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**THE APPLICATION OF COMPETITION LAW IN THE
AIRLINE INDUSTRY IN MALAYSIA**

By:

Norahimah Fitri Binti Mohd Hamdan

**A thesis submitted in the fulfilment of the requirements of a Doctor of
Philosophy (Ph.D.) Degree in Law**

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CAT	Competition Appeal Tribunal
CAAM	Civil Aviation Authority Malaysia
MAVCOM	Malaysian Aviation Commission
MyCC	Malaysian Aviation Competition Commission
ASEAN	Association of South East Asian Nations
GC	General Court
ECJ	Court of Justice of the European Union
HC	High Court
TFEU	Treaty of the Functioning of the European Union
CAA	Civil Aviation Authority
ICAO	International Civil Aviation Organization

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DECLARATIONS

I hereby declare that this thesis and the material contained in this thesis are the original work solely undertaken by me and have not been published or submitted for any degree at any other University.

ABSTRACT

As the world economy is moving towards full liberalisation, competition law plays an important role in the regulation of anti-competitive practices and the need to have appropriate competition law and policy in developing countries is becoming crucial. There are issues and challenges faced by these countries but international best practices and experiences from advanced and matured jurisdictions are an important influence and provide a useful guidance. The thesis aims to explore and investigate the application of completion law in the Malaysian airline industry through the insights drawn from the application of the competition laws in the EU airline industry based on its established laws and jurisprudence. From the institutional perspective, Malaysia faces great challenges in providing competition expertise in its enforcement agencies and judiciary. This investigation is timely and important. Competition legislation has only been in place in Malaysia since 2010 and sector specific regulation, including competition regulation, was only enacted for the airline industry in 2015. The establishment of two separate independent bodies by this legislation (MyCC and MAVCOM) may have the potential to create uncertainties and inconsistencies in implementing the law in the industry. Legal certainty is particularly important for the treatment of anti-competitive agreements for a developing jurisdiction like Malaysia. Malaysian competition legislation is largely based on EU competition law and this together with the international nature of the airline industry makes the EU jurisprudence highly authoritative. It is to be cautioned however, any reference to the EU jurisprudence must take into account the different economic structure of a developing country where there is a general lack of competition culture and awareness.

CHAPTER 1—INTRODUCTION

1.1 Introduction

Competition law is required to promote and maintain a healthy competitive business environment. It contains a set of rules that controls the anti-competitive practices in the market. Particularly, competition law is concerned with anti-competitive agreements, abuse of a dominant market position, mergers and public restrictions of competition.¹ In essence, it regulates business conduct individually or collectively which affects the competition process and consumer welfare. With privatisation and market liberalisation, international business transactions become more frequent and inevitable. Particularly in the air transport industry, competition becomes a challenging issue as the industry witnesses a significant development of airline cooperation and alliances. Airlines are becoming more assertive in order to ensure sustainability and their continued presence in the industry. As a consequence technical and commercial joint collaborations and activities among airlines such as interlining, code-sharing, airline cooperation, joint ventures, strategic alliances and mergers have increased.² Dominant airlines compete vigorously on prices and services and are often engaged in providing loyalty discounts and rebates, predatory pricing and refusal to supply or to grant access to essential facilities. From a competition law perspective, these arrangements have serious regulatory implications because of their potential effect on competition and the consumer.

1.2 Background of Research

As countries around the world are moving towards full liberalisation, the airline industry becomes highly competitive and airline collaborations increase tremendously. Nevertheless, for developing countries, there is a fear that opening up domestic market access to the world at large would threaten their domestic national airlines

¹ Richard Whish & David Bailey, *Competition Law*, Oxford University Press, Ninth Edition (2018), 3-4.

² In practice, these arrangements are dictated by bilateral or multilateral agreements which are often dictated by general aero-political considerations of the States concerned where States are also pressured to enter into more liberalised open skies agreements. Open skies agreement, an inter-governmental agreement, is based on open skies concept which allows air carriers of a State to freely operate in another State without restrictions, for instance, on the routes, air traffic rights, points of origin and destination and capacity. The focus of this thesis however is on the anti-competitive elements of these arrangements.

hence affect their economy. The fear of increased competition have hindered them from taking part fully in air transport liberalisation. Competition law becomes more important not only to ensure consumers obtain only the best products and services but also as an important legal means to control unfair competition. There are, nevertheless, several important issues to be considered in implementing competition law and policy in the developing countries. These include lack of financial resources, expertise in the agency and judiciary, lack of competition culture and underdeveloped markets, to name a few.³ Moreover, developing countries prefer competition policy that protects their stage of economic development which allows national champions and larger firms to take advantage of the economies of scale in order to be prepared to face the competition challenges in the market.⁴ Within this context this thesis will examine the application of competition law in the airline industry in Malaysia.

In 2012, the first competition case involving two major airlines in Malaysia was investigated by the national competition authority: Malaysian Competition Commission (MyCC).⁵ The case concerned a collaboration agreement between Malaysian Airlines System Berhad (MAS),⁶ Air Asia Berhad (AirAsia) and Air Asia X Sdn Bhd (AirAsiaX) which MyCC found to be anti-competitive.⁷ The case was brought to the Competition Appeal Tribunal (CAT)⁸ which reversed the MyCC's decision. In an appeal for a judicial review, the High Court (HC) reinstated MyCC's decision and found that CAT had erred in law.⁹ The case is now pending appeal at the Court of Appeal.¹⁰ The case marks an

³ Umut Aydin & Tim Buthe, 'Competition Law and Policy in Developing Countries: Explaining Variations and Outcome; Exploring Possibilities and Limits', *Law and Contemporary Problems* (2016) No. 4 Volume 79:1.

⁴ Kathryn McMahon, 'Developing Countries and International Competition Law and Policy' *SSRN Electronic Journal* (2009) 10.2139/ssrn.1523143.

⁵ MyCC was established by the Competition Commission Act 2010. A more detailed discussion is provided in Chapter 4.

⁶ MAS has been renamed as Malaysian Airline Berhad (MAB) through the Malaysian Airline System Berhad (Administration) Act 2015. For the purpose of this thesis the name MAS also refers to MAB unless otherwise stated.

⁷ The MyCC Decision: Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd. Dated 31 March 2014 [No. MyCC.0001.2012]. This case is analysed in detailed in Chapter 7.

⁸ CAT was established by the Competition Commission Act 2010. A more detailed discussion on CAT is provided in Chapter 4.

⁹ *Competition Commission v Competition Appeal Tribunal, Malaysian Airline System Berhad and AirAsia* [No:WA-25-82-05/2016] dated 20 December 2018 (High Court Judgment).

¹⁰ The Court of Appeal has set 13 December 2019 for the hearing of the appeal. Available at <<https://www.competitionpolicyinternational.com/malaysia-malaysia-airlines-airasias-appeal-fine/>> and <<https://www.theedgemarkets.com/article/malaysia-airlines-airasias-appeal-against-rm10m-fine-be-heard-dec-13>> accessed on 29 January 2019.

important milestone and has serious implications on the manner in which competition law in the airline industry is implemented. It has raised two important issues: the approach taken by the competition authorities and the court in interpreting and applying the competition law in the airline industry and the level of expertise acquired by these authorities. In 2016, another milestone was created in the industry by the establishment of an independent corporate body known as Malaysian Aviation Commission (MAVCOM).¹¹ MAVCOM is responsible for the economic regulations in the aviation sector including the enforcement of the competition regulation. MAVCOM is the first sector regulator empowered with an exclusive jurisdiction to enforce the competition regulations. In view of this recent development in the aviation sector and with the judgment of *MAS/AirAsia*, there is a real need to analyse the state of application of competition law in the airline industry, whether it is appropriately applied and the importance of having a sector regulator.

1.3 Research Objectives, Research Questions and Methods

The main objectives of the research are: to examine the application of the competition law in the Malaysian airline industry, to draw insights from the EU competition law in order to determine whether the application is at par with the international best practices and finally to recommend improvements and adaptations as may be required, particularly in the context of a developing economy such as Malaysia. The research is guided by two main research questions: (1) What are the competition institutions and competition regulations applicable in the aviation sector in Malaysia and how does Malaysia deal with the competition issues in its airline industry, and (2) to what extent the application of the competition law in the EU, the experience, the approach and the best practices, should be referred to. Although there are four main areas of competition laws, this research focusses only on two main areas of the competition law: anti-competitive agreements and abuse of a dominant position. The reasons being, as a developing country which the implementation of its competition law is still at its infancy, these two areas have been the main focus and priority of the competition authorities. The law cases have shown a clear indication that the country critically needs to strengthen and enhance the understanding of the law in these two

¹¹ MAVCOM was established by the Malaysian Aviation Commission Act 2015. A more detailed discussion of the powers and functions of MAVCOM is provided in Chapter 4.

areas in order to improve its implementation. Both the Competition Act 2010 (CA 2010) and Malaysian Aviation Commission Act 2015 (MACA 2015) do not provide for state aid provisions¹² and the merger provisions have only been recently introduced in MACA 2015.

The research mainly investigates and evaluates the application of the competition law in the airline industry in Malaysia and analyses the competition cases decided by the implementation and enforcement agencies. The roles played by such agencies are also analysed. The US and EU competition laws are the two dominant global models of competition laws. The EU competition laws are chosen as the main comparator in the study because of several important factors. The implementation of the EU competition laws for the past 50 years have made the system more advanced and mature and this will provide useful insights and guidance for a developing country like Malaysia. The Malaysian competition law, with very few differences, is based largely on the EU model of competition law. The Malaysian legal system has been influenced largely by the UK laws since its colonization by the British.¹³ As a consequent, a large number of Malaysian laws were modelled upon the UK laws, and the CA 2010 is no exemption. The UK Competition Act 1998 is also subjected to the EU competition regime. Any competition issues must be dealt with in a manner consistent with the EU laws¹⁴ and EU laws take precedent over the national laws in the event of any clash.¹⁵ Therefore, the EU laws and regulations as applied to the aviation sector are the main comparator in this study. As the UK competition law is ultimately dictated by the EU as the supreme law, it is only appropriate that EU law is chosen as the main comparator but not as the only comparator. In the South East Asia, more developing countries have implemented competition laws. In addition to the Malaysian Competition Act 2010, for example, the Singapore Competition Act 2004 and Thailand Trade Competition Act 1999 have been enacted. There are pertinent similarities in the EU to the efforts taken by Malaysia and the rest of ASEAN countries in becoming a fully liberalised air transport. Some reference to the case law

¹² An interview with the Head of Air Division, Ministry of Transport, Malaysia (10 April 2019), there is no indication that Malaysia intends to introduce the state aid provision in the near future. This is also confirmed during an interview made with the officer of MyCC on 23 August 2019. See Appendix 5.

¹³ A historical background of the Malaysian Legal System is provided in Chapter 3.

¹⁴ See Section 60 of the UK Competition Act 1988.

¹⁵ Case 6/64 *Costa v ENEL* EU:C:1964-66; See Whish & Bailey (n 1) p76.

from these jurisdictions, as applied to the aviation sector, therefore, will also be made wherever relevant.

The thesis therefore relies on the transplantation theories as an approach to comparative law, and is influenced by the work of Watson with some modifications.¹⁶ Comparative law is more than just a study of a foreign system, it is a study of the relationship of one legal system with another, its similarities and differences by understanding the nature of the law and its legal development.¹⁷ It is important to establish and understand the nature of the relationship and how a particular system derives from another system or exerts influence on another.¹⁸ One of the means and ways to compare is through the understanding of why certain legal systems were borrowed or transplanted from another. According to Watson, legal transplants are the 'moving of a rule or a system of law from one country to another'.¹⁹ His work, however, emphasizes the importance of the historical relationship between two legal systems and is mainly concerned with the existence of the rule, but not how it operates within the society.²⁰ This is where the approach taken in this thesis deviates. It investigates the legal rules and procedures in the competition regime in Malaysia together with the examination of like or equivalent rules and procedures in other jurisdictions mainly the EU, from which it borrowed or transplanted these laws. It goes further by reflecting and making comparisons between the two legal systems with a view to understand the nature of the law, its similarities and differences. It evaluates how the law operates based on academic and judicial interpretation and finally it attempts to see the important factors in ensuring the success of the legal transplantation with a view to improving the existing legal system.

The thesis adopts a qualitative methodology drawing on both doctrinal and non-doctrinal approaches. It includes a critical analysis of both the primary and secondary

¹⁶ Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press Edinburgh (1974).

¹⁷ Ibid, p7.

¹⁸ Ibid.

¹⁹ Ibid, p21.

²⁰ The work had been criticized for its acceptance on solely historical relationships between two legal systems. Others regarded it as superficial and lack of systematization and the most important critiques are the one forwarded by Kahn-Freund, as being lack of socio-legal context. See John W Cairns, 'Watson, Walton and the History of Legal Transplants' (2013) 41 *Georgia Journal of International & Comparative Law* 637.

sources of law (doctrinal) and interviews (non-doctrinal). The primary sources include international conventions, national laws and case law. The secondary sources involve mainly textbooks, journal articles, aviation and competition reports, working papers, thesis, newspapers, encyclopaedias and online materials. Primary and secondary sources are obtained mainly through library and database research. A minimal use of the non-doctrinal method involve interviews with relevant stakeholders and interested parties including senior government officials in Malaysia particularly from government agencies such as the Attorney General Chambers (AGC), Ministry of Transport (MOT), MyCC, CAT, MAVCOM, CAAM and MAS.

1.4 Significance of Study and Contribution

Competition law implementation in Malaysia is still at its infancy stage. Very little research has been conducted in this area of law²¹ and even less in the aviation industry. Literature on competition law is limited, particularly regarding its application in the aviation sector. Most literature merely provides general comments on competition legislation, the role of competition authorities and the power of enforcement. Further, based on the legal cases that have been decided thus far, there is a clear need to have more expertise, to enhance the skills and knowledge of the enforcers and to educate the business community on the importance of competition law.²² As liberalization of air transport is put into effect, this study is very significant. It contributes significantly to the existing legal framework of competition law and economic regulations in the aviation industry in Malaysia. Regionally, as a member of the Association of Southeast Asian Nations (ASEAN), it is foreseeable that the study will contribute greatly to other ASEAN countries such as Singapore, Thailand, Indonesia and Brunei. Many of these ASEAN countries have similar competition issues and concerns in their air transport industries as Malaysia *vis a vis* liberalization. This study will provide some useful insights into the pertinent issues and concerns faced by Malaysia specifically and ASEAN countries in general, particularly their reluctance to commit to a full-fledged air transport liberalization.

²¹ It is only recently, in April 2016, that a book entitled 'Competition Law in Malaysia' written by Dr. Hanif Ahamat & Dr. Nasarudin Abdul Rahman, both are an Assistant Professor of Law in the International Islamic University Malaysia has been issued and published.

²² Cassey Lee, 'Competition Law Enforcement in Malaysia: Some Recent Development', *Malaysian Journal of Economics Studies* 51 (Special issue): 77-88 ISSN 1511-4554 (2014).

1.5 Structure of Thesis

Chapter 1 introduces the main objectives of the thesis and describes the current scenario in Malaysia leading to the need of the research. It emphasizes the significant contribution of the study and explains the methodology used as well as clarifies why the EU laws are chosen as the main comparator. Chapter 2 outlines the important theories of competition, both from the legal and economic aspects, in the context of the globalisation of the airline industry. Chapter 3 provides the historical background of competition law in the Malaysian airline industry by providing the overview of the Malaysian political economy, the history and development of the airline industry and its current state. It also provides some insight into the Malaysian legal system and the development of the competition law in the airline industry. The relationship between Malaysia and ASEAN vis a vis competition law and the general overview of the EU competition laws are also discussed. Chapter 4 critically discusses the roles and functions of the implementation agencies prior and after the coming into force of the sectoral competition regulations for the aviation sector in 2016. The important factors influencing the institutional agency design in developing countries such as the independency and autonomy, the lack of competition experts and complex roles and functions of competition authorities are also analysed. Chapter 5 lays down all the relevant national competition laws and drawing on comparative material from the EU, analyses critically their application in the aviation sector specifically focusing on the anti-competitive agreements. Chapter 6 contains a critical study on the application of competition law in the various types of airline agreements; from interlining and code-sharing to joint ventures and strategic alliances. Chapter 7 studies the case of *MAS/AirAsia* and critically analyses the application of competition law in the airline cooperation based on the Malaysian general competition law. It is contrasted with the application of EU competition law in the EU air transport sector and provides some analysis if the case had been brought before the MAVCOM where the sector-specific aviation regulations apply. Chapter 8 looks into the anti-competitive behaviour of a dominant airline and focusses on three types of conduct which could be abusive and which are commonly practiced by the airlines; the granting of rebates and discounts, predatory pricing and the refusal to supply or provide access to essential facilities. Chapter 9 concludes the findings of all the previous chapters and determines whether all research questions have been answered and the aims and objectives of the

research have been achieved. It also clarifies any limitation and provides suggestions for the betterment of the implementation of competition law in the aviation industry in Malaysia.

CHAPTER 2—THEORETICAL AND CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter examines the theoretical framework underlying competition law. It discusses the economic theories of competition: perfect competition, monopoly, workable competition, contestable competition and effective competition and examines the debates on the different approaches put forth by the Harvard School, Chicago School and Post-Chicago School on these theories. Then it investigates the factors that influence competition in the airline industry and the competition law issues arising from this development.

2.2 Economics of Competition

‘Competition means struggle or contention for superiority, and in the commercial world it means a striving for the custom and business of people in the market place’.¹ It is also described as ‘a process of rivalry between firms seeking to win customers’ business over time by offering them a better deal’.² Rivalry, in turn, ‘creates incentives for firms to cut price, increase output because it provides the opportunity for successful firms to take business away from competitors, and poses the threat that firms will lose business to others if they do not compete successfully.’³ In the world economy, recent globalisation and liberalization has unleashed powerful economic forces and intense competition among business rivalries. The impact of competition in a market place is huge, some firms and economies have benefitted from it while others suffered. The supposedly benefits of competition are lower prices, better products, wider choices and greater efficiency. However, in practise, these benefits are affected by many other influential factors in the market. It is important therefore to understand the competition as well as the economic theories in order to determine the effect of competition on the economic performance and consumer welfare.

¹ Whish & Bailey (n 1) ch1, p4.

² Merger Assessment Guidelines (Joint Publication of the Competition Commission and the Office of Fair Trading CC2(Revised)/OFT1254 September 2010) para 4.1.2 p19; Available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf> accessed 28 June 2019.

³ Ibid.

Economic theories provide the main rationale for competition law, because such theories among others, have shown that '*rivalries among the market is something worth promoting and protecting*'.⁴ The foundations of free market theory are found in the work of Adam Smith, who recognized that the society is economically better off if businesses act freely to serve the needs of the consumer.⁵ At the same time Adam Smith observed that firms that seek to profit maximise may also pursue conduct that is not in the interests of the consumer, such as cartel behaviour. Adam Smith noted that people of the same trade have an inherent tendency to join together and have conversations resulting in a conspiracy to raise prices.⁶ Economic theory provides a useful understanding of the effects of certain common business practices and when such practices could be regarded as anti-competitive. Price discrimination between air passengers, for instance, could be held anti-competitive but it is not always the case. There can be trade-offs between the restrictive effects to competition and the efficiency benefits.⁷ It is also through economic theories that some practical tests and criteria are developed to analyse competition cases.⁸ According to Bork, antitrust is about the effects of anti-competitive behaviour on consumers which can only be explained through the economic theories.⁹ Competition or antitrust law (as it is known in the US) is used to foster the preservation and improvement of the powerful economic mechanism that compel businesses to respond to consumers.¹⁰

2.3 Theories of Competition

2.3.1 Perfect Competition

The model of perfect competition is based on the economic theories of allocative, productive and dynamic efficiencies.¹¹ The assumption is that there are infinite number of buyers and sellers in the market, there is only one type of product being produced, thus the products are homogeneous products, the consumers have perfect information

⁴ Gunner Neils, Helen Jenkins & James Kavanagh, *Economics for Competition Lawyers*, Oxford University Press (2011) p2.

⁵ Adam Smith, *The Wealth of Nations* (1776, reprinted Penguin, 1999).

⁶ Ibid, Book IV, Ch II.

⁷ Neils, Jenkins & Kavanagh (n 4) ch2, p5.

⁸ Ibid.

⁹ Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself*, Basic Book 1978 (reprinted with a new Introduction and Epilogue 1993) p90-91.

¹⁰ Ibid.

¹¹ Alison Jones & Brenda Sufrin, *EU Competition Law: Text Cases and Materials*, (6th edn, Oxford University Press 2016) p6-8; Whish & Bailey (n 1) ch1, p4-7.

about the market conditions and there are no barriers to enter and exit from the market. So, the allocative, productive and dynamic efficiencies can be achieved. For the allocative efficiency, the theory of perfect competition suggests that the allocation of the economic resources is efficient in a way that it is not possible to make anyone better off without making someone else worse off. The goods and services are allocated among the consumers according to their preferences at a price they are prepared to pay. Thus, the consumer surplus is at its largest. This could be achieved because in a perfectly competitive market the producer, who is deemed to be acting rationally with the aim to maximize profits, will continue producing for as long as it is privately profitable to do so. The production will only stop when the cost of producing a further unit (marginal cost) is equal to the price it would obtain for that unit (marginal revenue). Further, the producer is a price taker and can only sell at market price. The producer will not be able to affect the price because any change in the producer's own output is negligible to the aggregate output of the market by which the price is determined through the law of supply and demand.¹² There is no reason therefore for the producer to reduce its output as the price in a perfectly competitive market will not be affected by any reduction in production. Under a perfect competition, the goods and services are produced at the lowest price possible. The producer will not be able to increase the price above cost, because the customer would always find other sellers selling similar goods with the lowest price and the producer will be deserted, nor decrease it, as it is not profitable to do so. Moreover, other competitors are free to enter into the market and produce more efficiently leaving the producer with no choice but to incur the lowest cost possible to gain any profit at all. This is how productive efficiency is achieved in perfect competition. The producers will also be forced to innovate and develop new products as part of their battle to win the consumers' business. Thus, it creates a dynamic effect in stimulating technology, research and development. Though this dynamic efficiency is not captured by the static theory of perfect competition, it is clearly a benefit of competition.

¹² Whish & Bailey (n 1) ch1, p6.

2.3.2 Monopoly

The opposite of perfect competition is monopoly. 'A monopoly exists when there is only one firm in the industry'.¹³ This is because there are barriers that prevent other firms from entering the market or there is a natural monopoly.¹⁴ The monopolist is able to increase price by reducing the volume of its own production and also to earn the largest profit if it refrains from expanding its production to the level that would be attained under perfect competition.¹⁵ This is on the account that the monopolist producer is responsible for the aggregate output of the whole market and therefore is in the position to affect the market price. There is no competition to drive down the price. The customers are deprived of the monopolised goods and services that they had been prepared to pay for. This leads to allocative inefficiency whereby the resources are not distributed in the most efficient way possible.¹⁶ 'The extent of this allocative inefficiency is sometimes referred to as the "deadweight loss" attributed to the monopoly'.¹⁷ There may also be lower productive efficiency as the monopolist is not constrained by any competitors to reduce costs. There is no pressure for monopolists to innovate, improve or produce better products because they are already profit maximising.

But in the real economy there is no perfect competition or perfect monopoly. The model of perfect competition is based on assumptions which do not really exist in real markets. In reality there are many intermediate positions between the polar market structures of perfect competition and monopoly. There will often be more than one firm which is selling similar but also slightly differentiated versions. Products will not be homogeneous. Perfect information is not always available to the customers and producers and there are always barriers to entry and exit from the market. Thus, perfect competition is just a theory. Similarly, it is also difficult to experience monopoly in its purest form. There is always more than just one product and firm that is responsible for

¹³ John Sloman & Elizabeth Jones, *Essential Economics for Business*, (4th edn, Pearson Education Limited 2014) p100.

¹⁴ Natural monopoly is a situation of which the long-run average costs of a firm would be lower if it were under the monopoly than if it were shared between two or more competitors. This is usually the case of energy and telecommunications sectors where it is not economically efficient for two or more firms to produce such an expensive products. See also Sloman & Jones (n 13) ch2.

¹⁵ Whish & Bailey (n 1) ch1, p7.

¹⁶ Ibid.

¹⁷ Ibid.

the entire output of the market and in a true sense of economic operations, there are always competitors.¹⁸ Most competition law cases are not against the monopolists per se but firms having some degree of market power. Economic behaviour is also not always static as certain markets are dynamic in nature. In the information technology sector especially, products are rapidly replaced by more innovative products. Given these arguments, there is a need to consider the best standard of competition that should be present in a market place.

2.3.3 The theories of workable competition, contestable and effective competition

Some economists suggest, therefore, a concept of workable competition in which all the limitations in a perfect competition are recognised in order to attain a practical level of competition.¹⁹ This theory was developed in 1940 and was associated with the Harvard School. The criteria used to assess its workability were based on the structure, conduct and performance paradigm. As J.M. Clark puts it, 'it will mean something if we can find, after due examination, that some of these forms do their jobs well enough to be an adequate working reliance – more serviceable, on the whole, than those substitutes which involve abandoning reliance on competition. And it will be useful if we can learn something about the kinds and degrees of "imperfections" which are positively serviceable under particular conditions.'²⁰ The theory aimed at producing the best competitive arrangement practically attainable. Nevertheless, it does not provide any workable solution for developing a sound competition policy.²¹

Other economists suggested the theory of contestable markets. In this theory, 'the firms are forced to ensure an optimal allocation of resources in a market with a condition that the market is 'contestable' in that there are no barriers to entry or exit from the market.'²² The number of firms is insignificant in this theory as it emphasizes the existence of competition in a market, regardless of its level, which could be achieved by

¹⁸ Ibid, p8.

¹⁹ See John Maurice Clark, *Towards a Concept of Workable Competition* 30 American Economic Review (1940).

²⁰ Ibid, p242.

²¹ Jones & Sufrin (n 11) ch2, p24.

²² Whish & Bailey (n 1) ch1, p17.

'hit and run' entry into the market. In practice, this theory has been used in the case of *CHC Helicopter Corporation/Helicopter Services Group ASA*.²³ The UK Competition Commission²⁴ in this case cleared a merger which would otherwise create a duopoly in helicopter services based on the finding that the market was contestable. The Commission found that there would be constraints in the market by potential entry and this would prevent the two parties from raising their price.²⁵

Another 'concept' of competition that has gained much attention and widely accepted in the EU is effective competition. It connotes the idea that undertakings must be subject to a reasonable degree of actual and potential competitive constraints from the competitors as well as the customers and that the authority must ensure that the constraints remain in the market.²⁶ Effective competition is not based on any competition theories or models but has been expressed in many EU documents. Article 2(3) of the EU Merger Regulation provides that 'a concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position shall be declared compatible with the common market.'²⁷ The General Court (GC) in the case of *GlaxoSmithKline Services Unlimited v. Commission*²⁸ referred to the competition stated in Article 3(1)(g) EC²⁹ and Article 101 of the TFEU as 'effective competition, that is to say, the degree of competition necessary to ensure attainment of the objectives of the Treaty'. According to Bishop and Walker, 'the maintenance of "effective competition" lies at the heart of EC competition law'.³⁰ The 'economic goal of EU competition law is the protection and promotion of effective competition and that what matters are the outcomes

²³ UK Competition Commission, Cm 4556 (2000); See also Alison Oldale 'Contestability: The Competition Commission Decision on North Sea Helicopter Services', (2000) 21 *ECLR* 345.

²⁴ The UK Competition Commission together with the Office of Fair Trading were replaced with the UK Competition Market Authority in 2000.

²⁵ See Charles River Associates (CRA) Competition Memo, 'The CC Decision on North Sea Helicopter Services', April 2000.

²⁶ Whish & Bailey (n 1) ch1, p17.

²⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L/24 8 (EU Merger Regulation).

²⁸ [2006] ECR II-2969, para 109.

²⁹ Since the Lisbon Treaty this provision is found in Protocol 27 on the Internal Market and Competition

³⁰ Simon Bishop & Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, (University Edition, Sweet & Maxwell, 2010) p6.

for consumer that competition in a particular market delivers and not a particular forms that the competition process takes.’³¹

2.4 Schools of Competition Analysis – Harvard School, Chicago School and Post-Chicago School

The debates on the theories and concept of competition by prominent economists had started as early as 1930s in the work of E.S. Mason³² which was later resumed by his pupil J.S. Bain in the 1950s.³³ Their work was later known as the Structure-Conduct-Performance paradigm or the Harvard School’s view which holds that the structure of the market determines the way firms behave which subsequently determines market performance such as profitability, efficiency, technical progress and growth. This means that market performance is determined by the industry structure. This view was said to be made not on a theoretical basis but through flawed empirical studies.³⁴ Despite that, some economists still hold that structure plays an *important* role in the ability of a firm to act anti-competitively. As Hovenkamp puts it, ‘Antitrust without structural analysis has become impossible, thanks largely to the S-C-P writers. To be sure, they may have gone too far in emphasizing structure over conduct, but that is a question of balance, not of basic legitimacy’.³⁵

The view of the Harvard School was criticised by the Chicago antitrust theory, famously known as the Chicago School, whose views originated from a group of Chicago economists, a school of neo-classical, libertarian and free market economists in the 1960s.³⁶ This view states that market participants act rationally to achieve profit maximisation and any defects in the market are self-correcting. It places trust in the market and therefore there is no need for the government or competition law to intervene,

³¹ Bishop & Walker (n 30) ch2, 20-21.

³² Edward Sagendorph Mason, *Economic Concentration and the Monopoly Problem*, Harvard University Press (1957).

³³ Joe Staten Bain, *Barriers to New Competition*, Harvard University Press (1956) and *Industrial Organization* (2nd edn, Wiley, 1968).

³⁴ This criticism was led by the Chicago School, another school of thought on competition theories that originated partly from the school of neo-classical, libertarian and free-market economics; See Richard Posner, ‘The Chicago School of Antitrust Analysis’ (1978) 127 *University of Pennsylvania Law Review* 925.

³⁵ Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (4th edn, West 2011) 45.

³⁶ Ibid.

as the market is self-correcting and efficient. The fundamental view of this school is that the pursuit of efficiency as defined by the market should be the ultimate objective of competition law.³⁷ According to the Chicago School, as summarised by Hovenkamp, most markets are competitive and high market concentration as well as product differentiation are not considered as anti-competitive and that the harmful effects of monopoly are self-correcting as the monopoly's high profit naturally attracts new entrants to the market which in turn erode the monopoly's position.³⁸ Further, barriers to entry are the ones created by the government and it would be best to leave entry and exit unregulated.³⁹ The business firms are profit maximizers and even if they are not, the profits and the market shares of these firms grow at the expense of other firms in the market and antitrust enforcement should only be applied wherever there is inefficiency.⁴⁰ The Chicago School's view has been criticised for being highly theoretical and too simplistic as the neoclassical market efficiency model used as their foundation is too simple to account for the real world.⁴¹

After the Chicago School, Post Chicago School scholars emerged who acknowledged that while economists may be able to anticipate or indicate the questions in economic enquiries they may not always have the solutions. This school of thought stresses the effects of firms' strategic behaviour in different market situations. It relies on game theory to examine how firms may indulge in strategic entry deterrence.⁴² For instance, predatory pricing which is regarded by the Chicago School as rarely rational conduct is viewed by the Post-Chicago School in certain circumstances as a rational strategy to prevent entry to the market. It admits more complexities in competition but is also criticised of being overly theoretical. Different from the previous school of thought, this School also emphasises the significance of the theory of dynamic competition. The latest edition of the Chicago School-related-theory is the Neo-Chicago which takes the criticism put forward to their predecessor and presents a newly and intellectually

³⁷ Jones & Sufrin (n 11) ch2, p14-20.

³⁸ Herbert Hovenkamp, 'Antitrust Policy After Chicago' [1985] *University of Michigan Law Review* 213, 226-229.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Over time, some have argued that there has been no particular or obvious difference between the views of the Harvard School and the Chicago School as the basis upon which their argument relied upon is similar: Thomas A Jr Piraino, 'Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century' [2007] 82 (2) *Indiana Law Journal* 82.

⁴² Jones & Sufrin (n 11) ch2, p20.

reinvigorated Chicago.⁴³ It is cautioned that these US-based theories should not be considered rigidly as it tends to distort the understanding of the law itself particularly in its relationship with the EU antitrust policy.⁴⁴ It is also true that there has been some recent reassessment of the Chicago School approach in the context of the application of competition law to the abuse of market power in digital markets.⁴⁵ This is a question that has also occupied the EU.⁴⁶

2.5 Competition and the Airline Industry

The historical development of the US airline industry best illustrates the way competition emerged and influenced the development of the industry worldwide including the EU. In earlier days, the airline industry was primarily dominated by nation states and largely controlled by government regulations. Most airlines were state airlines and heavily subsidised by the governments. It was in the 1930s that airlines were seen to provide a market for aircraft, assist a country's aeronautical capacity and promote political influence internationally.⁴⁷ Specifically, competition in the aviation sector started in 1978 in the US when the US Air Deregulation Act was introduced. Prior to this, the US Congress had passed the Air Commerce Act in 1926 which was responsible for the regulatory tasks of the civil air transport. In 1938, through the US Civil Aeronautics Act, the civil aviation responsibility was transferred to an independent body known as Civil Aeronautics Administration (US CAA) which was governed by the Civil Aeronautics Board (CAB). The CAB was mainly created to protect the public and maintain the order of the rapidly overgrowing commercial aviation as well as to protect the existing airlines from destructive competition.⁴⁸

⁴³ David S Evans & Jorge Padilla, 'Designing Antitrust Rules of Assessing Unilateral Practices: A Neo-Chicago Approach' (2005) 72 *University of Chicago Law Review* 7.

⁴⁴ Jones & Sufrin (n 11) ch2, p21.

⁴⁵ Lina M. Khan, 'Amazon's Antitrust Paradox', 126 *Yale L.J.* (2016).

⁴⁶ Jacques Crémer, Heike Schweitzer and Yves-Alexandre, 'Competition Policy for the digital era', Available at <<http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> last accessed 15 July 2019.

⁴⁷ David Sawers, 'Competition in the Air – What Europe Can Learn From USA' (1987) The Institute of Economic Affairs, Westminster, London p11.

⁴⁸ John E Robson, 'Airline Deregulation: Twenty Years of Success and Counting' (1998) Regulation. Spring, p17. It was observed then that dealings with the CAB on new routes and frequencies of existing routes by the incumbent and new airlines at that time were highly bureaucratic and inefficient.

In 1958, the Federal Aviation Act was passed and the Federal Aviation Administration (FAA) was established to replace US CAA. US CAA however retained the regulatory tasks of determining the airlines routes and overseeing fares but the responsibility to set the aviation regulations was given to the FAA. The FAA was also given the sole responsibility for US civil and military systems for air navigation and air traffic control. Under the FAA, the CAB was required to immunize transactions that were found to be in line with the public interest and airlines were fully protected from the market forces and were governed by internal regulatory politics.⁴⁹ The civil aviation was tightly regulated by the CAB until 1978 where private interests influenced the licencing and regulatory capture was evident. The airlines were assured of the orderly and profitable dividing up of routes with little opportunity for new entry.

Policymakers gradually came to the realisation that the airlines could serve the consumers better without an intrusive regulatory structure and market forces were introduced as the arbiter of fares and service. Regulatory capture was gradually removed as regulators moved from 'puppets to puppeteers'.⁵⁰ The major change to the industry structure came in 1978 when the US Congress passed the Air Deregulation Act (ADA). After 40 years of extensive regulation in the commercial airlines industry, the US Congress made a fundamental change in its regulation of interstate and overseas air transportation which placed primary emphasis on competition.⁵¹ This Act withdrew government control from civil aviation and exposed the airlines to market forces. As a consequence, no prior approval was needed from the CAB for the US airlines to enter into any interstate city pair. Further, the airlines were left on their own to defend their market territory and economic integrity.⁵²

The impact of this deregulation was huge as for the first three years of its implementation nearly all the US carriers which once had strong financial standing suffered heavy losses.⁵³ This had a major effect on the global airline industry. Airlines sought mergers, successive acquisitions and others became bankrupt. The large carriers

⁴⁹ See US FAA at <<https://www.faa.gov/about/history/>>last accessed on 28 June 2019.

⁵⁰ Steven Truxal, *Competition and Regulation in the Airline Industry - Puppets in Chaos* Routledge, Taylor & Francis Group (2012) Ch2.

⁵¹ *Alaska Airlines v Brock* 480 US 678 (1987) at 681.

⁵² Truxal (n 50) ch3.

⁵³ George William, *The Airlines Industry and the Impact of Deregulation* (Aldershot: Ashgate, 1993) p49.

began to form tactical alliances by entering into the code share agreements with smaller commuter airlines to improve connectivity and overall efficiency.⁵⁴ Following the ADA, the US air transport industry became a market driven industry in which consumer demands determined the level of output in the form of air service products and prices. In response to the ADA, other segments of the aviation sector such as the complementary and essential infrastructures in the airports and air traffic control system remained under the heavy control of the government. There was a move from a pre-deregulation point-to-point to the more efficient hub-and-spoke system which was said to have originated in the US deregulation. The other wave was the emergence of the low cost carriers (LCC) with the creation and success of Southwest Airlines in the 1990s and the development of smaller regional jets. It is important to note that some areas of aviation are still regulated like the air traffic agreement between foreign countries known as bilateral service agreements.

In the UK, various attempts had been made as early as 1960 to introduce competition on domestic routes through the implementation of licensing policies by the UK Civil Aviation Authority (UK CAA).⁵⁵ In the EU, Member States initiated liberalization efforts in the mid-1980s. The strategic behaviours of the airlines as well as the regulators had been influenced by the US experience.⁵⁶ Similar to the pre-deregulation era in the US, the EU's pre-liberalization's aim was to protect the scheduled public owned flag carriers from competition which restricted market entry on both domestic and international routes and increased monopoly power. The first liberalization attempt was in 1987 and in 1993 the 'Single European Aviation Market' was fully realized. The first step of liberalization started with the unrestricted entry of airlines into intra EU markets subject to competition regulation under the Treaty on the Functioning of the European Union (TFEU) of anti-competitive agreements and the abuse of a dominant position which affect the interstate trade. The strict regulatory regimes during the pre-liberalization era in the US and the UK air transport industry have been heavily criticized as being a hindrance to industry efficiency. The economic regulation was based on the principle that the industry

⁵⁴ Bijan Vasigh, Ken Flemming and Thomas Tacker, *Introduction to Air Transport Economics: From Theory to Applications* (2013) p166-171.

⁵⁵ Peter S Johnson, *The Structure of British Industry* (London Routledge, 1988), p293-294.

⁵⁶ William (n 53) ch2.

required government control of prices and entry to ensure stability and longevity for the benefit of the public due to market failure.⁵⁷

It is evident that deregulation and liberalization are responsible for making the industry highly competitive.⁵⁸ The number of airlines entering into horizontal and vertical cooperative agreements to increase competitiveness and economic efficiency has shown a significant rise. Airlines have devised and adopted many tactical and strategic commercial cooperative arrangements with the express objectives of increased competitiveness and economic efficiency such as global alliances, franchising, joint ventures, codeshare and block space agreements, ground handling services and aircraft maintenance.⁵⁹ Though these airlines alliances prove to be an important means for airlines to remain competitive in an increasingly crowded industry, they also raise serious anti-competitive issues which need to be regulated.

2.6 Regulation, Globalization and Competition

In understanding why competition needs to be regulated, it is inevitably important to first understand the theories and the concepts of regulation. Regulation has always been defined and understood as part of governmental activities to control certain undesired behaviours in a community.⁶⁰ Beyond that, regulations should be understood in a more useful sense; as a specific set of commands promulgated to enforce certain rules by a specific devoted body; as deliberate state intervention designed to influence business or social behaviour; and as all forms of social and economic influence where all mechanisms affecting behaviour are deemed regulatory.⁶¹ The concept of regulation is not only to restrict or prevent undesired behaviour but also to enable or facilitate more effective and efficient behaviour.⁶² Therefore, it is pertinent to understand the main regulation theories; the public interest theory that claim regulations are made in pursuit

⁵⁷ M Armstrong & D Sappington, *Recent development in the theory of regulations* (Handbook of Industrial Organization, Oxford, North Holland 2007) p3.

⁵⁸ The history and development of air transport in Malaysia and the EU are provided in Chapter 3.

⁵⁹ Truxal (n 50) ch2, p119.

⁶⁰ R Baldwin & M Cave, 'Understanding Regulation – Theory, Strategy and Practise', (Oxford University Press, 1999) Part I, ch3.

⁶¹ Ibid, p2.

⁶² These are the concepts of 'red lights' and 'green lights' rules and regulations as discussed by C Harlow and R Rawlings, *Law and Administration* (3rd edn, Cambridge, 2009), ch2 and 3; See also Anthony Ogus, *Regulation - Legal Form ad Economic Theory*, (Oxford-Portland Oregon, 2004).

of public interest-related objectives; the private interest theory that believe regulations are made by pressures of certain business group to maximize profits and stabilize market; and the institutional interest theory that claim institutional structure is responsible to shape the regulations.⁶³ There is also the interest group theory which influences the making of regulation based on specific interests of a certain group and the force of ideas theories.⁶⁴ According to Baldwin and Cave,⁶⁵ among the motives to regulate are to counter the tendency to raise prices in the case of monopolies and natural monopolies and also to prevent anti-competitive behaviour. Others include dealing with windfall profits, externalities, information inadequacies, continuity and availability, public goods and moral hazard, unequal bargaining power, scarcity and rationing, distributional justice and social policy, rationalization and coordination and planning.⁶⁶

In implementing and enforcing the regulations, one needs to give serious consideration to the appropriate regulatory strategies to be adopted. This is an important aspect of regulation so as to enable the objectives of regulations to be achieved. The regulatory strategies include the use of command and control, self-regulation, incentive-based regime, market-harnessing control, disclosure regulation, direct action and rights and abilities. For competition in the air transport sector, market-harnessing control may seem to be appropriate to channel the market forces. Competition laws may be used to sustain a certain level of competition or prevent anti-competitive behaviours and unfair practices and to ensure at the same time that consumers are provided with adequate goods and services. The level of intrusion into a firm's internal decisions could also be minimized compared to the use of the commands and control which are normally backed up by criminal sanctions.⁶⁷ The implementation and the enforcement body of the competition regulations differ from one jurisdiction to the other. There could be a self-regulating body which regulates matters internally or the law could be implemented by the Parliament, local authorities, central government departments, regulatory agencies or courts and tribunals. In air transport, considering its nature that involves international boundaries and specific technical expertise, a regulatory agency may be appropriate to

⁶³ Ibid.

