidelines state the following:

> *"2.13. ….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 anti-competitive "object" is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement."*

62. Clause 5 of the Collaboration Agreement states that each of the parties shall focus on separate sectors in the airlines industry with MAS mandated to focus on being a FSC, AirAsia mandated to focus on being a LCC and in the case of Air Asia X, it was mandated to focus on being a medium–to-long haul LCC. Clause 9 was intended to be the supervisory clause to ensure that each of the parties comply with the business plans.

63. There is no doubt that MAS and AirAsia are competitors and the Collaboration Agreement is a horizontal agreement between competitors which clearly has the object of sharing markets. The

Act stipulates that any agreement between competitors to share the market would be an infringement of section 4(2) of the Act. Section 4(2) which was reproduced earlier is a deeming provision and therefore, it is not necessary for the Commission to conduct any "effect" analysis.

64. This position is consistent with the judgements in the EU as held in the case of *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meals Ltd (BIDS)*[21] and the case of *European Night Services v Commission*[22] where in the EU position has similar deeming provision in respect of agreement between competitors.

65. The Commission is under no obligation to carry out any precise market definition in respect of section 4(2) infringement. The Commission refers to its Guidelines on Market Definition in paragraphs 1.9. and 1.10. which are reproduced hereunder:

> "*1.9. However, it should be noted that for certain kinds of horizontal agreements the MyCC does not have to determine the anti-competitive effect. Certain horizontal agreements are deemed by the Act in section 4 (2) to be anti-competitive. These include:*
>
> *(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;*

[21] Case C-209/07 [2008] ECR 1-863.
[22] Case T-374/94 [1998] ECR II-3141

*(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; or

(d) perform an act of bid rigging.

[*emphasis added*]

1.10. Where it seems unlikely that conduct will either have a significant adverse effect on competition or that the enterprise does not possess substantial market power, the MyCC may not need to precisely define the market. It should be stressed that defining a relevant market requires considerable practical judgement. In some cases it may not be even necessary to define the relevant market precisely. For example, where there is evidence that the relevant market is one of a few possible market definitions and each of these market definitions lead to the same competition assessment then precise market definition is not necessary and would be a waste of resources."

66. The Commission has taken into consideration 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,

advertising, sales and distribution networks etc. *See Delta/Virgin Atlantic JV approved in 2013 and Singapore Airlines/Virgin Australia alliance approved in late 2011*. These alliances would not involve any market sharing agreements or joint management control of competing companies.

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 is 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.

68. Although the Collaboration Agreement contains a clause on antitrust compliance and/or clearance, it does not by itself provide any form of immunity for the parties. No evidence was provided to the Commission to indicate that the parties had conducted any assessment or compliance or the extent of the compliance or assessment.

69. Both MAS and AirAsia had also argued that they have indicated to the Commission their intention to seek an exemption for the Collaboration Agreement under section 6 or section 8 of the Act. The parties further argued that the Commission had failed to take into account the fact that the Commission had yet to issue procedural guidelines on exemptions back then to guide the parties on the process to submit an exemption application.

70. It is important to note that the absence of any guidelines or procedures for exemption applications has not stopped other enterprises from submitting their applications to the Commission. In fact, vide a Commission letter to MAS and AirAsia dated 4th April 2012, the Commission had informed the parties the following:

> "*On your company's concern over the guidelines for the application of exemption under the Act, we wish to inform you that the MyCC is finalising the details and will issue the guidelines in due course. In any event, this does not prevent one from applying for an individual exemption under section 6 of the Act by satisfying cumulatively the criteria under section 5(a) to (d) of the Act……*"

71. The parties would note that the Commission had received other individual as well as block exemption applications from various parties as early as in 2011, even before the enforcement of the Act. Therefore, the arguments put forth by the parties are not acceptable.

72. It is to be noted that guidelines are non-binding documents and only provide guidance to the members of public on how the Act is being applied. In the event there are any inconsistencies between the guidelines and the provisions under the Act, the Act shall prevail.

73. Furthermore, an intention to seek an exemption does not in any way warrant an automatic exemption being granted by the Commission. The parties cannot seek the benefit of an exemption

as the Commission had not received any application and had no opportunity to examine whether the requirements under section 5 would have been satisfied.

74. In any event, an application for an exemption would require the parties to demonstrate all the requirements under section 5 are met. Section 5 states that:

> "*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*"

75. Section 5 could have also been invoked as a valid defence for an infringement under section 4(2) of the Act. MAS and AirAsia stated that the Collaboration Agreement's net economic benefit outweighs the anti- competitive effects. This defence would be available to any party in respect of any infringement of the Act. However, the burden to satisfy section 5 shifts to both MAS and AirAsia. Any party relying on section 5 would have to satisfy ALL the requirements of the section and the Commission is of the view that the parties did not satisfy the requirements of section 5 of the Act. This burden was not discharged by the parties.