⁶⁴ Baldwin & Cave (n 60) ch2.

⁶⁵ Ibid, Part I, ch2.

⁶⁶ Ibid, Part I, ch4.

⁶⁷ Ibid.

implement the regulations. An independent regulatory agency has the advantage of being able to combine several functions: to adjudicate freely without the taint of political influence and to develop their own expertise. Nevertheless, a close monitoring in the carrying out of the multiple functions is required as it has the tendency to reduce performance of the agency as a whole.⁶⁸

2.7 Conclusion

This chapter establishes the theories and concept of competition from the economic point of view and the debates on the appropriate approaches to the regulation of the market. The concepts of perfect competition and monopoly, though not in existence in practise, provide a benchmark for how competition should be best achieved in the market. The concepts of workable, contestable and effective competition have been based on these ideas. Theories of competition regulation such as the Chicago School, Harvard School and Post-Chicago School, though they originated in the US, have greatly influenced the way competition policies and laws are being drafted, interpreted and implemented worldwide. The emergence and the development of the liberalisation and deregulation in the US airline industry have provided some insights on why and how the industry has become highly competitive. In the face of greater uncertainty and reduced profitability following the liberalisation airlines have sought to increase and consolidate through the international alliances. Airline cooperation activities have drastically increased which have in turn raised competition law issues. The study on the various roles of regulations have shown that these concerns can be resolved by having a proper strategy in the implementation of the competition regulations in the industry. Thus, this chapter provides the basic understanding on the theories of competition and the importance of such regulations in the airline industry.

⁶⁸ Ibid, Part I, Ch5.

CHAPTER 3—THE MALAYSIAN LEGAL SYSTEM AND THE COMPETITION REGULATION IN THE AIRLINE INDUSTRY

3.1 Introduction

This chapter investigates the historical background of the airline industry in Malaysia, and the development of the competition law and policy in the industry. First, the political economy of the country is described, along with the country's pertinent economic development plans. It is followed by the history of the aviation industry, in which the development and the current overview of the airline industry is highlighted. The chapter then explores the development of the competition law in the airline industry, by first setting out the Malaysian legal system, the circumstances leading to the drafting of the competition laws and policies and the application of the law in the airline industry. The chapter continues by discussing Malaysia's commitment at regional level, as a member of ASEAN. Finally, the application of the competition law in the European airline industry is considered by discussing the competition provisions under the TFEU.

3.2 The Malaysian Airline Industry

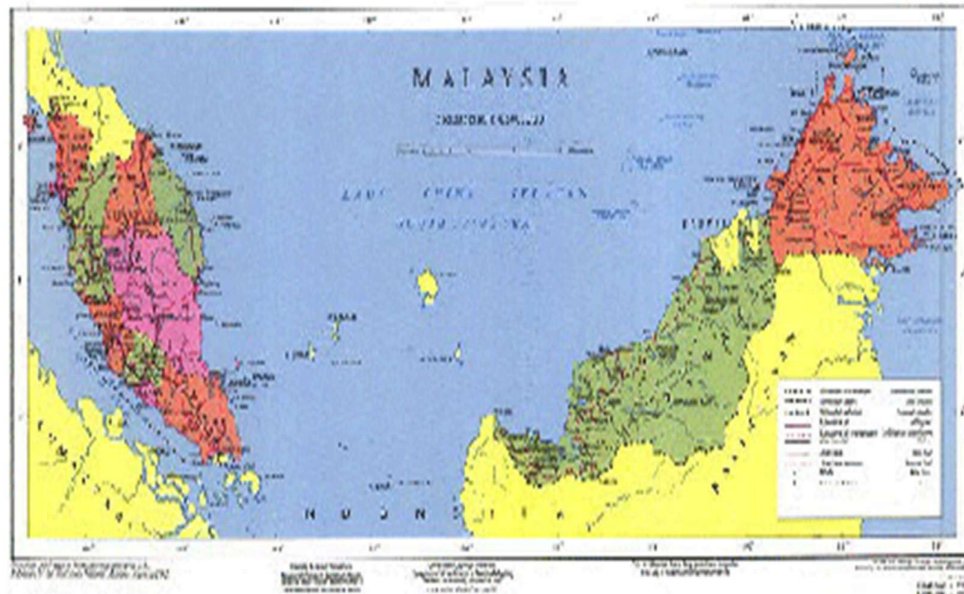
3.2.1 Overview of the Malaysian Political Economy

Malaysia comprises two distinct regions, namely West Malaysia (also known as Peninsular Malaysia, consisting of eleven states; Johor, Melaka, Negeri Sembilan, Selangor, Perak, Melaka, Penang, Kedah, Kelantan, Terengganu, Pahang), and East Malaysia (two states; Sabah and Sarawak) (*Figure 1*). These are separated by the South China Sea. Geographically, it is situated in Southeast Asia, which starts from the border of Thailand in the north to the Straits of Johor in the south, separating the Peninsular Malaysia from Singapore. Malaysia is a multiracial country comprising three main ethnic groups: the Malays, Chinese and Indians with the total estimate population of 32.4 million in 2018, showing an increase of 0.4 million, the equivalent of 1.2 per cent population growth compared to 32 million in the previous year.¹ The

¹ Government of Malaysia, Department of Statistics Malaysia; Available at <www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=155&bul_id=c1pqTnFjb29HSnNYNUpiTmNWZHArdz09&menu_id=L0pheU43NWJwRWVSZkIWdzQ4TlhUUT09> accessed 26 Feb 2019.

Malays, and other indigenous people in the West Malaysia such as the Dayaks, Ibans and Penans—who are regarded as the *Bumiputera* (people of the soil)²—from 69.1 per cent of the population, followed by the Chinese at 23.0 per cent, the Indians at 6.9 per cent, and other races at 1 per cent.³

Figure 1: The Administrative (Political) Malaysian Map



Source: Department of Survey and Mapping, Government of Malaysia

Malaysia is a small developing country which strives for an open economy. The country's GDP is approximately USD357.3 billion (at 2018). The country's GDP per capita is at USD9,482 million, causing it to fall into the middle-income country class. Basic statistics for the Malaysian economy can be found in *Figure 2 2* below.

² The term 'Bumiputera' is a Malaysian language term used to describe the indigenous Malay race and other indigenous in Malaysia, whose interests and positions are protected under Article 153 of the Federal Constitution.

³ Government of Malaysia, Department of Statistics Malaysia; Available at <www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=155&bul_id=c1pqTnFjb29HSnNYNUpiTmNWZHArDz09&menu_id=L0pheU43NWJwRWVVSZkIWdzQ4TlhUUT09> accessed 26 Feb 2019.

Figure 2: Malaysian Economy between 2016–2019

	2016	2017	2018	2019
Population (million)	31.6	32.0	32.4	33.3
Labour force (million)	14.7	15.0	15.3	15.6
Employment (million)	14.2	14.5	14.7	-
Unemployment Rate (%)	3.4	3.4	3.3	3.3
Nominal GDP (USD billion)	307.2	337.8	357.3	382
Nominal GNI (USD billion)	298.7	328.8	347.1	371.7
Real GDP growth rate (%)	4.2	5.9	4.8	4.9
GNI Per Capita (USD)	9,117	9,557	10,718	-
GNI Per Capita PPP (USD)	6,714.9	7,151.8	-	-
Inflation (% p.a.)	2.1	3.7	1.5 – 2.5	2.5 - 3.5
Merchandise exports (USD billion)	196.5	208.8	231.3	253.2
Merchandise imports (USD billion)	174.4	208.8	217.15	225.9
Current account of BOP (% of GNI)	2.5	3.1	2.5 -3.0	2.0 – 2.5
Exchange rate (RM/USD)	4.148	4.300	4.006	4.11

Source: Malaysian Economy in Figures, Economic Planning Unit, Malaysia 2019

Prior to independence,⁴ Malaysia's economy was centred on resource-based development, namely tin-mining and rubber cultivation, which was mainly controlled by the British, and to a certain extent the Chinese.⁵ The export of these two resources has been very important and attracted much foreign investment.⁶ The colonial period saw a manipulation of the country's economy to the advantage of the British. The Chinese and Indian immigrants were brought to the country; the Chinese were made to work in mining and trade, while the Indians were used the plantation sector, leaving the local Malays in the undeveloped rural areas. This resulted in the close identification between race and economic functions, in which many of the country's existing economic and political problems are rooted.⁷

⁴ Malaysian gained its independence on 31 August 1957.

⁵ Edmund Terence Gomez & Jomo Kwame Sundaram, *Malaysia's Political Economy - Politics, Patronage and Profits*, Cambridge University Press (1999) Ch2 p10.

⁶ See also John H Drabble, 'The Economic History of Malaysia', EH.Net Encyclopedia, edited by Robert Whaples, July 31, 2004. Available at <<http://eh.net/encyclopedia/economic-history-of-malaysia/>>accessed on 26 Feb 2019.

⁷ See also Jomo Kwame Sundaram, 'Malaysia's New Economic Policy and National Unity', *Third World Quarterly*, Vol 11 No 4 *Ethnicity in World Politics* (Oct 1989) p36-53.

The approach and philosophies of the country's economic policies and development plans have since then been heavily based and shaped by its colonialization, open economic policy, multiracial background, and federal system of the government. These can be seen through the many phases of the country's economic development. The first is the post-independence phase where the government's role was limited to providing infrastructure, and made minimal intervention in the economy.⁸ The focus on industrialization as a national economic goal during this period tended to create larger companies, which could take advantage of economies of scale, but this also created a potential monopoly market structure which was protected by a tariff wall.⁹ The second phase which covers the period from 1970–1990 saw a huge gap in the division of wealth between the races, especially those involving the Malays and the Chinese.¹⁰ The racial tension influenced and changed the landscape of the country's economic policy. As a result, an extensive interventionist long-term development policy, the 'New Economic Policy' (NEP) was adopted. It aimed at eradicating poverty, as well as redressing the economic imbalance between the major races in the country,¹¹ eliminating the identification of races based on economic functions.¹²

⁸ Nasarudin Abdul Rahman & Hanif Ahamat, *Competition Law in Malaysia* (Sweet & Maxwell, Thompson Reuters 2016) p23. Some of the major socio-economic problems during this period were a high rate of population increase, and uneven distribution of income. Following this period, a strategic approach was taken to overcome slow economic growth, and an import substitution policy implemented to enlarge the industrial base. This stage witnessed the government's intervention in the market, in order to encourage foreign investments in the economy through the provision of various tariffs and incentives. This approach, however, failed to generate more employment, and led to another export-oriented industrialization policy being introduced which aimed to promote and develop the manufacturing industry.

⁹ Ibid, p 24.

¹⁰ During the country's first general election in 1969, the ruling coalition Alliance Party won by less than half the majority vote, and the opposition parties, who were mainly dominated by the Chinese communities, provoked the Malays to give up their political power. This exacerbated racial tensions, leading to a riot on 13th May 1969, as a result of which the government declared a state of national emergency.

¹¹ Government of Malaysia, Second Malaysia Plan, Chapter 1—The New Development Strategy; The New Economic Policy was the main focus of the Malaysia's First Outline Perspective Plan which covered the period of 20 years (1971-1990).

¹² Ibid, p 1. This policy caused the government to participate more directly in the establishment and operation of productive enterprises: specific targets were set for ownership and employment in the commercial and industrial sectors by the *Bumiputera*, in which the *Bumiputera* were given a 30 per cent share in the modern economy sector. The government also enacted the Industrial Coordination Act 1975 (ICA 1975), which required a minimum threshold in the size of employment and paid-up capital for manufacturing firms to apply for operating licenses from the government. The ICA 1975 was initially used to control the entry into the industry, so as to ensure compliance with the objectives of the NEP on ownership and employment. This era also witnessed the emergence of government-linked companies such as Permodalan Nasional Berhad (PNB)—the government's investment arm company in 1978, and Perusahaan Otomobil Nasional (PROTON)—the first national automobile enterprise in

The third phase of the country's economic development, covering the period 1990–2000 involved the implementation of a new National Development Policy (NDP): a pro-development policy which was adopted to improve the NEP.¹³ The NDP encouraged private sector participation in the economy, but government intervention was still required, especially in supporting the involvement of the *Bumiputera* in the commercial and industrial sector.¹⁴ This phase also saw the implementation of the Malaysia Incorporated Policy¹⁵ and the Privatisation Policy.¹⁶ Although it was expected to improve the efficiency, and thus reduce the monopolistic market structure, in reality, the privatisation policy had transferred public monopolies to private hands.¹⁷ The final

1983. Although the implementation of the NEP raised the living standard of the *Bumiputeras*, it also resulted in more economic powers in the hands of the state.

¹³ Government of Malaysia, Sixth Malaysia Plan, Ch 1—Policies Objectives and Framework.

¹⁴ Government of Malaysia, Seventh Malaysia Plan, Ch 7—Privatisation.

¹⁵ The Malaysia Incorporated Policy adopted the idea that the nation is a corporate or business entity, jointly owned by both public and private sectors, which work together towards pursuing a common mission of the nation. Several mechanisms were introduced to achieve these objectives, including the deregulation of bureaucratic rules and regulations, the improvement of the delivery system, the institutionalization of the consultative machinery, and the establishment of a smart partnership between the public and private sectors. See; <www.mea.gov.my/en/policies/key-policies>accessed on 28 June 2019.

¹⁶ See <www.mea.gov.my/ms/dasar-utama/dasar-penswastaaan>accessed on 28 June 2019.

¹⁷ Nasarudin & Hanif (n 8) ch3, p27; See also Jeff Tan, 'Privatisation in Malaysia: Regulation, rent seeking and policy failure', Routledge, Taylor & Francis, 2008. Privatisation in Malaysia was introduced to deal with the under-performance of state-owned enterprises (SOE). SOEs first emerged in Malaysia during the British colonization, where SOEs were used to provide for utilities and infrastructure for the country. After the Japanese occupation in 1945, more SOEs were established for the purpose of rural development and as part of their effort to motivate and stimulate the Malay interests in the business sector against the prevailing Chinese dominance in the industry and trade at that time. After independence in 1957, SOEs were established to support the government's import substitution policy, as efforts for the development of rural areas intensified. In the 1960s, as the policy shifted to the expansion of the export industry, government agencies focussed on providing infrastructure and facilities to attract foreign investment in the country. With the introduction of the NEP, all existing and newly created SOEs were directed towards the purposes of the country's new economic policy objectives: national unity and the reduction of poverty. The NEP was said to have mainly focused on increasing the ownership shares of Bumiputera from two point four per cent to 30 per cent in 1990. The discovery of petroleum reserves in the 1970s had also contributed to the expansion of SOEs, as the government was able to increase its public spending. The country's SOEs were spread across various sectors, ranging from finance, services, and manufacturing—and due to the federal system of government, most SOEs were held equally by federal and state government. State SOEs were mostly involved in the primary sectors, such as agriculture, extractive industry and plantation; federal SOEs were more engaged with transport and finance sectors. These federal SOEs were said to be highly capitalized and incurred considerably larger debt.¹⁷ The poor performance of the SOEs were mainly attributed to unclear and conflicting objectives, lack of coordination and monitoring between the federal and state government. The overall weak performance of SOEs had considerably accelerated the introduction of privatisation in Malaysia in 1983. Generally, privatisation involves the transfer of public ownership to private hands, and can involve the transfer of 100 per cent stake of a public company to a private company. In Malaysia, most privatisations involve the transfer of less than half of assets or shares of the SOEs to private shareholders. Some of the first government-linked companies that were privatised include Kelang Container Terminal (KCT), Kuala Lumpur Light Rail Transit (KL LRT), the national car manufacturer known as Proton Automobil Nasional (PROTON), the national air carrier, MAS,¹⁷ the Postal Services Department, the Telecommunication Department now known as Telekom

phase covers the period 2000–2020, and includes the country's on-going economic policy: the Vision 2020 and the New Economic Model (ENM). This era acknowledged the importance of market competitiveness in Malaysia in its key economic policies and development plans. The Eight Malaysia Plan, for instance, forewarned the country of the many challenges presented by globalization and liberalisation. The plan emphasized the need to enhance the competitiveness of the economy, to strengthen economic resilience and to improve overall productivity.¹⁸ The plan also recognised the importance of having fair trade laws and policies, so as to better respond to the changing patterns of trade and investment arising from the increasingly competitive global economy. The prevention of anti-competitive behaviour such as collusion, cartels, price fixing, market allocation and the abuse of market power is central to a fair and free trade policy.¹⁹ These political scenarios had a great influence on the domestic economy.

3.2.2 The History and Development of the Airline Industry

As a British colony, together with Singapore, Malaysia's initial development of civil aviation was very much influenced by the British and the development of aviation in Europe in the early 20th century.²⁰ Aviation development was pertinent for colonialists at that time, wanting to expand their empire and establish close ties with their colonies around the world.²¹ In 1924, the British established an airline called

Malaysia Berhad (TM), the Works Department now known as Tenaga Nasional Berhad (TNB), and the national sewerage company now known as Indah Water Konsortium (IWK). These were followed by the passenger railways services now known as Keretapi Tanah Melayu Berhad (KTMB), television broadcasting services, various highways projects and hospital support services. Privatisation in Malaysia would usually start with the corporatization of government agencies or the incorporation of a limited company under the Companies Act 1965, whereas the privatisation of government companies often involved the transfer of share ownership from the government to the private sector without any change in the legal entity of the companies. Following the Asian financial crisis in the late 1990s¹⁷, many privatised companies have been re-nationalized; this includes MAS, IWK, KL LRT and PROTON. It was claimed that despite the extensive privatization that has taken place, regulatory reforms have lagged behind. The government, moreover, continued to be a major shareholder in many of the privatised incumbent entities, such as TM and TNB through the government vehicle company Khazanah Malaysia Berhad. Another feature of the Malaysian economy during this phase was industry consolidation, which involved the reduction of companies through mergers and takeovers. This mostly took place in the financial, communications and multimedia, and plantation sectors.

¹⁸ Government of Malaysia, Eight Malaysia Plan, Ch1—Policy Objectives and Framework and Chapter 16—Distributive Trade <<http://www.mea.gov.my>> accessed 28 June 2019.

¹⁹ Ibid, s16.32.

²⁰ K Raguraman, 'Airlines as instruments for nation building and national identity: case study of Malaysia and Singapore', (1997) 5 (4) *Journal of Transport Geography* 240.

²¹ Ibid, p240.

Imperial Airways, which was incorporated with the aim 'to service the empire'.²² On 16th April 1931, Imperial Airways made its first flight to Singapore on its mail carrier, and on 9th December 1933 Imperial Airways inaugurated its weekly scheduled services on the London–Singapore route, making stops in Cairo, Karachi and Calcutta.²³ Singapore had made itself a mini hub in 1934, by linking Imperial Airways from London to the flight operated by Qantas Empire Airways²⁴ to Darwin.²⁵ Imperial Airways continued to develop its routes from Malaya and throughout the world. The British then established the airline British Airways (BA) in 1935, quickly nationalised and merged with Imperial Airways in 1939, and the British Overseas Airways Corporation (BOAC) was formed as a result.²⁶ Imperial Airways established a presence in Malaya in 1933, when the airline's Armstrong Whitley Atlanta aircraft landed on the Sg Besi Airfield, Kuala Lumpur, Malaysia—probably the first commercial aircraft to have landed in the country.

The prominence of Singapore as a hub meant that the civil aviation administration originated in Singapore, with the formation of a Management Unit for Civil Aviation, headed by the Director of Public Works Department Singapore in 1935²⁷. Ten years later, in 1947, the Department of Civil Aviation (DCA) was formed in Singapore, which also governed the Malaysia's civil aviation.²⁸ In Malaysia, the DCA (now known as CAAM)²⁹ was first formed in 1953, and placed under the jurisdiction of the Ministry of Post and Telecommunications,³⁰ before being moved into the purview of the Ministry of Transport (MoT) in 1976.³¹ On 7th May 1958, Malaysia became a

²² Ibid, p241.

²³ Ibid, p241.

²⁴ Qantas Empire Airways Limited (now known as Qantas Airways Limited) is the Australia's largest domestic and international airline. It was established in 1934 by QANTAS Limited and Britain's Imperial Airways. The Australian Government is the sole shareholder of the company after it purchased the company shares in 1947. In 1967, the company changed its name to Qantas Airways Limited. Originally, the company was registered under the name of Queensland and Northern Territory Aerial Services Limited (QANTAS) and was said to be founded in 1920. See <<http://trove.nla.gov.au/people/783761?c=people>> and <<http://www.qantas.com/travel/airlines/history-through-the-years/global/en>>assessed on 28 June 2019.

²⁵ Raguraman (n 20) ch3, p241.

²⁶ Ibid, p 243.

²⁷ Ibid, p18.

²⁸ Ibid, p21.

²⁹ The DCA Malaysia is now known as CAAM. The DCA Malaysia was initially a government agency under the MOT and was recently corporatized in 2018 under the Civil Aviation Authority Malaysia Act 2017 and effectively known as CAAM on 19 February 2018.

³⁰ Raguraman (n 20) ch3, p21.

³¹ Ibid, p27.

member of the International Civil Aviation Organization (ICAO),³² a United Nations specialized agency established through the Chicago Convention on the International Civil Aviation 1944 (Chicago Convention), governing international civil aviation.³³ The overall responsibility for planning, formulating and reviewing the policies relating to the aviation industry in Malaysia lies with MoT.³⁴ These responsibilities include the granting of final approvals for the scheduled and non-scheduled flights, establishing airlines, negotiating and concluding Air Services Agreements (ASAs) entered into by the government,³⁵ and aviation project development. CAAM, on the other hand, is responsible for the technical regulations of the aviation industry, which include air traffic management, flight operations, airport standards, aircraft air-worthiness and aviation security.³⁶ The management of airports was originally the responsibility of CAAM, but with the passing of the Airport and Aviation Services (Operating Company) Act 1991 the responsibility was shifted to a private company, Malaysia Airports Holdings Berhad (MAHB), responsible for the operations, management and maintenance of all airports in Malaysia.³⁷ The aviation laws of the country include the Civil Aviation Act 1969, the Civil Aviation Regulations 1996, the Carriage by Air Act 1974, the Aviation Offences Act 1984, the Airport and Aviation Services (Operating Company) Act 1991, and the International Interest Act in Mobile Equipment (Aircraft) 2006. As a member of the ICAO, Malaysia is also party to several international aviation conventions.³⁸

³² Available at <www.mot.gov.my/en/aviation/ICAO-and-international-convention/members-of-ICAO>accessed 28 June 2019.

³³ A more detailed discussion of ICAO and its role are provided in the subsequent section.

³⁴ Available at <www.mot.gov.my/en/about-mot/history-mot>accessed 29 June 2019.

³⁵ The ASAs are the Government-to-Government agreements entered into by sovereign states to jointly regulate their international air services relationships including air traffic rights, code sharing and market access.

³⁶ Malaysian Civil Aviation Act 1969 and Malaysian Civil Aviation Regulation 2016.

³⁷ Available at www.malaysiaairports.com.my/about-us/corporate-profile/our-profile>accessed on 29 June 2019.

³⁸ Convention on International Civil Aviation (Chicago Convention 1944); Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention 1963); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention 1971); Convention on International Interests in Mobile Equipment 1971 (Cape Town Convention 1971); Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montreal Convention 1966); and Convention on the Privileges and Immunities of the Specialized Agencies 1947.

3.2.2.1 History, privatisation and renationalisation of MAS

MAS was the first national airline established in Malaysia. The country's aviation origins started from the idea of an internal air service in Malaya, first mooted by the Holt Group shipping company 1935.³⁹ In 1936, the British administration approved the establishment of Malayan Airways as a joint venture between the Imperial Airways Ocean Steamship Company of Liverpool, and Straits Steamship Company of Singapore.⁴⁰ At the same time, however, there was already a private company called Wearne Brothers which had been granted approval to carry out air services in Malaya, and this resulted in the suspension of the Malayan Airways.⁴¹ The Wearne Brothers operated only until the World War II, as it suffered losses during its last few years of operations. Malayan Airways then resumed its operation on 1st May 1947 as Malayan Airways Limited (MAL),⁴² a local joint venture between the Ocean Steam Ship Company, Straits Steamship Company and Mansfield Company. In 1948, BOAC acquired 10 per cent of MAL's shareholdings.

MAL's first scheduled services were on the Singapore–Kuala Lumpur–Ipoh–Penang route. In November 1947, MAL expanded its services from Bangkok and Sumatra, and in 1949, it began services to towns in Borneo, including Sibul and Labuan. In May 1953, MAL entered into an agreement with the Government of Borneo for the operation of feeder services⁴³ in North Borneo, and was said to play a significant role in the development of Borneo territories. MAL also facilitated the travel of government officials from various cities to rural areas. By 1950, there was already a comprehensive regional network by MAL out of Kuala Lumpur and Singapore across all the major settlements in Malaya and British Borneo. Just as Imperial Airways had successfully linked up the British with its colonies, the MAL was also seen as contributing towards the 'imagined political community' in Malaya, including

³⁹ Raguraman (n 20) ch3, p243.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² See also <www.malaysiaairlines.com/hq/en/about-us/our-story.html>accessed on 29 June 2019.

⁴³ ICAO Doc 9626, 'Manual on the Regulation of International Air Transport', Second Edition (2004), Chapter 5.3 defines a feeder service as '*an air service offered on regional routes that feeds traffic to major domestic or international services*' and Chapter 5.1 further explains that 'a feeder carrier operates short-haul services connecting small and regional points to a hub airport, generally using small to medium-aircraft'.

Singapore. In 1954, the MAL network included three international cities, 16 cities in Malaya and 11 cities in Borneo. During its first few years in operation, MAL suffered small losses but managed to recoup and made good profits thereafter.⁴⁴

By the mid-1950s, air transport in Malaya had already become a well-established mode of moving passengers, cargo and mail. This was evidenced in the increased number of passengers in Singapore's Kallang Airport, from 2,735 in 1937, to 183,023 in 1955. When Malaysia gained its independence in 1957, Singapore remained a British colony with British Borneo. Consequently, it was decided that MAL should become a public company and was given the exclusive rights for the operation of air services for the period of ten years. As a public company, MAL issued 550,000 new shares at USD10 each to increase its share capital from USD2.5million to USD8 million. BOAC and Qantas each acquired 33 per cent of MAL shares, and the remaining shares were divided among the government of Malaya, Sarawak, North Borneo, Brunei and Singapore. Although there was a disagreement about the BOAC's and Qantas' shareholdings in MAL (perhaps seen at the time that foreign participation would possibly take substantial control and ownership of a local airline), the two companies remained MAL's shareholders, due to their assistance and expertise. Their presence in MAL could divert government spending from providing substantial capital in air services to more urgent development needs and expenditures. Additionally, foreign airlines could also provide technical assistance including piloting, maintenance and engineering.

After being converted to a public company in 1957, MAL became more profitable, and its network had expanded to more than 20 destinations. When the new Federation of Malaysia was formed in 1963, including Sabah, Sarawak and Singapore, MAL was renamed Malaysian Airways Limited. When Singapore opted out of the Federation of Malaysia in August 1965, the shareholdings in MAL were reviewed, and as a result of which, the Federation and Singapore both held 33.74 per cent of MAL's shares by an agreement entered into in May 1966, also under which both BOAC and Qantas held 13.2 per cent each, and the remaining 6.12 per cent was shared among the Brunei, Straits Steamship, Ocean Steamship and the general public.

⁴⁴ Raguraman (n 20) ch3, p245.

Consequently, on 1st January 1967, MAL was again renamed Malaysia-Singapore Airlines (MSA), and it was seen to represent the two nations. In the succeeding years, Malaysia and Singapore developed different national and development interests, and the goals and priorities in air transport services of both countries varied. Malaysia focused on developing domestic needs for air transport services,⁴⁵ while Singapore was more interested in international links. The turning point of the MSA split came on 1st October 1972, when MSA was replaced with MAS and Singapore Airlines (SIA).⁴⁶ This also marked the establishment of the Malaysian's first national air carrier.

MAS was first corporatized in September 1985,⁴⁷ when some equity was sold to the Brunei government for USD43.5million, but the Malaysian government retained a significant interest through the Ministry of Finance Incorporated (MoFI).⁴⁸ Later in the year, MAS was public listed. In 1988, the Malaysian Central Bank (MCB) acquired a 32 per cent stake in MAS from the MoFI. The privatisation of Malaysia Airlines was needed to help finance the airline's expansion. In 1993, a private company, RZ Equities Sdn Bhd, acquired a 32 per cent stake in MAS from the MCB, and this portion was later acquired by the Malaysian Helicopter Services (MHS) in 1994. The acquisition was said to be fully financed by bank loans, the largest in the country with the most MHS shares were pledged. With the said acquisition, MHS owned 32 per cent of MAS' stake, the government of Malaysia owned 27.2 per cent, and a 'golden share'⁴⁹ was retained by MoFI. In the case of Malaysia, a golden share is normally retained by the government in the privatised company, so as to ensure the government's control over some strategic and significant decisions.⁵⁰ After a series of losses and mounting debt from 1998–2000, the MHS could no longer finance MAS.

⁴⁵ MAS has been heavily burdened by the public service obligations it carried since the time it was established. In fact, other new airlines have also been tasked with the public service obligation. Therefore, the MACA 2015 has provided for the provision of public service obligation which are being paid by a fund established in the Act. This is confirmed based during the interview conducted with the DGCA of Malaysia on 17 August 2017 (See Appendix 5).

⁴⁶ Raguraman (n 20) ch3, p246.

⁴⁷ Jomo (n 7) ch3, p38-40.

⁴⁸ Tan (n 17) ch3, Chapter 6, p139; Ministry of Finance Incorporated is a government investment company established under the Minister of Finance (Incorporation) Act 1957, See <<http://www.treasury.gov.my/index.php/en/contactus/faqs/gic.html>>accessed on 28 June 2019.

⁴⁹ A 'golden share' is a special right given or retained in a company that gives the holder the power to veto any important decisions of the company. The special rights will normally involve the decision to appoint board of directors or to overrule company's resolutions. It is commonly retained by a government to make sure that the company's operations are in line with the government's policies.

⁵⁰ Jomo (n 7) ch3, p18.

MAS also suffered some significant inherited problems in terms of operational inefficiency and institutional constraints. Following the MSA Split, MAS had been made to focus on unprofitable domestic routes and an ill-equipped fleet. While it operated solely in a monopolistic domestic market, the government had the final say over the domestic fares due to national integration. The creation of a golden share in the company also allowed the government to retain control. Given the challenges of the airline industry, which includes low profitability, high indebtedness, rising capital costs and overcapacity, evidence showed that privatisation was not feasible. Airlines need high margins and a guaranteed uptake (passenger load), but demand has always been uncertain. Historically, airlines have only been able to make profits in favourable circumstances, and the industry was marginally profitably between 1960 and 1990. It was said that the privatisation of MAS was '*...poorly structured, based entirely on loans and creating an unpayable debt burden which affected the owner's ability to finance the company*'.⁵¹ These issues led to the renationalisation of MAS in 2000. Following the losses and the rising debt, the government on 20 December 2000 signed an agreement for the purchase of MAS shares by the government of Malaysia through MoFI for USD41.4million.⁵²

The airline then struggled to cut costs to compete with new low-cost carriers such as AirAsia in the early 2000s. It has since suffered a series of large losses, particularly in 2011; MAS suffered losses amounting to USD1.7billion, cutting routes to some prominent long-haul destinations which proved to be unprofitable. It also began an internal restructuring, and sold out its engineering and pilot training units. The losses were also said to be due to poor yield management and an inefficient route network. Mismanagement was said to be the main internal issue in MAS, but other external factors (such as the high fuel price) had also contributed to its unprofitability. To make matters worse, in 2014, MAS lost two of its aircraft, both Boeing 777-200ERs. On 8th March 2014, the MAS flight MH370 from Kuala Lumpur to Beijing disappeared from the radar, and the wreckage still hasn't been found today.⁵³ MAS had not made a profit since 2010, but this tragedy saw a dramatic decline in ticket sales, while losses

⁵¹ Tan (n 17) ch3, p192.

⁵² Ibid, p140.

⁵³ See <<http://www.mh370.gov.my/index.php/en/>>assessed 7 Dec 2016.

were higher than ever. Additionally, MAS had to compensate families for family members on flight MH370, making their costs even higher. After just a few months from the MH370 incident, MAS lost another plane (flight MH17), routed from Amsterdam to Kuala Lumpur on 17th July 2014, after it was shot down near the Ukraine–Russia border.⁵⁴ This incident witnessed another decline, this time of 33 per cent of ticket sales, causing the company to sink even lower. While it was struggling with competitiveness for a while, the two major mishaps brought MAS to rock bottom. The loss of flights MH370 and MH17 have worsened the airline's economic position considerably. Prior to this double tragedy, MAS was already aware of the need to restructure the company's operations due to weak financial performance, and the two plane disasters only accelerated the need.

In 2015, in view of MAS's financial state, the Malaysian Airline System Berhad (Administration) Act 2015 (MASBA 2015) was passed. MASBA 2015 is a special law that provides for the administration of MAS, and its wholly and partially-owned subsidiaries under an administrator. MASBA 2015 also provides for the establishment of a new entity to replace the national carrier company. With MASBA 2015, MAS has now become Malaysia Airlines Berhad (MAB), with a new business model.⁵⁵ Recent history notwithstanding, MAS was reported to have recorded a profit in early 2016, its first positive monthly result in years, and was said to be on track to return to the profitability by 2018.⁵⁶ Revenue has improved, and costs are down, due to low jet fuel prices. The company's main problems were identified, and this included the unsustainable network of routes, high operating costs and old information technology systems. The Government recently, nevertheless, is seriously considering options to sell MAS but will retain the national carrier identity.⁵⁷ Today, Malaysia has several

⁵⁴ See <www.dca.gov.my/wp-content/uploads/2015/02/Preliminary-Report-MH17.pdf>assessed on 28 June 2019.

⁵⁵ Malaysian Airline System Berhad (Administration) Act 2015.

⁵⁶ See <www.travelweekly-asia.com/Travel-News/Airline-News/Malaysia-Airlines-on-track-to-profitability>assessed 29 June 2019.

⁵⁷ See StarOnline, 'Dr M: Govt okay with selling MAS, but wants its identity retained', 25 June 2019, available at <www.thestar.com.my/news/nation/2019/06/25/dr-m-govt-okay-with-selling-mas-but-wants-its-identity-retained/#l6617MrY8T43KcMo.99>accessed on 28 June 2019; Also <www.channelnewsasia.com/news/asia/malaysia-airlines-to-maintain-national-carrier-identity-even-if-11658792>last accessed 29 June 2019; <www.reuters.com/article/us-malaysiaairlines-decision/malaysia-to-decide-fate-of-malaysia-airlines-soon-pm-says-idUSKBN1QT0DO>accessed 29 June 2019; <www.bloomberg.com/news/articles/2019-03-12/mahathir-said-he-s-weighing-shutdown-sale-of-malaysia-airlines>accessed 29 June 2019.

scheduled passenger airlines as well as its national carrier, including AirAsia, AirAsiaX, Malindo Air, Firefly and MASWings.

3.2.2.2 Other airlines operating in Malaysia

Being the only national carrier that provided the air transport services for both the domestic and international market, MAS had been dominating the Malaysian airline industry since 1972. In 1993, almost 20 years later, AirAsia was incorporated by a national conglomerate known as DRB-Hicom, to be the second national carrier providing a full-service in the domestic market; although it didn't become operative until 1996.⁵⁸ A few years into operations, AirAsia suffered a huge loss, which resulted in its buyout by Tune Air Sdn Bhd⁵⁹ in 2001 for just USD0.26, with debts amounting to USD9.8million.⁶⁰ Thenceforth, AirAsia was transformed into Malaysia's first low-cost carrier, initially providing domestic services, and later expanding to the international market.⁶¹ This also marked the start of the many series of price war between MAS and AirAsia which the Government refused to intervene and regarded it as healthy competition.⁶²

2007 witnessed the entry of another three airlines into the market: AirAsia X, a subsidiary of AirAsia, a low-cost carrier established to provide long-haul services

⁵⁸ DRB-Hicom Berhad was formed in 2000 through a merger between two companies; Diversified Resources Berhad (DRB) and Heavy Industries Corporation of Malaysia Berhad (HICOM). It specializes in automotive industries and owns the national car manufacturer PROTON, the national motorcycle and engine company, Motosikal dan Enjin Sdn Bhd (MODENAS) and CTRM Sdn Bhd, a global supplier for aviation parts. See <www.drb-hicom.com/about-us/discover-us/>accessed on 29 June 2019.

⁵⁹ Tune Air Sdn Bhd is originally a leisure and entertainment company owned by entrepreneur Tony Fernandez, who is now the owner and biggest shareholder of AirAsia Group.

⁶⁰ Rizal Ahmad and Mark Neal, 'AirAsia: The Sky's The Limit', *Asian Journal of Management Cases* 3(1) (2006), p 26; Mok Kim Man and Jainurin Bin Justine, 'AirAsia In The Malaysian Domestic Airline Market: Empirical Analysis of Strategy', *International Business & Economic Research Journal*, Volume 4 No 12 (December 2005) p55; Hasrul Sani, Faizal Sufri and Amiruden, 'Globalisation Based on Air Asia Berhad', *The International Journal of Business & Management*, Vol 4 Issue 11, (November 2016) p176.

⁶¹ Rizal (n 59) ch3, p7-31;

⁶² See TheStar Online, 'DPM: Airline free to compete', Wed 20 Aug 2003, <www.thestar.com.my/news/nation/2003/08/20/dpm-airlines-free-to-compete/>accessed 29 June 2019; See also, Cassey Lee, 'Competition Policy in Malaysia', Working Paper Series, Centre on Regulation and Competition, Institute for Development Policy and Management, University of Manchester, Paper No 68 (2004) p 11.

mainly in the market of Asia Pacific Region;⁶³ then, FlyFirefly Sdn Bhd (Firefly), another low-cost carrier and wholly-owned subsidiary of MAS, offering short-haul services mainly in Indonesia, Singapore and Thailand;⁶⁴ the third entry into the market was MasWings Sdn Bhd (MasWings), another wholly-owned subsidiary of MAS, whose main focus was to provide scheduled services to rural areas in the East Malaysia.⁶⁵ By this time, there were already five airlines operating and providing multi-airline business models in the Malaysian airline industry. In 2012, MAS and AirAsia attempted to collaborate through a share swap arrangement which would result in the cross-holding of shares by both airlines in each other's companies but it was aborted following a complaint of anti-competitive practices by the public.⁶⁶ About six years later, as a result of a cooperative initiative between Malaysia and Indonesia, Malindo Airways Sdn Bhd (Malindo) was formed to provide premium schedule passenger services, catering mainly for regional destinations including Indonesia, Thailand, Singapore, Bangladesh, Pakistan Nepal, Sri Lanka and Australia.⁶⁷ Malindo Air's entry to the market made a huge impact on the market share of existing airlines, as it offered competitive scheduled passenger services for the domestic and international market in Malaysia. In terms of scheduled cargo airlines, two companies were providing service: Raya Airways Sdn Bhd (Raya Air), operating for the last 20 years, and MyJet Express Sdn Bhd (MyJetExpress).⁶⁸

3.2.2.3 Current overview of the structure of the airline industry

Since the early 2000s, the aviation industry in Malaysia has evolved tremendously. There are generally three main categories of players in the industry: the

⁶³ AirAsia X was initially known as Fly Asian Express, which started operation in the rural areas of West Malaysia. See <www.airasiax.com/corporate_profile.rev> accessed on 29 June 2019.

⁶⁴ See <www.fireflyz.com.my/about/company-profile>accessed on 29 June 2019.

⁶⁵ See <www.maswings.com.my/About-us>accessed on 29 June 2019.

⁶⁶ See BBC News on 'Malaysian Airlines and AirAsia scrap share swap deal', 3 May 2012, Available at <www.bbc.co.uk/news/business-17934467>accessed on 29 June 2019; This case is discussed further in Chapter 7.

⁶⁷ See <www.malindoair.com/about-us>accessed on 29 June 2019.

⁶⁸ Raya Airways Sdn Bhd was formerly known as Transmile Sdn Bhd, and has been operating as a cargo airline in the industry for almost 20 years. MyJet Express Sdn Bhd is also serving the cargo services.

air transport service providers,⁶⁹ the airport operators⁷⁰ and the ground handlers.⁷¹ The air transport service providers consist of scheduled and non-scheduled passenger and cargo airlines.⁷² There are currently six scheduled passenger airlines in Malaysia: MAS, AirAsia, AirAsia X, Firefly, MasWings and Malindo Air, and two scheduled cargo airlines: Raya Air and MyJet Express.⁷³ The non-scheduled airlines consist of companies offering services for on-demand charter and cargo, oil and gas, surveying, aerial work, and pleasure flying, and currently there are nineteen companies licensed to provide such services. The on-demand charter is the least concentrated sub-segment in this sector. Malaysia has six international airports: Kuala Lumpur International Airport (KLIA), Senai International Airport (SIAi), Penang International Airport (PIA), Kota Kinabalu International Airport (KKIA), Kuching International Airport (KIA), and Langkawi International Airport (LIA), where the first four airports serve as the main hubs in Malaysia. There are also eighteen other domestic airports and eighteen STOL⁷⁴ ports in Malaysia. All of these 42 airports are operated by four companies: Malaysia Airports Holdings Berhad (MAHB), Malaysia Airport (Sepang) Sdn Bhd, Senai Airport Terminal Services Sdn Bhd, and Tanjung Manis Sdn Bhd.⁷⁵ MAHB, which operates 39 of the 42 airports, remains the dominant airport operator, and holds market shares of 98.8 per cent and 96.6 per cent in revenue and passenger traffic respectively.⁷⁶ The other main player in the industry is the ground handling service provider, which provide services such as catering, refuelling and general ground handling (baggage and passenger handling, etc.). This is the least

⁶⁹ According to sections 35 and 36 of MACA 2015, all carriers must have the Air Service License (ASL) for scheduled services and the Air Service Permit (ASP) for the non-scheduled services. See <www.mavcom.my/en/industry/air-service-licence/>accessed on 29 June 2019.

⁷⁰ According to section 38 of MACA 2015, all aerodrome operators are required to have an Aerodrome Operator Licence (AOL).

⁷¹ According to section 37 of MACA 2015, all ground handlers are required to have a Ground Handler Licence (GHL).

⁷² As stated earlier, the main focus of the thesis is the scheduled passenger and cargo airlines.

⁷³ According to the latest list of ASL holders provided by MAVCOM; Available at MAVCOM website <www.mavcom.my>accessed on 28 June 2019.

⁷⁴ The STOL ports refer to the small airports or air strips used by small aircrafts normally operating in the non-scheduled services.

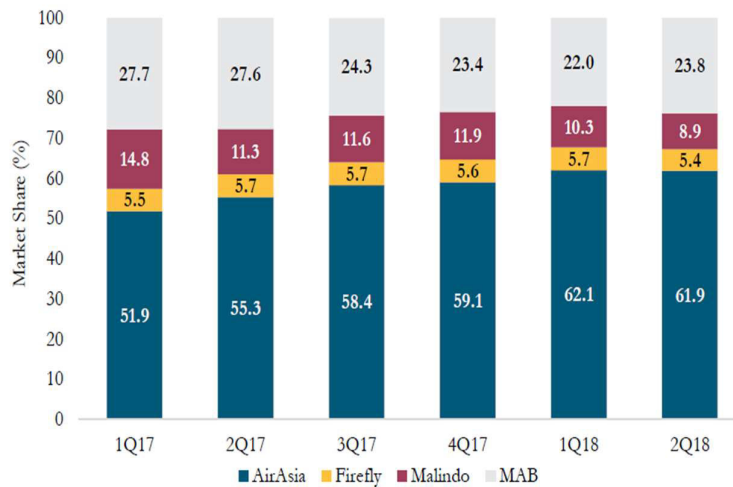
⁷⁵ According to the latest list of AOL holders provided by MAVCOM; Available at MAVCOM website <www.mavcom.my>accessed on 28 June 2019.

⁷⁶ MAVCOM, Waypoint – Outlook of the Malaysian Aviation Industry (November 2018), p 29; Available at MAVCOM website <www.mavcom.my>accessed on 28 June 2019.

concentrated aviation service market, and there are currently 30 licensed companies providing such services.⁷⁷

Since 2017, AirAsia has been the dominant player for the scheduled passenger service market.⁷⁸ This can be seen clearly in the percentage of the domestic of passenger traffic in *Figure 3* below. AirAsia had the biggest market share, 51.9 per cent in the first quarter of 2017 to 61.9 per cent in the second quarter of 2018 in the domestic market. This was reported to be at the expense of other carriers such as Malindo and MAS, who lost 5.9 per cent and 1.9 per cent respectively from the first quarter of 2017 to the second quarter of 2018.

Figure 3: Percentage of Airlines' Market Share for Domestic Routes by Passengers 2017–2018



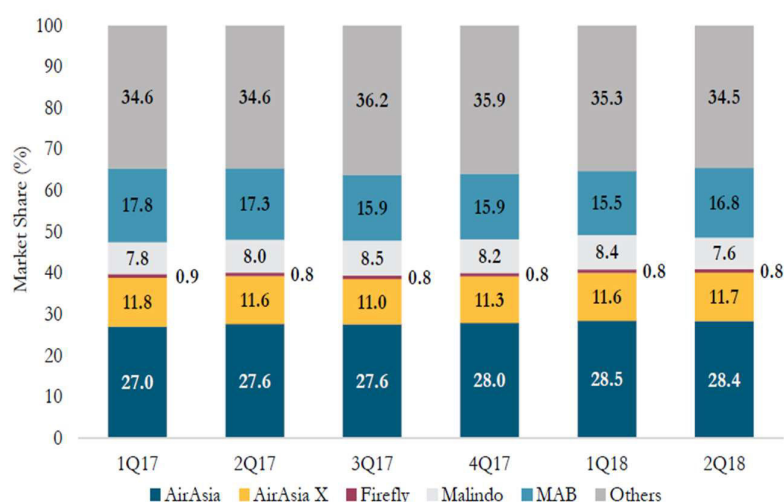
Source: Malaysian Aviation Commission (MAVCOM) (Nov, 2018)

For the international market, as shown in *Figure 4*, AirAsia still held the biggest market share, increased from 27.0 per cent in 2017 to 28.4 per cent in 2018. However, it was also reported that MAS had the biggest drop of 1.0 per cent in its international market share.

⁷⁷ According to the latest list of GHL holders provided by MAVCOM; Available at MAVCOM website <www.mavcom.my>accessed on 28 June 2019.

⁷⁸ MAVCOM, Waypoint – Outlook of the Malaysian Aviation Industry (May 2018), p24; Available at MAVCOM website <www.mavcom.my>accessed on 28 June 2019.

Figure 4: Percentage of Airlines' Market Share for International Routes by Passengers 2017–2018



Source: Malaysian Aviation Commission (MAVCOM) (Nov, 2018)

In terms of market concentration⁷⁹ according to routes served by the airlines, it was reported that 13 out of 45 domestic routes in 2016 had a concentration level of 1.0000⁸⁰— meaning there was only one airline serving a few domestic routes. Nevertheless, some of the concentrated routes do not have high load factors,⁸¹ which could possibly indicate that there was insufficient demand for the capacity offered on those routes.⁸² In 2017, the monopoly structure of the industry domestic routes remained, as there were 14 out of 40 domestic routes with 1.0000 concentration level.⁸³ It was also reported that 58 per cent of international routes were operated by one airline.⁸⁴ In 2018, the domestic and international routes were reported to be more concentrated. As shown in *Figure 5*, the concentration level in 2018 has increased to 0.4505, from 0.3986 in 2017.

⁷⁹ Market concentration in the Malaysian aviation industry is measured using the Herfindahl-Hirschman Index (HHI) Index.

⁸⁰ Way MAVCOM, Waypoint – Outlook of the Malaysian Aviation Industry (Aug 2017), p21; Available at <www.mavcom.my>accessed on 28 June 2019.

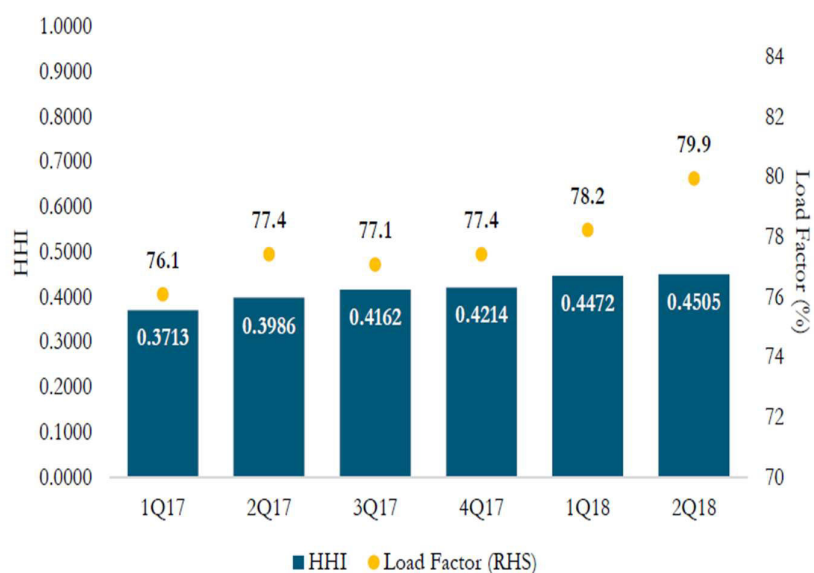
⁸¹ 'Load factor' is the ratio of the total filled seats to the total available seats in an airline. It measures the capacity utilization of the airline.

⁸² Way MAVCOM, Waypoint – Outlook of the Malaysian Aviation Industry (Aug 2017), p21; Available at <www.mavcom.my>accessed on 28 June 2019.

⁸³ Way MAVCOM, Waypoint – Outlook of the Malaysian Aviation Industry (May 2018), p 25; Available at <www.mavcom.my>accessed on 28 June 2019.

⁸⁴ Ibid.

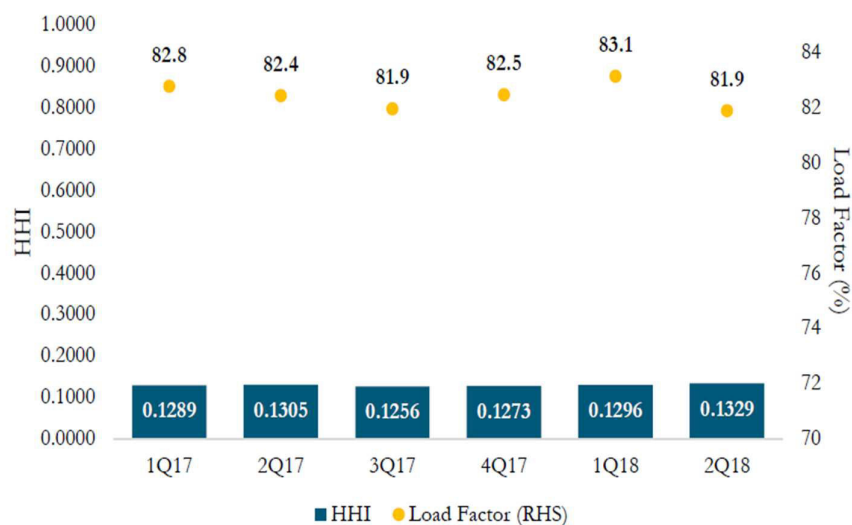
Figure 5: Domestic Market Concentration Levels and Load Factors, 2017–2018



Source: Malaysian Aviation Commission (MAVCOM) (Nov, 2018)

However, the level was reported to be considerably lower for international routes, serviced by more than 60 airlines as compared to only four in the domestic market, as shown in *Figure 6*.

Figure 6: International Market Concentration Levels and Load Factors, 2017–2018



Source: Malaysian Aviation Commission (MAVCOM) (Nov, 2018)

3.3 Competition Law in the Malaysian Airline Industry

3.3.1 Pre-competition law period (1957–2012)

At national level, there were no clear and formal economic regulations governing the airline activities prior to CA 2010. Although some matters pertaining to the licensing requirements of air transport services were provided under the then Civil Aviation Regulations 1996,⁸⁵ CAAM was only responsible for the approval of the technical part of the licence; the final approval was granted by the MoT. At MoT level, the approval was granted based on the Ministry's general policy and procedures, as there were no specific laws to govern the economic activities of the industry.

Nevertheless, at international level, air transport matters have always been governed by the air service agreements (ASAs) between countries, and they are subject to the Convention on the International Civil Aviation 1944 (Chicago Convention 1944) of which Malaysia has been a Member State since 1958. The ASAs are government-to-government agreements that define the commercial rights granted by the States for the designated airlines to carry out air transport services within any territories of the States. In Malaysia, the final decisions on matters concerning the ASAs lies with the MoT. Since 1944, the international civil aviation matters have been governed and administered by the Chicago Convention 1944⁸⁶ which, to date, has 192 sovereign states as its members.⁸⁷ Malaysia ratified the Convention on 7th April 1958, and since 2007 has been a Council Member.⁸⁸ A body called the International Civil

⁸⁵ The Civil Aviation Regulation 1996 has been amended and re-named as Civil Aviation Regulations 2016.

⁸⁶ The Convention on the International Civil Aviation. Article 3 of the Convention states that the Convention applies only to civil aircraft and not state aircraft, such as aircraft belonging to military, customs and police services.

⁸⁷ As at 18 April 2018, ICAO has 192 Member States; See <<https://www.icao.int/MemberStates/Member%20States.English.pdf>>accessed on 5 January 2019;

⁸⁸ See <https://www.icao.int/secretariat/legal/Status%20of%20individual%20States/malaysia_en.pdf> and <<http://www.mot.gov.my/en/aviation/ICAO-and-international-convention/members-of-ICAO>>accessed on 5 January 2019; ICAO also cooperates with regional organizations such as EU and regional civil aviation bodies; See <https://www.icao.int/Meetings/a38/Documents/WP/wp009_en.pdf> and <<https://www.icao.int/about-icao/Pages/Invited-Organizations.aspx>>accessed 5 January 2019; All of EU Member Countries are also ICAO Member States.

Aviation Organization (ICAO) was established by Article 43⁸⁹ of the Convention to develop the principles and technical regulation of the international air navigation and to foster the planning and the development of international air transport.⁹⁰ ICAO has been given comprehensive legislative power to promulgate the international Standards and Recommended Practices (SARPs) on matters concerning safety, regularity and efficiency of air navigation⁹¹ and these SARPs are documented in the form of Annexes to the Convention.⁹² Though the SARPs have no similar legal binding force as the Articles to the Convention, the policy on the implementation of SARPs is based on the Member States' obligation to adopt all practicable measures to expedite the navigation of aircraft between Member States.⁹³ Member States who wish to depart or find it impracticable to comply with the SARPs must notify the ICAO immediately of such departures or non-compliance.⁹⁴ The SARPs 'are critical to ICAO Member States and other stakeholders, given that they provide the fundamental basis

⁸⁹ Article 43 of the Chicago Convention provides that, 'An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.'

⁹⁰ Article 44 of the Chicago Convention.

⁹¹ Article 37 of the Chicago Convention provides, among others, that, the ICAO, '*...shall adopt and amend from time to time, as maybe necessary, international standards and recommended practices and procedures dealing with: (a) Communications systems and air navigation aids, including ground marking; (b) characteristics of airports and landing areas; (c) Rules of the air and air traffic control practices; (d) Licensing of operating and mechanical personnel; (e) Airworthiness of aircraft; (f) Registration and identification of aircraft; (g) Collection and exchange of meteorological information; (h) Log books; (i) Aeronautical maps and charts; (j) Customs and immigration procedures; (k) Aircraft in distress and investigation of accidents; and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.*'; For procedures to make SARPs; See <<https://www.icao.int/about-icao/AirNavigationCommission/Pages/how-icao-develops-standards.aspx>> last accessed on 5 January 2019.

⁹² Article 54(l) of the Convention states that the Council of the ICAO has the mandatory functions to '*Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken.*'

⁹³ Article 22 of the Convention provides that, '*Each contracting State agrees to adopt all practicable measures, through the issuance or special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance.*'

⁹⁴ Article 38 of the Chicago Convention provides, inter alia, that, '*Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard.*' It is also important to note that Standards require a higher degree of compliance, as compared to the Recommended Practices, because Standards contain specifications which are recognized as necessary for the safety or the regularity of the international air navigation. In the event of non-compliance to the Standards, it is compulsory for the Member State to notify the Council immediately. This is expressly stated in the Foreword of all Annexes.

for harmonized global aviation safety and efficiency in the air and on the ground, the worldwide standardization of functional and performance requirements of air navigation facilities and services, and the orderly development of air transport.’⁹⁵

To ensure compliance, the ICAO continuously monitors its Member States through safety and security audits, the results of which are made public on its website.⁹⁶ As to date, ICAO has 19 Annexes which contain SARPs to be followed by the Member States in various technical areas.⁹⁷ Other than SARPs, the ICAO has also been issuing guidelines, plans and reports on technical and economic matters from time to time. Though the focus of ICAO was initially to standardize the technical as well as the commercial aspects of the international civil aviation, the effort to establish a commercial framework was constrained, due to the irreconcilable positions of the Member States which resulted in the ICAO to becoming a non-regulatory but technical body, primarily concerned with air navigation.⁹⁸ There are no Annexes dealing with competition provisions thus far under the Convention but the ICAO’s policy on competition is clear; to have a fair and equal opportunity for all Member States to compete.⁹⁹ The Convention was drafted on the Member States’ agreement to develop

⁹⁵ The importance of SARPs and other air navigation procedures are explicitly stated on the ICAO website; See <<https://www.icao.int/about-icao/AirNavigationCommission/Pages/how-icao-develops-standards.aspx>>accessed on 5 January 2019.

⁹⁶ ICAO has been conducting safety and security audits regularly through its Universal Safety Oversight Audit Program (USOAP) and Universal Security Audit Program (USAP) based on the SARPs and other national civil aviation legislation to assess its Member States’ safety and security capabilities; For further information on USOAP and USAP, see <<https://www.icao.int/safety/Pages/USOAP-Results.aspx> and <<https://www.icao.int/Security/USAP/Pages/default.aspx>>accessed on 5 January 2019.

⁹⁷ See <https://www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf>accessed 5 January 2019; Annex 1 – Personnel Licencing, Annex 2 – Rules of the Air, Annex 3 – Meteorological Services for International Air Navigation, Annex 4 – Aeronautical Charts, Annex 5 – Units of Measurement to be Used in Air and Ground Operations, Annex 6 – Operations of Aircraft, Annex 7 – Aircraft Nationality and Registration Marks, Annex 8 – Airworthiness of Aircraft, Annex 9 – Facilitation, Annex 10 – Aeronautical Communications, Annex 11 – Air Traffic Services, Annex 12 – Search and Rescue, Annex 13 – Aircraft Accidents and Incidents Investigation, Annex 14 – Aerodromes, Annex 15 – Aeronautical Information Services, Annex 16 – Environmental Protection, Annex 17 – Security–Safeguarding International Civil Aviation against Acts of Unlawful Interference, Annex 18 – The Safe Transport of Dangerous Goods by Air, Annex 19 – Safety Management.

⁹⁸ Paul Stephen Dempsey, ‘The Role of the International Civil Aviation Organization on Deregulation, Discrimination, and Dispute Resolution’, *Journal of Air Law and Commerce*, Volume 52, Issue 3, School of Law, Southern Methodist University (1987) p530.

⁹⁹ See <<https://www.icao.int/sustainability/Pages/Competition-in-air-transport.aspx>>accessed on 5 January 2019; See also ‘ICAO Information Paper on ICAO Policies and Guidance Materials for Competition’ available at <https://www.icao.int/sustainability/Documents/Competition_Existing%20Guidance.pdf>accessed on 5 January 2019 which contains a compilation of Assembly Resolutions, Conclusions and Recommendations of Air Transport Conferences and Air Transport Regulation Panel and Manuals pertaining to the existing ICAO policies and guidance materials for competition.

international civil aviation in a safe and orderly manner on the basis of equality of opportunity and sound and economic operations.¹⁰⁰ The establishment of ICAO was clearly aimed at ‘insuring the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines’¹⁰¹ and to avoid discrimination between them.¹⁰² Among the ICAO’s objectives is to ensure all international airlines operate fairly without economic waste caused by unreasonable competition¹⁰³ and the objectives of its air transport policy are to increase the consumers’ benefits and choices and to improve the air connectivity as well as to create a more competitive business opportunities in the market place.¹⁰⁴

Competition law and its related issues were specifically addressed under the ICAO’s economic development strategy under which the ICAO has issued guidance and for air transport policy and regulations. There are four main documents: the Policy and Guidance Material on the Economic Regulation of International Air Transport (Doc9587),¹⁰⁵ Manual on the Regulation of International Air Transport (Doc9626),¹⁰⁶ ICAO’s Policies on Taxation in the Field of International Air Transport (Doc8632)¹⁰⁷ and Templates for Air Service Agreements (TASAs).¹⁰⁸ Of these, the Doc 9587 which provides for the economic regulation for international air transport specifically addresses and provides resolutions and recommendations for competition issues. The first part of Doc 9587 contains ICAO’s Assembly Resolutions that recognize the increasing competition in the liberalised international air transport industry, and recommends Member States to give due consideration in their respective regulatory responsibilities and international air transport relationship the application of competition laws.¹⁰⁹ It recognizes that Member States will continue to promote

¹⁰⁰ Preamble to the Chicago Convention 1944.

¹⁰¹ Article 44(f) of the Chicago Convention 1944.

¹⁰² Article 44(g) of the Chicago Convention 1944.

¹⁰³ Article 44(e) of the Chicago Convention 1944.

¹⁰⁴ See <<https://www.icao.int/sustainability/Pages/economic-policy.aspx>>accessed on 5 January 2019.

¹⁰⁵ ICAO Doc 9587, ‘Policy and Guidance Material on the Economic Regulation of International Air Transport’, Third Edition (2008).

¹⁰⁶ ICAO Doc 9626, ‘Manual on the Regulation of International Air Transport’, Second Edition (2004).

¹⁰⁷ ICAO Doc 8632, ‘ICAO Policies on Taxation in the Field of International Air Transport’, Third Edition (2000).

¹⁰⁸ ICAO Sample, ‘Bilateral Template of Air Services Agreement’.

¹⁰⁹ ICAO Doc 9587; Part 1 – Regulatory Agreements and Arrangements; p1-20 – 1-23 (Recommendations of the 1994 Worldwide Air Transport Conference).

efficiency and minimize market distortions while ensuring effective fair competition.¹¹⁰ In the liberalization process, market access to the international air transport and the air carriers' freedom to conduct commercial activities should be liberalized.¹¹¹ Nevertheless, all Member States should avoid the unilateral application of competition laws that may affect the orderly and harmonious development of international air transport, and give due consideration to its special characteristics.¹¹²

Many Member States have protested robustly about being subject to the extraterritorial application of the US anti-trust laws in the 1970s, in the wake of the unilateral decision by the US to deregulate its airline industry.¹¹³ Member States were also encouraged to prohibit any unfair practices, such as charging rates and fares at a level insufficient to cover the costs of services (predatory pricing), excessive capacity, practices that have a probable effect of removing competitors from the market (exclusionary conduct/barriers to entry) and behaviour indicating a dominant position that may warrant closer examination.¹¹⁴ Member States were also encouraged to ensure the equal sharing of capacity, the implementation of a flexible tariff system and to increase market access.¹¹⁵

The second part of Doc 9587 sets out recommendations regarding model clauses for safeguards against anti-competitive practices, to be considered by Member States in their air service agreements.¹¹⁶ The salient points of the model clauses suggest that Member States with national competition laws should alert other Member States in their bilateral or multilateral air service agreements of any application of such laws including, but not limited to, the potential incompatibility between the laws and the agreements and to provide sufficient assistance in implementing such laws. The model clauses were 'soft law' instruments that aimed to

¹¹⁰ ICAO Doc 9587; Part 1 – Regulatory Agreements and Arrangements; p 1-24 – 1-28 (Declarations of the 2003 Worldwide Air Transport Conference on the 'Challenges and Opportunities of Liberalization')

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Dempsey (n 97) ch3, p534.

¹¹⁴ ICAO Doc 9587, Part 1 – Regulatory Agreements and Arrangements; p 1-28 – 1-30 (Recommendations of 1997 Air Transport Regulations Panel).

¹¹⁵ Ibid.

¹¹⁶ ICAO Doc 9587, Part 7 – Broader Regulatory Environment; p 7-2 – 7-4 and Appendix 2 on Guidance Material on the Avoidance or Resolutions of Conflicts over the Application of Competition Laws to International Air Transport; The model clause is also incorporated in the TASAs.

avoid any conflicts over the application of national competition laws. Though the model clause is in no way binding on the Member States, it should assist them 'in the avoidance or resolution of conflicts over the application of national competition laws, policies and practices to international air transport'.¹¹⁷ Other parts of the Doc 9587 provides policies and guidelines on the regulatory agreements and arrangements,¹¹⁸ airline ownership and joint operations,¹¹⁹ regulation of airline capacity,¹²⁰ international fares and rates,¹²¹ computer reservation systems,¹²² airline commercial matters,¹²³ and other regulatory issues.¹²⁴ The second document, Doc 9626, provides narrative definitions and explanations in the most logical order to key issues on regulatory structures and process at national, bilateral and multilateral level¹²⁵ and regulatory content topics such as basic market access, air carrier capacity, tariffs and ownership, air cargo, non-scheduled air services, airline commercial and cooperative activities, airline passengers, and airport-related matters.¹²⁶ The other two documents, the ICAO Doc 8632 and TASAs, provide guidance for Member States through the ICAO Resolutions on taxation and templates for air services agreements respectively.¹²⁷

In the light of globalization and liberalisation, ICAO also undertook several studies on topics such as on the safeguard mechanisms for fair competition, slot allocation, trade in services, airline code sharing, and participation measures.¹²⁸ As an international body responsible for the orderly growth and development of the international air transport, matters regarding competition and its emerging global issues have always been a priority in ICAO, and have been actively discussed from

¹¹⁷ ICAO Doc 9587; Appendix 2 on Guidance Material on the Avoidance or Resolutions of Conflicts over the Application of Competition Laws to International Air Transport.

¹¹⁸ ICAO Doc 9587, Part 1.

¹¹⁹ Ibid, Part 2.

¹²⁰ Ibid; Part 3

¹²¹ Ibid; Part 4

¹²² Ibid; Part 5

¹²³ Ibid; Part 6

¹²⁴ Ibid; Part 8

¹²⁵ ICAO Doc 9626; Part 1- Part 3

¹²⁶ Ibid, Part 4; Some of the definitions and explanations such as the airline commercial and cooperative activities will be discussed further in the following chapters.

¹²⁷ These two ICAO Documents are not the focus of the thesis and therefore not discussed.

¹²⁸ For further information on these studies, see <<https://www.icao.int/sustainability/Pages/policies-and-guidance.aspx>>accessed on 5 January 2019; Matters on slot allocation and airline code sharing will be discussed further in the following chapters. For other ICAO studies and databases, see <https://www.icao.int/sustainability/pages/Eap_ER_Databases.aspx>last accessed on 5 January 2019.

time to time in many of the ICAO symposia and conferences.¹²⁹ The latest work of the ICAO on competition was the development of the Competition Compendium, issued in 2017.¹³⁰ It contains information on the general competition laws of the surveyed Member States,¹³¹ regulations and policies at national and regional levels, competition practices through bilateral and multilateral agreements and the relevant government agencies responsible for the enforcement of the competition law.

3.3.2 Competition law period (2012–2015)

In 2010, the Malaysian Parliament passed its first comprehensive-all-sector competition law, the Competition Act 2010 (CA 2010).¹³² All competition matters in the airline industry was first regulated under this Act. The aviation sector, however continues to be subject to the Chicago Convention 1944. The CA 2010 has six parts: Part I sets out the preliminary matters such as the interpretation and the application of the law, Part II contains the substantive competition provisions, Part III provides for the powers of investigation and enforcement of the MyCC, Part IV deals with matters pertaining to the decisions made by the MyCC, Part V provides for the establishment of the Competition Appeal Tribunal, including its constitution, powers and procedures, and Part VI contains general provisions concerning penalty, right of private action, power of the Minister to make regulations, and power of the MyCC to issue guidelines.¹³³

¹²⁹ Competition issues were mainly and normally discussed in the ICAO Worldwide Air Transport Conferences, ICAO Air Transport Symposium (the Third ICAO Air Transport Symposium 2013 specifically addressed competition issues based on the theme – Addressing Competition Issues: Towards a Better Operating Environment) and ICAO Air Services Negotiation Conference (ICAN) (competition issues were discussed during the Seventh ICAO Air Services Negotiations Conference, 2014)

¹³⁰ The Competition Compendium is available at <[https://www.icao.int/sustainability/Compendium/Documents/ICAO%20Competition%20Compendium%20\(Jan.%202017\).pdf](https://www.icao.int/sustainability/Compendium/Documents/ICAO%20Competition%20Compendium%20(Jan.%202017).pdf)> accessed on 5 January 2019.

¹³¹ The Competition Compendium was developed based on surveys conducted over 129 Member States, ICAO Competition Compendium (2017), Appendix B.

¹³² The CA 2010 was passed by the House of Representatives and the Senate on 5 May 2010; Hansard by the Malaysian House of Representative, Bil. 25, 7 Jun 2010.

¹³³ This chapter introduces the Act generally with specific focus on Part II. Part II is further discussed and analysed in detailed in Chapters 5 and 8 on anti-competitive agreements and abuse of a dominant position respectively. Part III, Part IV and Part V are discussed at length under Chapter 4.

Unlike the EU competition laws, the Act does not provide for the regulation of mergers¹³⁴ and state aid.¹³⁵ Chapter 1 contains the prohibition of horizontal as well as vertical anti-competitive agreements and follows quite closely the main underlying principles enunciated under Article 101(1) but with some noticeable differences.¹³⁶ It also provides for exemptions which are mostly similar to Article 101(3).¹³⁷ For the purpose of guidance and implementation, the MyCC has issued 'Guidelines on Chapter 1 Prohibition—Anti-Competitive Agreements' in 2012.¹³⁸ These Guidelines provide definitions and interpretations of some of the terms used in the Act, and explain in detail the concepts underlying the prohibition of anti-competitive agreements. The prohibition on the abuse of a dominant position is provided for under Chapter 2 of the Act which clearly adopts the settled EU law jurisprudence under Article 102.¹³⁹ MyCC issued the 'Guidelines for Chapter 2 Prohibition—Abuse of Dominant Position'¹⁴⁰ in 2012, which provide a more detailed elaboration on how to determine dominance and types of abuses in order to assist the MyCC in carrying out its competition assessment effectively.

Chapter 3 gives the power to MyCC to conduct market reviews, whether on its own initiative or upon the Minister's request, as well as its procedure.¹⁴¹ Chapter 4 provides the Minister with the power to exclude certain matters from the application of the law.¹⁴² Currently, the Act does not apply to agreements or conduct that is engaged in order to comply with a legislative requirement, collective-bargaining activities, and

¹³⁴ This is to be consistent with the national policy that encourages merger and take-over activities with the aim to strengthen the domestic economy and after considering the feedback given by the Securities Commission and the Central Bank of Malaysia; Hansard by the Malaysian House of Representative, Bil. 22, 20 April 2010, p129;

¹³⁵ State aid provision was also not included. Given the structure of the Malaysian economy and the national economic policy, the provision may not be seen as pertinent to the implementation of competition laws in a long term, See (n 12), ch1.

¹³⁶ Further discussion is provided in the subsequent section.

¹³⁷ The differences are discussed on the succeeding section; For more detailed discussion on the differences See Vincent Eng Teong See, 'Competition Act 2010: the issue and challenges', *European Journal of Law and Economics* (2015), p598-601.

¹³⁸ MyCC Guidelines on Chapter 1 Prohibition – Anti-Competitive Agreements (2 May 2012).

¹³⁹ Vincent ETC (n 136) ch3, p602.

¹⁴⁰ MyCC Guidelines on Chapter 2 Prohibition—Abuse of Dominant Position (12 May 2012) Part 2.

¹⁴¹ Section 11 and 12 of CA 2010. Market review includes a study into the structure of the market concerned, the conduct of enterprises in the market, and the conduct of suppliers and consumers to the enterprises in the market or any other relevant matters. To date, MyCC has conducted market reviews on two sectors: the pharmaceutical and the building construction sector.

¹⁴² Section 13 of CA 2010.

enterprises entrusted with the operation of services of general economic interest.¹⁴³ In addition to the two guidelines,¹⁴⁴ during its first year of establishment, MyCC issued another two guidelines: the Guidelines on Complaints Procedures¹⁴⁵ and the Guidelines on Market Definition.¹⁴⁶ In 2014, another two guidelines were issued, namely, the Guidelines on Financial Penalties¹⁴⁷ and the Guidelines on the Leniency Regime.¹⁴⁸ A detailed discussion of the guidelines, in so far as it is relevant to the subject matter of the thesis, is provided in the subsequent chapters.¹⁴⁹ The first competition case involving the airline industry was brought to the attention of MyCC in 2012. It was made by the Federation of Malaysian Consumers Association (FOMCA) through a complaint against the cooperation between MAS and AirAsia for possible anti-competitive practices on market sharing and price fixing.¹⁵⁰ The case is important in the competition regime in the country not only because it involved the airline industry but also as the first case to be brought to the CAT and the HC for judicial review. It is to be noted that CA 2010 does not have provisions on state aid and mergers.

3.3.3 Post-competition law period (2015–present) and the Enactment of the Malaysian Aviation Commission Act 2015 (MACA 2015)

Over the years, there has been heavy pressure from the industry players for an independent body to be established, in order to oversee and monitor the economic operations of the aviation industry. There was also a strong need to improve the industry's stability, in terms of rendering a fair and level playing-field for the industry players, and to provide better protection to the consumer interests.¹⁵¹ As there was no specific economic regulation governing the aviation industry, an independent body which regulates the economic activities would further enhance and strengthen the

¹⁴³ Second Schedule of CA 2010.

¹⁴⁴ See (n 137) (n 139) ch3.

¹⁴⁵ MyCC Guidelines on Complaints Procedures (26 July 2014).

¹⁴⁶ MyCC Guidelines on Market Definition (2 May 2012).

¹⁴⁷ MyCC Guidelines on Financial Penalties (14 October 2014).

¹⁴⁸ MyCC Guidelines on Leniency Regime (14 October 2014).

¹⁴⁹ The guidelines on anti-competitive agreements, abuse of dominant position and market definition are discussed in detailed to the extent it is relevant to the discussion of the thesis.

¹⁵⁰ "FOMCA wants AirAsia' share swap investigated", the Star Online, February 25, 2012.

¹⁵¹ This is confirmed based on the documents sightings and information gathered during the interviews conducted with the officers of the Attorney General's Chambers, Malaysia on 14 and 15 August 2017 (See Appendix 5).

aviation industry as whole.¹⁵² The establishment of MAVCOM was also part of the proposal made under the MAS restructuring plan.¹⁵³ Consequently, in 2015, Malaysia passed its first comprehensive piece of legislation that provides for the economic¹⁵⁴ and competition¹⁵⁵ regulation of the aviation sector.

The MACA 2015 came into force on 1st March 2016. MAVCOM was established by MACA 2015¹⁵⁶ whose main function is to regulate economic matters relating to the civil aviation industry. With the establishment of MAVCOM, all economic matters and regulations pertaining to the civil aviation industry are under the responsibility of MAVCOM. Consequently, this also means that all competition issues of the aviation industry are no longer governed by the CA 2010, and MyCC is no longer the competition authority responsible for the aviation sector.¹⁵⁷ The MACA 2015 has fourteen parts, which mainly provide for the establishment of MAVCOM, its functions and powers, constitution, its administrative and financial matters,¹⁵⁸ licensing of air services,¹⁵⁹ competition provisions,¹⁶⁰ air traffic rights and slot allocation,¹⁶¹ and public service obligations.¹⁶² It also sets out mechanisms for the protection of consumers¹⁶³ and dispute resolution between the aviation industry players.¹⁶⁴

¹⁵² Government of Malaysia, Parliament of Malaysia, Hansard on Aviation Commission Bill 2015, DR-08042015, p147 - 148

<<http://www.parlimen.gov.my/files/hindex/pdf/DR08042015.pdf#page=163&zoom=70&search=aviation>>last accessed on 7 Dec 2016.

¹⁵³ 'Rebuilding A National Plan: The MAS Recovery Plan' issued by Khazanah Holdings Berhad dated 29 August 2014. Available at <<https://www.khazanah.com.my/khazanah/files/0a/0a418f2f-6c5a-494d-8904-251b49e981bd.pdf>>accessed on 25 May 2019. This is confirmed based on the interview with the Director of Economics, MAVCOM (Kuala Lumpur, 16 August 2017) (See Appendix 5).

¹⁵⁴ Before the coming into force the MACA Act, the economic activities of the aviation industry were not formally regulated under a specific Act with some were left unregulated. For example, matters concerning ground handling was never regulated and the slot allocation was administratively arranged by the airport authorities and the public service obligations and air traffic rights (which were also specified under the air services agreements) were administratively decided by MoT. The consumer protection was governed under the general consumer law (CPA 1999). For the licensing of air services, the CCM was responsible for the technical verification under the Civil Aviation Regulation 1996 but the final approval was in the hands of MoT.

¹⁵⁵ Before the MACA 2015 came into force, competition issues of the aviation industry were governed by the general competition laws (the CA 2010 and the CCA 2010).

¹⁵⁶ A detailed discussion of MAVCOM is provided in Chapter 4.

¹⁵⁷ For this purpose, the CA 2010 has been amended to exclude the MACA 2015 from its application.

¹⁵⁸ Part II, III, IV and V of MACA 2015.

¹⁵⁹ Part VI of MACA 2015.

¹⁶⁰ Part VII of MACA 2015.

¹⁶¹ Part VIII of MACA 2015.

¹⁶² Part IX of MACA 2015.

¹⁶³ Part XI of MACA 2015.

¹⁶⁴ Part XII of MACA 2015.

The Act regulates competition in two ways: through the licensing regime and the competition provisions.¹⁶⁵ Part VI provides that all scheduled and non-scheduled air services which involve the carriage of passenger or mail or cargo for hire and reward and aerodrome operation must be licenced.¹⁶⁶ For non-scheduled services, a permit must be obtained.¹⁶⁷ The ground handling services, which were not regulated prior to the Act, are now required to be licenced under the Act.¹⁶⁸ Airport operators must also be licensed under Act.¹⁶⁹ MAVCOM is also given the power to set charges for aviation services rendered, based on the factors specified in the provisions.¹⁷⁰ These charges include the landing charges, passenger service and security charges, airport pass charges, airside vehicle and driving charges, security service charges, and housing parking charges.¹⁷¹ Part VII sets out the competition provisions which adopt most of the competition provisions, except for mergers, contained in the CA 2010. Part VII has six divisions; provisions on the interpretation contained in the Part and its application, the prohibition of anti-competitive agreements, abuse of a dominant position, mergers, decisions by MAVCOM, and general matters such as on the power to conduct market reviews and issue guidelines, and the right to bring private actions.

For anti-competitive agreements, section 49 of the Act states that 'an agreement between enterprises is prohibited in so far as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any of the aviation service market'.¹⁷² It adopts the similar anti-competitive provision under section 4 of the CA 2010 except that by virtue of section 48, the prohibition only applies to agreements affecting the aviation services. As the MACA 2015 was created specifically for the aviation industry, it is understandable and acceptable that the prohibition applies only to those agreements that are related to the aviation service market. Section 53 also mirrors the abuse of a dominant position under section 10 of

¹⁶⁵ Nasarudin & Haniff (n 8) ch3, pg261. This licensing regime is out of the scope of the thesis and therefore will not be discussed.

¹⁶⁶ Section 35 of MACA 2015.

¹⁶⁷ Section 36 of MACA 2015.

¹⁶⁸ Section 37 of MACA 2015.

¹⁶⁹ Section 38 of MACA 2015.

¹⁷⁰ Section 46 of MACA 2015.

¹⁷¹ Malaysian Aviation Commission (Aviation Service Charges) Regulations 2016.

¹⁷² Section 49(1) of MACA 2015.

the CA 2010, but it does not provide a list illustrating the abusive conduct. The Commission may publish further guidance of the types of abuse. The main feature of MACA 2015 is the merger provisions introduced under section 54. The provision covers mergers and anticipated mergers and provides for self-notification procedures. Merger provisions were particularly important in preparation for the ASEAN open skies agreement.¹⁷³ The Act however does not provide for state aid provisions. Pursuant to section 65 of the MACA 2015, MAVCOM has the power to issue guidelines, and it is not surprising that the structure and content of the guidelines are similar to that of MyCC. The guidelines include the Guidelines on Market Definition, Guidelines on Abuse of Dominant Position, Guidelines on Substantive Assessment of Mergers, Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger, Guidelines on the Determination of Financial Penalties and Guidelines on Leniency Regime.¹⁷⁴ As to date, there are no competition cases involving the airline under the MACA 2015.

3.4 The Competition Law in the ASEAN Aviation Industry

At the regional level, Malaysia is a member state of ASEAN, and competition policy and legislation in the aviation industry in Malaysia are also strongly affected by the regional and international agreements. ASEAN was established on 8th August 1967 through the signing of the ASEAN Declaration¹⁷⁵ by Malaysia, Singapore, Indonesia, Philippines, Thailand, Brunei, Vietnam, La PDR, Myanmar and Cambodia. The creation of ASEAN was based on the need among the countries within the region to strengthen regional cooperation based on mutual interests and problems.¹⁷⁶ The main objectives of ASEAN are to accelerate growth, social progress and cultural development as well as to promote regional peace and stability.¹⁷⁷ The relations

¹⁷³ This is confirmed based on the documents sightings and information gathered during the interviews conducted with the officers of the Attorney General's Chambers, Malaysia on 14 and 15 August 2017 (See Appendix 5). The term used during the preparation of MACA 2015 was 'anti-competitive partnership' and the strategic alliances between airlines were also recognized as having the high potential to distort the competition.

¹⁷⁴ These guidelines are available at <<https://www.mavcom.my/en/resources/legislations/>>accessed on 5 January 2019.

¹⁷⁵ Also known as Bangkok Declaration. The first few founding countries which established ASEAN were Malaysia, Thailand, Indonesia, Philippines and Singapore whereas Brunei joined in 1984, Vietnam in 1999, Lao PDR in 1997, Myanmar in 1999 and Cambodia in 1999. See <<http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>>accessed on 10 Oct 2016.

¹⁷⁶ See <<http://asean.org/asean/about-asean/>>accessed on 10 Oct 2016.

¹⁷⁷ ASEAN Declaration 8 August 1967.

among the ASEAN state members are based on the agreed fundamental principles of mutual respect for the independence, sovereignty and equality.¹⁷⁸ In response to global competition, the ASEAN Leaders have initiated some vital efforts towards having a more 'competitive ASEAN'. In 1997, the 'ASEAN Vision 2020' was established, which aimed at transforming ASEAN into a stable, prosperous, and highly competitive region by the year 2020.¹⁷⁹ In 2003, ASEAN Leaders declared the establishment of the 'ASEAN Community' which consisted of the ASEAN Economic Community (AEC) for the regional economic integration, ASEAN Security Community, and ASEAN Socio-Cultural Community.¹⁸⁰ To accelerate the complete establishment of the ASEAN Community by 2015, the 'CEBU Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015' was signed in 2007, which contained the strong commitments and determinations of ASEAN member states towards establishing the envisaged ASEAN Community by 2015.¹⁸¹

3.4.1 Initiative for a regional competition regime

In particular, the establishment of the ASEAN as a single market and production base has become the main objective enunciated in the AEC Blueprint.¹⁸² Four essential characteristics have been identified in order to transform ASEAN into the envisaged competitive single market. The first characteristic is a single market and production base, which has a free flow of goods, services, investments, skilled labour and free flow of capital; the second characteristic is by having a competitive economic region and to promote fair competition, a competition policy, and the related laws and regulations which should be established in all ASEAN Member States.¹⁸³ There are also measures for consumer protection, as well as intellectual property rights. Regional efforts are also required to work on and integrate other critical areas of cooperation such as infrastructure development, which includes transport, mining,

¹⁷⁸ Treaty of Amity and Cooperation in Southeast QAsia1976 <<http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>>accessed 10 Oct 2016.