76. The parties also argued that the Commission had only provided limited access to documents to the parties. The Commission has made available all the documents except those classified to be internal and confidential. Morever, MAS itself had requested that some of the documents gathered in the course of the Commission's investigation be classified as confidential and not to be revealed to any third party including AirAsia.

5. DURATION OF THE INFRINGEMENT

77. As mentioned earlier, the Collaboration Agreement was entered into by MAS, AirAsia and AAX on 9th August 2011. However, the enforcement of the Act only took place on 1st January 2012. Therefore, the Commission takes 1st January 2012 as the starting point of the anti-competitive agreement taking effect.

78. For the purposes of this proposed decision, the Commission considers that the infringement ended on 2nd May 2012 when the parties entered into the Supplemental Agreement. No reference to routes and market focus between parties is made in the Supplemental Agreement thus allowing the airlines to compete.

6. FINANCIAL PENALTIES

79. Section 40(1) of the Act provides that, if the Commission determines there is an infringement of a prohibition under Part II, it shall require the infringement to be ceased immediately; may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end; may impose a financial penalty; or may give any other direction as it deems appropriate.

80. Any financial penalty imposed by the Commission shall not exceed the statutory maximum established by subsection 40(4) which provides:

> "*A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred*."

81. On the basis of the 2012 Annual Reports of MAS and AirAsia, the Commission noted RM13,756,411,000 as MAS' worldwide turnover and RM4,946,091,000 as AirAsia's worldwide turnover. Based on paragraph 52 above, this would mean that MAS' and AirAsia's financial penalties should not exceed 10% of the worldwide turnover for the period January to April 2012 which then would amount to RM458,547,033 and RM164,869,700 respectively.

82. The specific services in the current case involve air transport services that have a product as well as a geographic dimension.

All of the domestic flight services (i.e. geographic dimension) provided by MAS and AirAsia consist of city-pair flights (i.e. product dimension).

83. Consumers who travel by air will choose for themselves the domestic flight service according to its affordability, hospitality, and price (i.e. airfare). However, demand substitutability of domestic flight services is somewhat limited. Under the current Government's policy on air transport (which is based on an internationally accepted "cabotage policy"), only locally-owned airline operators are permitted to carry passengers between any two points within Malaysia (including any two points between Peninsular Malaysia and both Sabah and Sarawak).

84. Furthermore, flights between Peninsular Malaysia and both Sabah and Sarawak cannot be substituted by other forms of transport (namely, sea transport by boat or ferry, or road transport). For this reason, consumers who travelled between Peninsular Malaysia and both Sabah and Sarawak were directly affected following the market exit of Firefly.

85. The Commission has decided to impose financial penalties on both MAS and AirAsia on the basis of the turnovers that were earned between 1st January 2012 and 30th April 2012 from their respective flights on the following routes:

- Kuala Lumpur-Kuching;
- Kuala Lumpur-Kota Kinabalu;

- Kuala Lumpur-Sandakan; and
- Kuala Lumpur-Sibu

86. The computation of financial penalties consists of the following steps.

- Step 1: Determine the basic amount of financial penalty as a proportion of the flight turnover earned between January and April 2012.

- Step 2: Increase the financial penalty by taking into account aggravating factors (if any); and decrease the financial penalty by taking into account mitigating factors (if any).

- Step 3: Enhance the specific and general deterrence effects of the financial penalty by adjusting it further (as necessary).

- Step 4: Verify that the financial penalty is no more than 10% of the enterprise's worldwide turnover over the period of infringement.

87. In determining the basic amount of the financial penalties, the Commission draws upon the turnover data provided by MAS and AirAsia.

88. According to MAS' data, the turnover earned from the provisions of Kuala Lumpur-Kota Kinabalu, Kuala Lumpur-Kuching, Kuala Lumpur-Sandakan and Kuala Lumpur-Sibu flight services over the period of 1st January to 30th April 2012 summed up to a total of RM241,433,499. In the case of AirAsia, the turnover earned from the same provisions as MAS flight services over the same period of 1st January to 30th April 2012 summed up to RM185,576,653.

89. As mentioned earlier, in Step 2 of the financial penalty calculations, the basic amount of the financial penalties are adjusted upwards to take into account aggravating factors (if any), as well as downwards to take into account mitigating factors (if any).

90. In this case, the Commission did not take into account any aggravating factors.

91. In the course of the Commission's investigation, both parties were found to be fully cooperative, especially in the provision of requested data and information. The Commission also considers the voluntary action taken by the parties to remove the reference to routes and market focus stated in the Collaboration Agreement would be another mitigating factor apart from the fact that the parties do have competition compliance programmes in place.