¹⁷⁹ 2nd Informal ASEAN Summit, Kuala Lumpur, December 1997.

¹⁸⁰ 9th ASEAN Summit, Bali, October 2003.

¹⁸¹ The Cebu Declaration was signed in Cebu, Philippines on 13th January 2007. See <<http://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/>>accessed 10 Oct 2016.

¹⁸² ASEAN Documents; AEC Blueprint; Para II; p 5 <<http://asean.org/wp-content/uploads/archive/5187-10.pdf>>accessed 11 Oct 2016.

¹⁸³ Ibid, para B, p18.

energy and financial, taxation, and e-commerce. Specifically, in the area of transportation, the Blueprint provided that the ASEAN adopt general principles and a framework to develop and implement the ASEAN Single Aviation Market (ASAM).¹⁸⁴ This will be discussed at length in the final section of this chapter. The third characteristic is to have the equitable economic development which entails Small and Medium Enterprise (SME) development, narrowing the development gap not only within ASEAN Member States but also between ASEAN and other parts of the world.¹⁸⁵ The final characteristic is the integration among the ASEAN Member States into the global economy, pursued through a coherent approach to external economic relations and participation in a global supply network.¹⁸⁶

In terms of economic integration, ASEAN has made great progress in its efforts to establish the AEC by 2015. This can be seen as a more liberalised market has been created: tariffs have been virtually eliminated, trade costs have been reduced through customs procedures and harmonisation of the technical regulations, there is an improved investment regime, improved transportation and network infrastructure, and a more business-friendly and supportive environment has been established.¹⁸⁷ The work on AEC 2015 has been extended by the AEC Blueprint 2025, which was adopted during the ASEAN 27th Summit held in Kuala Lumpur in 2015. While retaining most of the key elements characterised in the AEC Blueprint 2015, the AEC Blueprint 2025 envisages a stronger economic community, through a highly integrated cohesive economy, achieving a more competitive, innovative and dynamic ASEAN with more enhanced connectivity and sectoral cooperation and a resilient, inclusive people-centred approach.¹⁸⁸ Competition policy and laws have always played an important role in supporting the establishment of the AEC, from its first milestone deadline in 2015 to the next in 2025. This is crucial in creating a level playing-field, as well as nurturing a fair business competition culture in the long run. To date, all the ASEAN Member States have their own competition policies and laws, except for Cambodia

¹⁸⁴ Ibid, para B4, p21.

¹⁸⁵ Ibid, para C, p24.

¹⁸⁶ Ibid, para D, p25.

¹⁸⁷ ASEAN Documents, A Blueprint for Growth—ASEAN Economic Community 2015: Progress and Key Achievement.

¹⁸⁸ See <http://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf>accessed 11 Oct 2016.

which is at the final stage of passing its own laws.¹⁸⁹ All ASEAN Members adopt the two main areas of competition law: anti-competitive agreements and abuse of dominance provisions, seven Members have adopted the merger provisions but none of the Members have adopted the state aid provisions.¹⁹⁰ There remains an inconsistent application of the competition laws in the ASEAN Member States. This is perhaps due to the huge differences among the countries, in terms of political and legal systems, and levels of economic and social development.¹⁹¹

The legal system of each of the Member States is also different. Malaysia and Singapore, for instance, differ from Indonesia and Thailand in the sense that the legal systems of Malaysia and Singapore are based on common law, while those of Thailand and Indonesia are based on civil law, or at least reflect a hybrid system.¹⁹² The competition legislation is often modelled on different countries, and there is little convergence. Malaysia's and Singapore's competition law statutes are modelled after EU competition law, with modifications to suit local circumstances, and Indonesian and Thailand competition laws have different characteristics. The laws have different objectives, and substantive, procedural and institutional provisions, which create some inconsistencies in the manner in which the economic boundaries of competition regulation are defined. Almost all ASEAN Member States have different political, economic and social backgrounds and environments, which make it difficult for a uniform rule to be adopted. Moreover, the levels of economic development of these countries also differ. There are obvious differences: Singapore, for instance, has a very strong economy which concentrates on high-tech industries and services with large and highly-competitive firms. Malaysia and Thailand, on the other hand, are experiencing a transition from labour intensive to high-tech industries, with the broad participation of foreign and local companies. Indonesia's economy is still

¹⁸⁹ See <<http://learn.asialawnetwork.com/2019/01/08/cambodia-legal-alert-cambodias-latest-draft-competition-law/>>accessed 29 June 2019.

¹⁹⁰ See 'Handbook on Competition Policy and Law in ASEAN for Business 2017' (ASEAN Secretariat, 4th edn (2017), Annex II: Comparative Table for Competition Law Framework in ASEAN; Available at <https://asean.org/storage/2016/12/Handbook-on-Competition-Policy-and-Law-in-ASEAN-for-Business-2017_Full.pdf>accessed on 28 June 2019.

¹⁹¹ Dr. Hanif Ahamat & Dr. Nasarudin Abdul Rahman, 'Delimiting the Social Boundaries Of Competition Law In ASEAN A Common Approach?', *IIUM Law Journal* (2014) 22 IIUMLJ 165. See also, Dr. Khatina Nawawi, 'Regionalisation of Competition Law and Policy in ASEAN' Cambridge University Press (2018) DOI: <https://doi.org/10.1017/9781108182058.004>.

¹⁹² Ibid.

predominantly agricultural, and is dominated by SMEs. Hence, in terms of having a harmonized law for the purpose of ASEAN countries, ASEAN has established the ASEAN Experts Group on Competition (AEGC), in an effort to achieve harmonized competition policies and laws. The AEGC has developed the 'ASEAN Regional Guidelines on Competition Policy', and compiled a 'Handbook on Competition Policy and Law in ASEAN for Business' to further strengthen competition-related policy capabilities and best practices among its Member States.¹⁹³ Uniform competition policies and laws are seen as vital to ASEAN's vision of regional economic integration.¹⁹⁴

3.4.2 Regional competition regime in the airline industry

The cooperation in the air transport industry under ASEAN started in the early 1990s. In 1992, it was agreed under the Framework Agreement on Enhancing ASEAN Economic Cooperation that the ASEAN countries needed to further enhance their regional cooperation in transportation.¹⁹⁵ Later in 1994, the ASEAN's 'Plan of Action for Transport and Communications 1994-1996' (Plan of Action 1994-1996) was formulated, and the Framework Agreement on Services (FAS) was adopted. The former included the development of an open-sky policy for ASEAN—perhaps the first discussion on open-sky policy at the regional level—and the latter was adopted for the trade liberalization in services. The Plan of Action 1994-1996 was later amended to Plan of Action 1996-1998 and included the 'development of a competitive air service policy towards an open-sky policy for ASEAN' as one of the work programmes. This has marked the start of a gradual progression in deregulating and liberalizing civil aviation in ASEAN. Following this, ASEAN recognized that the competitive market should be based on fair and equal opportunity for all its member states, and implemented the Competitive Air Services Policy in ASEAN Sub-regional Groupings/Growth Areas, Development of the ASEAN Open Sky Policy and ASEAN

¹⁹³ See <<http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/competition-policy/>>accessed 11 Oct 2016.

¹⁹⁴ Cassey Lee and Yoshifumi Fukunaga, 'ASEAN Regional Cooperation and Competition Policies', ERIA Discussion Paper Series, April 2013, ERIA-DP-2013-03, <<http://www.eria.org/ERIA-DP-2013-03.pdf>>accessed on 17 Nov 2016.

¹⁹⁵ Michael Z.F. Li, 'Air transport in ASEAN: Recent developments and implications', *Journal of Air Transport Management*, 4(1998) 35-144, p138.

Multilateral Agreement on Commercial Rights on Non-Scheduled Services Among the ASEAN Countries 1971.¹⁹⁶ The Plan of Action 1999–2004 promoted a more competitive environment for the aviation industry, and called for the development of liberalisation policy for air freight services and adoption of a more liberal and flexible air services arrangement in sub-regional groupings in ASEAN.¹⁹⁷

The work towards liberalized air transport services has since continued, and in 2004, an Action Plan for the ASEAN Air Transport Integration and Liberalisation 2005-2015 was adopted together with its accompanying Roadmap for Integration of Air Travel Sector (RIATS). RIATS set and identified goals and target dates for air freight (cargo) services and scheduled passenger services. The air freight (cargo) services was targeted to be fully liberalized by 2008, whereas the scheduled passenger services target dates were made based on the full achievement of the third, fourth and fifth freedom¹⁹⁸ flights within the ASEAN sub-regions and capital cities by 2010.¹⁹⁹ The implementation of RIATS led to the conclusion of other multilateral agreements on air services, including the Multilateral Agreement on Air Services (MAAS) in 2009, the Multilateral Agreement for Full Liberalization of Air Freight Services (MAFLAFS) in the same year, and the Multilateral Agreement for Full Liberalization of Passenger Air Services (MAFLPAS) in 2010.

In MAAS, MAFLPAS and MAFLFAS, the underlying liberalized targets are similar, in that all agreements provide each state's designated airlines the first freedom right (to fly across one state's territory without landing) and the second freedom right (to make stops in the territory for non-traffic purposes such as for fuel and supplies,

¹⁹⁶ Ibid, p139.

¹⁹⁷ Forsyth P., King J., Rodolfo C.L., 'Open Skies ASEAN', *Journal of Air Transport Management* 12 (2006) 143-152, p144.

¹⁹⁸ According to ICAO Doc 9626, Manual on the Regulation of International Air Transport Part, 4 'Third Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier (also known as a Third Freedom Right)', 'Fourth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a Fourth Freedom Right).' and 'Fifth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State (also known as a Fifth Freedom Right).'

¹⁹⁹ Alan Khoo-Jin Tan, 'Toward a Single Aviation Market in ASEAN: Regulatory Reform and Industry Challenges', ERIA-DP-2013-22.

known as ‘second freedom’). Further, the third, fourth and fifth freedom market access rights were also provided. The third freedom gives state A the right to carry passenger cargo or baggage for profit from its own state to state B, and the fourth freedom gives the right to the state A to carry back the passengers from state B to its own state. In both directions from state A to state B, the fifth freedom gives the right to state A to stop over at state C to drop off or pick up new passengers. All five of these air freedoms are often granted by states in air services agreements, bilaterally or multilaterally.

RIATS also set a target for the realisation of ASEAN Open Skies policy by 2015. Building on this targets, ASEAN established the ASEAN Single Aviation Market (ASAM), also known as ‘ASEAN open skies’, for the liberalization of air transport services in the region by 2015 during its 13th ASEAN Summit, which is also seen in support of the AEC 2015 and AEC 2025.²⁰⁰ ASAM is the latest arrangement by ASEAN member states to materialise the single aviation market in the South East Asia region. The ASAM’s aspirations are in line with the previous agreements and AEC, as it aims to create fair competition, a level playing-field, and an efficient and competitive air transport market with a flexible business environment, as well as enhancing aviation safety and security, and harmonising standards and procedures.²⁰¹ The cooperation is based on two major sectors, the economic and the technical sectors. The economic sector includes matters dealing with market access, charters, airline ownership and control, tariffs, commercial activities, competition laws and policy as well as state aid, consumer protection, and dispute resolution, and the technical sector includes aviation safety and security, and air traffic management.²⁰² The ASAM came into effect on 1st January 2015. Today, ASEAN continues to implement the ASAM together with the MAAS, MAFLPAS and MAFLFAS.

By implementing ASAM, the restrictions on third, fourth, and fifth airspace freedoms for airlines based in ASEAN member states have been removed—all member states will give full market access to their international airports to other

²⁰⁰ Available at <http://asean.org/wp-content/uploads/images/archive/documents/111219-17th%20ATM_Agenda%20Item%208%20ASAM%20Implementation%20Framework.pdf>accessed on 29 June 2019.

²⁰¹ Ibid, p1.

²⁰² Ibid, p2.

ASEAN members, and restrictions on the flight frequency and maximum capacity will be eliminated.²⁰³ The objective is to create competition between airlines, as the ticket prices are expected to fall and give way for domestic airlines to become regional players. Nevertheless, the practical implementation of ASAM has not been smooth. Till to date, the implementation has remained slow.²⁰⁴

3.5 The Competition Law in the EU Airline Industry

In the EU, the origin of the competition law system was found in the Treaty of Rome.²⁰⁵ It started with the fourth Preamble to the Treaty that recognised ‘...the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition’.²⁰⁶ Article 3(1)(g) of the Treaty contained the fundamental principle of undistorted competition.²⁰⁷ It provided clearly that the activities of the Community (now the EU) shall include ‘a system ensuring that competition in the internal market is not distorted’.²⁰⁸ More comprehensive competition provisions were contained in Chapter 2 of the Treaty of Rome; the first section dealt with the prohibition on anti-competitive agreements,²⁰⁹ the abuse of dominance²¹⁰ and other procedural provisions including but not limited to the powers of Commission to make appropriate regulations and directives,²¹¹ and the second section dealt with the granting of state aid incompatible with the internal market²¹² and the related procedures.²¹³ In 2007, the Treaty of Lisbon was signed, amending the Treaty of Rome, and renaming it as the Treaty on the Functioning of the European Union (TFEU).²¹⁴ The EU competition law now, therefore, is found under Chapter 1 of Title

²⁰³ See <www.aseanbriefing.com/news/2016/05/06/asean-aviation-2016.html>accessed on 29 June 2019.

²⁰⁴ TheEdgeMarket, ‘Asean Open Skies Implementation Remains Slow- IDEA’, 17 October 2017, Available at <www.theedgemarkets.com/article/asean-open-skies-implementation-remains-slow-%E2%80%94-ideas>accessed on 29 June 2019.

²⁰⁵ Jones and Sufrin (n 11) ch2, p1 & 31; The Treaty of Rome here refers to the Consolidated Version of the Treaty Establishing the European Community (97/C 40/03).

²⁰⁶ Fourth Preamble of the Treaty of Rome.

²⁰⁷ Jones & Sufrin (n 11) ch2, p32.

²⁰⁸ Article 3(1)(g) of the Treaty of Rome.

²⁰⁹ Article 81 of the Treaty of Rome.

²¹⁰ Article 82 of the Treaty of Rome.

²¹¹ Article 83 to Article 86 of the Treaty of Rome.

²¹² Article 87 of the Treaty of Rome.

²¹³ Articles 88 and 89 of the Treaty of Rome.

²¹⁴ The Treaty of Lisbon also amended Maastricht Treaty 1993; The EU was established based on two treaties, namely, the Rome Treaty 1957, which was later renamed as the Treaty on the Functioning of

VII of Part Three of the TFEU.²¹⁵ The prohibition on the anti-competitive agreements is provided under Article 101, and the prohibition on the abuse of dominance is set out under Article 102. Matters pertaining to the granting of state aid are found under Article 106. There have been several important developments in the EU competition regime since then. The most significant was the ‘modernization’ of the law, which took place in the form of a major reform in enforcement with the adoption of Regulation 1/2003.²¹⁶ Modernization also dictates a more economic approach to be taken by the Commission in implementing Article 101 and Article 102. The other important milestone was the addition of the EU Merger Regulation in 1989 and its reform in 2004, which was aimed to control concentrations between undertakings.²¹⁷ It has been widely accepted now that these four main areas of competition provisions: the anti-competitive agreement, abuse of dominance, state aid and merger, form the substantive competition law in the EU.²¹⁸

The application of competition law to the aviation sector was more gradual compared to other modes of transportation. Matters relating to the transport sector are enumerated under Title VI of the TFEU,²¹⁹ whereby Article 90 clearly says that the objectives of the Treaty shall be pursued ‘within a framework of a common transport policy’.²²⁰ Article 91 empowers the European Parliament and the Council to make appropriate common rules, conditions and measures for international transport, taking into account the distinctive features of transport.²²¹ The Treaty also provides that only compatible aids shall be granted to Member States²²² and any measures relating to

the European Union (TFEU), and the Maastricht Treaty 1993 which was later renamed as the Treaty of the European Union (TEU) by the Lisbon Treaty 2007.

²¹⁵ The competition provisions under the TFEU are similar to that of the Rome Treaty, except that the ‘common market’ was replaced with ‘internal market’ and one additional procedure was inserted under Article 105.

²¹⁶ Council Regulation (EC) 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/1 (Regulation 1/2003). The Modernization of EU competition law took place with the coming into effect of Regulation No. 1/2003 where it aimed at creating a more effective enforcement framework across the EU. The main modernized regulations include the decentralization of the application of Art 101 and 102 by not only the EU but all national competition authorities, the abolition of the notification system under Art 101(3), the creation of a more level playing field for the treatment of agreements in the EU and the establishment of the competition authorities network in the EU.

²¹⁷ EU Merger Regulation.

²¹⁸ For the purpose of this thesis, the focus is only on Article 101 and 102 of the TFEU.

²¹⁹ Title VI – Transport, Articles 90-100 of the TFEU.

²²⁰ Art 90 of TFEU.

²²¹ Art 91 of TFEU.

²²² Art 93 of TFEU.

transport rates and conditions must consider the economic circumstances of Member States.²²³ It also makes clear that any form of discrimination on rates and conditions imposed on the carriage of the same goods and transport²²⁴ or which involves 'element of support or protection in the interest of one or more particular undertakings or industries' are prohibited.²²⁵

These provisions are, nevertheless, applicable to rail, road and inland waterways, whereas the sea and air transport may subject to a different set of procedures set by the European Parliament and the Council.²²⁶ This has resulted in the exemption of air transport sector from the EU competition rules for many years.²²⁷ It was in the landmark case of *Ministere Public v Ucas Asjes*²²⁸ (Nouvelles Frontieres Case) that the Court of Justice (ECJ) decided that 'air transport remains, on the same basis of other modes of transports, subject to the general rules of the Treaty, including the competition rules.'²²⁹ Soon after this judgment, EU competition rules have been gradually applied to air transport through a special competition regime, where competition rules were enforced under different procedures²³⁰ with many block exemptions granted.²³¹ The position now is much simpler; the EU competition rules and regulations are fully applicable to air transport.²³² Apart from that, the EU air transport sector is also bound by the Air Transport Agreement between the EU, the

²²³ Art 94 of TFEU.

²²⁴ Art 95 of TFEU.

²²⁵ Art 96 of TFEU.

²²⁶ Article 100 of the TFEU.

²²⁷ When the Treaty of Rome first came into effect in 1958, air (and sea) transport was exempted from the competition provisions.

²²⁸ Case 209-213(84) (Joined Case) *Ministere Public v Ucas Asjes* [1986] 3 CMLR 173.

²²⁹ *Ibid*, para 45.

²³⁰ Council Regulation (EEC) 3975/87 of 14 December 1987 laying down the procedure for application of the rules of competition for undertakings in the air transport sector. This regulation was repealed by Council Regulation (EC) No 411/2004 of 26 February 2004 in connection with air transport between the Community and third countries.

²³¹ Council Regulation (EEC) 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector. This regulation was repealed and replaced with Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.

²³² The air transport is now bound by the following main regulations; (1) Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2) Regulation (EC) No 847/2004 of 29 April 2004 on the negotiation and implementation of air services agreements between Member States and third countries (3) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

US and the Member States,²³³ and other various liberalising measures such as on matters relating to allocation of slots,²³⁴ ground handling activities,²³⁵ air carrier liability,²³⁶ compensations and assistance on denied boarding²³⁷ and computer reservation system.²³⁸ It follows therefore, the general rules on competition which are provided under Part VII of the TFEU²³⁹ and in particular the notices and guidelines for the implementation of Articles 101 and 102,²⁴⁰ horizontal cooperation agreements,²⁴¹ vertical agreements²⁴² as well as mergers²⁴³ are also applicable to the air transport sector.

The prohibitions on anti-competitive agreements are found in Article 101 of the TFEU. The provision lists several anti-competitive behaviours, such as price fixing, limiting production, and market sharing, that are highly likely to be prohibited, but the list is not exhaustive.²⁴⁴ The prohibition covers both the horizontal as well as the

²³³ OJ [2007] L 134/4.

²³⁴ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community Airports [1993] OJ L14/1.

²³⁵ Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports OJ L/272.

²³⁶ Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents OJ L 285.

²³⁷ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing Regulation (EEC) No 295/91 OJ L46.

²³⁸ Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89 OJ L35.

²³⁹ TFEU, Articles 101, 102, 103, 104, 105, 106, 107, 108, 109.

²⁴⁰ Regulation 1/2003; Commission Notice on the definition of relevant market for the purpose of competition Community law OJ C 372; Commission Notice on agreements of minor importance which do not appreciably restrict competition under the Article 101(1) of the TFEU (De Minimis Notice) [2014] OJ C291; Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 [101] and 82 [102] of the Treaty [2004] OJ C101/81 (Guidelines on the Effect of Trade Concept); Commission Notice : Guidelines on the application of Article 101(3) of TFEU [2004] OJ C101/97.

²⁴¹ Council Regulation (EC) No.2821/71 on application of Article 101(3) to categories of agreements, decisions and concerted practices OJ L285/46; Commission Regulation (EC) No 1217/2010 on application of Article 101(3) to certain categories of research and development agreements OJ L335/36; Commission Regulation (EC) No 1218/2010 on application of Article 101(3) to certain categories of specialization agreements OJ L335/43; Commission Notice : Guidelines 2011/C 11/01 on the applicability of Article 101 of the TFEU to horizontal co-operation agreements OJ C11/1.

²⁴² Council Regulation (EC) No.330/2010 on the application of Article 101(3) of TFEU to categories of vertical agreements and concerted practices OJ L102/1; Commission Regulation (EC) No.2790/1999 on the application of Article 101(3) of TFEU to categories of vertical agreements and concerted practices OJ L336/21; Commission Notice: Guidelines No. 2000/C291/01 on Vertical Restraints OJ C291/1.

²⁴³ EU Merger Regulation.

²⁴⁴ Article 101(1) states that the prohibition is to those agreement which are in particular, ‘...(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*

vertical agreements.²⁴⁵ Some important key concepts have been derived from this part of the provision, such as the concept of 'agreement', 'concerted practices', 'undertakings', 'single economic entity' and 'effect on trade between Member States'.²⁴⁶ In addition to Regulation 1/2003, the Commission has issued a number of Guidelines and Notices such as on the definition of relevant market, agreements of minor importance, the effect on trade concept which aim to facilitate the interpretation and the application of the provision.²⁴⁷ Article 102 prohibits any abuse by one or more undertakings of a dominant position within the internal market, in so far as it affects trade between member states by imposing unfair prices, limiting production, applying dissimilar conditions to equivalent transactions, or making the conclusion of a contract subject to unnecessary conditions.²⁴⁸ This list of abusive conduct is, however, not exhaustive.²⁴⁹ The burden of proof of the infringement relies on the party or the authority who alleges it.²⁵⁰ Unlike Article 101, there are no exemption provisions provided for the prohibition on the abuse of a dominant position, but that does not preclude the dominant undertaking from pleading a proportionate 'objective justification'.²⁵¹ There is also no equivalent *de minimis* threshold as applicable in Article 101.²⁵² The application of these two areas of law to the various types of airline cooperative agreements including the code sharing, joint ventures and alliances are critically discussed and analysed in Chapter 6.

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.'

²⁴⁵ The prohibition covers both the horizontal and vertical agreements.

²⁴⁶ These key concepts are further elaborated in Chapter 5.

²⁴⁷ See (n 239) ch3.

²⁴⁸ Article 102 of the TFEU states that, 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. Such abuse, may in particular, consists in; (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying the dissimilar conditions to equivalent transactions with other trading parties, thereby placing at a competitive disadvantage; (d) making 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.'

²⁴⁹ *Continental Can* [1973] ECR 215; *Tetra Pak International SA v Commission* [1996] ECR I-5951 (Tetra Pak II) para 37; *British Airways v Commission* [2007] ECR I-2331, para 57; *Deutsche Telekom v Commission* [2010] ECR I-955, para 173.

²⁵⁰ See Regulation 1/2003, Art 2.

²⁵¹ The concept of 'objective justification' is established by the EU Courts. See *Post Danmark A/S Konkurrenceradet* EU:C:2012:172, para 40 where the Court first identified objective necessity and efficiencies as the two grounds of justification.

²⁵² A more detailed discussion on Article 102 is provided in Chapter 8.

The other areas of competition law governed under the EU are the provision of state aid and mergers. Generally, the granting of state aid is prohibited unless it is justified by reason of general economic development. Articles 107 to 109 of the TFEU set out the prohibition and the principles for the granting of any kind of state aid, so as to ensure the competition in the market is not distorted. Article 7(1) provides that ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’²⁵³ Article 107(2), however, lays down the circumstances where state aid shall be compatible with the internal market and therefore permitted,²⁵⁴ and Article 107(3) sets out the other circumstances where state aid could be considered compatible.²⁵⁵ Article 108 provides for procedures to be followed by States, with regards to the grant of the state aid, and Article 109 empowers the Commission to make regulations pertaining thereto. There are procedural and implementation regulations issued for the implementation of Article 107 and 108.²⁵⁶ One guideline that is particularly pertinent for the aviation industry is the guideline on

²⁵³ Article 7(1) of the TFEU.

²⁵⁴ Article 107(2) of the TFEU states that ‘The following shall be compatible with the internal market:
 (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
 (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.’

²⁵⁵ Article 107(3) states that, ‘The following may be considered to be compatible with the internal market:
 (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
 (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
 (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
 (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
 (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.’

²⁵⁶ Council Regulation (EU) 2015/1589 of 17 July 2015 laying down detailed rules for the application of Article 108 of the TFEU OJ L248; Commission Regulation (EU) 2015/2282 of 22 November 2015 amending Regulation (EC) No. 794/2004 as regards the notification forms and confirmation sheets OJ L235; Commission Regulation EU No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the TFEU to *de minimis* aid OJ L352.

state aid to airports.²⁵⁷ Others include guidelines on rescue and restructuring²⁵⁸ and the notion of state aid.²⁵⁹ For mergers, the EU Merger Regulation²⁶⁰ governs the assessment of mergers, acquisition and joint ventures and concentrations that meet the prescribed threshold (EU Community Dimension) in the internal market. Generally, the regulation prohibits a merger between undertakings that significantly reduces competition in the single market. The substantive test for mergers is found in Article 2(3) Reg 139/2004.²⁶¹

Establishment with full-function joint venture whereby an undertaking, under the control of two or more undertakings, which performs on a lasting basis all the functions of an autonomous economic entity may fall within the meaning of ‘concentration’.²⁶² Those which do not fall within this definition may be caught under the anti-competitive prohibitions under Article 101. Therefore, mergers and alliances are closely aligned in the sense that they are often concluded in the same agreements but subject to a different competition assessment. It is also noted that mergers without the EU Community Dimension fall within the jurisdiction of the respective national competition authorities. The EUMR regime requires a compulsory pre-merger notification for the assessment of mergers. This regulation is supplemented by another implementing regulation,²⁶³ notices and guidelines. These areas of competition regulations are not within the scope of this thesis, but are mentioned here in the context of the comparative analysis of the framework for competition regulation in the EU and Malaysia. Moreover, as many of the EU competition cases concerning airlines involved both mergers and alliances, these cases are also considered in the thesis. Despite the considerable differences between the state of the airline industry and the development of competition law in the sector between Malaysia and the EU, the international nature

²⁵⁷ Communication from the Commission—Guidelines on State Aid to airports and airlines [2014] OJ C 99/03.

²⁵⁸ Communication from the Commission—Guidelines on State Aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C249.

²⁵⁹ Commission Notice on the notion of State Aid as referred to in Article 107(1) of the TFEU [2016] OJ C 262; Communication from the Commission: Guidelines on State Aid to airports and airlines [2014] OJ C99.

²⁶⁰ EU Merger Regulation, Art 1, para 2.

²⁶¹ EU Merger Regulation, Art 2(3) states, ‘A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.’

²⁶² EU Merger Regulation, Art 3(1)-(4).

²⁶³ EU Merger Regulation.

and the unique characteristics of the airline industry itself will provide a common ground for comparison.

3.6 Conclusion

Malaysia is a middle-income country which strives for an open economy. The country's economic policies and development plans have been heavily influenced by its colonialization. In the past, there was minimal intervention in the economy but this has changed after the country gained independence. Industrialization policy was introduced as a strategic approach to overcome the slow economic growth. Large companies with potential monopoly market structure protected by a tariff wall were created. An extensive interventionist approach was taken when the country implemented the NEP. When the Incorporated and Privatisation Policy were introduced, there was still government intervention in the commercial and industrial sector and to protect *Bumiputera*. In this era deregulation of bureaucratic rules and regulations started to emerge. The privatisation policy which aimed to increase the role of the private sector and to reduce the financial and administration burden has resulted in the transfer of public monopolies to private hands. Many state and federal SOEs were created but federal SOEs were more engaged with transport and finance sectors. These federal SOEs were highly capitalized and incurred considerably larger debt. After nearly half a century, the country development plan emphasized the need to enhance the competitiveness of the economy and recognised the importance of having fair trade laws to respond to the increasingly competitive global economy. This has brought the country to pass its first general competition law, the CA 2010. Three years after the CA came into effect, the country passed the MACA 2015 which created a sector regulator for the aviation sector with a comprehensive power to enforce the competition regulations in the airline industry.

The history of the Malaysian aviation industry was also very much rooted and linked to the development of the British aviation industry. This is evident by the initial establishment of MAS, until it became the national carrier. After serving the country for more than 20 years, MAS was joined by many other domestic airlines during its third decade in the market—a market which had been monopolized by MAS, as a full-

service premium carrier. In 2017, however, the industry has evolved and become dominated by the country's first low-cost carrier, AirAsia. In terms of economic regulations, the market was not regulated until the CA 2010 came into force in 2012. As the Malaysia legal system was very much influenced by the British during its colonization, the CA 2010 was also largely modelled on the UK and the EU competition laws. Although MACA 2015 was passed to provide for the economic regulation and sector-specific competition provisions for the aviation sector, it adopted most of the provisions of CA 2010, with the exception that it accommodates for the aviation service market and contains a merger provision. The country's regional affairs with ASEAN have also influenced competition law development in the country, but as far as the aviation industry is concerned, there have been no uniform competition laws, and no comprehensive implementation of ASAM. This background and setting provides the basis for the application of the competition law which will be examined in the subsequent chapters.

CHAPTER 4 – THE IMPLEMENTATION AND ENFORCEMENT AGENCIES FOR COMPETITION LAW IN THE AIRLINE INDUSTRY IN MALAYSIA

4.1 Introduction

This chapter discusses the roles of the implementation and enforcement agencies for competition laws in the Malaysian aviation sector. As discussed in Chapter 3, the CA 2010, CCA 2010 and MACA 2015 have already created three institutions for the implementation of competition law in the airline industry: MyCC, CAT and MAVCOM. Competition issues in the sector have therefore been governed by: MyCC as the national competition authority and CAT as the appeal tribunal prior to 2016 and MAVCOM as the sectoral regulator starting from 2016. This chapter starts by discussing these key institutions, their establishment, functions and powers, and the enforcement of competition provisions. It then analyses the important factors influencing the institutional agency design in developing countries, such as the issues surrounding independency and autonomy, the lack of competition experts, and the complex roles and functions of competition authorities. In comparison, international best practices by institutions responsible for the implementation of the competition regime, such as those of the UK and the EU, are referred to where necessary.

4.2 Malaysia Competition Commission (MyCC)

4.2.1 Structure of organization

The CCA 2010 provides for the establishment of MyCC, its functions and powers, employees and finances.¹ MyCC was established on 1 April 2011 and began its formal operation on 1 June 2011. Section 3 of the CCA 2010 states that, a ‘body corporate to be known as the “Competition Commission” is established’. As such, MyCC is an independent corporate body which has a perpetual succession and may

¹ This was after Parliament had passed the CA 2010 on 2 June 2010, but before the coming into force of the CA 2010 on 1 January 2012. It was said that a grace period of about 18 months, given before the CA 2010 became effective, was for the MyCC to be established and readied, as well as for the public to be comprehensively alerted and educated about the implementation of the new law in the country.

sue and be sued in its own name.² The CA 2010 further provides MyCC with the power of investigation, enforcement and decision-making, making it responsible for the implementation and enforcement of the CA 2010. Despite being a separate legal entity, MyCC is placed under the supervision of the Ministry of Domestic Trade, Cooperatives and Consumerism (MDTCC).³ MyCC is directly responsible to the Minister, to whom is given the power to give directions pertaining to the use of the powers and functions of the Commission.⁴

4.2.2 Members of the Commission

MyCC consists of a Chairman, four Government representatives, and three to five other members from the private sectors, who have experience and knowledge of matters relating to business, industry, commerce, economics, law, competition, consumer protection, public administration, or any other suitable qualification.⁵ All members of MyCC are appointed by the Prime Minister upon the recommendations of the Minister,⁶ and such appointments can only be revoked by the Prime Minister.⁷ The members of Commission are not allowed to hold any other office or employment unless approved to do so by the Minister.⁸ All members shall hold office for a term not exceeding three years, and may be reappointed for another term, but shall not hold office for more than two consecutive terms.⁹ The remunerations of members are determined by the Minister with the concurrence of the Minister of Finance.¹⁰

² Section 3(2) of the CCA 2010 states that, '[t]he Commission shall have perpetual succession and a common seal' and Section 3(3) of the CCA 2010 provides that, '[t]he Commission may sue and be sued in its name.'

³ See < <https://www.kpdnhep.gov.my/about-kpdnkk-2/?lang=en> > last accessed on 22 June 2019.

⁴ Section 18 of the CCA 210 states that '(1) The Commission shall be responsible to the Minister.

(2) 'The Minister may, in writing, give to the Commission directions of a general character, consistent with the provisions of the competition laws, relating to the performance of the functions and powers of the Commission and the Commission shall give effect to such directions.' 'Minister' is defined by Section 2 of the CCA 2010 as '...the Minister for the time being charged with the responsibility for matters concerning domestic trade and consumer affairs;'. The same definition is provided under section 2 of CA 2010.

⁵ Section 5 of the CCA 2010.

⁶ Section 5 of the CCA 2010.

⁷ Section 11 of the CCA 2010.

⁸ Section 8 of the CCA 2010.

⁹ Section 9 of the CCA 2010.

¹⁰ Section 10 of the CCA 2010.

The current Chairman of MyCC was a former Court of Appeal Judge and has 45 years of legal experience.¹¹ The other members consist of three government officials and five members from the private sector who possess a range of experience in law (including competition law), business and engineering.¹² It is important however that a competition authority must be able to make decisions which are impartial and unhindered not just by political interests but other external influences or pressures.¹³

4.2.3 Functions and Powers

The main functions of MyCC are to implement and enforce competition law provisions, including the issuance of guidelines for implementation and enforcement,¹⁴ advising the Minister or other public or regulatory authority on matters concerning competition, cautioning the Minister on any current or proposed legislations that is likely to have an anti-competitive effect and recommending ways and means to avoid such effects, as well as advising the Minister on any reforms to competition laws and providing advice on international agreements related to competition matters.¹⁵ Other functions include being an advocate, creating awareness and educating the public on competition matters, and carrying out general studies on any competition-related issues in any sector of the economy.¹⁶ Generally, MyCC has the power to do all things necessary or expedient for the performance of its functions under the law.¹⁷ Specifically, it has the power to impose penalties for any infringement of the law and to charge fees for services rendered in performing its functions.¹⁸ It also has the power to appoint experts or consultants, to formulate and implement programmes, and to cooperate with any corporate body or government agency for the purpose of carrying out its functions.¹⁹

¹¹ Ibid.

¹² Malaysian Competition Commission Annual Report 2011 (June-December).

¹³ Sofia Alves, Jeroen Capiu and Ailsa Sinclair, *Principles for the Independence of Competition Authorities*, European Commission, Brussels *Competition Law International*, Vol II No 1 April 2015, p14.

¹⁴ As to date, MyCC has issued seven guidelines; Guidelines on Complaints Procedures, Guidelines on Market Definition, Guidelines on Anti-Competitive Agreements, Guidelines on Abuse of a Dominant Position, Guidelines on Financial Penalties, Guidelines on the Leniency Regime and the latest being the Guidelines on Intellectual Property Rights and Competition Law issued on 5 April 2019. See section 3.3.3 of Chapter 3.

¹⁵ Section 16 of the CCA 2010.

¹⁶ Section 16 of the CCA 2010.

¹⁷ Section 17(1) of the CCA 2010.

¹⁸ Section 17(2) of the CCA 2010.

¹⁹ Section 17(2) of the CCA 2010.

With the power of investigation and enforcement,²⁰ and the power to make decisions,²¹ MyCC may conduct an investigation on its own initiative, upon the direction of the Minister, or upon complaints received from the public.²² It can close any investigation it sees fit by making a public statement on its decision to do so.²³ MyCC officers are empowered to investigate and have the same powers as a police officer, having investigatory powers for seizable offences provided under the Criminal Procedure Code.²⁴ Consequently, MyCC has the power to request information, to retain documents, and to access records.²⁵ It is noted that the Act makes it an offence for any person to disclose any confidential information relating to a firm, including valuable trade and business and industrial secrets, during an investigation by the MyCC.²⁶ It is also an offence for any person to issue threats and reprisals with the intention of preventing anybody from making a complaint to the MyCC or cooperating with its investigations.²⁷

MyCC has the power to issue interim measures²⁸ and propose decisions²⁹, convene oral representations, conduct hearings, and make a finding of non-infringement³⁰ or infringement³¹ of the prohibitions.³² MyCC may grant general exemptions,³³ individual exemptions,³⁴ and block exemptions.³⁵ It can establish a leniency regime and accept an undertaking.³⁶ The leniency regime, in particular, aims to reduce the administrative costs and resource burden on the MyCC as it seeks to

²⁰ Part III of the CA 2010.

²¹ Part IV of the CA 2010.

²² Sections 14 and 15 of the CA 2010.

²³ Section 16 of the CA 2010.

²⁴ Section 17 of the CA 2010.

²⁵ Sections 18 - 20 of the CA 2010.

²⁶ Section 21 of the CA 2010.

²⁷ Section 34 of the CA 2010.

²⁸ Section 35 of the CA 2010.

²⁹ Section 36 of the CA 2010.

³⁰ Section 39 of the CA 2010.

³¹ Section 40 of the CA 2010.

³² As to date, MyCC has made seven findings of non-infringement involving various industries, such as the food industry, housing development and steel manufacturers. MyCC has made findings of infringement for six cases, which involved the food industry, flowers associations, depot operators and an important competition case in the aviation sector, the *MAS/AirAsia* case.

³³ Section 5 of the CA 2010.

³⁴ Sections 6 and 7 of the CA 2010.

³⁵ Sections 8 and 9 of the CA 2010.

³⁶ Section 37 - 43 of the CA 2010.

uncover cartel activity that is otherwise secret and difficult to detect.³⁷ The leniency programmes offer a penalty reduction of up to 100% to enterprises that admit their involvement in an infringement of any prohibitions specified under section 4(2) of the CA 2010. This section provides for prohibitions of horizontal agreements with specific objects and those who cooperate and contribute significantly to investigations.³⁸ The leniency programme also offers different percentages of penalty reduction depending on whether an enterprise was the first to bring a suspected infringement to the attention of the MyCC, and on the stage of investigations in which the involvement was admitted and information was provided. MyCC's decisions are enforceable in the HC, and any breach of the order of the HC is punishable as a contempt of court.³⁹ The decisions of the MyCC are subject to review by an appeal tribunal known as the 'Competition Appeal Tribunal'.⁴⁰

4.2.4 Employees and Financial Matters

The overall administration and management of MyCC lies with the Chief Executive Officer (CEO), who is appointed by the Minister.⁴¹ The CEO has general control over all employees of the Commission and discharges its duties according to general directions of the Commission.⁴² The Commission may employ such number of employees as it deems fit and necessary and, with the approval of the Minister, determine its own condition of service.⁴³ In terms of finance, MyCC manages its own 'Competition Commission Fund', which is established by law.⁴⁴ MyCC may from time to time receive such sums as may be provided by Parliament, from fees or charges for its services, and monies derived from investments, grants and borrowings.⁴⁵ The fund is used to pay any expenditures lawfully incurred, including the remuneration and allowances of its members and employees.⁴⁶ It is noted, however, that MyCC's

³⁷ Nasarudin & Hanif (n 8) ch3, p195.

³⁸ Section 41 of the CA 2010.

³⁹ Section 42 of the CA 2010.

⁴⁰ See more discussion about Competition Appeal Tribunal (CAT) in later section.

⁴¹ Section 20 of the CCA 2010.

⁴² Section 20 of the CCA 2010.

⁴³ Section 22 of the CCA 2010.

⁴⁴ Section 27(1) of the CCA 2010 states that, 'A fund to be known as the "Competition Commission Fund" is established and shall be administered and controlled by the Commission.'

⁴⁵ Section 27(2) of the CCA 2010.

⁴⁶ Section 28 of the CCA 2010.

financial procedures, power to borrow and invest, and power to enter into contracts and to open bank accounts are subject to the Minister's approval.⁴⁷ MyCC is also required by law to furnish its accounts, returns, reports and any other information to the Minister and any public authority as the Minister may require.⁴⁸ These considerable powers of the Minister may affect the independency of a competition authority and this is discussed further in the later section 4.6.1.

The establishment of MyCC is similar to the current competition authority in the UK which is known as Competition and Markets Authority (CMA). It was established on 1 October 2013 by the Enterprise Act 2012 (EA 2012) replacing the two previous competition authorities; the Office of Fair Trading (OFT) and the Competition Commission (CC). The functions of OFT and CC were also transferred to the CMA. The decision to have a single authority was to eliminate inefficiency, duplication and overlap in the UK competition regime. The CMA Board consist of a Chairman and a minimum of four members appointed by the Secretary of State. It is administered by the Chief Executive who may be the Chairman or appointed from any member of the Board. CMA has considerable powers under the UK Competition Act 1998 (CA 1998) in enforcing the Chapter 1 and Chapter 2 prohibitions, to adopt interim measures and decision and also to enforce Articles 101 and 102 of the TFEU. CMA can also conduct market investigations and studies. CMA decisions are appealable to an appeal tribunal also known as the CAT.⁴⁹ Non-appealable decisions of CMA can be appealed to the Administrative Court for a judicial review. CMA also has the power to bring criminal prosecution for cartel offences under the EA 2012. There are several sector regulators in the UK who share competition concurrent powers with the CMA. These sector regulators can enforce Articles 101 and 102 of the TFEU as well as the Chapter 1 and Chapter 2 prohibitions. The UK Civil Aviation Authority (UK CAA) is one of the sector regulators. Their decisions are also appealable to the CAT and they can also refer matters to CMA. These concurrent powers can be removed by the Secretary of State if he or she thinks appropriate to promote competition and benefit the consumers. UK CMA has established the UK Competition Network (UK CN) as a forum to enhance

⁴⁷ Sections 31 – 35 of the CCA 2010.

⁴⁸ Section 19 of the CCA 2010.

⁴⁹ Section 46 of UK CA 1998.

cooperation and ensure consistent and effective competition enforcement with all the sector regulators.

4.3 The Malaysian Competition Appeal Tribunal (CAT)

4.3.1 Structure of Organization

The CA 2010 also established an appeal tribunal known as the 'Competition Appeal Tribunal' (CAT).⁵⁰ CAT is an independent judicial body created by law and has an exclusive jurisdiction to review decisions made by MyCC.⁵¹ It began operation on 1 January 2012 and, in practise, CAT is also placed under the supervision of the MDTCC.⁵²

4.3.2 Members of CAT

The CAT consists of a President and between seven to twenty members.⁵³ The President must be appointed from the High Court judges by the Prime Minister, upon the recommendation of the Minister and nomination by the Chief Justice of the Federal Court.⁵⁴ The appointments of other members are also by the Prime Minister and on the recommendation of the Minister.⁵⁵ The law specifically requires that members have the relevant expertise in industry, commerce, economics, law, accountancy, or consumer affairs.⁵⁶ These appointments can only be revoked by the Prime Minister.⁵⁷ The term of office for both the President and members is six years.⁵⁸ The President and the members do not receive remuneration but are paid allowances as the Minister

⁵⁰ Section 44 of the CA 2010 states that, 'There is established a Competition Appeal Tribunal, which shall have exclusive jurisdiction to review any decision made by the Commission under sections 35, 39 and 40.'

⁵¹ Section 51 of the Malaysian CA 2010. Unlike MyCC, CAT is established by the CA 2010 itself and not by a separate Act.

⁵² See <<https://trp.kpdnhep.gov.my/tribunalpersaingan/index.php?lang=en>>accessed on 23 June 2019.

⁵³ Section 45(1) of the CA 2010.

⁵⁴ Section 45(2) of the CA 2010.

⁵⁵ Section 45(1)(b) of the CA 2010.

⁵⁶ Section 45(3) of the CA 2010.

⁵⁷ Section 47 of the CA 2010.

⁵⁸ Section 45(5) of the CA 2010.

may determine.⁵⁹ One important aspect, section 49 of the CA 2010 compels all members, as soon as practicable, disclose any of their interests to the President which may conflict with their duties in any particular matter. The President must himself declare his interest if he thinks it may conflict with his duty in a particular matter. Failure by the President or members to do so may invalidate decisions made by the tribunal and subject the President and members to the revocation of their appointment. Currently, CAT consists of a President who is a serving High Court Judge,⁶⁰ and ten members.⁶¹ The members are from various legal and economic backgrounds; three are serving Court of Appeal and High Court judges, two are Professors in Economics, one is an Associate Professor in Competition Law, two are economists, one is an expert in international trade, and another is an advocate and solicitor. CAT is administered by a Secretary who is assisted by a number of public officers who are appointed by the Minister.⁶²

4.3.4 Appeal Proceedings

The CAT may hear appeals from any person who is aggrieved by the MyCC's decisions.⁶³ Appeals are heard by a panel of three members or such greater uneven number determined by the President based on a particular case.⁶⁴ Any decision by CAT is decided by a majority.⁶⁵ The President determines the dates and places for its sitting, and the CAT decides on its own procedure.⁶⁶ The CAT may confirm or set aside the decision of MyCC, remit the matter back to MyCC, impose, revoke or vary the financial penalty, give a direction as the MyCC could have given, and make any decision which the MyCC could have made.⁶⁷ The decision of the CAT is enforceable by leave of the HC, and a judgment may be entered in terms of its decision.⁶⁸ CAT is

⁵⁹ Section 46 of the CA 2002 provides that such allowances may include daily sitting allowance, lodging travelling and subsistence allowance and such fixed or other allowances as the Minister thinks appropriate.

⁶⁰ See <<https://themalaysianreserve.com/2018/10/02/fearlessly-independent-retired-judge-%E2%80%A8to-steer-competition-commission/>>accessed on 23 June 2019.

⁶¹ See <<https://trp.kpdnhep.gov.my/tribunalpersaingan/index.php?lang=en>>accessed on 23 June 2019.

⁶² Section 50 of the CA 2010.

⁶³ Section 51 of the CA 2010.

⁶⁴ Section 54 of the CA 2010.

⁶⁵ Section 58(1) of the CA 2010.

⁶⁶ Section 56 of the CA 2010.

⁶⁷ Section 58(2) of the CA 2010.

⁶⁸ Section 59 of the CA 2010.

given the power of a subordinate court under the Subordinate Courts Act 1948 with regards to the enforcement of attendance of witnesses, hearing evidence on oath, or affirmation and punishment for contempt.⁶⁹

This is similar to the UK CAT which was established by EA 2002 as an independent body consisting of a President, a panel of Chairmen (members appointed by the Lord Chancellor following the recommendation of Judicial Appointments Commission) and ordinary members (appointed by the Secretary of State). It has four main functions; to hear all 'appealable decisions' from the UK CMA and other sectoral regulators under CA 1998 and Articles 101 and 102 of the TFEU, to hear any claims for damages, to determine review of CMA's decisions and to hear appeals against penalties. Cases heard by three persons chaired by a President or one member from the panel of Chairmen. It is administered by a body corporate called 'Competition Service' established under section 13(1) of the EA 2002 with the purpose of funding and providing support services, which includes the provision of staff and accommodation, to the UK CAT.

4.4 The Malaysian Aviation Commission (MAVCOM)

4.4.1 Structure of Organization

Upon coming into force the MACA 2015, an independent body corporate known as the 'Malaysian Aviation Commission' (MAVCOM), which is responsible for providing economic and commercial regulations for the civil aviation industry in Malaysia, was established on 1 March 2016.⁷⁰ In practise, MAVCOM is placed under the MOT for the purpose of supervision. Upon the establishment of MAVCOM, the CA 2010 is no longer applicable to any aviation matters⁷¹ and MyCC is relieved from its duties to deal

⁶⁹ Section 57(2) of the CA 2010.

⁷⁰ Section 3 of the MACA 2015 states that 'A body corporate to be known as the 'Suruhanjaya Penerbangan Malaysia' or 'Malaysian Aviation Commission' is established.'

⁷¹ First Schedule of the CA 2010 specifically excludes the MACA 2015 from its application.

with competition cases in the aviation sector, except for cases that it had decided prior to 2016.⁷²

4.4.2 Members of MAVCOM

The Executive Chairman of MAVCOM is appointed by the Prime Minister. Other members include a permanent representative each from the MoT and from the Director General of the Economic Planning Unit in the Prime Minister's Office.⁷³ There are also four to six members from the private sector who have the experience or have shown capacity and professionalism in matters relating to economics, law, finance, business, administration, aviation or any other suitable qualification relevant to the Act.⁷⁴ The members from the private sector are appointed by the Minister upon consultation with the Prime Minister.⁷⁵ The appointment of the Executive Chairman can only be revoked by the Prime Minister, while the members from the private sectors may be revoked by the Minister.⁷⁶ The members from the private sector are not allowed to hold any other office or employment relating to the aviation services unless with the approval of the Minister.⁷⁷ Their tenure is for a term not exceeding three years, although they may be reappointed for another term, they may not serve more than two consecutive terms.⁷⁸ The remunerations of members are determined by the Prime Minister.⁷⁹

The current Executive Chairman of MAVCOM was appointed on 1 July 2018.⁸⁰ He is an economist, an academic, and a Member of Parliament.⁸¹ It is noted that currently MAVCOM has only one permanent representative from the MOT and three other members from the private sectors, these being a former judge of the Court of

⁷² *MAS/AirAsia* is discussed in Chapter 7.

⁷³ The Ministry of Economic Affairs took over the major roles and functions previously implemented by EPU on May 12, 2018, after the 14th General Election (GE14). See <www.mea.gov.my/en/profile/historyds>accessed on 29 June 2019.

⁷⁴ Section 5(1) of the MACA 2015. This qualification is also expected from the Executive Chairman; See section 5(2) of the MACA 2015.

⁷⁵ *Ibid.*

⁷⁶ Section 9 of the MACA 2015.

⁷⁷ Section 5(3) and (4) of the MACA 2015.

⁷⁸ Section 7 of the MACA 2015.

⁷⁹ Section 8 of the MACA 2015.

⁸⁰ See <<https://www.mavcom.my/en/commissioners/>>accessed on 23 June 2019.

⁸¹ *Ibid.*

Appeal and the High Court who has also served as the Deputy Public Prosecutor, an aviation specialist, and an investment specialist.⁸² MAVCOM is in the process of appointing other members to comply with the legal requirement under MACA 2015. A longer period is taken due to the change of the agencies portfolios named in the Act.

4.4.3 Administration of MAVCOM

MACA 2015 confers certain administrative and advisory functions upon the Executive Chairman. The Executive Chairman is responsible for the daily affairs of MAVCOM, the administration of its fund, and the general control of the employees.⁸³ The Executive Chairman also advises and provides policy to the Minister on matters relating to civil aviation, and to all government agencies on all matters relating to the aviation industry from the economic perspective.⁸⁴ The Commission, however, must be consulted in the management of the fund and the provisions of policy recommendations.⁸⁵ There are two funds established by the MACA 2015, the Aviation Commission Fund,⁸⁶ and the Public Service Fund.⁸⁷

4.4.4 Functions and Powers

The main functions of MAVCOM are to regulate all economic matters in the civil aviation industry, to provide a mechanism for the protection of consumers and to resolve disputes between the providers of aviation services, to allocate traffic rights, to monitor slot allocation, to administer public service obligations, and to coordinate matters of interest in the aviation industry, locally and internationally.⁸⁸ It is also

⁸² Ibid.

⁸³ Section 21(1)(a), (b) and (c) of the MACA 2015.

⁸⁴ Section 21(1)(d) of the MACA 2015.

⁸⁵ Section 21(2) of the MACA 2015.

⁸⁶ Section 25 of the MACA 2015.

⁸⁷ Section 27 of the MACA 2015 provides that the Aviation Commission Fund consists of moneys received from the Parliament, fees, investments and borrowings which are to be used for, among other things, the payment of all lawful expenditures of the Commission and remunerations of the members and employees of the Commission. The Public Service Fund consists of all moneys received from the Parliament and any moneys lawfully received by the Commission for the purpose of funding the public service obligations. The fund is to be used to pay airlines which have performed public service obligations. Section 30 and 32 also provides that MAVCOM has the powers to borrow and to invest, albeit with the approval of the Minister of Transport and the concurrence of the Minister of Finance.

⁸⁸ Section 17(1) of the MACA 2015.

responsible for improving local and global connectivity in the aviation industry, for promoting effective competition which will enable the domestic carriers to compete in a sustainable, profitable, efficient and fair manner, and to maximise the utilization of government grants while seeking ways to reduce such reliance over time.⁸⁹ MAVCOM has the power to cooperate with other government agencies or any bodies, local or foreign, to require the furnishing of information from industry stakeholders for the performance of its functions under the law, to impose fees or charges for the services it may have rendered, and to disseminate information and create public awareness about its functions.⁹⁰ For technical, safety and security matters, however, MAVCOM shall consult the Director General of the Civil Aviation (DGCA).⁹¹

4.4.5 Competition powers of MAVCOM

The most notable power of MAVCOM is the enforcement of competition regulations in the aviation sector. MAVCOM is responsible for granting the air service licences for scheduled journeys, air service permits for unscheduled journeys, ground handling licences, and aerodrome operator licences.⁹² Nevertheless, MAVCOM must consult DGCA on all matters pertaining to technicalities, safety and security before any issuance of the licences and permits can be made.⁹³ It should be noted that, prior to the establishment of MAVCOM, CAAM being a technical body, was responsible for issuance of all these licences and permits, on the proviso that the recipients satisfied all the technical, safety and security requirements and met the approval of the Ministry of Transport.⁹⁴ Therefore, when this responsibility was transferred to MAVCOM, CAAM had to be consulted with regard to these technical, safety and security matters. Consequently, the Ministry of Transport no longer has the power to grant such licences and permits. It is hoped that the vesting of these powers in an independent body will reduce the possibility of intervention and political interference.

⁸⁹ Ibid.

⁹⁰ Section 18 of the MACA 2015.

⁹¹ Section 19 of the MACA 2015.

⁹² Section 35 – 39 of the MACA 2015.

⁹³ Section 19 of MACA 2015.

⁹⁴ This is provided under the old Civil Aviation Regulations 1996 which is revoked by the new Civil Aviation Regulations 2016.

In enforcing the competition regulations, the Act gives MAVCOM quite considerable powers. Section 51 provides for the establishment of the individual exemption regime and MAVCOM, upon an application made by an enterprise, may or may not grant the exemption. The bases of the individual exemption, as specified in the Act, concern when an anti-competitive agreement has a direct significant identifiable technological, efficiency and social benefits in which the benefits could not reasonably have been provided without the agreement having the effect of distorting the competition. In such cases, the detrimental effect must be proportionate to the benefits provided, and therefore such agreement does not allow the enterprise to eliminate competition completely with respect to the substantial part of the aviation services. The same basis is used for granting the block exemptions under Section 52 of the Act.⁹⁵

Similar to those powers granted to MyCC, MAVCOM can issue interim measures if it has reasonable grounds to believe that any prohibitions under the Act have been infringed pending an investigation. These interim measures include suspending the effect of, and desisting from acting in accordance with a particular agreement, desisting from any conduct, or doing or refraining from doing any particular act.⁹⁶ MAVCOM may make a finding of non-infringement or infringement of the prohibitions provided under Part VII of the Act.⁹⁷ If MAVCOM finds that there is an infringement, it has the power to require it to cease immediately, to specify appropriate steps to end the infringement, and to impose a financial penalty or any other directions as it thinks fit and appropriate. Section 60 of the Act establishes the leniency regime whereby an enterprise may obtain up to 100% immunity from penalties if it admits involvement in an infringement or provides MAVCOM with information which substantially assists the Commission in its investigations. The leniency regime applies only to cases relating to anti-competition agreements.⁹⁸ MAVCOM is also empowered to accept undertakings from enterprises to do or refrain from doing anything that it considers appropriate.⁹⁹ In this regard, MAVCOM may close an investigation without making any findings or

⁹⁵ This is similar to Article 101(1) of the TFEU.

⁹⁶ Section 57 of the MACA 2015.

⁹⁷ Section 58 and 59 of the MACA 2015.

⁹⁸ Section 60 of the MACA 2015.

⁹⁹ Section 62 of the MACA 2015.

imposing any penalty should an undertaking be accepted. MAVCOM may enforce its directions and decisions in the HC.¹⁰⁰ The HC may make an order to comply if a person is found to be in non-compliance with such a direction or decision. Any breach of the order of the HC is punishable as a contempt of court.

MAVCOM may also conduct a review of the aviation service market, whether on its own initiative or upon the Minister's request in order to determine whether any features or combination of the market prevents competition in the sector.¹⁰¹ This review includes a study into the structure of the aviation service market under investigation, the conduct of enterprises, suppliers and consumers in the aviation sector, and any other relevant matters as the Commission deems appropriate. MAVCOM may also deal with the private actions brought by any person who suffers loss or damage directly as a result of an infringement under the Act¹⁰² and the power to issue guidelines on economic and legal analysis. These are to be used in determining competition cases under the Act, establishing the principles for penalties, and to specify the types of anticipated mergers to be considered under the Act and the procedures to be followed by any party making the application for notification of an anticipated merger and notification of merger.¹⁰³ It is specifically provided in the Act that any decisions given by MAVCOM pertaining to competition provisions can be appealed to the HC.¹⁰⁴

The difference in UK; matters concerning competition issues in aviation sector are governed by their civil aviation authority (UK CAA) which is given concurrent powers under the CA 1998 to enforce the Chapter 1 and Chapter 2 prohibitions as well as the prohibitions under Article 101 and 102 of the TFEU. UK CAA is primarily responsible for the development of the aviation sector, the enforcement for the safety and security standards of the industry and also its economic regulations. As a sector

¹⁰⁰ Section 61 of the MACA 2015.

¹⁰¹ Section 63 of the MACA 2015.

¹⁰² Section 64 of the MACA 2015.

¹⁰³ Section 65 of the MACA 2015. As to date, MAVCOM has issued seven guidelines; Guidelines on Aviation Service Market Definition, Guidelines on Anti-Competitive Agreements, Guidelines on Abuse of Dominant Position, Guidelines on Substantive Assessment of Mergers, Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger, Guidelines on the Determination of Financial Penalties, and Guidelines on Leniency Regime.

¹⁰⁴ Section 88 of the MACA 2015.

regulator, UK CAA is also a member of the UKCN. A Memorandum of Understanding was signed between the UK CAA and UK CMA specifying a more detailed working arrangement in enforcing the competition regulations. This includes matters pertaining to case allocation, sharing of information, pooling of resources and market investigations and studies.

4.5 The relationship between MyCC, MAVCOM and CAT

MyCC was primarily established to enforce competition law across all sectors of the economy. It is the only national competition authority with the sole function of regulating and promoting competition. It is an independent administrative agency which is empowered to investigate and enforce the law. Its decisions are appealable to a special competition tribunal, the CAT, the decisions of which are subject to judicial review. MAVCOM, on the other hand, is a commission established for the purpose of regulating the economic matters of the aviation sector. This encompasses matters pertaining to the licencing regime, competition, air traffic rights and slot allocation, consumer protection and public services obligations in the aviation services market including the enforcement of competition regulations. It is given specific investigation, enforcement and decision-making powers. The decisions of MAVCOM are not, however, appealable to CAT, but are subject to judicial review by the HC. This is notably different from the arrangement between the competition authority and the sector regulator in the UK where all decisions of UK CAA may be appealed to the UK CAT.

Both MyCC and MAVCOM therefore assume the dual role of investigator and adjudicator. Looking at the purpose of establishment, both agencies may have similar objectives and pursue common goals insofar as competition enforcement is concerned. Nonetheless, their respective scope and jurisdiction differ. While MyCC deals with competition issues in all sectors of the economy, MAVCOM deals only with competition issues within the aviation sector. These differences have given rise to several issues. One possible area of concern is the consistency of the application of the competition law by both authorities. The actual standards and mechanisms applicable in assessing a particular competition case may differ between these two

agencies following the different nature of the aviation industry market to other sectors of the economy. It is not clear whether both institutions will be bound by each other's decisions, considering that many of the competition prohibitions are similar. The fact that the decisions of MAVCOM regarding competition cases are not subject to the review of CAT, the specialized competition tribunal, is also problematic.

There is no Memorandum of Agreement entered into between MyCC and MAVCOM and there is no joint cases so far between these authorities. Section 38 of the CCA 2010, requires MyCC, upon the direction of the Minister, to make 'interworking arrangements with any other authority in Malaysia or in a foreign jurisdiction or any international organisation and determine the arrangements for such interworking or membership of international organisations.'¹⁰⁵ Pursuant to this, MyCC spearheaded the establishment of a Special Committee on Competition whose members included representatives from the sectoral regulators, such as the Malaysian Communication and Multimedia Commission (MCMC), the Energy Commission (EC), the National Water Services Commission (NWSC), the Land Public Transport Commission (SPAD), and the Central Bank of Malaysia.¹⁰⁶ The committee serves as a forum for regulators to discuss and harmonise their respective terms and principles on competition laws so as to be in conformity with the CA 2010. With the establishment of MAVCOM as the sector regulator, MAVCOM is also a member of the committee and any matters and issues arising from the implementation and the enforcement of competition laws are discussed and addressed in this committee. There have been no issues arising thus far from the committee given the fact that MAVCOM has not dealt with any competition issues from the aviation sector. Any inconsistency therefore remains to be seen. The Special Committee is similar to the establishment of the UKCN which serves as a platform for all sector regulators to synchronise their enforcement and implementation. It is to note that infringements of CA 2010 and MACA 2015 are regarded as civil offences and are referred to the civil courts. Decisions of MyCC, CAT and MAVCOM are enforceable in the HC and any breach of the order of the HC is punishable as a contempt of court. Though there are criminal offences provided in the CA 2010, the CCA 2010 and the MACA 2015, such offences

¹⁰⁵ Section 39 of the CCA 2010.

¹⁰⁶ Malaysian Competition Commission Annual Report 2011-2015.

are not related to the competition provisions as the offences are related to tipping-off, breach of threats and reprisals, obstructions of the duty of an authorized officer, giving false information, and the disclosing of confidential information.

4.6 Key Factors Affecting Competition Authorities

4.6.1 Autonomy and independence

There is a wide consensus that “competition authorities must be independent both from the executive branch of government and from the business community”.¹⁰⁷ Among the strongest arguments for this independence; the fact that the government’s commitment to its competition policy is more credible if it is administered by an independent part of the executive branch. Moreover, government or political interference in the outcome of competition law enforcement cases is to be avoided.¹⁰⁸ The competition authority must also be free from the influence of the business community, as there is a fear that “the competition authority could be captured by private interests of the most powerful firms in the market making the authority unable to discharge its law enforcement responsibility in a fair and equitable manner”.¹⁰⁹ Most importantly, by being independent, a competition authority is able to make an objective decision. This is pertinent as a commitment to independence would show the government’s seriousness in promoting competition, enhance the credibility of the agency, and strengthen the community’s (both firms and consumers) trust in the agency and the market.

What constitutes independence has been the topic of numerous discussions and debates. It has been agreed by most commentators that independence can be observed on the basis of structural and operational independence.¹¹⁰ Structural independence means the establishment of a competition authority as a separate legal

¹⁰⁷ Jenny, Frederick ‘Competition Authorities: Independence and Advocacy’; Sokol D. and Ioannis Lianos; “The Global Limits of Competition Law”; Stanford University Press, 2012, p 1. See also United Nations Conference on Trade and Development (UNCTAD), *The role of competition policy in promoting economic development: The appropriate design and effectiveness of completion law and policy*, 30 August 2010.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, p 2.

¹¹⁰ Ibid, p 3.

entity from the ministries. Operational independence refers to the liberty and freedom of the competition authority to conduct its investigations, pursue its enforcement activity, and impose solutions without any government interference.¹¹¹ Therefore, structural independence may be achieved formally through a legal framework, but it does not guarantee that an authority's actual behaviour and decisions are always independent. Much depends on actual operation, such as the authority's daily work and the people appointed as members or heads of the authority.¹¹² Ideally, for an agency to be autonomous, it must be free from any political pressures, especially when it conducts investigations and prosecutes violations. It must be accountable for its activities, functions and powers, and expenditure of public resources. Autonomy can be achieved if an agency is independent. There is, however, a danger of having a completely autonomous and 'too accountable' body, as complete autonomy could potentially isolate an agency from executive policy decisions, while being 'too accountable' will only subject the agency to unnecessary reporting.¹¹³

In developing countries, however, governments are prone to implement protectionist measures, as there is a need to protect certain sectors of the economy. As a result, a minister is given considerable powers under competition law. If this power to intervene in the economy is exercised too frequently it can result in competition being distorted. In the case of MyCC, it is notable that the Minister has considerable powers under the CA 2010.¹¹⁴ The most significant of these is the power to amend the First Schedule of the Act, which provides for the exclusion of certain sectors in the economy, and the Second Schedule, which exempts certain matters from prohibitions on anti-competitive practices, as provided under section 13. However, section 13 further provides that it is compulsory for the Minister to conduct a public consultation before an amendment is made. This serves as a check and balance on his or her power. Others include the power to make regulations for the effective implementation of the law and to issue general directions to the Commission

¹¹¹ Ibid, p 3.

¹¹² Sofia, Jeroen & Ailsa (n 14) ch4, p16.

¹¹³ William E Kovacic & Hayman D.A, "Competition Agency Design: What's on the Menu?" (2012), GW Law Faculty Publications and Other Works, Paper 628, p5.

¹¹⁴ During the interviews with the officers of the Attorney General Chambers and MyCC this issue was highlighted and it was agreed that Minister's intervention is still required in ensuring the law is implemented according to the policy (See Appendix 5).

for the better carrying out of its functions. The Minister also seems to have extensive control over the selection of the members and the appointment of the Chief Executive Officer, the conditions of service of employees, and the approvals and authorisations of financial matters. In its Economic Survey carried out in Malaysia in 2016, the OECD observed that the independence and capacity of the MyCC to perform its functions are limited by the prominent role of the Minister under the law.¹¹⁵ In practise, it is unclear as to what extent these powers influence the outcome of the competition cases made by the MyCC. As the Minister's control may eventually threaten the independence of the authority, it is crucial that the powers are exercised in accordance with the provisions of the Act. "This is to ensure that the competition law is not used by the political or industrial goals unrelated to competition policy."¹¹⁶

Operational independence also includes the ability of the authority "to participate in the government and regulatory matters and to take positions that are independent of those held by others in the public or private sectors".¹¹⁷ Some of the organizational features of a competition authority, such as the terms and conditions of appointment of the agency's head and the selection of the board members, may also contribute to its independence or lack of independence. To ensure independence, a fixed-term appointment of three years with stringent conditions on dismissal and renewal would reasonably allow the agency's head to carry out his or her duties effectively. The board of members must be selected thoroughly and their background and status must be free and independent from any government influence or private business interests. This is particularly difficult to implement in developing countries, as competition experts are not numerous and they tend to have important roles in business as well as connections with influential politicians, which can give rise to possible conflicts of interest or regulatory capture. In order to assess and review these instruments, taking account of best international practices, it is important that the agencies are subject to accountability mechanisms, including peer review by international agencies such as UNCTAD and the OECD.

¹¹⁵ See <<http://www.oecd.org/eco/surveys/Malaysia-2016-OECD-economic-survey-overview.pdf>>last accessed on 29 January 2019.

¹¹⁶ Sofia, Jeroen & Ailsa (n 14) ch4, p15.

¹¹⁷ Ibid, p 4.

In the case of MyCC, the CCA 2010 makes it mandatory for all members to make a statutory declaration on any interest, financial or otherwise, in any commercial undertaking or trade prior to their appointment.¹¹⁸ This is to avoid any conflict of interest between the members of the MyCC and the cases dealt with by them. At a functional level, accountability and transparency are the major considerations in appointing members of the MyCC. As mentioned earlier, the MyCC comprises several senior government officials. The rationale may be that their representations will ensure that the national agenda and public interest are protected. However, there is a strong need for a competition authority to be able to make impartial decisions, unhindered, not just by political interests, but other external influences or pressures.¹¹⁹ Therefore, the authority must always ensure that both its competition goals and national public interests are safeguarded fairly.

In the case of MAVCOM, the board includes an Executive Chairman, who is not only an economist, but a Member of Parliament, and a representative from the MOT. Its three other members are an advocate and solicitor, and two retired senior government officers who have vast experience and expertise in the aviation sector and investment respectively.¹²⁰ It is notable that the MOT is responsible for all policy matters and decisions on transportation in the country, including air transport, and that this expertise consists of a lawyer, an economist and an aviation specialist. Their representations in MAVCOM may be crucial during the early period of its establishment for the government to ensure that its policies and plans pertaining to the aviation industry are implemented accordingly. Nonetheless, it would seem that few competition and aviation experts are appointed as MAVCOM members. Section 5 of MACA 2015 provides that other members of MAVCOM are appointed based on their experience or professionalism in economics, finance, aviation, business, administration, law or any other matter related to the functions of MAVCOM,¹²¹ while nobody from the employment or business of aviation services can become a member

¹¹⁸ Section 7 of the CCA 2010.

¹¹⁹ Sofia, Jeroen & Ailsa (n 14) ch4, p14.

¹²⁰ See <<http://www.mavcom.my/en/commissioners/>>accessed on 23 June 2019. MAVCOM is in the process of appointing other members and the process has taken a longer time as there are changes in the government portfolios and agencies named under the Act pursuant to the last general election. This has been confirmed by the senior officer of MAVCOM on 24 June 2016.

¹²¹ Section 5(1)(c) of the MACA 2015.

of MAVCOM.¹²² Yet there do not seem to be any representatives of the aviation industry. Clearly, the members are either government officials, ex-government officials, or officers that sit as directors in the GLCs. It is not clear as to the rationale of these selections and appointments but it may be that, at this early stage, the establishment of MAVCOM needs to be seen as the government's effort to strengthen the industry. In this regard, it is important to state that the level of expertise has an important influence on the autonomy and independence of the authority.¹²³ This counter balance is particularly important in developing jurisdictions, where it is needed to avoid capture, as often the most qualified representatives may only be found within the regulated industry itself and their appointment may threaten the independence of the competition authority.¹²⁴ As it is now, it is arguable whether the combination of the members are effective to ensure a smooth implementation and enforcement of the competition provisions as no case has been assessed thus far.¹²⁵

At present there is a good and useful mix of expertise employed for the management of MAVCOM. The Chief Operating Officer (COO) is an investment specialist in the aviation industry. An aviation economist who had served MAS for over 34 years has been appointed as the Director of Aviation Development. A specialist in consumer affairs is leading the Consumer Affairs Department. An economist is the Director of Economics, and a financial expert is the Director of Finance.¹²⁶ One possible ground for these appointments is that MAVCOM needs to strengthen its internal operations, and thus its strategy appears to be to instil skill and knowledge in its day to day operations. While too much government intervention tends to distort competition, some sectors of the economies in the developing countries may require certain protection. Malaysia's aviation sector, in particular, has faced various challenges such as weaknesses in the financial performance of industry players, non-competitive market structures, weak consumer protection, and the recent air tragedies. Government intervention was required to guarantee economic stability. It is hoped that

¹²² Section 5(3) of the MACA 2015.

¹²³ Sofia, Jeroen & Ailsa (n 14) ch4, p16.

¹²⁴ Ibid, p17.

¹²⁵ Interviews conducted with the MAVCOM's Director of Economic indicates that MAVCOM's current focus has been on the economic development and analysis of the industry which prioritises the recruitment of a strong management team rather than the members.

¹²⁶ See <<http://www.mavcom.my/en/senior-management/>>accessed on 29 January 2019.

these appointments will become more independent of government and industry over time and that government interventions will be reduced as the market becomes more competitive.

On the other hand, too much regulatory independence could also pose a disadvantage. “Indeed, the more independent of the executive is the competition authority the less effective its advocacy is likely to be”.¹²⁷ Competition authorities are expected to act as an advocate to the government. It is necessary for the fight against private anti-competitive practices to be complemented by the elimination of public restrictions.¹²⁸ This may only be achieved if the competition authority is able to participate in the regulatory reform exercises and influence the government to remove or abolish certain unnecessary regulatory restrictions. If a competition authority is completely independent and isolated from the executive, there will be a lack of access to decision makers in the executive and legislative branches, making it hard for the authority to carry out its advocacy role. Comparatively, a competition authority that forms part of the executive is more likely to have an access to relevant information, which would enable it to improve its decision-making and to have a positive impact on regulatory reform and competition advocacy. While many competition authorities have the mandate and means to advocate for competition, the crucial question is to what extent their opinion is taken into account by government. One possible solution therefore is to ensure that the opinion of the competition authority is required by law at all stages of regulation making.¹²⁹

In the case of MyCC, section 16 of CCA 2010 provides that the MyCC is responsible for advising the Minister or other public or regulatory authorities on matters

¹²⁷ Jenny Frederick, ‘The Institutional Design of Competition Authorities: Debates and Trends’; In Competition law enforcement in the BRICS and in developing countries, ed. Frederic Jenny and Yannis Katsoulacos, (2016) Springer, p 30.

¹²⁸ See also William E Kovacic, ‘Institutional Foundations For Economic Legal Reform Transition Economies: The Case Of Competition Policy And Antitrust Enforcement’, 77 *Chi.-Kent L. Rev.* 265 (2001), The George Washington University Law School Public Law and Legal Theory Paper No. 591, Legal Studies Research Paper No. 591, in which he emphasizes that competition policy is not all about prohibitions enforcement, which may not necessarily be the principal instrument, but more importantly advocacy, education, research and studies. It has been widely accepted that advocacy contributes significantly in the implementation of competition policy. A competition authority which serves as an advocate to the government and public at large encourage reliance on market processes rather than massive unnecessary regulatory interventions which will only distort the competition process.

¹²⁹ Frederick (n 128) ch4, p15.

concerning competition. Moreover, it must caution the Minister on any current or proposed legislations that is likely to affect competition, and recommend ways and means to avoid such effects. Finally, it must advise the Minister on any international agreements related to competition matters. With access to government information, this provision empowers the MyCC in its advocacy role towards the government. On the other hand, there is no explicit provision with regard to the advocacy role of MAVCOM under the MACA 2015. This is perhaps due to the fact that MAVCOM has already been empowered with the sole responsibility of regulating the aviation industry, as may be seen through the functions and powers of MAVCOM under sections 17 and 18 of the MACA 2015, and the fact that most of its members are from government agencies.

4.6.2 Expertise and technical knowledge

Apart from being independent, a competition authority must possess a group of competition experts to guarantee the effective implementation of competition law. “The best of laws cannot be applied without adequate human resources, i.e. a staff of sufficient size with adequate technical competence”.¹³⁰ This is especially true in the area of competition law, where a high-level of economic and legal analysis are involved, necessitating the employment of lawyers and economists, as well as investigators who are familiar with competition law and policy. Additionally, having legal officers with a strong litigation background and experience, and sound knowledge in administrative law, as well as civil procedure is a real advantage.¹³¹ Nevertheless, developing countries often lack these professionals, and this has become a major obstacle in implementing competition law. Kovacic recognizes scarcity in human capital as one of the challenges confronted by developing countries with transition economies. The weak indigenous competition policy expert is “one dimension of a general deficiency that afflicts economic law reform programs in

¹³⁰ Gal, Michal, ‘The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries’ (2004) New York University Law and Economics Working Papers. Paper 10.

¹³⁰ United Nations Conference on Trade and Development (UNCTAD), *The role of competition policy in promoting economic development: The appropriate design and effectiveness of completion law and policy*, 30 August 2010, p5.

¹³¹ Ibid.

transition economies.”¹³² In most transition economies, the implementation of new competition policy systems and other types of market-oriented legal reform begin with relatively little indigenous expertise in competition law and industrial organization economics. The shortage of what might be called ‘the human capital of capitalism’, which consists of legal, managerial, economic, accounting and statistical knowledge, is critical in developing countries.¹³³

Having little competition expertise in one issue is one problem; using this minimal expertise inappropriately is another. As highlighted by Frederic Jenny, governments moving towards a more market-oriented economy tend to reduce their regulatory functions, but increase their surveillance functions in competition authorities.¹³⁴ In most cases, civil servants with backgrounds and experience in economic regulation are reallocated to deal with different tasks in competition cases. The aims of economic regulation and competition law enforcement are different, as the former is always designed to ensure efficient economic performance while the latter seeks to impose sanctions on violators of competition law. Thus, civil servants with economic regulation experience may not be the best people to handle competition cases. Likewise, a lawyer with a sound knowledge of competition law may not be the best person to be relied upon to carry out economic analysis when dealing with competition cases, as he or she is trained legally rather than economically. Another potential problem is regulatory capture, which occurs when a small group of experts has influence over the regulations in an economy. The disparities between public and private sectors salaries also contributes to this shortage of competition experts.¹³⁵ It is

¹³² Kovacic (n 129) ch4, p305.

¹³³ Ibid.

¹³⁴ Frederic (n 128) ch4, p43.

¹³⁵ See also United Nations Conference on Trade and Development (UNCTAD), *The role of competition policy in promoting economic development: The appropriate design and effectiveness of completion law and policy*, 30 August 2010, p 6. It is stated that staffing and financial resources are the third factor that needs attention in institutional design for competition law and policy. A competition authority will often be faced with the problems of having a lack of skilled man power and limited monetary budgets. In most developing countries, civil servants are paid less compared to their equivalents in the private sector. This has resulted in more corruption cases, and there is a high possibility that good and skilled competition officers will exit the public sector for better and more lucrative wages in the private sector. This issue also involves having unskilled judges presiding over competition cases.

important to note that this lack of expertise occurs at almost all levels, from investigators to decision makers and judges.¹³⁶

The composition of MyCC members seems to have the right combination of expertise, as it includes the policy makers, legal experts, economists, academicians and researchers and industry players who are crucial for the facilitation of a new law. For instance, its members from the private sector include the Executive Director of the Malaysian Institute of Economic Research, the Vice Chancellor of Nilai University, Malaysia, prominent practising lawyers, and an executive director of an information technology and animation firm.¹³⁷ There seems to be an important representation of qualified personnel, including lawyers and economists, but the MyCC could look to increase its expertise. This has been observed by the Organization for Economic Co-operation and Development (OECD), as it was stated in its 2016 survey that “MyCC has less than desirable expertise in competition economics, employing too few experienced economists.”¹³⁸ For MAVCOM, it can be seen that the majority of the persons appointed as Commissioners are from the government sector. As mentioned earlier, these selections and appointments may be necessary in order for MAVCOM to be seen as the government’s effort to strengthen the industry. Nevertheless, it is difficult to assess the performance of MAVCOM given the fact that its establishment is still in its infancy and no outcomes of competition cases have resulted as yet.

There are several possible solutions to the scarcity of skilled human resources. One solution is the creation of a good reputation for the authority in order to attract good staff and political support. Further, a good and easily accessible accumulation of professional knowledge and case histories can also help to solve this problem.¹³⁹ A long term investment in human capital and the transfer of knowledge is also important. This requires a considerable effort to transfer information and expand the pool of

¹³⁶ The need on having the skilled and experienced expertise in competition law regime has always been the concern during the preparation of MACA 2015. This is confirmed based on the documents sightings and information gathered during the interviews conducted with the officers of the Attorney General’s Chambers, Malaysia on 14 and 15 August 2017 (See Appendix 5).

¹³⁷ Members of Commission, MyCC Website, See <<http://www.mycc.gov.my/members-of-mycc>>accessed 24 March 2017.

¹³⁸ See <<http://www.oecd.org/economy/surveys/Malaysia-2016-OECD-economic-survey-overview.pdf>>accessed on 29 January 2019.

¹³⁹ Michal (n131) ch4.

experts with professional training and qualifications in market-oriented economics and law. More importantly, the government must be able to build a self-sustaining intellectual infrastructure, including improving the department of business, law and economics in all higher learning institutions by offering and strengthening its competition syllabus and subjects.

4.6.3 Mixed or single function agencies

As suggested by Kovacic, a single purpose agency often pursues a single objective in competition law, for instance, the enforcement of antitrust law, whereas, a multipurpose agency may enforce other bodies of law, such as consumer and public procurement law.¹⁴⁰ A single purpose agency will tend to have a clearer, more focused and coherent programme compared to a multi-purpose agency. Nevertheless, the latter can enjoy a diversity of functions and experts that will help in taking a complex case to court. Competition authorities are entrusted with two functions, namely competition enforcement and consumer protection functions; moreover, each of these may be used to further the goals of the other.¹⁴¹ For instance, a good competition policy, ensuring that a market is fully competitive, can reduce the need for consumer policy, while effective consumer policy, by enhancing the ability of consumers to exercise informed choices, can make a market more competitive. The competition authority may also gain from “developing and sharing of the expertise across these two areas.”¹⁴² Nevertheless, having these two functions in an authority may also bring challenges. When a market becomes too competitive, consumers may have difficulties dealing with the complexity of competition, such as the increase in deceptive practices, complex pricing schemes, and a lack of information relating to complex services.¹⁴³ In a similar manner, the imposition of constraints on a supplier for the purpose of consumer protection may lessen competition. Integrating the two functions in a single authority has the tendency of one dominating to the detriment of the other, and this in turn makes the implementation of the latter ineffective. A lack of clarity of purpose for

¹⁴⁰ Kovacic & Hayman (n 114) ch4, p12.

¹⁴¹ Frederic (n 128) ch4, p9.

¹⁴² Ibid, p 10.

¹⁴³ Ibid, p 9.

the two functions tends to affect the focus of the authority and thereby jeopardize its credibility.

Therefore, a competition authority with multiple functions needs to give serious consideration to several aspects of institutional design. Kovacic and Hayman provide a good analysis of the issues presented by having multiple portfolios in a competition authority.¹⁴⁴ The assignment of policy tasks to the competition agency is the major concern as it determines the substantial responsibilities that an agency should have and the boundaries with other bodies and policies. In this regard, several important factors, including policy coherence, credibility and branding, capacity and capability, sustainability and the adaptability of current regulations, inter-organizational cohesion, collateral effects on the regulatory ecosystem, and political implications must be given due attention. Firstly, an agency with multiple functions must have policy coherence with regards to all of its responsibilities. Policies that complement each other enhance efficiencies, but policies that substitute other policies tend to degrade the overall performance of an agency. Secondly, a good agency's brand portrays the agency's priorities and objectives, enhancing the agency's credibility. Nevertheless, too many responsibilities may dilute the credibility of the brand. Thirdly, the capacity of an agency is often measured in terms of the sufficiency and adequacy of its resources. An agency with multiple responsibilities may find it difficult to operate efficiently in all areas of responsibility, and may utilize major parts of the resources in a particular area. This results in some areas being neglected and unproductive. Capability, on the other hand, determines whether an agency has the tools required for making good decisions, and whether it utilises them to do so. Fourthly, an agency must be resilient in the face of changes and development. Hence, it is important to consistently review whether multiple functions are adaptable and sustainable. The fifth factor concerns internal organizational cohesion. An agency combining several functions is inclined to have a streamlined department and units with specific expertise and staff. This can either result in departments and staff competing to provide better services or the creation of unhealthy competition and rivalry. To overcome this, there must be coordination and cohesiveness in the internal operations of the agency. The sixth factor concerns overlapping jurisdictions among multiple agencies. This scenario

¹⁴⁴ Kovacic & Hayman (n 114) ch4.

affects and disrupt regulatory ecosystems, and therefore proper consistent reviews and coordination must be carried out. The last factor is that of political implications, which may influence the allocation of responsibilities among agencies. Where responsibilities should be placed depends on who (the minister or ministry) will resolve disputes pertaining to such responsibilities and what outcome that is likely to lead to.¹⁴⁵ Of all the factors, it is suggested that the political implications, coherence, and capacity and capability are the most crucial criteria to focus on. These factors account for the political support that an agency must have in order to achieve a long term success. Policy coherence will help an agency to define clear aims and priorities in carrying out its functions internally and externally, and capacity and capability will enhance the agency's reputation for effectively performing its functions.