92. The Commission is of the opinion that it is important for the financial penalties to have a sufficient specific deterrence effect on market sharing. Based on the calculation discussed above, the

financial penalties that would have been imposed on MAS based on its total turnover of the respective routes would have been RM24,143,350 and RM18,557,665 in the case of AirAsia.

93. Nevertheless, taking into consideration all the other factors mentioned as well as equal participation of both parties in the Collaboration Agreement, the Commission has decided to impose on both parties a financial penalty of RM10,000,000 each. This quantum is significantly lower than the amount that could have been otherwise been imposed on the parties.

7. CONCLUSION

94. The Commission concludes that there has been an infringement of section 4(2)(b) of the Act and the Commission imposes a financial penalty of RM10,000,000 on MAS and AirAsia respectively.

APPENDIX 1

LIST OF TOP THIRTY (30) SHAREHOLDERS OF MALAYSIAN AIRLINE SYSTEM BERHAD AS AT 18TH MARCH 2013

Name	No. of Shares	%
Khazanah Nasional Berhad	2,218,218,317	66.37
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Employees Provident Fund Board*>	278,955,620	8.35
CIMSEC Nominees (Tempatan) Sdn. Bhd. <*Khazanah Nasional Berhad (MAS ESOS Pool*)>	100,259,510	3.00
Amanahraya Trustees Berhad <*Skim Amanah Saham Bumiputera*>	73,035,867	2.19
Warisan Harta Sabah Sdn. Bhd.	50,302,884	1.51
State Financial Secretary Sarawak	45,833,333	1.37
Chief Minister, State of Sabah	29,809,116	0.89
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Exempt An for American International Assurance Berhad*>	22,158,200	0.66
Maybank Nominees (Tempatan) Sdn. Bhd. <*Maybank Trustees Berhad for Public Regular Savings Fund (N14011940100)*>	16,746,000	0.50
AA Amanahraya Trustees Berhad	14,369,900	0.43

<*Public Sector Select Fund*>		
Cartaban Nominees (Asing) Sdn. Bhd. <*State Street London Fund MATF for Marathon New Global Fund Plc*>	12,139,568	0.36
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Employees Provident Fund Board (Nomura)*>	10,000,000	0.30
Amanahraya Trustees Berhad <*Public Savings Fund*>	8,534,000	0.26
Mohamed Faroz Bin Mohamed Jakel	8,474,000	0.25
ECML Nominees (Asing) Sdn. Bhd. <*DMG & Partners Securities Pte Ltd For Keen Capital Investments Ltd (N2-60391) (009)*>	7,350,000	0.22
Mega First Housing Development Sdn. Bhd.	6,369,800	0.19
CIMB Group Nominees (Tempatan) Sdn. Bhd. <*Cimb Bank Berhad (EDP 2)*>	5,847,000	0.17
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Employees Provident Fund Board (CIMB PRIN)*>	4,229,300	0.13
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Employees Provident Fund Board (AM INV)*>	4,000,000	0.12

RCI Ventures Sdn. Bhd.	3,935,000	0.12
HSBC Nominees (Asing) Sdn. Bhd. *<Exempt An for the Bank of New York Mellon (Mellon Acct)>*	3,884,292	0.12
HSBC Nominees (Asing) Sdn. Bhd. *<Exempt An For JPMorgan Chase Bank, National Association (U.S.A.)>*	3,808,564	0.11
Citigroup Nominees (Asing) Sdn. Bhd. *<CBNY For Dimensional Emerging Markets Value Fund>*	3,795,300	0.11
Citigroup Nominees (Tempatan) Sdn. Bhd. *<Employees Provident Fund Board (PHEIM)>*	3,565,266	0.11
HSBC Nominees (Asing) Sdn. Bhd. *<TNTC for the Marathon-London International Fund>*	3,397,534	0.10
HSBC Nominees (Asing) Sdn. Bhd. *<BBH and Co Boston for Vanguard Global Equity Fund>*	3,279,566	0.10
Employees Provident Fund Board	3,000,000	0.09
HSBC Nominees (Asing) Sdn. Bhd. *<Exempt An for the Bank of New York Mellon (BNYM as E&A)>*	2,650,828	0.08
Citigroup Nominees (Asing) Sdn. Bhd. *<CBNY for Emerging Market Core Equity Portfolio DFA Investment Dimensions Group Inc>*	2,539,366	0.08

Citigroup Nominees (Asing) Sdn. Bhd. *<CBNY for DFA Emerging Markets Small Cap Series>*	2,361,400	0.07