In the case of MyCC, it is explicitly stated in the CA 2010 that the Act is “to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers”.¹⁴⁶ Section 16 of the CCA 2010 clearly provides for the MyCC's functions, which are primarily competition law and policy enforcement. Both the CA 2010 and the CCA 2010 do not provide any other functions and powers to the MyCC, such as consumer protection or any other policy areas. It is clear that the MyCC is a single function competition authority. Moreover, in practise, all issues pertaining to consumer protection are dealt with by a special Consumer Tribunal. The case is somewhat different with the way the competition regulations are being implemented in the aviation sector under the MACA 2015 by MAVCOM. MAVCOM was not only established for the purpose of enforcing competition law in the aviation sector. It was also established to regulate all economic matters, including competition, relating to the civil aviation industry. Undoubtedly, there are multiple functions provided under the MACA 2015 to MAVCOM which include not only the enforcement of competition regulations, but also licensing and charges, air traffic rights and slots allocation, public service obligations, consumer protection and dispute resolution. While acknowledging the relative infancy of MAVCOM's establishment, there remains a serious concern regarding its capacity and capability in carrying out multiple legal functions. It is foreseeable that MAVCOM will have to

¹⁴⁵ Ibid, p34.

¹⁴⁶ Long preamble of the CA 2010.

face quite challenging difficulties in carrying out the competition functions while pursuing the other multiple policy goals at this early stage. An instant setback would see insufficient and inadequate human and financial resources unable to operate all areas of responsibilities efficiently. Too great a degree of 'sector-specificity' with regards to the various economic regulatory functions will necessitate a large number of experts with a good background in law, economics and aviation. The lack of skilled and experienced experts in these areas certainly prevents the effective implementation of competition law, a lack of capability in making competition decisions, and, in the short term, this will affect the authority's credibility. With these limited human and financial resources, there is also a possibility that MAVCOM could only implement a few of its functions properly. However, the more important problem is the overlapping jurisdictions with other agency with similar competition powers, particularly the MyCC. This overlap risks inconsistent application of competition law across all sectors.

4.6.4 Powers of Investigations and Remedies

The issue of whether a competition authority should adopt the prosecutorial or the administrative model in implementing competition law has been much debated by competition experts. In the prosecutorial model, the competition authority brings the competition case to the court for judgment (this is the practise in the US Antitrust Division of the Department of Justice), whereas in the administrative model, the competition authority investigates and adjudicates the case (this is the practise in the EU).¹⁴⁷ One apparent difference is that the competition authority is the prosecutor and the court is the decision maker in the prosecutorial model, whereas the competition authority acts as both the investigator and the decision maker in the administrative model. The advantage of the prosecutorial model is that "the impartiality of the proceedings is better protected through the separation of investigation and adjudication in a judicial context than in the administration proceedings where those functions are combined in a single entity."¹⁴⁸ This model also rules out the bias of both the investigators and the adjudicators, as behavioural economics suggest that "such

¹⁴⁷ Frederic (n 128) ch4, p20.

¹⁴⁸ Ibid.

bias affects perceptions and decision making in all aspects of our lives.”¹⁴⁹ Further, the judicial decision process is more transparent and credible as compared to the decisions by the administrative model. Nevertheless, the prosecutorial model has its own drawbacks as the courts are not always specialized and the judges almost always face difficulties in understanding the underlying economic principles. This is especially so in a more complex competition case.

As far as the integration of the functions is concerned, besides the issue of bias and impartiality, such “integration of the two functions into one agency can undermine procedural fairness and legitimacy as the bundling of prosecutorial and adjudicatory powers may lead to quality control problems.”¹⁵⁰ In practise, a lot depends on the actual execution of the functions by the competition authority. In an administrative model, there are various sub-models reflecting varying degrees of separation between investigation and adjudication”.¹⁵¹ One group in a competition authority can lead the investigation of a competition case while another in the same authority adjudicates it. Thus, the administrative model decisions are not necessary flawed. In this regard, Jenny highlights two possible configurations. On the one hand, the investigations are carried out by a section responsible for investigations of the single administrative agency and a decision is made by the board of the same agency. On the other, a more unitary structure eschews different procedures and structures, but may have different divisions handling the investigations process and the adjudication.¹⁵² An advantage of having the investigation and adjudication roles separated are that mistakes or any irregularities in the competition case can be avoided, as two sets of people are looking at the same issue. Moreover, more information is likely to be disclosed to the decision maker, enhancing procedural fairness and legitimacy in the decision-making processes as well as limiting the risks of confirmation bias. This separation, however, has its own risks, including a lack of monitoring from the board that makes decisions, and a potential lack of understanding of the issues investigated, which may affect the decision made. Yet this is a comparatively trivial risk presented by not having the two roles separated.

¹⁴⁹ Ibid, p21.

¹⁵⁰ Kovacic & Hayman (n 114) ch4, p 12.

¹⁵¹ Frederic (n 128) ch4, p23.

¹⁵² Ibid, p 23.

The MyCC follows the administrative model, whereby it operates as both investigator and adjudicator. The MyCC is responsible for the investigations of competition cases as well as the issuing of decisions. Under section 14 of the CA 2010, the MyCC is given the power to conduct any investigations if it has reason to suspect that an enterprise has infringed any prohibition under the Act. Part IV of the CA 2010 also gives the MyCC the power to make decisions, which includes the power to issue interim measures, propose decisions, make findings or non-findings of any infringement, and to accept undertakings. However, section 17 of the Act also provides that officers authorised by MyCC are given investigatory powers. In practise, these officers are the ones responsible for the investigations and the Board of MyCC is in-charge of making decisions. Among other powers granted to investigators are the powers to require information, to retain documents, to access records, and to search and seize with and without warrant.¹⁵³ It is noted that the CA 2010 does not criminalize the infringement of any competition prohibitions. Like many other administrative institutions, all MyCC's decisions are subject to judicial review. Section 44 of the CA 2010 provides for the establishment of a Competition Appeal Tribunal (CAT) which has exclusive jurisdiction to review all decisions issued by MyCC. According to section 57, the CAT has the power to summon parties and procure and admit evidence. It is not however provided under the Act whether the decisions by CAT are appealable, but this does not affect the right of any party affected by the decisions to apply for a judicial review.¹⁵⁴ In this regard, the HC of Sabah and Sarawak in the case of *Federation of Sabah Industries & 3 Others v Competition Commission* granted leave for judicial review filed by the four applicants, namely the Federation of Sabah Industries, Kota Kinabalu the Chinese Chamber of Commerce and Industry, Sabah Housing and Real Estate Developers Associations, and Sabah Timber Industries Association.¹⁵⁵

In the case of MAVCOM, the same administrative model is adopted, as MAVCOM is given the power of enforcement and investigation by Part XII of the MACA 2015, and also power to make decisions on competition matters under Division 5 of Part VII. The power of investigation includes the power to conduct an inspection and

¹⁵³ Sections 18 – 27 of CA 2010.

¹⁵⁴ Nasarudin & Hanif (n 8) ch3, p187.

¹⁵⁵ BKL-25-2/10-2014.

to require information. Similar to the MyCC, MAVCOM's power to make decisions includes the power to issue interim measures, to propose decisions, to make findings or non-findings of any infringement, and to accept undertakings. It is also notable that the Act provides for the power of investigation to be given to MAVCOM's authorized officer.¹⁵⁶ Thus the investigations are carried out by the authorised officers of the Commission, who then presents the case for the board of MAVCOM to decide. As provided under section 88 of the MACA 2015, the decisions of MAVCOM are appealable to the HC. The infringements of the competition prohibitions are not a criminal offence.

4.6.5 Role of international agencies

Malaysia is a member of the United Nations Conference on Trade and Development (UNCTAD), and has benefited from the competition law and policy conferences held by the organization. The members of the MyCC Board have actively participated in the UNCTAD's conferences, particularly on the subject of competition law and policy. In 2015, one of the MyCC's members, Prof Datuk Dr. Sothi Rachagan chaired the Roundtable on the Review of the Implementation of the UN Set of Principles on Competition Policy and UNCTAD's Model Law on Competition during the 7th Intergovernmental Group of Experts (IGE) Meeting and Review Conference of the United Nations Conference on Trade and Development (UNCTAD), held in Geneva, Switzerland.¹⁵⁷ The latest participation by MyCC in the UNCTAD was the contributions made by Malaysia in the 15th Session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy and Intellectual Property, held from 19 – 21 October 2016 in Geneva, Switzerland.¹⁵⁸ Malaysia is not a member of the Organization for Economic Cooperation Development (OECD), but is subject to peer reviews and surveys by the agency. The OECD Economic Survey of Malaysia conducted in 2016,¹⁵⁹ included some observations on the competition regime in the

¹⁵⁶ Section 79 of MACA 2015.

¹⁵⁷ See <<http://www.bernama.com/bernama/v8/ge/newsgeneral.php?id=1153053>>accessed on 29 January 2019.

¹⁵⁸ See <http://unctad.org/meetings/en/Contribution/ciclp2016c03_ccMalaysia.pdf>accessed on 29 January 2019.

¹⁵⁹ See <<http://www.oecd.org/eo/surveys/Malaysia-2016-OECD-economic-survey-overview.pdf>>accessed on 29 January 2019.

country. The survey highlighted the need to improve the competition framework. Some areas of concern included the absence of merger control and the need to build the competition authority's capacity and independence. There is an issue regarding the autonomy and independence of MyCC, as it is "constrained by broad ministerial discretion over personnel changes, and the ability to issue directions."¹⁶⁰ Further, "MyCC has less than desirable expertise in competition economics, employing too few experienced economists."¹⁶¹ It also noted that Malaysia is currently the only jurisdiction in ASEAN with a competition law that does not provide for competition merger control, the only exception being the merger provisions contained in the recently introduced MACA 2015.¹⁶²

4.7 Conclusion

The institutional design for competition authorities in developing countries is an important area of discussion among competition experts. Paramount consideration must be given to the developing countries initial conditions, such as the market conditions, the economic policy (including the role of government and private ownership), and the institutional and organizational conditions for competition to develop. In the case of the aviation sector in Malaysia, the approach taken in terms of having sectoral regulations for its competition may reflect the government's aviation policy, which is highly interventionist and protective of a sector which is still considered vulnerable due to financial instability and air disasters experienced by its national carrier in recent years. The interventionist mode may therefore be important to ensure that the sector becomes more financially stable particularly considering its important contribution to Malaysia's economic development. At the same time it is important that mechanisms are put in place to preserve the independence and accountability of the regulator in the enforcement and advocacy of competition law, while significant powers for intervention are retained by government ministers. There are also some important unresolved issues regarding the need to improve the technical knowledge of the regulators, the absence of appropriate powers to regulate mergers, inadequate access

¹⁶⁰ Ibid, p 36.

¹⁶¹ Ibid.

¹⁶² Ibid.

to appeals to the CAT for aviation decisions, and the issue of the appropriate relationship and potential conflicts between the competition regulation of the aviation sector by MAVCOM and other areas of the economy by MyCC.

CHAPTER 5—ANTI-COMPETITIVE AGREEMENTS UNDER ARTICLE 101 OF THE TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION, AND UNDER THE MALAYSIAN COMPETITION LAW AS APPLIED TO THE AVIATION SECTOR

5.1 Introduction

This chapter specifically studies the provision of Article 101 of the TFEU, and its application to the airline industry. First of all, it critically discusses the concept of market power, the importance of market definition, and the concept of barriers to entry in general, and examines these concepts in the airline industry. These concepts are essential and foundational to all competition analysis. Second, the key interpretations and concepts contained in Article 101 TFEU (such as the ‘undertaking’, ‘single economic unit’, ‘agreements’, ‘concerted practices’ and ‘decisions of associations’) are examined through court decisions and the applicable EU guidelines. Thirdly, the discussion explores the two important elements of the anti-competitive prohibition: the restrictions by object, and the restrictions by effect and the application of the defences in Article 101(3). The final section considers the Malaysian CA 2010 and the MACA 2015, wherein the similarities and differences with the EU are analysed.

5.2 Market Power, Market Definition and Barriers to Entry

5.2.1 Market Power

The concept of market power is central to the competition law. It is an economic concept which refers to the firm’s ‘ability to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded’.¹ Lander and Posner introduced the concept as ‘the setting of price in excess of marginal cost which measures the proportional deviation of price at the firm’s profit-maximising output from the firm’s marginal cost at that output’.² It was formalised

¹ William M Landes and Richard A Posner, ‘Market Power in Antitrust Cases’, Volume 94 No. 5 *Harvard Law Review March* (1981), p937.

² Landes & Posner (n 1) ch5, p939.

in the Lerner index, and first developed to measure the monopoly power.³ It received much criticism which, according to Vickers, was mainly based on its limitations for being static, and for using a single-product dominant firm model, when market dynamics and a more general form of oligopoly behaviour and product differentiation should have been considered.⁴ Further, there was too much focus given to the market share approach, disregarding the importance of the evidence of conduct and profit in the market.⁵ To many economists, market power refers to the ability to price above the short-run marginal cost, and in the long run, above the average total costs.⁶ This means that firms with market power have the ability to raise prices above a competitive level through the restriction of output, and therefore enjoy an increased profit.⁷ The notion of market power is used in determining a firm's monopoly power or dominance. In the real market, nevertheless, most firms possess some degree of market power, at least over a short period of time. From the competition law perspective, only the firms with 'substantial' market power exercised over a significant period of time have the potential to act anti-competitively, and therefore it becomes a concern under the law.⁸

In EU competition law, the importance of market power has been embedded in all of its competition rules, though the role differs according to the varying degrees of market power required in each of these rules.⁹ For the prohibition of anti-competitive agreements, market power is analysed based on the notion of 'appreciable restriction of competition'.¹⁰ For instance, the agreements entered into between competing undertakings with the aggregate market shares not exceeding ten per cent, and the agreements entered into between non-competing undertakings with the aggregate market shares not exceeding 15 per cent are not considered to appreciably restrict

³ Lerner, 'The Concept of Monopoly and the Measurement of Monopoly Power', *The Review of Economic Studies*, Volume 1, Issue 3 (1934) p157-175.

⁴ John Vickers, 'Market Power in Antitrust Cases', 2 *European Competition Journal* 3, (2006), p6.

⁵ Ibid.

⁶ Bishop & Walker (n 30) ch2, p52.

⁷ Ibid.

⁸ Jones & Sufrin (n 11) ch2, p54.

⁹ Luis Ortiz Blanco, *Market power in EU Antitrust Law*, Hart Publishing (2012), p4-12.

¹⁰ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), (2014/C 291/01), para 8.

competition.¹¹ The concept of ‘effect on trade’ also requires a certain percentage of market share to be held by the undertakings.¹² The Commission usually considers agreements to affect the trade within Member States if the market shares held by undertakings are around five per cent of the market¹³, but to have no effect on trade if the market shares are less than five per cent.¹⁴ In order to determine whether an anti-competitive agreement could fall within the exemptions provided under Article 101(3), a realistic analysis of the various sources of competition in the market is required, to determine whether competition is being eliminated in the substantial part of the product market in question.¹⁵ The role of market power is more significant in determining an abuse of a dominant position under Article 102. The Commission must first establish the firm’s dominance based on its market power¹⁶, where a firm with less than 40 per cent market share is unlikely to be dominant.¹⁷ In the case of a merger, market power is assessed through the concentrations in the market, in determining whether the merger leads to a substantial impediment to effective competition under the EU Merger Regulation.¹⁸ Market power can be measured directly based on the econometric data, or indirectly by using a structural approach.¹⁹ Since it is difficult and problematic to obtain and interpret the econometric data,²⁰ the indirect method of assessing the market power is widely used, and preferred²¹. It involves two stages: the definition of the relevant market, and the assessment of market power by analysing the market

¹¹ Commission Notice (De Minimis Notice), para 8(a) and (b).

¹² Guidelines on the Effect of Trade Concept (n 239) ch3; See sub-section 2.4 on the concept of appreciability.

¹³ Ibid, para 46.

¹⁴ Ibid, para 52.

¹⁵ Commission Notice on Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), para 107-109

¹⁶ Communication from the Commission—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking(2009/C 45/02)

¹⁷ Commission Guidance on the Commission’s enforcement priorities, para 14.

¹⁸ EU Merger Regulation, Art 2; See also Ioannis Kokkoris, ‘The concept of market definition and the SSNIP test in merger appraisal’ *European Competition Law Review* (2005) 26(4), 209-214.

¹⁹ Jones & Sufrin (n 11) ch2, p55.

²⁰ The direct method requires the acquiring of econometric data which is often not available and problematic although some economists supported it.

²¹ Most of the competition authorities in the world choose to use of the indirect method in assessing the market power. However, it is noted that the US Horizontal Merger Guidelines 2010 introduced the Upward Pricing Pressure (UPP) as the alternative to market definition in its merger assessment. See section 6.01 US Horizontal Merger Guidelines 2010. The UPP was developed by the work of Farrell and Shapiro in Farrell and Shapiro, ‘Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition’, (2010) 10 *The BE Journal of Theoretical Economy* Art 9.

shares²² and the barriers to entry in the market. This two-stage procedure is adopted by the EU competition law, and becomes the central and most important feature in its competition assessment.²³

5.2.2 Market Definition

The phrase ‘relevant market’ originated from US antitrust law, back in the mid-twentieth century, where the notion of relevant market is used implicitly in a monopoly case of *United States v Aluminium Co of Am*²⁴, and a merger case of *United States v Columbia Steel Co*²⁵. Although there were no specific and clear rules or principles laid down, ‘much has been written about the conditions under which other products (or locations) should be added to an existing group to make it a (relevant) market’.²⁶ The ‘relevant market’ test was later given a formal definition in the US 1982 Merger Guidelines²⁷, and later, in the US 1992 Merger Horizontal Guidelines²⁸, where it was built around the hypothetical monopolist test (HMT). The test was widely accepted by the competition authorities around the world²⁹, including the EU. The Commission issued the Notice on the definition of relevant market for the purpose of Community law in 1997, which employed the Small but Significant Increase in Price (SSNIP) test that was said to be based essentially on the idea of HMT.³⁰

²² According to Landes and Posner, in the absence of the firm elasticity of demand, market shares could be used to measure the firm’s market power together with other factors such as market elasticity of demand. However, market shares alone is misleading without considering the demand and supply elasticity. See Landes and Posner (n 1) ch5, p944-947; See also Blanco (n 9) ch5, p28 where he said that the appreciability of restrictions under Article 101(1) could be assessed by qualitative (abstract effects) and quantitative (market shares) approach.

²³ In the US, the definition of the relevant market and the assessment of market power is not regarded as important and it was even suggested that if the theoretical monopolist could show that it holds certain market power, the establishment of the existence of market power and the definition of the relevant market would be unnecessary. See Blanco, p 1; See also the cases of *Appalachian Coals*, *Indiana Federation of Dentists* and *Kodak* where the US Supreme Courts held that the market and market powers should not be assessed in isolation.

²⁴ 148 F.2d 416, 426 (2d Cir. 1945).

²⁵ 334 US 485, 508 (1948); See Gregory J Werden, ‘The History of Antitrust Market Delineation’, 76 *Marquette Law Review* 123 (1992), p130-135.

²⁶ Adriaan ten Kate and Gunnar Niels, ‘The Relevant Market: A Concept Still in Search of a Definition’, 5 *Journal of Competition Law and Economics*, (2009), p298.

²⁷ See para 2 of US 1982 Merger Guidelines, available at <<https://www.justice.gov/archives/atr/1982-merger-guidelines>>accessed on 11 March 2019.

²⁸ See para 1 of US 1992 Horizontal Merger Guidelines, available at <https://www.justice.gov/archives/atr/1992-merger-guidelines>>accessed on 11 March 2019.

²⁹ Kate & Niels (n 26) ch5, p298.

³⁰ Ibid. The test used in HMT and the SSNIP is the same test.

The primary objective of market definition is to gather all encompassing products or services that are considered effective substitutes to the product or services under the investigation, and which could exert some competitive constraints on the ability to increase price within the identified geographical area.³¹ Once the relevant market is defined, the next step is the assessment of market power and barriers to entry. The market definition, therefore, serves as a tool that provides for the basis upon which the market power assessment could possibly be executed. It is simply a step in a process of determining the market power, and not an end in itself.³² Nevertheless, since the concept is an economic one, one should be cautioned that economic theories and models are built on assumptions, and do not always cover the real-world situation.³³ While they can provide a coherent framework of analysis, some relevant lines of reasoning, and certain theories of competitive harm, they may not always be able to give a definitive solution.³⁴ Therefore, some economic commentators even suggest that the market definition should be abandoned, on the basis that it is impossible to define the market without first formulating the market shares³⁵; others propose that more attention should be given to measuring the competitive effects of business behaviour.³⁶ While the latter proposal seems acceptable, entirely abandoning the market definition would bring chaos to antitrust litigation.³⁷ The market definition does more than just an assign market shares, as it separates the active competitive forces that exist in the market (the strategic action of the firm in question) from the passive competitive forces in the backgrounds (such as elasticity of demand, which though often regarded as of secondary importance, does matter, and has influence on the market).³⁸ Despite the extreme views of opponents on this matter, market definition is still required and used by the competition authorities around the world, and has become a standard feature of competition law.

³¹ Bishop & Walker (n 30) ch2, para 4.002-4.003.

³² Whish & Bailey (n 1) ch1, p 41; Jones & Sufrin (n 11) ch2, p56.

³³ Jonathan Faull and Ali Nikpay (eds); *The EC Law of Competition*; (2nd edn, Oxford University Press, 2007), 4 para 1.03.

³⁴ *Ibid*, para 1.04.

³⁵ Louis Kaplow, 'Why (Ever) Define Market', 124 *Harvard Law Review* (2011), p440.

³⁶ Dennis W Carlton, 'Market Definition: Use and Abuse', (2007) *Competition Policy International* 3; Salop, 'The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium', (2000) 68 *Antitrust LJ* 187.

³⁷ Gregory J Werden, 'Why (Ever) Define Market? An Answer to Professor Kaplow', US Department of Justice, Antitrust Division (2012), p21.

³⁸ *Ibid*.

The main purpose of market definition is to identify, in a systematic way, the competition constraints faced in the market from both the product and geographical dimensions, as well as to determine the actual competitors capable of constraining the behaviour and competition in the market.³⁹ The Court in *Europemballage Corporation and Continental Can Co Inc v Commission*⁴⁰ stated that ‘the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics 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’.⁴¹ The definition of the relevant market, in both its product and its geographic dimensions, often has a decisive influence on the assessment of a competition case. It is very important, therefore, to determine at first instance the market in which the undertakings operate (both in terms of goods or services and its geographical area) before a case against them can be established, and whether competitive constraints exist. The EC Notice on Market Definition⁴² provides useful guidance on the ways through which the competitive constraints in the market could be identified; demand substitutability, supply substitutability and potential competition.⁴³ The test is centred on measuring the interchangeability of the goods or services in response to an increase in price, and the demand substitutability is the essence of market definition; in some situations, supply substitutability will be considered to determine potential competition.

In SSNIP test,⁴⁴ the range from five per cent to ten per cent price increase is considered significant. However, the SSNIP test must be used with caution, as it can be wrongly interpreted in abuse of dominance cases when the monopolist is already charging a significant monopoly price, meaning the substitution which occurs after the

³⁹ Commission Notice No. C372/5 on the definition of relevant market for the purposes of Community competition law, para 2

⁴⁰ Case 6/72 [1973] ECR 215 *Europemballage*.

⁴¹ *Europemballage*, para 14.

⁴² Commission Notice on Market Definition, para 13.

⁴³ *Ibid.*

⁴⁴ Commission Notice on Market Definition, para 17 states ‘The question to be answered is whether the parties’ customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable...’

increase of price at the margin will be exaggerated.⁴⁵ This is what happened in the famous ‘cellophane case’ of *United States v El du Pont de Nemour and Co*⁴⁶ In this case, El du Pont de Nemour and Co, a US company, was charged with monopolising interstate commerce in cellophane, in violation of section 2 of Sherman Act. The District Court of Delaware held that there was no unlawful monopolisation by the company and this was upheld by the Supreme Court. Here, the fallacy arises when the SSNIP cannot identify whether the current price is already a monopoly price resulting from the exercise of the market power. This issue is recognised in the EC Notice on Market Definition, particularly in abuse of dominant position cases, where the fact that the prevailing price might already have been substantially increased will be taken into account.⁴⁷ In other circumstances, a test on supply-side substitutability will be carried out, to determine whether another supplier could produce the product in question should the product be increased in price.⁴⁸ Examples of evidence include past and present customers and market studies. In actual practice, however, data is not easily available, and even when it is available, one must consider carefully the facts of each case at issue.

In respect of the anti-competitive agreements under Article 101(1) of the TFEU, market definition helps determine the appreciable effects on competition. The Court in *European Night Services*⁴⁹ stated that it was not in the position to make any findings on whether the restrictions on competition have any appreciable effects ‘in the absence of any such data concerning the analysis of the relevant market.’⁵⁰ In a horizontal cartel’s case of *Raiffeissen Zentralbank Osterreich v Commission (Lombard Club Case)*⁵¹, eight Austrian banks were found to have infringed Article

⁴⁵ Although the focus of this chapter is on provisions of Article 101 of TFEU, the provision on the abuse of a dominant position as provided under the Article 102 of TFEU is discussed and referred to wherever relevant and necessary.

⁴⁶ *Cellophane*, 351 US 377 (1956); It was held that ‘there was no illegal monopoly where although defendant might be assumed to control cellophane itself, there existed competition and interchangeability with other flexible wrappings’. A cellophane was not a market in itself, but part of the greater ‘flexible wrapping paper’, as it only comprised twenty per cent of the ‘flexible wrapping paper market’, and du Pont could not be said to monopolise it. See ‘Anti-Trust Law: The Impact of the Cellophane Case on the Concept of Market’ *Indiana Law Journal* 1957 Vol 32: Issue 3 Article 4, 374.

⁴⁷ Commission Notice on Market Definition, para 17.

⁴⁸ *Europemballage*.

⁴⁹ *European Nights Services*, para 179.

⁵⁰ *Ibid*, para 93.

⁵¹ Joined cases T-259/02 to T-264 and T-267/02 [2006] ECR II-897, paras 1-3.

101(1), in a series of agreements and concerted practices on the banking market in Austria. In their appeal to the court, the parties challenged the Commission's definition of a broader relevant market, and argued that their capability of affecting the trade within the Member States should have been examined separately within their respective markets.⁵² The Court of First Instance (now the GC) held that the various banking services involved were not capable of being substituted with each other but it would be artificial if the relevant market is defined narrowly in this business sector, as a separate examination into each specific market would not appreciate fully the competitive effects when all of the separate services fall within the same business sector.⁵³ Therefore, the use of a broad market definition by the Commission was justified. Similarly in the case of *Volkswagen AG v Commission*,⁵⁴ the court stated that the reason for defining the relevant market under Article 101(1) is to determine whether the agreement is liable to affect the trade between Member States, and has the object or effect of the restriction of competition within the common market.⁵⁵ The court had made it clear in the case of *MasterCard Inc v Commission (Mastercard)*,⁵⁶ that the purpose of market definition under Article 101(1) of the TFEU 'cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing competition'.⁵⁷

5.2.3 Barriers to entry

An undertaking with high market shares does not necessarily have market power, if there are low barriers to entry in the market, because any attempt to increase price will attract new entry to the market.⁵⁸ How vulnerable the firm is to the new entrants depends highly on the barriers to entry. The concept of barriers to entry is therefore crucial to the antitrust debate⁵⁹, as it could determine the extent to which a monopoly firm can exercise its market power. It is important to note that this concept of 'barriers to entry' refers to anything that prevents potential competitors from entering

⁵² *Lombard*, para 172.

⁵³ *Lombard*, para 175.

⁵⁴ Case T-62/98 [2002] ECR II-2707.

⁵⁵ *Ibid*, para 4; The same was held in the case of also *Mastercard Inc Case* para 171.

⁵⁶ Case C-382/12P EU:C:2014:2201.

⁵⁷ *Ibid*.

⁵⁸ Jones & Sufrin (n 11) ch2, p79.

⁵⁹ See Bork (n 9) ch2, p310-311.

a market. For existing competitors, the concept is barriers to expansion where it refers to anything that prevents existing competitors from expanding their output.⁶⁰ There has been an endless debate on the right definition of barriers to entry. According to the Bainian definition, barriers to entry refers to the situation where the established firms can 'elevate the selling price above the minimal average cost of production without inducing potential entrance'⁶¹, whereas the Stiglerian defines it as 'a cost producing (at some or every rate of output) which must be borne by a firm which seeks to enter industry, but is not borne by firms already in the industry'.⁶² While the Bainian definition was regarded as broad (as it could include many things as 'barriers') and effects-based, the Stiglerian definition was narrower, in the sense that it focused only on the demand and cost conditions suffered by the incumbent and potential entrants respectively.⁶³ The Bainian definition has largely been adopted in EU competition law decisions.⁶⁴

Nevertheless, some agreed that it is unnecessary to have an agreed definition.⁶⁵ The more important task is to analyse the entry conditions from a dynamic rather than a static perspective.⁶⁶ It is not a question of determining whether or not barriers to entry exist, according to a certain definition, but beyond that: whether barriers could or would exist, and to what extent this deters new entrants from entering the market.⁶⁷ Despite that, the OECD reported that these barriers could be categorised as three main types: sunk costs, structural, or strategic barriers.⁶⁸ The sunk costs are normally incurred by a new firm as a start-up, and are irrecoverable when the firm leaves the market. This includes the costs for human capital, highly capitalised equipment or building, advertisement and promotion, research and development, and compliance to government regulations.⁶⁹ The structural and strategic barriers normally

⁶⁰ Jones & Sufrin (n 11) ch2, p79.

⁶¹ JS Bain, *Industrial Organisation*, (2nd edn, John Wiley, 1968), 242.

⁶² GJ Stigler, *The Organisation of Industry*, (Irwin, 1968).

⁶³ Jones & Sufrin (n 11) ch2, p80.

⁶⁴ It is also adopted in the US; See Jones & Sufrin (n 11) ch2, p80.

⁶⁵ The OECD provided a good summary of all the definitions; See OECD Policy Roundtable on barriers to entry, p9 where it defines 'barriers to entry' as generally means 'an impediment that makes it more difficult for a firm to enter the market'.

⁶⁶ OECD Roundtable, p35.

⁶⁷ OECD Roundtable, p36.

⁶⁸ OECD Roundtable, p29; see also Jones & Sufrin (n 11) ch2, p81-86.

⁶⁹ Jones & Sufrin (n 11) ch2, p82.

do not involve direct costs, but are situations that hinder new firms from entering the market easily. The structural barriers arise from the nature or basic conditions of the industry which are normally beyond the incumbents' direct control, or they may arise out of the incumbents' effort to compete.⁷⁰ These includes the absolute cost advantages, the economies of scale and scope, the high capital costs, the reputational and network effects, the legal and regulatory barriers, the barriers to exit, the first-mover advantages, and the vertical integration.⁷¹ Strategic barriers, on the other hand, are the behaviours of the firms which may purposely be intended to deter new entrants, or just a strategy in reaction to business threats. This includes predatory pricing, limit pricing, intentional over-investment in capacity and sunk costs, fidelity rebates, product differentiation and advertising, tying, exclusive dealing, patent-hoarding⁷², and switching costs.⁷³ Some of these strategic behaviours, such as predatory pricing and fidelity rebates, can be regarded as abusive, and can operate as a barrier to entry because they signal to firms that it is not profitable to enter a market.⁷⁴

In the EU, the Commission has adopted a broader scope⁷⁵ of barriers to entry in its Horizontal Merger Guidelines.⁷⁶ For merger cases, entry analysis is crucial in its overall competition assessment, as it helps the Commission determine whether an entry provides a 'sufficient competitive constraint' to the post-merger parties.⁷⁷ The Commission examines an entry based on three main factors: the likelihood of entry from the legal, technical and reputational perspective, its sustainability over time, and its sufficiency.⁷⁸ An entry is regarded as a 'sufficient competitive constraint' when it is 'likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger'.⁷⁹ In the Guidance Paper⁸⁰, the same broader concept is adopted in the competition assessment involving the abuse of a dominant position.⁸¹

⁷⁰ Ibid.

⁷¹ OECD Roundtable, p37.

⁷² Ibid, p38.

⁷³ Jones & Sufrin (n 11) ch2, p86.

⁷⁴ The discussion on the abusive conducts is provided under Chapter 8.

⁷⁵ Jones & Sufrin (n 11) ch2, p86.

⁷⁶ EU Merger Regulation.

⁷⁷ Guidelines on Horizontal Mergers, para 68.

⁷⁸ Ibid, para 69-75.

⁷⁹ Guidelines on Horizontal Mergers, para 68.

⁸⁰ Commission Guidance on the Commission's enforcement priorities; The discussion on the abusive conducts is provided under Chapter 8.

⁸¹ Commission Guidance on the Commission's enforcement priorities, para 16.

5.2.4 Market definition in the airline industry

As established in Chapter 3, the EC Notice on Market Definition is also applicable in the air transport sector. It is noteworthy that in the airline industry, the way the relevant market is defined is heavily influenced by the nature and the special characteristics of air transport services. This is evident through several distinguishable features. Firstly, the nature of the services is the carriage of persons or goods from one place to another⁸², and from this, it follows that the product market in itself includes a geographic aspect, as it requires the relocation of persons or goods from one place to another.⁸³ Secondly, the air transport services also involve a route or a network: a direct, or a hub-and-spoke network.⁸⁴ A direct network involves a carriage of passengers directly from one point to another point in place, whereas a hub-and-spoke network involves a carriage of passengers from smaller towns (spokes) to a large airport (hub), where the hub is further linked to another hub or smaller towns (the end destination).⁸⁵ This has become the basis of the traditional approach taken by the Commission when it defined the relevant market, based on routes or bundle of routes.⁸⁶

Thirdly, the definition of relevant market in the air transport services is focused on the demand-side substitution, rather than on the supply side of the market. In *Ahmad Saeed Flugreisen and Others*⁸⁷, the issue of the airline's relevant market was first discussed. The ECJ, in determining whether an airline had a dominant position in the market, raised two possible approaches in defining the relevant market; the sector operated by the scheduled flight constituted a separate market, and that the possible

⁸² This nature is in fact relevant to all modes of transportation including the land and the sea. See DAF/COMP(2014)14, OECD, 'Airline Competition', Background Paper by the Secretariat, 18–19 June 2014, para 80.

⁸³ DAF/COMP(2014)14 "Airline Competition" Background Paper by OECD Secretariat, Directorate for Financial and Enterprise Affairs, Competition Committee 12 June 2014.

⁸⁴ See Stephen Holloway, *Straight and Level: Practical airline economics*, Ashgate Publishing Limited, (1997), p248-253 and David Sawers, 'Competition in the Air—What Europe Can Learn from the USA', The Institute of Economic Affairs (1987), p29.

⁸⁵ See William E O'Connor, *An Introduction to Airline Economics*, Prager Publishers (1995), p23-24.

⁸⁶ It was stated in the Judgment of the Court of Justice in the case of Case 66/86-*Ahmed Saeed Flugreisen* [1989] ECR 803) and was later confirmed in the Judgment of the Court of First Instance dated 19 May 1994 in the Case T-2/93 – *Air France v Commission* para 17; it was later followed in a series of merger cases such as the Commission Decisions of 20 July 1995 in the case of IV/M.616 - *Swissair/Sabena* para 18, of 28 February 1997 in the case of IV/M.857 — *British Airways/Air Liberte* para 14 and of 3rd August 1999 in the case of IV/M.1494 — *MarineWende/SairGroup/AOM* para 14.

⁸⁷ Case 66/86, *Ahmad Saeed Flugreisen and Others* [1989] ECR 803.

substitutes to the scheduled flight must be taken into account such as scheduled flights on other routes, charter flights, railway or land transport.⁸⁸ This indicates the Court's recognition of the importance of 'sector' (routes) as a separate market, and also demonstrated that the Court focused on the demand-side substitution in defining the relevant market. Since this case, the Commission, through a series of cases, has developed that the relevant market is defined based on the routes or bundle of routes⁸⁹, to the extent there is a substitutability between them. It was clarified further in the case of *KLM/Alitalia*⁹⁰ that the market definition in the airline industry is focused on the demand substitutability, though the Commission noted the fact that the hub-and-spoke network did affect the supply side of the market. In the case of *United Airlines/USAirways*,⁹¹ the Commission concluded that 'network competition is still not sufficient to modify the traditional approach', because from the supply side, there was no indication that airlines would be able to offer services for transatlantic city pairs within a short period of time without incurring high cost and risk, as compared with the immediate and continuing demand from the consumer for air transport services between two points.⁹² Although this approach is said to only reflect the demand side of the market (as it shows only all the possible travel options for passengers from one point to another), and airlines often claim that the supply side of the market (where airlines compete with the size of their hub and spoke system) should also be taken into account, the demand side substitution remains as the first determining role in defining the relevant market.⁹³

Having said that, the demarcation of relevant markets starts with the determination of the point of origin (O) to the point of destination (D) and the 'O&D pair approach' or 'O&D city pair' becomes the main and pertinent element in the concept market definition in the airline industry'.⁹⁴ Under the O&D pair approach, the relevant

⁸⁸ Ibid, paras 39-41.

⁸⁹ Ibid.

⁹⁰ The Commission Decision of 11 August 1999 in COMP/JV.19-KLM/ALITALIA, para 22.

⁹¹ Commission Decision of 12 January 2001 in COMP/M.2041 – *United Airlines/US Airways*.

⁹² Ibid, para 11-12.

⁹³ OECD Report on Airline Competition, para 82; and Report by the European Commission and the United States Department of Transportation, 'Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches', 16 November 2010, paras 77-79.

⁹⁴ The concept of point-of-origin and point-of-destination was clearly stated in the following cases; Case No COMP/M.3280 Air France/KLM, para 81; COMP/JV.19 KLM/ALITALIA, para 22; Case No. COMP/M.3770 Lufthansa/Swiss; See also, Bruckner, Lee and Singer, "City-Pairs Versus Airport-Pairs:

market is defined based on the routes between the city pairs, or, where there is more than one airport in a city, airport pairs. Every combination of the origin and destination points will be considered to be a separate market from the customer's point of view. There are two further sub-elements included in this O&D pair approach: the types of passengers, and flights. There are two main types of passengers that will influence the scope of the relevant market; the premium passengers (also known as the time-sensitive passenger), who tend to travel for business purposes, require significant flexibility and service quality, and tend to pay a higher price for these facilities, and the non-premium passenger (also known as the non-time sensitive passenger) who normally travel for leisure purposes, and are willing to travel at any time as long as the price is reasonable. The latter normally do not require any flexibility, and not willing to pay for the extra facilities. The identification of these categories is important, as it determines which category of customers is willing to switch to other travel options and which is not; this will assist in providing a more precise definition of the relevant market.

For types of flights, the Commission makes a further distinction between direct and indirect flights. The direct flights concern flights between two airports, and between the airports whose catchment areas significantly overlap with the catchment areas of such airports. The indirect flights concern flights between such airports in so far as these indirect flights are substitutable with the direct flights at issue. Other factors included are other modes of transportation and airport substitution. To establish whether there is competition on the particular O&D market, the Commission will look at the different transport possibilities in the market, not only other direct flights between the two airports concerned, but the indirect flights or other means of transportation that can form a substitution.⁹⁵ Whether or not competition exists will depend on several factors, like overall time travel, frequency of service, and the price of different alternatives.

A Market-Definition Methodology for the Airline Industry" *Springer Science Business Media New York* 2012.

⁹⁵ Michael Gremminger, Director-General Competition, Unit D "The Commission approach towards global airline alliances—some evolving assessment principles; Competition Policy Newsletter" Spring 2003.

Once the relevant market is determined, the Commission will proceed with the competitive assessment, which will see each component determined in the relevant market being evaluated based on the relevant competition rules and regulations. In the case of *Koninklijke Luchtvaart Maatschappij NV (KLM) and Alitalia Linee Aeree Italiane SpA (Alitalia) (KLM/Alitalia)*,⁹⁶ the Commission considered the O&D city pairs approach, and concluded that the joint venture created by the parties would create a single dominant position in the Amsterdam—Milan and Amsterdam—Rome routes, as KLM and Alitalia were the only operators prior to concentration, and after the concentration, the parties would have 100 per cent market share on the routes. Further, the monopoly position was protected by barriers to entry, as they are less attractive due to their congestion, high number of frequencies, and low average-load factor. On a different London—Milan and London—Rome route, however, the Commission decided that the parties would not create any dominant position, as there were other players at that time which shared the market share, such as BA, Air One, Debonair and Go. It is clear that the relevant market was defined based on the routes using the O&D pair approach.

There is no doubt that the Commission's market definition has gone through an evolution.⁹⁷ In the early days, it was always thought that direct flights for time-sensitive passengers were generally not substitutable with indirect flights. But indirect flights may now be seen as a competitive alternative to non-stop flight, subject always to airline preference, price schedule, and availability of direct flights. In the case of *United Airlines/US Airways*,⁹⁸ it was concluded that indirect routes can be a competitive alternative to non-stop services if they are marketed as connecting flights on the city-pair in question. With the emergence and increasing number of international airline alliances and cooperation, the process of defining the relevant market in the airline industry has become very complex and challenging. Airline alliances often involve wide-ranging types of horizontal agreements, where they collaborate on various areas and levels of cooperation. The cooperation may start with the simplest interlining

⁹⁶ COMP/JV.19 *KLM/Alitalia*.

⁹⁷ Michael Gremminger, Director-General Competition, Unit D "The Commission approach towards global airline alliances—some evolving assessment principles" Competition Policy Newsletter Spring 2003.

⁹⁸ COMP/M.2041 *United Airways/US Airways*.

agreement, which will then be expanded to a more complicated joint venture, such as to develop a joint network where direct coordination on prices, routes and scheduling are involved. Finally, the cooperation may end with the most complicated merger-like integration. Hence, the approach to O&D pairs, for instance, is broadened as the substitutes for the products and geographical dimensions are getting more complex.⁹⁹

5.3 The Prohibition of Anti-Competitive Agreements under Article 101 of the TFEU

5.3.1 The key concepts

The prohibition under Article 101(1) mainly concerns the ‘agreements’ by ‘undertakings’ and ‘associations of undertakings’, thus making them the main concepts and addressees of Article 101.¹⁰⁰ The concept of ‘undertakings’ is important, as it makes it possible to determine the categories of actors to which the competition rules apply¹⁰¹, and ‘it serves to establish the entity to which a certain behaviour is attributable’.¹⁰² The Treaty does not define the word ‘undertaking’, but it has been broadly interpreted by the EU Courts, which had in many of their decisions, clarified and developed the many types of ‘undertaking’ which fall within the ambit of the Article. It is also a settled law that undertakings need not be legal entities, so long as they are involved in an economic activity.¹⁰³ This means that the scope of ‘undertakings’ is wider than its literal meaning, as it precludes almost any entity regardless of its form,

⁹⁹ Considerations of market power may also change overtime due to the changing financial conditions in the market. In Case No COMP/M.5830 – *Olympic/Aegean Airlines* (2013), a merger was approved under the EU Merger Regulation (EC) No 139/2004 notwithstanding that the merger would result in dominance on the Greek domestic air transport market, where the two carriers controlled more than 90%. It was also determined that entry in the immediate future by other airlines was unlikely on any of those routes. The merger was approved on the grounds of the so-called ‘failing firm’ defence. The weakening financial position of the Greek economy and declining demand for domestic air travel mean that it was likely that Olympic would be forced to exit the market absent the merger and there was no less anti-competitive alternative than an acquisition by Aegean. The number of routes served by both Aegean and Olympic had decreased substantially over recent years from 17 to 7 routes.

¹⁰⁰ Okeoghene Odudu, ‘The Boundaries of EC Competition Law’, Chapter 3–The Meaning of Undertaking within Article 81 EC’, p23.

¹⁰¹ C-67/96, *Albany International BV(Albany) v Stichting Bedrijfspensioenfonds Textielindustries* [1999] ECR I-5751, para 206.

¹⁰² Ibid.

¹⁰³ C-180/98 to C-184/98 (Joined Cases) [2000] ECR I-6451 para 21.

but the activities of such entities are confined only to the economic activities. Clearly, a functional approach must be adopted when determining whether or not an entity is carrying out or engaging in the economic activities, for the purpose of being defined as an ‘undertaking’ under the TFEU.¹⁰⁴

In the airline industry, airlines are normally regarded as undertakings, as their commercial activities are mainly providing air transport services for passengers and cargo. Other entities in the supply chain, such as the ground handling service providers, caterers and travel agents may also be regarded as undertakings, insofar as they engage in an economic activity. There are entities in the industry which are vested with the functions of the official authority or in the public interest. Airport authorities, for instance, although they are usually government-owned and are responsible for the airport’s management and infrastructure, may be regarded as undertakings insofar as they carry out economic activities. In *Aéroport de Paris (ADP) v Commission*¹⁰⁵, the fact that ADP is a public corporation placed under the authority of the Minister responsible for civil aviation does not, in itself, mean that it cannot be regarded as an undertaking. The Court regarded as undertaking based on its provision of airport facilities to airlines and other service providers in return for a fee which was freely fixed by ADP.¹⁰⁶

There are, nevertheless, companies and organisations in the industry that may not be ‘undertakings’, as they carry out their tasks and duties in the public interest. An organisation responsible for providing the air navigation services in the public interest

¹⁰⁴ Whish & Bailey (n 1) ch1, p84; The concept of undertaking ‘encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed’; See *Hofner and Elser v Macrotron GmbH*, Case C-41/90 [1991] ECR I-1979, para 21. The key factor here is the ‘economic activities’—which has been held in the case of *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, C-180/98 to C-184/98 (Joined Cases) [2000] ECR I-6451, para 75, as the activities of offering goods and services in a given market. Hence, any activities which are not economic by nature are not caught under the definition of ‘undertakings’. This is significant, as it excludes entities whose activities do not belong to the sphere of the economic, such as those connected with the exercise of power of a public authority; See Case C-309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I1577, para 57. For the social protection given on the basis of solidarity, *Sodemare v Regione Lombardia* (C70/95) defined ‘solidarity’ as the ‘inherently uncommercial act on involuntary subsidisation of one social group by another’. A public body may be regarded as an undertaking, to the extent that it engages in an economic activity which can be severed from those in which it functions as a public authority; See Case 107/84—*Commission v Germany* [1985] ECR 2655, para 14-15.

¹⁰⁵ Case T-128/98 *Aéroports de Paris v Commission* ECR [2000] II 3929, para 111.

¹⁰⁶ *Aéroport de Paris*, para 121-122.

was held not to be undertaking in *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)*¹⁰⁷. The Court decided that Eurocontrol was not an undertaking, but performed tasks related to maintaining and improving air navigation safety in the public interest. This was confirmed in the case of *Selex Sistemi Integrati SpA v Commission*¹⁰⁸ when Selex, an Italian company engaged in air traffic management, lodged a complaint with the Commission that Eurocontrol infringed Article 102 of the TFEU. The Court agreed that the acquisition of prototypes by Eurocontrol was not an economic activity, as it was not used in a subsequent economic activity but in the exercise of public power.¹⁰⁹ It is also noteworthy that an association of undertakings is also subjected to Article 101(1), as it usually comprises members who make consensus decisions, either to be followed or practiced in their respective industry.¹¹⁰ It follows that that their decisions are also prohibited if they were found to be restrictive, but this does mean they have to engage in economic activities to be caught under the provision.¹¹¹

Besides the form of the establishment and the economic activities that define an undertaking, the number of undertakings involved are also important. Article 101(1) of TFEU does not apply to agreements between two or more legal persons that form a 'single economic entity', as they collectively comprise a single undertaking. The concept revolves around the fact that if the undertakings comprise a parent and a subsidiary company, or a principal and an agent, the relationship between them is so close (one is dependent on the other, or one has a decisive control over the other), the agreement between them is regarded as internal allocation of functions rather than a restrictive agreement between two independent undertakings.¹¹² The test is whether

¹⁰⁷ Case C-364/92, [1994] ECR 20-27.

¹⁰⁸ Case C-113/07P, [2009] ECR I-2207.

¹⁰⁹ Also discussed in CAA Competition Working Paper: A discussion of National and European Competition Case Law relevant to the Aviation Sector CAP 1370 (published by the Civil Aviation Authority 2016); Julian Nowag, "Case C-113/07P *Selex Sistemi Integrati SpA v Commission* [2009] ECR I-2207: Redefining the Boundaries between Undertaking and the Exercise of Public Authority' European Competition Law Review 2010, Vol. 31, No. 12, pp 483-487.

¹¹⁰ Case C-309/99—*Wouters v Commission* para 61

¹¹¹ Case T-25/95—*Cimenteries CBR SA v Commission* para 1320.

¹¹² Whish & Bailey (n 1) ch1, p94.

the parent company has decisive influence over the other, resulting in the absence of real autonomy in determining the commercial policy in the market.¹¹³

In the airline industry, the concept has been considered in *Qantas Airways and Orangestar Investment Holdings*,¹¹⁴ a competition case decided by the Singapore Competition Commission (SCC) under Section 34 of the Singapore Competition Act 2004 which is based on Article 101(1). Section 34 prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which have as their object or effect the prevention, restriction, or distortion of competition.¹¹⁵ The main issue was whether Orangestar Investment Holdings was a subsidiary of Qantas Airways, as the latter had a certain level of control over the former due to some shareholdings and interests. The parties claimed that they formed a single economic entity, and thereby the cooperation agreement they entered into was excluded from the prohibition on anti-competitive agreements under section 34 of SCA 2004. The SCC rejected the argument, concluding that Qantas Airways' shareholdings fell short of a majority, and the blocking rights normally exercised by the company's board did not belong to Qantas Airways alone, but were shared with another holding company. Thus, the requisite level of control required to establish a single economic entity relationship was absent.¹¹⁶ The SCC decided that the parties did not form a single economic entity, and therefore the agreement entered into between them was subject to the prohibited agreements under section 34 of SCA 2004.¹¹⁷

Another key concept is the concept of 'agreement'. In competition law, this concept is far-ranging and beyond the scope of a 'legal' agreement. It requires some

¹¹³ See Case C-97/09P—*Akzo Nobel NV and Others v Commission* [2009] ECR I-8237. In *Viho Europe BV v Commission*, a distribution agreement entered into by the Parker Pen Group with its 100 per cent owned subsidiaries did not infringe Article 101(1) of the TFEU. The parent company had control over sales, advertising and marketing policies of the subsidiaries, and the latter had no real autonomy to determine their cause of action, although the action could amount to the division of the national market. The judgment in *Viho* was cited in the Commission's Guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements.

¹¹⁴ Case No CCS 400/003/06; Notice of Decision issued by the Commission pursuant to a Notice by Qantas Airways and Orangestar Investment Holdings of their Co-operation Agreement.

¹¹⁵ Section 34 of SCA 2004 is equivalent to Article 101(1) of the TFEU.

¹¹⁶ Case No CCS 400/003/06; the case was also discussed at length in an article by Alan Khee-Jin Tan, 'Airlines Agreements and Competition Law: Qantas Airways Operations in Singapore' *Annals of Air and Space Law* Vol XXX111 (2008).

¹¹⁷ The concept of 'single economic entity' was also raised in the case of *MAS/AirAsia* which is discussed in Chapter 7.

element of collusion, regardless of its legality, and thus attracting the other concept of ‘concerted practices’ and ‘decisions by associations of undertakings’. The need to distinguish between an agreement and concerted practices has always been debatable—but most important is whether the conduct is collusive or non-collusive. It was held in *NV Limburge Vinyl Maatchhappij v Commission*¹¹⁸ that the Commission cannot be expected to classify the infringement precisely, as in any event, both forms of infringement are covered by Article 101(1) of the Treaty. It is clear therefore, that it is the anti-competitive conduct between the parties that is subject to scrutiny by the competition authorities, rather than the legal form in which it is performed. In many cases under Article 101(1) of the TFEU, the existence of the agreement is not in doubt—rather the focus is on the terms which restrict competition.¹¹⁹ It is the aim of the prohibition to catch multiple forms of coordination and collusion between undertakings¹²⁰, hence the precise characterisation of the cooperation at issue does not affect the need to carry out a legal analysis.¹²¹ The contrary would facilitate the evasion of law.¹²² Undoubtedly, this is the main reason why the concept of ‘agreement’ differs significantly from that of under contract law.¹²³

Over the past three decades, and particularly with the deregulation of the air transport sector in many markets, airlines have derived and adopted various strategic and tactical alliances with the aim of increasing competitiveness and economic efficiencies.¹²⁴ As a result, airline agreements consist of a wide spectrum of cooperation, starting from a purely technical arrangement such as interlining, block space arrangement, and code sharing, to complex joint ventures and strategic global alliances.¹²⁵ The majority of cases under Article 101(1) concern joint operation and cooperation between airlines including airline alliances.¹²⁶ Most of these agreements

¹¹⁸ Case T-305/94 *NV Limburge Vinyl Maatchhappij v Commission*, paras 695-699.

¹¹⁹ Jones & Sufrin (n 11) ch2, p140.

¹²⁰ *Commission v Anic Partecipazioni* [1999] ECR I-4125; Case C-49/92P.

¹²¹ *Asnef-Equifax, Servicios de Informacion sobre Solvencia y Credito, SL v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)*; Case C-238/05.

¹²² Whish & Bailey (n 1) ch1, p103.

¹²³ This issue is crucial to the decision in the *MAS/AirAsia Case* which is examined in Chapter 7.

¹²⁴ Truxall (n 50) ch2, p119.

¹²⁵ The detailed discussion of these airline cooperation is provided in the following Chapter 6.

¹²⁶ John Milligan, *European Union Competition Law in the Airline Industry*, Wolters Kluwer Aerospace Law and Policy Series, Vol 4 (2017), p76. Further discussion on airline alliances is provided in section 6.4, Chapter 6.

are concluded horizontally and formally whereby the parties' obligations are explicit. It follows that the competition assessment in these agreements have been focusing on identifying the restrictive elements of the agreements, rather than proving their existence.¹²⁷ Airlines also often enter into vertical agreements, such as the agreements between the airlines and travel and tour agencies, or computer reservation system providers (distributors), a typical supply agreement, an aircraft maintenance agreement, and ground handling services. An example of a vertical agreement that has raised a competition concern is the case of *International Air Transport Association (IATA) Cargo Agency Programme*.¹²⁸ IATA, an association of airlines of which almost all airlines in the world are members, established a collective selective distribution system, that, among other things, contained provisions on the prohibition of agent commission, a minimum quantitative requirement on the level of turnover and higher staff requirements, and an exclusivity clause preventing agents acting for non-IATA members. The Commission found these provisions to be restrictive and ordered their removal. This case, however, was exempted under Article 101(3), on the basis that it created a worldwide network for distributing the airline services and improved the quality of agents, while the administration costs involved were reduced. IATA could also fall under the ambit of the decisions made by the associations of undertakings.

Airlines are also susceptible to collusion and involvement in concerted practices. Although there have been only a few cartel cases in the industry, these cases, which involved the airfreight and freight forwarding sector, resulted in huge fines. In the case of *Freight forwarding*,¹²⁹ the Commission investigated four distinct cartels that 'coordinated their pricing behaviour in the provision of international freight forwarding services with respect to four different surcharges/charging mechanisms: new export system, advanced manifest system, currency adjustment factor and peak season surcharge.'¹³⁰ The cartels were first revealed by Deutsche Post, who applied

¹²⁷ Ibid.

¹²⁸ 91/480/EEC-Commission Decision of 30 July 1991—Case No IV/32.659 on IATA Passenger Agency Programme and 91/481/EEC-Commission Decision of 30 July 199—Case No IV/32.792 IATA Cargo Agency Programme.

¹²⁹ Commission Decision of 28 March 2012—Case COMP/39.462—Freight forwarding, (2012/C 375/05).

¹³⁰ Ibid, para 1.

for leniency. The total fine imposed by the Commission on all 14 freight forwarders amounted to EUR 169 million. In the case of *Airfreight*,¹³¹ a high profile case of the price fixing of fuel surcharges, 11 carriers colluded to introduce fuel surcharges in response to the increasing oil prices. This case was the largest cartel investigation in the air transport sector, resulting in an enormous amount of fines (EUR 799 million) and the involvement of competition authorities from many jurisdictions, not just in the EU, but also the US, Canada, South Korea, Japan and Australia.¹³²

5.3.2 The concept of ‘appreciability’

It could reasonably be submitted that the concept of ‘appreciability’ is the key factor in the application of Article 101(1). The two important concepts are: the appreciable effect on trade between Member States and on competition. In other words, the Treaty does not apply to agreements which do not ‘appreciably’ affect the trade between the EU Member States¹³³ and which do not have ‘appreciable’ effects on competition. The concept of effect on trade between Member States is clearly spelled out in the first part of the provision: ‘which may affect trade between Member States’. The Commission Guidelines on the concept lay down comprehensive rules indicating when agreements are in general unlikely to be capable of appreciably affecting trade, incorporating the non-appreciable affectation of trade rule or NAAT rule, and providing for the methodology of the application of the rule, subject always to the interpretation given by the courts. Unlike the concept of effect on trade between Member States, this concept is not expressly spelled out in Article 101(1). The Commission, in its Notice on agreements of minor importance (*De Minimis Rule*), views that certain agreements do not appreciably restrict competition if the aggregate market shares held by the parties to the agreement fall below the specified

¹³¹ Case COMP/39258—Airfreight.

¹³² Milligan (n 125) ch5, p67. This Commission Decision dated 9 October 2010 was annulled by the General Court, but was later re-adopted by the Commission Decision dated 7 March 2017.

¹³³ In *Societe Technique Miniere v Maschinenbau Ulm*, the proof of these three elements were required: sufficient degree of probability on the basis of a set of objective factors of law and fact, an influence on the pattern of trade, and a direct or indirect, actual or potential influence on the pattern of trade. The concept of appreciability is based on a quantitative element of the effect on trade criterion, where it is measured based on the turnover and the market shares of the undertakings in the market.

threshold.¹³⁴ The Notice further specifies that certain agreements containing hard-core restrictions, such as price fixing, output limitation, market allocation, resale price maintenance, and absolute territorial protection do not benefit from the market shares threshold.¹³⁵ In practice, however, this concept has not been applied consistently. In the decision of the ECJ in *Volk v Vervaecke*¹³⁶, it was held that agreements containing object restraints between undertakings which held market shares of less than one per cent could escape the Article 101(1) prohibition, as being insignificant to the market. In the case of *Expedia Inc v Autorite de la Concurrence*,¹³⁷ however, the ECJ held that agreements with object restrictions are so injurious that they always appreciably affect competition, regardless of their market share.

5.3.3 The determination of the ‘object’ or ‘effect’ of the restriction of competition

Article 101(1) of the TFEU prohibits all agreements ‘which have as their object or effect the prevention, restriction or distortion of competition within the internal market.’¹³⁸ The infringement must be established, based on either the objective or the consequences of such agreement that restrict competition. Agreements that are conspicuously anti-competitive include agreements that ‘fix the price, limit or control production, share the market.’¹³⁹ The Guidelines on the applicability of Article 101 of the TFEU provides that the agreements with object restrictions are those which ‘by their very nature have the potential to restrict competition within the meaning of Article 101(1)’¹⁴⁰. ‘[I]t is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.’¹⁴¹

¹³⁴ For instance, the agreements entered into by actual or potential competitors are considered to be of minor importance, and therefore do not appreciably affect the competition if the aggregate of the market shares held by them in the relevant market do not exceed ten per cent, and this threshold is also applicable to agreements where it is difficult to classify whether the parties are competitors or non-competitors. For the agreements which are entered into by non-competitors, the aggregate market shares must not exceed 15 per cent.

¹³⁵ Commission Notice (De Minimis Notice), para 11.

¹³⁶ Case 5/69, p302.

¹³⁷ Case C-226/11 EU :C :2012 :795.

¹³⁸ Article 101(1) of the TFEU.

¹³⁹ Article 101(1) of the TFEU .

¹⁴⁰ Guidelines on the applicability of Article 101(3) of the Treaty of the Functioning of the European Union on horizontal cooperation agreements (2011/C 11/01), para 24.

¹⁴¹ Guidelines on Horizontal Co-operation Agreements, para 26.

Nevertheless, the provision is ‘insufficient in itself to explain the numerous intricacies involved in understanding how this provision works’¹⁴², and that further judicial interpretations and clarifications are needed.

It is a settled law that the requirements of infringement by ‘object’ and ‘effect’ are alternative for a finding of an infringement¹⁴³, thus the words ‘object’ and ‘effect’ are to be read disjunctively.¹⁴⁴ This initial ‘categorisation’ has an impact on the standard of proof, in finding an infringement under the Article 101(1) object restriction cases, because once a breach is established, it would be unnecessary to prove further that an agreement has an anti-competitive effect.¹⁴⁵ Consequently, the burden of proof switches from the Commission to the defendant to establish a defence under Article 101(3).¹⁴⁶ In this regard, it is instructive to consider the opinion given by AG Kokott in *T-Mobile*, on the classification of certain types of agreement according to the object and effect restrictions. The distinction sensibly conserves the competition authorities’ resources and the judicial system, and it provides legal certainty which allows the undertaking to adapt their conduct accordingly.¹⁴⁷ Even more interesting is the equalisation drawn between the object restrictions and the strict liability offences. She stated that just as no conviction is needed for a certain traffic offences committed by a driver, for the prevention of accidents, the same rationale applies to the prohibition of the object, where no proof of effects are required.¹⁴⁸

According to King, the word ‘object’ has not been defined in the case law, but most decided cases reveal that it focused on the object as being the aim, purpose, and intention of an agreement.¹⁴⁹ In *IAZ International Belgium SA v Commission*,¹⁵⁰ the court said that in determining the object restriction of an agreement, the analysis of its content, provisions, and objectives in the economic and legal context is

¹⁴² Whish & Bailey (n 1) ch1, p120.

¹⁴³ *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededinging sautoriteit (T-Mobile)* Case C-8/08 [2009] ECR I4529; para 31.

¹⁴⁴ *BIDS*, p136.

¹⁴⁵ Whish & Bailey (n 1) ch 1, p123.

¹⁴⁶ See *Societe Technique Miniere v Maschinenbau Ulm GmbH (STM)* [1966] ECR 235 p7.

¹⁴⁷ Case C-8/08—G Kokott Opinion, para 43 – 44.

¹⁴⁸ *Ibid*, para 45.

¹⁴⁹ Saskia King, ‘The Object Box: Law, Policy or Myth?’, *European Competition Journal* (2011), p 276.

¹⁵⁰ Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82, 110/82 [1983] ECR 3369.

important.¹⁵¹ In other cases, ‘close regard must be had to the wordings of its provision and to the objectives in which it is intended to attain’¹⁵² and that there is a need to consider ‘the precise purpose of the agreement, in the economic context in which it is to be applied.’¹⁵³ Object restrictions are considered to be ‘hard-core’ restrictions, and have included conduct such as price fixing, market sharing, and information exchange.¹⁵⁴ Price fixing, in particular, includes the fixing of selling as well as the purchasing price.¹⁵⁵ The Commission and EU Courts have not always applied the standard consistently, however. Some cases have taken a wider approach, in which case a mere effect on competition is sufficient, while others have taken a narrow approach, where more stringent factors were considered to find an object restriction. Where the court took a wider approach, a potential negative effect is sufficient, and there is no need to prove concrete effects.

The turning point is the significant judgment of *Groupeement des Cartes Bancaires v Commission*¹⁵⁶, where the EU Court seems to put the controversy to rest, stating that the concept of object restrictions should be interpreted restrictively.¹⁵⁷ This means that the court should not take a liberal approach unduly. This case also marks a return to a more conservative and orthodox approach.¹⁵⁸ In this case, the GC held the measures taken by the group of banks in formulating the fee for its issuing and acquiring members were, by object, restricting competition, as they hindered new entrants to the markets.¹⁵⁹ On appeal, the ECJ stated that the GC did not at any point explain in what respect that wording could be considered to reveal the existence of a sufficient degree of restriction of competition by object.¹⁶⁰ In determining the context, ‘it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the

¹⁵¹ Ibid, para 25.

¹⁵² C-209/07—*Competition Authority v Beef Industry Development Society Limited*, para 71; [2008] ECR I-8637, para 21.

¹⁵³ *GlaxoSmith*, para 55.

¹⁵⁴ See *European Night Services* and *Expedia Inc.*

¹⁵⁵ Ioannis Kokkoris, ‘Purchase Price Fixing: A per se infringement?’ *European Competition Law Review* (2007) 473-487. It is argued that a purchase price fixing without any disguised cartel or output restrictions could also be a per se infringement.

¹⁵⁶ *Cartes Bancaires*.

¹⁵⁷ Ibid.

¹⁵⁸ Whish & Bailey (n 1) ch1, p126.

¹⁵⁹ Ibid, para 60.

¹⁶⁰ Ibid, para 65.

market'¹⁶¹. The GC failed to define the concept of object restriction, as it disregarded the essential legal criterion that is the finding that 'such coordination reveals in itself a sufficient degree of harm to competition'.¹⁶²

For effect restrictions, further examination must be carried out to determine its actual and potential effects. The Guidelines on the application of Article 81(3) [101(3)] of the Treaty¹⁶³ provides a clear approach on the effect restriction assessment in which it states that the effects of the agreement 'must affect actual and potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability'¹⁶⁴ and no presumption can be made on the anti-competitive effects, unlike in the object analysis.¹⁶⁵ Therefore, the determination of the effect restrictions requires an extensive analysis. The case of *Delimitis v Henniger Brau AG*¹⁶⁶ demonstrated the depth of analysis required in assessing the restrictive effects, in that the ECJ not only considered the agreement in the context in which it occurred¹⁶⁷, but further provided an extensive discussion on the definition of the relevant market,¹⁶⁸ the assessment of market access¹⁶⁹, and the foreclosure effects.¹⁷⁰ It follows that another important element to be established is the counterfactual analysis. A comparison between two situations is necessary: before and after the agreement in question is concluded. This is to consider what would have been the situation if such an agreement had not been concluded.

The assessment of whether or not the object of an agreement is restrictive of competition is not an easy task. The assessment is highly dependent on the facts of each and every case in question. But the dilemma is always the level of analysis

¹⁶¹ Ibid, Para 53.

¹⁶² Ibid, para 57.

¹⁶³ OJ 2004 C101/08.

¹⁶⁴ Ibid, para 24; The same was held in the case of *Master Card v Commission* where an agreement is said to have a restrictive effect when 'it is liable to have an appreciable adverse impact on the parameters of competition such as the price, the quantity and quality of the goods or services'. The assessment on the effect restriction, therefore, requires a more extensive analysis

¹⁶⁵ Ibid, para 24.

¹⁶⁶ Case C-234/89.

¹⁶⁷ Ibid, para 14.

¹⁶⁸ Ibid, para 26-42.

¹⁶⁹ Ibid, para 19-23.

¹⁷⁰ Ibid, para 24-27.

required for each of the restrictions. The decisions of the Commission and the EU courts listed above seem to suggest that there must be, at least, some form of ‘fair economic analysis’ being undertaken—but it should not be too detailed particularly in object restriction cases, so as to risk ‘mingling’ between the object and effect analysis which would then undermine the object-effect distinction.¹⁷¹ Many joint venture agreements in the airline industry which involved extensive cooperation in the key parameters of competition such as fares, routes, and revenue sharing have been found to restrict competition by object.¹⁷² A detailed discussion on the application of Article 101(1) of the TFEU to these agreements is provided in the next Chapter 6.

The agreements that infringe Article 101(1) are automatically void, pursuant to Article 101(2)¹⁷³, and are therefore unenforceable not only between the parties but also against a third party.¹⁷⁴ The anti-competitive agreement may not be declared void in total, as only the clauses that are found to infringe the provision are severed. The Court in *Societe de Vente de Ciments et Betons del’Est SA v Kerpen & Kerpen GmbH und Co. KG* held that ‘the Treaty applies only to those contractual provisions which are incompatible with Article 85(1)[101(1)]’, but the consequences of the nullity on ‘unaffected’ clauses of the agreement are within the jurisdiction of the national competition authorities.¹⁷⁵ Once an agreement has been found to infringe Article 101(1), Article 101(3) provides the avenue for the undertakings to apply for exemptions provided under the provision.¹⁷⁶ The undertakings have now the responsibility to prove that the agreement fulfils all the criteria laid down therein. The undertakings must

¹⁷¹ Whish & Bailey (n 1) ch1, p126.

¹⁷² See *Continental/ United/ Lufthansa/ Air Canada* - Case COMP/AT.39595 - 23.5.2015 and *Air France/ KLM/ Alitalia/ Delta* - Case AT.39964 - 12.5.2015.

¹⁷³ Article 101(2) states that ‘Any agreements or decisions prohibited pursuant to this Article 101(1) shall be automatically void’.

¹⁷⁴ Case 22/71—*Beguelin Import v GL Import Export* [1971] ECR 949 para 29.

¹⁷⁵ Case 319/82, [1983] ECR 4173 para 12.

¹⁷⁶ Article 101(3) provides that “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.’

prove that the agreement contributes to improve the production or distribution of goods, and promote technical and economic progress, as well as provide a fair share to consumers. Nevertheless, the restrictions must be indispensable, in that the objective of the agreement could not be achieved without them being imposed on the undertaking, and the restrictions must not eliminate completely the competition in the market. The evidence is assessed based on the balance of probabilities.¹⁷⁷ For the application of Article 101(3), the Commission has issued a Guideline that sets out its view on the substantive assessment applied in various types of agreements and practices¹⁷⁸, and also a Commission Regulation on the application of these exemptions to categories of vertical agreements and concerted practice.¹⁷⁹ The Commission has in the past issued a number of block exemptions with particular application to the airline industry.¹⁸⁰ No block exemptions have been issued however since full liberalisation.

5.4 The Prohibition of Anti-Competitive Agreements under the Malaysian Competition Laws

5.4.1 Section 4 of CA 2010

Section 4(1) of the CA 2010 provides a general prohibition for any horizontal or vertical agreement between enterprises 'in so far as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services'.¹⁸¹ Section 4(2) of the Act sets out an important deeming provision for certain categories of conduct that are considered 'hard core' object restrictions and forms a significant departure from Article 101(1) TFEU. It states specifically that 'a horizontal agreement between enterprises which has the object to:-

¹⁷⁷ *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR 9291, para 93-95.

¹⁷⁸ Guidelines of the application of Article 81(3) of the Treaty, OJ 2004 C101/08), para 3.

¹⁷⁹ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices.

¹⁸⁰ The Commission Regulation on the Application of Article 101(3) to certain categories of agreements and concerted practices in the air transport sector.

¹⁸¹ Section 4(1) of CA 2010.

‘(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.¹⁸²

Section 4(3) makes it clear that any enterprise that becomes a party to such a prohibited agreement is liable for infringement under that provision.¹⁸³

5.4.1.1 The key concepts

Section 4 of the Act employs mostly similar key concepts under Article 101(1) of the TFEU and they are clearly defined in the Act. The prohibition under Section 4 applies to an ‘enterprise’, rather than ‘undertaking’, which is specifically defined as ‘any entity carrying on commercial activities relating to goods or services’.¹⁸⁴ The Act uses the concept of ‘commercial activities’ rather than ‘economic entity’.¹⁸⁵ This negative interpretation is important, not because it excludes the government authorities, but it includes them in so far as they carry out commercial activities regardless of their status. This is consistent with the functional approach adopted by

¹⁸² Section 4(2) of CA 2010, emphasis added.

¹⁸³ Section 4(3) of CA 2010 states ‘Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition’.

¹⁸⁴ Section 2 of CA 2010. The definition further states that, ‘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’. Thus, the concept of ‘single economic unit’, as adopted in the EU, is included in the definition of ‘enterprise’. This definition has been applied in *MAS/AirAsia* where MyCC decided that Air Asia Berhad and AirAsia X Sdn Bhd formed a single economic unit, as the former was able to control the conduct of the latter in the market, and both companies shared the common shareholders and directors. See also MyCC Decision on Ice Manufacturers dated 30 January 2015 (MyCC.700.2.0001.2014), MyCC Decision on Sibu Confectionery and Bakery Association dated 12 February (No. MyCC.0045.2013); Available at <<http://mycc.gov.my/legislation/case>>assessed 23 March 2019.

¹⁸⁵ Commercial activities cover all activities that are commercial in nature but excludes ‘(i) any activity, directly or indirectly, in the exercise of governmental authority, (ii) any activity conducted based on the principle of solidarity, and (iii) any purchase of goods or services not for the purposes of offering the goods and services as part of an economic activity.’ Section 3(4) defines “commercial activity” as ‘any activity of a commercial nature but does not include—

(a) any activity, directly or indirectly in the exercise of governmental authority;

(b) any activity conducted based on the principle of solidarity; and

(c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.’

the EU. More significantly, considering that most of the prominent companies in Malaysia are government-linked, it is argued that excluding them from the Act would have effectively carved half of the country's market from the scope of the Act.¹⁸⁶ It is argued further that the scope of 'commercial activity' may be narrower than 'economic entity' as some activities may still be regarded as 'economic' although they are not intended to be 'profit-making' as commercial activities are unlikely to be carried out without profits.¹⁸⁷ There are, however, no further explanations provided for the concept of solidarity.¹⁸⁸

'Agreement' is explicitly defined as 'any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices'.¹⁸⁹ As with the EU, the concept of agreement under Section 4 extends beyond the boundaries of a 'formal' agreement. Any form of communication between competitors including, for example, the attendance at a business lunch at which there is discussion about the key parameters of competition such as price could amount to 'an agreement' and should be avoided, as they could implicate the enterprise as being party to such agreements.¹⁹⁰ Concerted practice is another form of 'agreement' that may be prohibited under the Act, as it is included in the definition of an 'agreement'.¹⁹¹ The phrase 'concerted practice' is further defined, following closely EU law.¹⁹² There have been two cases involving

¹⁸⁶ Vince ETC (n 136) ch3, p592; The Minister of Domestic and Consumer Affairs, when presenting the Competition Bill in the Parliament in 2010, also confirmed the application of the Act to all government-linked companies and took into account the fact that their participation in the Malaysian Stock Exchange market was more than 36% compared to the local market. See Hansard of the Malaysian Parliament on the Competition Bill 2010 dated 20 April 2010 (DR.20.4.2010), p132.

¹⁸⁷ Rachel Burgess and Dr Leela Cejnar, 'Following from afar: Malaysia's competition law looks to Europe', *European Competition Law Review* (2014) p2, See *Hofner v Macrotron GmbH* (C-41/90) [1991] ECR I-1979 p21.

¹⁸⁸ *Ibid.*

¹⁸⁹ Section 2 of CA 2010.

¹⁹⁰ MyCC Guidelines on Chapter 1—Prohibition—Anti-Competition Agreements, 2 May 2012, para 2.1 – 2.3; The nature of an agreement was discussed at length in the case of *MAS/AirAsia*, where the Competition Appeal Tribunal (CAT) overruled the findings made by the MyCC on the existence of the agreement between MAS and AirAsia. The CAT found that no agreement existed between the parties as it was never implemented and was unenforceable. On judicial review, however, the High Court set aside the CAT's decisions, and found that the CAT failed to consider the definition of 'agreement' in Section 2 of the Act.

¹⁹¹ See (n 188) for the definition of 'agreement'.

¹⁹² Section 2 of the Act defines 'concerted practices' as 'any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition and includes any practice which involves direct or indirect contact, or communication between enterprises, the object or effect of which is either –(a) to influence the conduct of one or more enterprises in a market;

concerted practices so far; the case of *Container Depot Operators*¹⁹³ where a company that provided a software system was found to infringe Section 4(1) by engaging in a vertical concerted practice with a group of container depot operators to fix and impose unfair rebates and the case of *Seven Tuition and Day Care Centres*¹⁹⁴ which involved a horizontal concerted practice among tuition and day care centres to increase price for the services rendered where all enterprises were found to infringe Section 4(2)(a) of the Act. The ‘decision by association’ is also another form of an ‘agreement’ that may be prohibited under the Act. The first competition case decided by MyCC concerned a decision by an association. In this case of *Cameron Highlands Floriculturist Association*, the MyCC stated that it is the intention of the Act to ‘widen the meaning of an agreement to also cover all the decisions made by an association without limiting it to just an ordinary agreement’.¹⁹⁵

5.4.1.2 The concept of ‘significant restrictions’ in determining the ‘object or effect’ under section 4(1) of the CA 2010

It is noted that while the EU applies the concept of ‘appreciability’, the CA 2010 uses the concept of ‘significance’. The word ‘significant’ means an agreement must have more than just a trivial impact, which is measured in relation to the identified market.¹⁹⁶ As the basis for the assessment, the MyCC takes the ‘safe harbour’ approach, based on the combined market share of the parties in the relevant market.¹⁹⁷ If the parties to the agreements are competitors, the agreement will not be significant if their combined market share is less than 20 per cent; if the parties to the agreements are non-competitors, the agreement will not be significant if their combined market share is less than 25 per cent.¹⁹⁸ It is noted that the ‘safe harbour’ approach is similar to the De Minimis Notice applied in the EU, except that the threshold set is higher by ten per cent. This connotes that firms with higher market

or (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition.’ See also MyCC Guidelines on Anti-Competitive Agreements, para 1.1 and 2.6.

¹⁹³ MyCC Decision on *Container Depot Operators* (700.2.005.2013).

¹⁹⁴ MyCC Decision on *Seven Tuition and Daycare Centres* (700.1.1.4302017).

¹⁹⁵ MyCC Decision on *Cameron Highlands Floristculturist*, para 2.3.

¹⁹⁶ MyCC Guidelines on Anti-Competitive Agreements, para 3.4.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

shares will not be caught by the provision in Malaysia unlike those in the EU. There is therefore an enhanced safe harbour under Malaysian law. This may be due to the market size and higher level of concentration of the economy in Malaysia.

Section 4(1) prohibits the agreements which have an anti-competitive object or effect which significantly prevents, restricts or distorts competition in the market.¹⁹⁹ This Section is considered to provide a catch-all, general prohibition that applies to all types of anti-competitive agreements. The general rule is that the MyCC will first look into the common intentions and the aims of the parties to the agreement in the light of the agreement's economic context, to determine whether or not the object of the agreement is highly likely to have a 'significant anti-competitive effect'.²⁰⁰ If this is not found to be the case, then the assessment proceeds to examine further whether there are indeed any 'significant anti-competitive effects'.²⁰¹

The first case under Section 4(1) was the case of *Container Depot Operator* where the MyCC found that, Counterchain Malaysia Sdn Bhd, a company that provided a software system for the management of empty containers had engaged in vertical concerted practices with a group of container depot operators by influencing their conduct to increase the depot gate charges.²⁰² The MyCC decided that the vertical agreements had the effect of significantly preventing, restricting and distorting competition. The 'safe harbour' approach was applied and the company was found to exceed the threshold. The decision was made based on the anti-competitive effects of the vertical agreements between the enterprises and no discussion was made on the standard of analysis required for the object restriction.

5.4.1.3 The concept of 'significant restrictions' and the deeming provision of the object restriction under section 4(2) of the CA 2010

Section 4(2) deems certain conduct to be a restriction by object but the list is non-exhaustive. This conduct is also deemed to be a 'significant' restriction, therefore

¹⁹⁹ MyCC Guidelines on Anti-Competitive Agreements, para 3.3.

²⁰⁰ Ibid, para 2.13.

²⁰¹ Ibid, para 3.14.

²⁰² MyCC Decision on *Container Depot Operators* (700.2.005.2013), para 10.4.

dispensing with the need to determine market share.²⁰³ It treats certain horizontal agreements as anti-competitive²⁰⁴. Any horizontal agreement which has the object to fix the price, share the market, limit the production, or perform an act of bid rigging is deemed to have the object of significantly restricting²⁰⁵ competition and is therefore prohibited.²⁰⁶ This section contains two main elements: the first part specifies four types of anti-competitive conduct which are legally presumed to have an object that restricts competition, and the second part states that any horizontal agreement having such conduct is deemed to have significantly restricted competition. Once it is established and proven that the agreement contains the object to achieve one or more of the four types of the anti-competitive conduct, there is no need to examine further into the anti-competitive effects of the agreement.²⁰⁷ This clearly connotes, therefore, that the concept of 'significant restrictions' is no longer relevant as it has been deemed under Section 4(2).

The general rule to determine the object of an agreement that is restrictive of competition under section 4(2) is that the MyCC will examine the actual common intentions of the parties and the aims they wish to pursue in the light of the economic context of the agreement.²⁰⁸ If, upon the assessment, the object of an agreement is highly likely to have a significant anti-competitive effect, the agreement is regarded as having the anti-competitive object²⁰⁹, and no further analysis into the anti-competitive effects of the agreement will be made.²¹⁰ Consequently, the significant restrictions required in Section 4(2) can be deemed to exist. If the anti-competitive object is not found, a further examination into its anti-competitive effects is required.²¹¹ This

²⁰³ For object restrictions cases, there is no necessity to define the market because the agreement is deemed to have a significant effect on competition; MyCC Guidelines on Market Definition; para 1.9 and 1.10.

²⁰⁴ Para 2.11 of the MyCC Guidelines on Anti-Competitive Agreements states that Section 4(2) provides for horizontal agreements with object of engaging in cartel practices and therefore deemed to have the object of significantly preventing, restricting and distorting competition.

²⁰⁵ Section 4(2) of the Competition Act 2010 reads as '*...preventing, restricting and distorting competition*'. In the following text, the term 'restrict' meant to include the prevention and distortion of competition.

²⁰⁶ Section 4(2) of CA 2010.

²⁰⁷ MyCC Guidelines on Anti-Competitive Agreements, para 3.25.

²⁰⁸ Ibid, para 2.13.

²⁰⁹ Ibid, para 2.13.

²¹⁰ Ibid, para 2.14.

²¹¹ Ibid, paras 2.15 and 3.25.

approach is said to be consistent with the objective of the CA Act 2010²¹² that is 'to promote the economic development by promoting and protecting the process of competition and the interests of the consumers'.²¹³ Nevertheless, in practice, the approach to deeming provision has been found to be complex and controversial.²¹⁴

While Article 101(1) of the TFEU provides that certain conduct can be found to be restrictive by object, the CA 2010 expressly deems this conduct to be anti-competitive. It is clear that Section 4(2) singles out the four types of conduct which are, based on the EU established cases, to be 'hardcore restrictions' and 'object' restrictions and uses the deeming provision to automatically regard them as 'significant' thus ruling out the necessity of applying the concept of 'significant restriction'. It is argued that this categorisation between Section 4(1) and Section 4(2) is intended to provide a legal certainty among enterprises²¹⁵ but the MyCC is still able to develop its own jurisprudence for other kinds of agreement to be anti-competitive by object based on the general provision of Section 4(1). It is also observed that bid rigging is classified as a 'hardcore restriction' under the Act and this may be due to the fact it is a prominent business feature in the Malaysian business industry. Discriminatory pricing and tying as provided under Article 101(1)(d) and (e) of the TFEU are not deemed to be 'significantly' anti-competitive but this conduct can also be assessed under the abuse of a dominant position in Section 10(2) of the Act.²¹⁶ The legislator may intend to regulate the conduct only when there is a presence of a dominant position with a higher market shares under Section 10(2).²¹⁷ These types of conduct however could still be caught as anti-competitive under Section 4(1).