APPENDIX 2

LIST OF TOP THIRTY (30) SHAREHOLDERS OF AIRASIA BERHAD

Name	No. of Shares	%
Tune Air Sdn. Bhd.	334,936,396	12.06
Citigroup Nominees (Tempatan) Sdn. Bhd. *<Employees Provident Fund Board>*	201,686,600	7.26
HSBC Nominees (Tempatan) Sdn. Bhd. *<Credit Suisse HK for Tune Air Sdn. Bhd.>*	158,000,000	5.69
HSBC Nominees (Asing) Sdn. Bhd. *<BBH (LUX) SCA for Genesis Smaller Companies>*	122,383,881	4.40
HSBC Nominees (Asing) Sdn. Bhd. *<TNTC for the Nomad Investment Partnership LP Cayman>*	109,520,000	3.94
Amanahraya Trustees Berhad *<Skim Amanah Saham Bumiputera>*	99,727,700	3.59
Cartaban Nominees (Asing) Sdn. Bhd. *<SSBT Fund HG05 for the New*	77,785,000	2.80

Economy Fund>		
Cartaban Nominees (Asing) Sdn. Bhd. *<SSBT Fund QR1P for the Hartford Capital Appreciation Fund>*	64,143,600	2.31
HSBC Nominees (Asing) Sdn. Bhd. *<Exempt An For JPMorgan Chase Bank, National Association (U.S.A.)>*	57,622,155	2.07
HSBC Nominees (Asing) Sdn. Bhd. *<NTGS LDN for Skagen Kon-Tiki Verdipapirfond>*	47,375,200	1.71
Cartaban Nominees (Asing) Sdn. Bhd. *<SSBT Fund HG22 for Smallcap World Fund, Inc.>*	44,000,000	1.58
Cartaban Nominees (Asing) Sdn. Bhd. *<Exempt An for State Street Bank & Trust Company (West CLT OD67)>*	38,292,700	1.38
Maybank Nominees (Tempatan) Sdn. Bhd. *<Maybank Trustees Berhad for Public Ittikal Fund (N14011970240)>*	36,411,900	1.31

Maybank Nominees (Tempatan) Sdn. Bhd. <*Kuwait Finance House (Malaysia) Berhad for Tune Air Sdn. Bhd. (Tony Fernandes)*>	32,000,000	1.15
HSBC Nominees (Asing) Sdn. Bhd. <*Exempt An for the Bank of New York Mellon (Mellon Acct)*>	30,059,309	1.08
HSBC Nominees (Asing) Sdn. Bhd. <*Exempt An for JPMorgan Chase Bank, National Association (U.K.)*>	28,652,594	1.03
ECML Nominees (Tempatan) Sdn. Bhd. <*Pledged Securities Account for Tune Air Sdn. Bhd. (001)*>	26,835,367	0.97
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Pledged Securities Account – Bank Julius Baer & Co Ltd for Tune Air Sdn. Bhd. (CB SG)*>	26,000,000	0.94
HSBC Nominees (Asing) Sdn. Bhd. <*Exempt An for JPMorgan Chase Bank, National Association (Saudi*	25,519,279	0.92

Arabia)>		
Amanahraya Trustees Berhad <*Public Islamic Sector Select Fund*>	25,190,100	0.91
Valuecap Sdn. Bhd.	25,034,900	0.90
HSBC Nominees (Asing) Sdn. Bhd. <*BBH and Co Boston for Vanguard Emerging Markets Stock Index Fund*>	23,841,848	0.86
Cartaban Nominees (Asing) Sdn. Bhd. <*SSBT Fund QR1F for Capital Appreciation HLS Fund (Hartford Sfi)*>	23,412,400	0.84
ECML Nominees (Tempatan) Sdn. Bhd. <*Pledged Securities Account for Tune Air Sdn. Bhd. (001)*>	22,586,619	0.81
HSBC Nominees (Asing) Sdn. Bhd. <*Exempt An for JPMorgan Chase Bank, National Association (Norges Bk Lend)*>	21,698,200	0.78
ECML Nominees (Tempatan) Sdn. Bhd. <*Pledged Securities Account for Tune Air Sdn. Bhd. (001)*>	21,000,000	0.76

HSBC Nominees (Asing) Sdn. Bhd. <*Exempt An for Morgan Stanley & Co. LLC (Client)*>	20,912,300	0.75
HSBC Nominees (Asing) Sdn. Bhd. <*TNTC for Fidelity Series Emerging Markets Fund (FID INV TST)*>	20,042,700	0.72
HSBC Nominees (Asing) Sdn. Bhd. <*TNTC for United Nations Joint Staff Pension Fund*>	19,100,000	0.69
Citigroup Nominees (Tempatan) Sdn. Bhd. <*Exempt An for Eastspring Investments Berhad*>	18,232,300	0.66