It can be concluded that Section 4(1) is a general prohibition and requires a higher standard of analysis to determine the object restriction than the one specified under Section 4(2).²¹⁸ As a result, this seems to suggest that, there are two standards of analysis applicable for the determination of object restrictions under the CA 2010;

²¹² Ibid, para 2.12.

²¹³ Long Preamble of CA 2010.

²¹⁴ This issue is examined in detailed in the *MAS/AirAsia* case which is discussed in Chapter 7.

²¹⁵ Vince ETC (n136) ch3, p595 and Mervyn Lai Wei Shiung, 'The MAS-AirAsia Case: Testing the Relevance of EU Competition Principles in Malaysia', 2 *Malayan Law Journal* [2017] lxxxvi p5.

²¹⁶ Section 10(2) of CA 2010.

²¹⁷ Vince ETC (n136) ch3, p596.

²¹⁸ See the discussion on Section 4(2) in 5.4.1.3.

a more extensive analysis required to determine an object restriction under Section 4(1) and a lesser analysis for agreements under Section 4(2).²¹⁹

5.4.2 Section 49 of MACA 2015

MACA 2015 contains sectoral regulations that govern competition in the aviation sector in Malaysia.²²⁰ The competition regulations largely adopt the provisions of CA 2010. Section 49 of the MACA 2015 mirrors closely the provision of the anti-competitive agreements in Section 4 of CA 2010. Be that as it may, there are some important differences between the two provisions that are significant to the airline industry. Section 49(1) of the MACA 2010 prohibits agreements between enterprises 'in so far as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any aviation service market'.²²¹ Section 49(2) of the Act mirrors that of the deeming provisions in s4(2) CA 2010. It specifically provides for the prohibition of 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 aviation service 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, in connection with aviation services, is deemed to have the object of significantly preventing, restricting, or distorting competition in any aviation service market.'²²²

The enterprise that becomes a party to such a prohibited agreement is liable for infringement under that provision.²²³

5.4.2.1 The key concepts

The key concepts used under Section 49 of the MACA 2019 are similar to that of Section 4 of the CA 2010, and although most of the differences are in wordings, some essential elements are worth noting. The prohibition under Section 49 of the

²¹⁹ Mervyn (n 214) ch5, p5.

²²⁰ The *MAS/AirAsia* case, however, is still under the jurisdiction of the CA 2010. See Chapter 3.

²²¹ Section 49(1) of MACA 2015.

²²² Section 49(2) of MACA 2010.

²²³ Section 49(3) of MACA 2010.

MACA 2015 applies to an 'enterprise' which is specifically defined by Section 47 of the Act as:-

'any individual, body corporate, unincorporated body of persons or any other entity carrying on commercial activities relating to aviation 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 in the aviation service market.'²²⁴

This definition includes the concept of 'single economic unit', but differs from the definition under section 2 of the CA 2010 in two aspects: it incorporates the element of 'individual, body corporate, unincorporated body of person' and the 'aviation service market'. Although the second element is understandable as the MACA 2015 applies only to the aviation sector, the first element connotes a wider scope of 'enterprise'. The 'agreement' is defined by Section 47 of the Act as:-

'any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a horizontal agreement, a vertical agreement, an airline code sharing, alliance, partnership or joint venture agreement, decision by an association and concerted practices.'²²⁵

This definition is notably different from that of Section 4 of CA 2010, as it incorporates not only the horizontal and vertical agreement²²⁶, but also the specific types of airline cooperation.²²⁷ It seems to suggest that although the concept of agreement is beyond the scope of a 'formal contract', there are certain agreements that are common in the aviation sector, and it highlights these agreements as of particular concern of the competition authorities. The issue on the nature and the existence of the agreements in the airline industry was raised in the case of *MAS/AirAsia*.²²⁸ In determining whether the agreement entered into by MAS and AirAsia was anti-competitive, the MyCC took the view that the airlines alliances such as code sharing, revenue and cost coordination of capacities, routes and schedule

²²⁴ Section 47 of MACA 2015.

²²⁵ Ibid.

²²⁶ The horizontal and vertical agreements are stated clearly in the provision of Section 4 of the CA and not in the definition of 'agreements'.

²²⁷ 'Agreement' is further elaborated in the MAVCOM Guidelines on Anti-Competition Agreements, (GL/Competition/ACA/2018) published on 19 January 2018, para 2.2-2.5 (a), (b) and (c).

²²⁸ *MAS/AirAsia* is discussed further in Chapter 7.

planning, coordination of marketing, advertising, sales, and distribution may be pro-competitive and would not involve market sharing, but that the agreement in question went beyond an alliance agreement.²²⁹

As shown in the earlier section, the ‘concerted practices’ and ‘decisions of associations’ form part of the ‘agreement’ as defined under Section 47 of the MACA 2015, and therefore fall within the scope of prohibition of Section 49 of the Act. The ‘concerted practice’ is further defined under Section 47, and it mirrors the exact definition under Section 2 of the CA 2010 except that it specifically concerns the aviation market services.²³⁰ A concerted practice could potentially be anti-competitive, if the object or effect is to influence the conduct of others in the aviation market services, or to disclose conduct that it contemplates to adopt where such disclosure would have not been made under the normal conditions of competition.²³¹ The ‘decision by association’ is, however, not defined in the Act, but it may take many forms—such as resolutions or recommendations of the management, the committee, or the members of the association, which has the object or effect of influencing or coordinating the conduct of its members.²³² An association could involve indirect price-fixing through the sharing of price lists, which could be deemed to have the object of significantly restricting competition.²³³ This also means that associations could also be liable under Section 49 of the Act through their decisions.

5.4.2.2 The concept of ‘significant restrictions’ in determining the ‘object or effect’ under Section 49(1) of the MACA 2019

Considering that MACA 2015 adopts largely the provisions of the CA2010, the same issues and concerns may be expected to arise. Section 49(1) provides for a

²²⁹ MyCC Decision on *MAS/AirAsia*, para 66.

²³⁰ Section 47 defines ‘concerted practices’ as ‘any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either— (a) to influence the conduct of one or more enterprises in a market; or (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of competition’.

²³¹ MAVCOM Guidelines on Anti-Competitive Agreements, para 2.5(e)(i).

²³² *Ibid*, para 2.5(d).

²³³ *Ibid*, para 2.10(a)(ii).

general prohibition that any agreement, horizontal or vertical, which has the object or effect of significantly preventing, restricting or distorting competition in any aviation market is prohibited. Similar to the approach taken by Section 4 of the CA 2010, the ‘significant restrictions’ of an agreement in Section 49 is measured in relation to the combined market shares of the enterprises, as an indicator to determine the effects to the market.²³⁴ As a result of which, the ‘safe harbour’ approach as applied in Section 4 of the CA 2010, with the same threshold, is also applied in the aviation sector.²³⁵ Nevertheless, the MAVCOM Guidelines make it clear that if the minimum threshold is exceeded, the agreement does not necessarily have the effect of significantly preventing or restricting competition²³⁶, and further consideration must be made to the market power of the parties, the content of the agreement as well as the structure and conditions of the relevant aviation service market.²³⁷ The MAVCOM Guidelines on Aviation Service Market Definition state that the market definition may be required to analyse whether an agreement has the object or effect of significantly preventing, restricting or distorting competition in any aviation service market.²³⁸ Although other competition authorities may provide guidance on the definition of a relevant aviation service market, it may not be appropriate, as the aviation industry requires a fact-specific analysis according to each case. The issue of what circumstances the definition of the relevant market is necessary is raised in the case of MAS/AirAsia which is discussed further in Chapter 7 - Case Commentary: MAS/AirAsia.

5.4.2.3 The concept of ‘significant restrictions’ and the deeming provision of the object restriction under section 49(2) of the CA 2010

Section 49(2) of the MACA 2015 imports the deeming provision of Section 4(2) of the CA 2010, and treats all agreements which have an object specified therein to be anti-competitive, and therefore prohibited under the Act. The list is however non-

²³⁴ MAVCOM Guidelines on Anti-Competitive Agreements, para 2.16.

²³⁵ An agreement may not have the effect of significantly preventing, restricting or distorting competition in the aviation market if, in the case that the parties to the agreement are competitors, the combined market shares are less than 20 per cent, and if, in the case that the parties are non-competitors, the combined market shares are less than 25 per cent: MAVCOM Guidelines on Anti-Competitive Agreements, para 2.17.

²³⁶ MAVCOM Guidelines on Anti-Competitive Agreements, para 2.18.

²³⁷ Ibid, para 2.19.

²³⁸ MAVCOM Guidelines on Aviation Service Market Definition (GL/Competition/ASMD/2018), para 2.3 (a).

exhaustive. The MAVCOM Guidelines on Anti-Competitive Agreements state that an agreement may have an anti-competitive object if the objective and the nature of the coordination is highly likely to harm competition.²³⁹ Additionally, in determining the object, it is important to take into account the purpose of the agreement in the light of the surrounding economic and legal context, which includes, but is not limited to: ‘the nature of the services, the structure and the conditions of the relevant aviation market services, and the intention of the enterprise.’²⁴⁰ After considering all these factors, if a horizontal agreement is found to have fulfilled any of the objects specified in Section 49(2), there is a legal presumption that such an agreement has the object of significantly preventing, restricting and distorting competition, even if the combined market shares of the parties to the agreement are very low.²⁴¹ The phrase ‘very low’ is uncertain, and is nowhere clarified in MACA 2015, nor in the MAVCOM Guidelines, but it strongly suggests that it is highly unlikely that the threshold of the ‘safe harbour’ approach will be considered for cases under Section 49(2), as the ‘significant restriction’ is already deemed. It is noted that this is not expressly stated in the MyCC Guidelines, but since the agreements which have the object restrictions are deemed to be significantly restricting, preventing, and distorting competition in Sector 4(2) of the CA 2010—making the concept of ‘significant restrictions’ inapplicable—the same stance may be reasonably presumed to be taken. As noted earlier, the threshold set under this approach is higher by ten per cent, as compared with the *De Minimis Rule* applied in the EU.

In determining the anti-competitive effects of an agreement, the impact of the agreement on the relevant aviation service market will be conducted. In this case, a definition of a relevant market is necessary, and the concept of ‘significant restrictions’ discussed in the earlier section will be applicable. The MAVCOM Guidelines provide a non-exhaustive list of examples of agreements that may have significant effects on competition, such as agreements that involve information sharing, and vertical agreements on price and non-price restriction, and resale price maintenance.²⁴²

²³⁹ MAVCOM Guidelines on Anti-Competitive Agreements, para 2.8.

²⁴⁰ Ibid, para 2.9.

²⁴¹ Ibid, para 2.9.

²⁴² Ibid, para 2.20.

5.4.3 The difference between CA 2010 and MACA 2019

While the MyCC Guidelines on Anti-Competitive Agreements state that the MyCC will look into the common intentions of the parties to the agreement and the aims it wishes to pursue in order to establish an object restriction, the MAVCOM Guidelines on Anti-Competitive Agreements provide a more ‘specific-to-aviation market’ criterion that, besides looking into the intention of the parties and the purpose of the agreement in light of the economic context, MAVCOM will consider the nature of the service and the structure and conditions of the relevant aviation service market.²⁴³ MAVCOM is also empowered to conduct a market review; a more detailed analysis on the specific services in the industry could be performed, and this would contribute to a more accurate and appropriate competition assessment.²⁴⁴

It is specifically mentioned in the MAVCOM Guidelines on Market Definition that it will use the concepts and principles on domestic and international best practices, relating to the competition law and its development in defining the relevant market.²⁴⁵ Looking at the international nature of the industry itself, this approach is welcomed. Based on many competition cases worldwide, especially in the EU, there are an abundance of cases that could provide valuable guidance on how competition law is applied to the aviation sector. MAVCOM, as a special body which regulates aviation-related matters, arguably has all the skills, competence and expertise specific to the aviation industry. The members of MAVCOM who are appointed by the Minister, after consultation with the Prime Minister, are those who have the ‘...experiences or have shown the capacity and professionalism in matters relating to economics, finance, aviation, business, administration and law’,²⁴⁶ relevant to the functions of the MAVCOM. Particularly, in assessing any competition cases, the MAVCOM members

²⁴³ Ibid, para 2.9

²⁴⁴ These differences are elaborated further in Chapter 7 where the *MAS/AirAsia* case was assessed under the CA 2010 and not the MACA 2015. It would still be difficult however to see a different outcome to that determined by MYCC given the similarity in the wording of the legislation.

²⁴⁵ MAVCOM Guidelines on Market Definition, para 1.4.

²⁴⁶ Section 5(1)(c) of the MACA 2015.

are expected to better appreciate and evaluate the issues in the context of aviation industry by having such special knowledge and skills peculiar to the industry.²⁴⁷

5.5 The similarities and difference between the Article 101 of the TFEU and the Malaysian competition as applied in the airline industry

From the discussion above, it is clearly shown that though the provisions of Article 101(1) form the basis of Malaysian competition law on anti-competitive agreements, there are some pertinent differences. A comparison of the statutory language of these provisions as presented in a matrix form in **Table 1** gives a clearer view. Firstly, Section 4(1) of the CA 2010 and Section 49(1) of the MACA 2015 prohibit a horizontal or vertical agreement insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.²⁴⁸ Both the Guidelines on Anti-Competitive Agreements by the MyCC and the MAVCOM require a 'certain level of significance' which is based on the 'safe harbour' approach and that it is also necessary to define the market for these kinds of agreements. These factors appear to be quite similar to those required under the first limb of Article 101(1) of the TFEU's provisions²⁴⁹ which applies the De Minimis Rules to measure the 'appreciable' effects on competition. Although the percentage of the threshold is different, the basis of the measurement is the same; the combined market shares of the parties in the relevant market. The only different in this part is that Article 101(1) requires the anti-competitive agreements to be incompatible with the internal market based on the notion of 'may affect' the trade between Member States.²⁵⁰ This concept is not applicable under both the CA 2010 and the MACA 2015.

²⁴⁷ These differences are discussed critically in Chapter 7 and are of great importance as one of the issues raised by the CAT is the lack of analysis carried out by the MyCC from the perspective of the aviation industry.

²⁴⁸ Section 4(1) of CA 2010 and Section 49(1) of MACA 2015.

²⁴⁹ According to paragraph 8 Part II of the Commission Notice (De Minimis Notice), anti-competitive agreements which involve competitors possessing a combined market share of less than 10% in the same market or for non-competitors, less than 15%, do not appreciably restrict competition; See also EC Guidelines on the applicability of Article 101(1) of the TFEU to horizontal cooperation agreements (2011/C 11/01) and Commission Notice on the definition of relevant market for the purpose of Community competition law [1997] OJ C372/5.

²⁵⁰ Guidelines on the Effect of Trade Concept (n 239) ch3.

Secondly, Section 4(2) of the CA 2010 and Section 49(2) of the MACA 2015 contain a list of anti-competitive conduct which are deemed to have the object of significantly preventing, restricting and distorting competition which negates the necessity to examine the anti-competitive effects of such an agreement. The 'safe harbour' approach is not applicable and there is no requirement to assess the market shares. However, there are still some analysis to be carried out as there is still a need to establish the existence of the object restriction by examining the actual common intentions of the parties and assessing the aims pursued by such agreement. Article 101(1) of the TFEU does not have a 'deeming provision' and the category of 'object' as 'hardcore' restrictions is based on the established case law and there is no examination required to look further into the anti-competitive effects of the agreements as it is presumed that it has the appreciable effect on competition.²⁵¹ However, the concept of the effect on the trade between Member States is still required. Thirdly, unlike Article 101(2) of the TFEU, both of Section 4(3) of the CA 2010 and 49(3) of the MACA 2015 provide for the infringement of the prohibition by the enterprise but are silent on the legality of the agreement in question. It is submitted that the anti-competitive agreements which have been prohibited under CA2010 and MACA 2015 will fall within the general contractual principles. Finally, both the CA 2010 and MACA 2015 have similar provisions for exemption as provided under the Article 101(3) the TFEU.

²⁵¹ Opinion of the Advocate General Kokott, Case C-226/11, Expedia Inc, para 50.

Treaty of the Functioning of the European Union (TFEU)	Competition Act 2010 (CA 2010)	Malaysian Aviation Commission Act 2015 (MACA 2015)
<p>1. Article 101(1)</p> <p>‘The following shall be prohibited as <u>incompatible with the internal market</u>: all agreements between undertakings, decisions by associations of undertakings and concerted practices <u>which may affect trade between Member States</u> and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, ...’¹</p>	<p>Section 4(1)</p> <p>‘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.’</p>	<p>Section 49(1)</p> <p>‘An agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any <u>aviation market services</u>.’</p>
<p>2 ...cont’d of Article 101(1) ‘...and in particular those which:</p> <ul style="list-style-type: none"> (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.’ 	<p>Section 4(2)</p> <p>‘Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to-</p> <ul style="list-style-type: none"> (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- <ul style="list-style-type: none"> (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid rigging, <p><u>is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.</u>’</p>	<p>Section 49(2)</p> <p>‘Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to-</p> <ul style="list-style-type: none"> (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions; (b) share <u>the aviation service market</u> or sources of supply; (c) limit or control- <ul style="list-style-type: none"> (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid rigging, <p><u>in connection with aviation services</u> is deemed to have the object of significantly preventing, restricting, or distorting competition in any <u>aviation service market</u>.’</p>

¹ First part of the Article 101(1) provision; (*emphasis added*)

3. Article 101(2)	Section 4(3)	Section 49(3)
' <u>Any agreements or decisions prohibited</u> pursuant to this Article <u>shall be automatically void.</u> '	' <u>any enterprise</u> which is a party to an agreement which is prohibited under this section <u>shall be liable for infringement of the prohibition.</u> '	'Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.'
4. Article 101(3)	Section 5 – Relief of Liability	Section 50 – Relief of liability
<p>'The provisions of paragraph 1 may, however, be declared inapplicable in the case of:</p> <ul style="list-style-type: none"> - 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, <p>which contributes to improving the production or distribution of goods or to <u>promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit</u>, and which does not:</p> <ul style="list-style-type: none"> (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.' 	<p>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:</p> <ul style="list-style-type: none"> (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. 	<p>Notwithstanding section 49, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 49 based on the following reasons:</p> <ul style="list-style-type: none"> (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 aviation services.

Table 1: Comparison between Article 101 of the TFEU, Section 4 of the CA 2010 and Section 49 of MACA 2015

5.6 Conclusion

The application of competition laws to the aviation sector in the EU is based on its general competition laws enshrined in the TFEU and the EU objective of the single market. The concepts established through the judicial interpretation, therefore, are the result of the specific criteria of EU, especially the concept of affect on trade of Member States. Malaysia has largely adopted EU competition law with some modifications in its general competition law, the CA 2010, as well as its specific competition regulation within the aviation sector in MACA 2015. Although some pertinent elements have been modified to suit the economic development in Malaysia, the law adopts and applies the same principles from the settled and established jurisprudence in the EU. In particular it adopts the same approach to the determination of market definition and dominance. In the airline industry the most common way of determining the relevant market is to start with the determination of the point of origin (O) to the point of destination (D), the so-called 'O&D pair approach' or 'O&D city pair'.

One notable difference with the EU is the approach taken under Malaysian law to deem certain anti-competitive practices to be object restrictions. This is to provide legal certainty in the industry and to reduce the cost of investigation and enforcement, regarding certain practices that are deemed to have significant effects on competition. The other difference is the higher market threshold required to determine a significant restriction of competition in the absence of an 'object' restriction, under Malaysian competition law. The same approach is also adopted in the sector regulations in the aviation sector. For the airline industry in particular, although the MACA 2015 governs the sector through the specific competition regulations, given the similar competition provisions transplanted into MACA 2015 from the CA 2010, it is arguable that the approach by the sectoral regulators would be similar to the approach adopted under the CA 2010. The application of these provisions, particularly the CA 2010 which was applicable to the aviation prior to 2016 will be examined in more detail in Chapter 7 which provides a detailed analysis of the *MAS/AirAsia* case.

CHAPTER 6 – THE COMPETITION LAW IMPLICATIONS OF COOPERATION AGREEMENTS AND AIRLINE ALLIANCES

6.1 Introduction

‘What is phenomenal in the airline industry is the level of intense cooperation often between what formerly were rivals or competitor firms through a range of contractual arrangement, each with varying degree of integration.’¹

Forces in the global market place increasingly require airlines to collaborate and cooperate with each other from across the world for market efficiency, cost reduction and increase in profitability.² The above passage accurately describes the intense competition faced by the airlines which has led to the recent development of airline cooperation in the industry. Though these ‘economic-efficiency seeking commercial practices’ can be regarded as a positive outcome to ‘what was envisaged by the neoclassical ideals of deregulation and liberalization as economic principles,’³ the level of commitment and cooperation on certain key parameters of airline competition such as fares, routes and capacity may potentially give rise to anti-competitive behaviour which are prohibited under the competition law. This chapter examines these competition issues which are very much influenced by the economic features of the airline industry, its business model and its global network character. The discussion starts by describing the salient features of the various types of the airline cooperation agreements, how they may give rise to anti-competitive behaviours and the application of the EU competition law. There has only been one competition case in the airline industry in Malaysia, the *Mas/AirAsia* case, which concerned one of these forms of agreements: the airline cooperation agreement, which is critically discussed in the next Chapter 7. The discussion in this chapter is therefore mainly focused on the manner in which all these forms of agreements have been considered from the perspective of the EU competition law and other jurisdictions as necessary and how it could be appreciated and considered in the Malaysian context.

¹ Truxal (n 50) ch2, p5.

² Vasigh, Flemin and Tacker (n 54) ch2.

³ Ibid, p2.

6.2 Typology of airline cooperative agreements

Airline commercial practices encompass a wide range and forms of cooperation. Starting from the basic arrangement on interlining, franchising and block space agreement, which normally require a low level of integration between the parties, to a more complex agreement on code-sharing, joint ventures, merger-like integration and strategic alliances, which involve a higher level of integration. In the airline industry, these cooperative agreements are normally referred to as the 'airline alliances' in which the ICAO describes as the 'voluntary unions of airlines held together by various commercial cooperative arrangements'.⁴ They normally contain a variety of elements such as 'code-sharing, blocked space, cooperation in marketing, pricing, inventory control, Frequent Flyer Programme (FFP), coordination in scheduling, sharing of offices and airport facilities, joint ventures and franchising'.⁵ Airline alliances, code-sharing and franchising are recognized as the most notable airline cooperative activities that have attracted the regulatory attention because of their potential effect on competition.⁶ The traditional airline alliances often involved a minimum level of cooperation such as on tariff and sharing of capacity, cost and revenue within duopoly routes which provided only little incentives for competition and efficiency. The modern alliances however are normally built around possible synergies complementing each other's routes structures and services.⁷ In recent years, the industry has witnessed the emergence of 'mega alliances' which are the 'alliance groupings of geographically spread large and medium airlines with extensive combined global networks'⁸ such as the Star Alliance, Oneworld and SkyTeam.⁹

While ICAO term these forms of cooperation as traditional and modern alliances, from the competition authorities' perspective, they can generally be categorised as either a 'tactical' or 'strategic' alliance.¹⁰ Similar to the ICAO's description, the tactical alliances typically involve basic airline cooperation on interlining, code-sharing and FFP which aim to address a specific deficiency in the routes or the network system. At least one of the

⁴ ICAO, 'Manual on the Regulation of International Air Transport', Doc 9626, para 4.8-1 (ICAO Doc 9626).

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

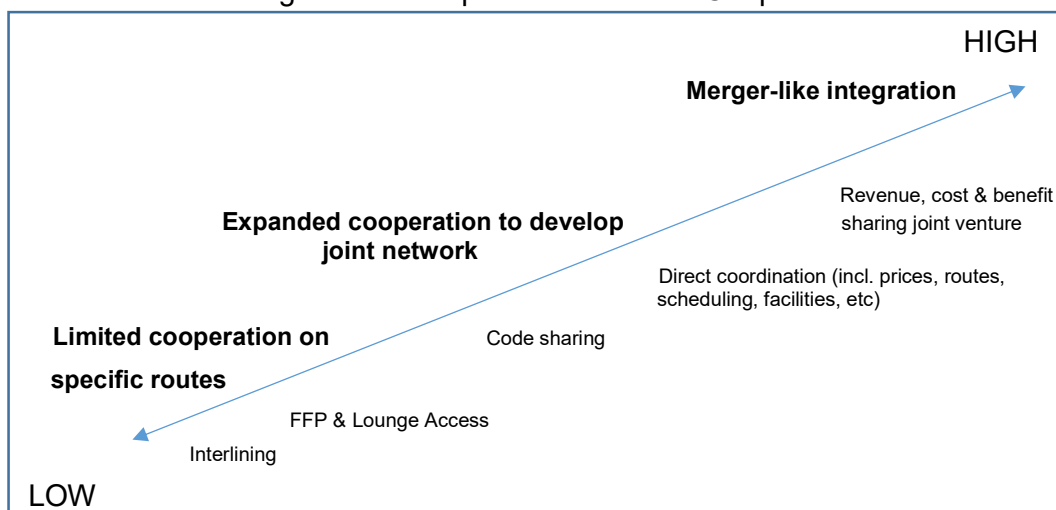
⁸ Ibid.

⁹ These strategic alliances are described further in the later section of this chapter.

¹⁰ Joint Report by the European Commission and the United States Department of Transportation, 'Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches', 16 October 2010, p4. (Joint EU and US Report on Alliances).

parties under the tactical alliances is not a member of the larger alliances. The 'strategic alliances' or the 'global alliances', refer to the alliance groupings and normally involve multilateral cooperation and joint ventures that require a higher level of integration from among the alliance members.¹¹ The purpose is to expand and optimise their global network in order to offer greater benefits to the travelling consumer.¹² It can be reasonably inferred from these categories that, although not all airlines are involved in the strategic alliances as some of them are not members of any of the giant global alliances, almost all airline cooperative activities fall within the category of the tactical alliances. The broad spectrum of these forms of airline cooperation is best explained in *Figure 7* below.

Figure 7: The Spectrum of Airline Cooperation



Source: Joint Report by the EC and the US, DOT on Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches, 2010

The lowest level of integration involves mostly agreements on interlining, FFP, sharing of facilities and block seat arrangements which typically concern technical cooperation and marketing arrangement. This type of agreement may have the least potential to restrict competition based on the nature of their specific technical features and purposes. At the middle of the spectrum are the agreements on code sharing and to a certain extent, agreements that contain direct coordination on prices, routes scheduling and facilities. This type of agreement may or may not have the potential to have an anti-competitive impact on competition. The agreements at the highest level of the spectrum

¹¹ Ibid.

¹² Truxal (n 50) ch2, p136.

almost always have the potential to restrict competition as they cooperate mostly on the key parameters of airline competition such as the joint fares and pricing and the sharing of revenues, profits and costs. These spectrum-related agreements may fit in the categories of the tactical and strategic alliances; the agreements at the lowest and middle level fall within the category of the 'tactical' alliances whereas the agreements sitting at the highest level of the spectrum maybe covered under the 'strategic' alliances.

The analysis of the competition issues in these agreements is focused on the most common and controversial cooperation in the industry and based largely on these two categories; tactical and strategic alliances. To aid understanding, the tactical alliance agreements are divided into three further categories; the technical agreements which consist of interlining, blocked space arrangements and franchising, the semi-technical agreement of code-sharing and the airline cooperation agreements which also include joint ventures. The strategic alliances consist of a combination of all these agreements except that the parties are members of the global alliances. It is important to note that this chapter deals mostly with the agreements that are horizontal in nature; between the actual and potential competitors. There have been only a few cases that involved vertical integration of cooperative agreements in the industry that have caught the attention of the competition authorities. These agreements are discussed to the extent that they provide a relevant analysis to the discussion on the tactical and strategic alliances.

6.3 Tactical alliances

6.3.1 Interlining, blocked space arrangement and franchising

Interlining refers to the transportation on more than one carrier connecting multiple routes to complete one's journey. In air transport services, it is a system of a global network of scheduled international air transport linking cities all around the world¹³ and forms a major part of airline commercial activities. It is a cooperation between two carriers, under which each carrier may accept the other airlines' tickets in exchange for transport.¹⁴ From the airlines perspective, it enables the implementation of the sophisticated technology to

¹³ ICAO Doc 9626, p4.3-9.

¹⁴ Truxal (n 50) ch2, p121-122.

allow interline ticketing routes involving two or more airlines within the same e-ticket.¹⁵ For passengers, it provides more efficient solutions to locate, modify or make changes to itineraries, prevents loss of tickets thus, reduces costs and protects the environment.¹⁶ Passengers therefore have the opportunity to travel with a ticket issued by one carrier on flights operated by any number of other carriers worldwide.¹⁷ Technically, from the ICAO's point of view, interlining is managed either using the IATA interlining system or through the bilateral agreements between airlines (non-IATA interlining).¹⁸ IATA has made an effort to establish the Multilateral Interline System which provides these facilities to all airlines to participate through an agreement called Multilateral Interline Traffic Agreement. Under this agreement, airlines can sell each other's services whereby a single ticket issued by one airline can comprise a few segments of flights which are to be performed by different airlines. Based on IATA interlining, the revenues are prorated in accordance with either the Multilateral Prorate Agreement (MPA) or the Special Prorate Agreement (SPA) where the former is managed by IATA and the latter is concluded individually by two or more airlines. The non-IATA interlining involves direct cooperation between two carriers independently and it is often known as bilateral interlining and club interlining.¹⁹ The revenues are also determined based on either the MPA. In terms of fares, the interlining agreements cover fares where both carriers agree to publish a fare from the origin to the final destination and then internally divide the revenue between them. A customer does not have to pay two fares based on each carrier's flight and could be issued one ticket with two flight segments. The agreement allows each airline to accept the other's ticket and covers baggage transfers and liability. Interlining forms a major part of the airline cooperative activities and has a close link with code-sharing exercise. It is worth-noted that the difference between interlining and code sharing is that there is no sharing of the airline designator codes to market the ticket and each airline operates their own routes.

An interlining agreement rarely gives rise to anti-competitive concerns as it was originally intended to facilitate airlines in carrying their passengers through multiple points

¹⁵ See <<http://www.avianca.com/en-br/travel-information/plan-your-trip/our-partners/interline-agreements.aspx>>accessed on 2 March 2016.

¹⁶ Ibid.

¹⁷ Truxal (n 50) ch2, p121-122.

¹⁸ ICAO Doc 9626, p4.3-9. IATA has made an effort to establish the Multilateral Interline System which provides these facilities to all airlines to participate through an agreement called Multilateral Interline Traffic Agreement. See <<https://www.iata.org/whatwedo/workgroups/Pages/mita.aspx>>last accessed on 8 April 2019.

¹⁹ ICAO Doc 9626, p4.1-7.

and provides a hassle-free travel to customers. There have been no competition cases which found interlining, on its own, to be anti-competitive though there may be possibilities that airlines manipulate the scope of interlining to increase their market power. In *Austrian Airlines/Lufthansa*,²⁰ in determining whether there was any elimination of competition under Article 101(3), the Commission found that the joint ventures eliminated actual competition on the substantial parts of the German-Austrian market. Particularly on the Vienna–Frankfurt route, a manipulation of the scope of interlining could have enhanced the market power of the airlines thus causing severe restrictions to potential competition by way of barriers to entry.²¹ As the remedies, exemptions were granted to the joint ventures on the condition that parties shall enter into an interlining agreement at the request of new entrants.²² In fact, interlining has become a common feature in the commitments offered by the parties in most of the competition cases.²³ It reduces the barriers to entry for potential competitors through their participation in the interlining agreements. It is worth noting that refusal to interline could also be held to be anti-competitive.²⁴

Another type of technical agreement is the blocked space arrangement. It is an arrangement made for ‘a number of passenger seats and/or specified cargo space purchased by an air carrier for the carriage of its traffic on an aircraft of a second air carrier.’²⁵ It involves the allocation of seats or cargo space on one airline to another on all or some of its flights. The blocked-space arrangement can be further divided into two types. The ‘hard’ blocked-space; when the marketing carrier pays the operating carrier a certain fee for the reserved seats regardless of whether the seats are successfully sold or not and the ‘soft’ blocked-space, where the unsold seats are returnable. It is argued that under this type of arrangement, an airline could possibly gain access to capacity and markets that are otherwise restricted or prohibited by the government regulations.²⁶ In normal circumstances, block space agreement will commonly though not always be associated with code-sharing agreements (CSA). Its effects on competition is minimal unless implemented collaboratively with other airline cooperation.

²⁰ *AuA/LH* (COMP/37.730) Commission Decision 2002/746/EC [2002] L242/25 dated 5 July 2002.

²¹ *AuA/LH*, para 99(d).

²² *AuA/LH*, Annex, para 5.

²³ See *Austrian/SAS* (Case COMP/37749), *SkyTeam* (Case COMP/37984), *BM/LH/SAS* (Case COMP/37812), *SkyTeam* (Case COMP/37894).

²⁴ *British Midland v Aer Lingus* [1992] OJL96/34, recitals 14-30. This case is discussed in Chapter 8.

²⁵ ICAO Doc 9626, p4.1-7.

²⁶ Truxal (n 50) ch2, p127.

Franchising is still not common in international air transport unlike interlining, blocked space arrangement and code sharing but there are possibilities that its operation could give rise to anti-competitive concerns. Airline franchising involves 'a franchiser carrier granting a franchise or right to use various of its corporate identity elements (such as its flight designator code, livery and marketing symbols) to a franchisee carrier to market or deliver the latter's air service products, typically subject to standards and controls intended to maintain the quality desired by the franchise'.²⁷ A fundamental advantage offered by franchising is the attraction for airlines to allow them to protect and extend their brand to routes which are otherwise commercially unviable without actually operating air services to such routes.²⁸ It is implemented by way of permitting the franchisee to operate on such routes while using the name and livery of the franchisor, whereby the franchisor skilfully avoids the risk of capital investment but still derives income in the shelter of a franchise agreement.²⁹ Franchising is frequently used in the airline business in Europe. In 1996, BA had six franchising agreements with City Flyer Express, Maersk Air, Brymon Airways, Loganair, Manx Airlines Europe and GB Airways. The six franchisees operated under the name British Airways Express (with the exception of two who operated under the name British Airways). The franchisees paid BA a fixed fee for the use of services they were obliged to use including reservations systems and a fixed royalty for the use of the brand of the airline. The franchisees could also offer their passengers air miles on BA in the latter's frequent flyer scheme. Another significant example of a franchising agreement is that between Air France and BritAir when BritAir placed its entire staff and 23 aircraft under the brand name of Air France in exchange for Air France granting a dozen of its routes to BritAir which operated 150 daily flights on these routes.³⁰ In October 1996, Lufthansa entered into a unique franchising agreement with Augsburg Airways, forming a partnership named *Team Lufthansa* whereby Augsburg Airways operated, at its own cost, three German domestic routes with Lufthansa flight numbers and under quality control by Lufthansa.

²⁷ ICAO Doc 9626, p4.8-4.

²⁸ Ruwantissa I. R. Abeyratne, 'Strategic Alliance of Airlines and Their Consequences', *Journal of Air Transportation World Wide*, Vol. 5 No. 2 (2000).

²⁹ Ibid.

³⁰ Ibid.

For the franchiser carrier, franchising provides them with brand exposure, traffic feed, increased income from the fees and royalties, network extension with minimum financial risks and better utilization of slots while the franchisee can benefit from the access to major carriers' product distribution system, FFP, skills and training as well as knowledge and reputation enhancement.³¹ Franchising may raise competition issues in terms of its coordination on routes, schedules and pricing but there have been no EU competition cases which involved franchising thus far. Other regulatory concerns include market and consumer protection.³² The issue of market access arises when the franchising takes place in international routes as restrictions may have been imposed by governments on the use of other carrier's identity in carrying out the air transport services. For consumers, better protection is needed for the distribution of safety, security, liabilities and economical implication between the franchiser and the franchisee.

6.3.2 Code-sharing agreements

6.3.2.1 Definition and features

Airline code-sharing involves the sharing of one airline's designator code (operating carrier) by another airline to be used by the latter (marketing carrier) as a marketing strategy in advertising and selling as its own the services of the former. In a study conducted by ICAO in 1997, airline code-sharing was defined as follows:-

1.1 Code sharing is the practice whereby one carrier permits a second carrier to use its airline designator code on a flight, or where two carriers share the same airline designator code on a flight. In its application, passengers actually fly on an airline other than the one identified on the ticket. Code sharing thus involves one airline advertising and selling the services of another airline as its own. Consequently, the use of code sharing permits the offer and sale of transportation services involving more than one airline (which would normally be considered as "interline" as if they were transportation services on one airline (which is the characteristic of "on-line")³³

³¹ ICAO Doc 9626, p4.8-4-4.8-5.

³² Ibid..

³³ ICAO, 'Implications on Code Sharing', ICAO Circular 269-AT/110 (1997), Chapter 1 - Description of Code Sharing and Its Consequences, p 1; See also, ICAO Doc 9626, p 4-8-3.(ICAO Circular on Code Sharing).

According to the European Competition Authorities, a CSA is:-

“...an agreement between two or more air carriers whereby the carrier operating a given flight allows one or more other carriers to market this flight and issue tickets for it as if they were operating the flight themselves. In practice, these other carriers add their own carrier designator code and flight number onto that of the operating carrier. Code share partners also agree on how they compensate each other for the seats they sell on one another's flights”³⁴

It is a little more than an enhanced marketing agreement which allows a carrier to sell seats on a flight operated by another carrier.³⁵ A simple glance at the definitions connote that it is merely a technical and marketing strategy. As it developed over time, however, code-sharing may also have anti-competitive effects as it could permit airlines to dominate a particular route or hubs, limit capacity, increase price and barriers to entry and thereby restrict competition. It is these anti-competitive effects that have made the code-sharing controversial and become the concern of competition law.³⁶ Historically, airline code-sharing was first introduced in 1967 in the US by the Allegheny Commuter System as a marketing strategy.³⁷ Allegheny's form of code-sharing, however, did not attract much attention and there was no development in code-sharing post-Allegheny. To some competitors at that time, code-sharing was seen as an unfair and deceptive practise.³⁸ It

³⁴ European Competition Authorities, 'Code Sharing Agreements in Scheduled Passenger Air Transport – The European Competition Authorities' Perspective', European Competition Journal (2006), para 10 p5. (ECA Report on Code Sharing).

³⁵ IATA Economics Briefing – The Economic Benefits Generated By Alliances and Joint Ventures; Available online at https://www.iata.org/whatwedo/Documents/economics/Economics%20of%20JVs_Jan2012L.pdf accessed on 21 June 2018.

³⁶ ICAO Circular Code Sharing (1997), ch7.

³⁷ Oster C and Pickrell D, 'Code Sharing, Joint Fares, And Competition In The Regional Airline Industry', Transportation Research Part A: General, Volume 22 Issue 6 (Nov 1988), p 405; See also Barry K Humphreys, 'The implications of international code sharing', *Journal of Air Transport Management*, Vol 1 No 4 (1997), p195. It was used by the Allegheny Airlines (AA) (later known as USAir) to facilitate in the provisions of air services on routes to small communities because their large aircraft were not suited to commuter operations and withdrawal from such routes were inevitable due to the rigid regulations imposed at that time by the US Civil Aeronautics Board (CAB). Cooperation was established between AA and a few small independent airlines which were permitted to operate such routes by using AA's flight designator code. The small airlines were branded as Allegheny Commuter, used AA's uniforms, promotional materials, gates and terminals and even their aircraft were painted with AA's colour. The AA acted as a 'surrogate licencing authority' as it determined which small airline to operate which routes. This kind of code-sharing exercise saved AA from operating the small routes and accomplished its mission to become a major airline. For small independent airlines, code-sharing can enable them to enjoy a profitable existence despite having lost their identities.

³⁸ Humphreys BK (n 37) ch6, p197; For example, the American Airlines in 1983 filed a complaint with the CAB alleging code sharing as unfair and deceptive and 12 other independent carriers applied to ban the concept a few months later claiming that it threatened their viability.

was around 1984 that code sharing started to become more prevalent and this was said to be caused by two major developments in the industry; the recognition of the importance of the feed traffic together with the development of hub and spoke networks and most importantly, the increasing use of the modern Computer Reservation System (CRS).³⁹ In Europe, a similar concept of code-sharing was said to be first implemented on a small scale with the launch of BCal Commuter by British Caledonian in countering BA network advantage in London Heathrow.⁴⁰

By the late 1990s, there were extensive variants of code-sharing arrangements which involved more than a mere marketing and technical operational technique. Certain potential regulatory concerns on consumer and competitive aspects had been raised. Many studies have been carried out on the implications of code-sharing to competition. A study revealed that CSAs had certain effects on traffic development but it was by redistribution rather than stimulation of new routes.⁴¹ It provided economic benefits to airlines, airports and passengers and gave advantages to developing countries serving thin routes at minimal cost and increased market access provided the underlying traffic rights were obtained.⁴² Yet, it was not governed by any systematic regulatory framework but rather by ad hoc mechanisms which were dictated by the aero-political considerations. CSAs could also create a pro-competitive environment if airlines are able to offer more services or if it is capable of improving the existing services in the market, as a result, there is a tendency for the price to be lowered.⁴³ It allow airlines to operate new routes which are otherwise not commercial or financially viable to be operated. The study cautioned, however, that the pro-competitive effect must be assessed carefully in order to determine whether or not they are providing benefits to air passengers such as offering better and convenient alternatives in terms of pricing, travelling time, connections and routes.

³⁹ Ibid, p196-197.

⁴⁰ Ibid, p196; See also "BCal launches commuter service"; Flight International (13 November 1982) available at <<https://www.flightglobal.com/pdfarchive/view/1982/1982%20-%202562.html>>accessed on 29 January 2019; "Three UK commuters merge"; Flight International (23 October 1982) Available at <<https://www.flightglobal.com/pdfarchive/view/1982/1982%20-%202272.html>>accessed 29 January 2019.

⁴¹ ICAO conducted a study on the implications of airline code-sharing in 1997 and identified a few issues that needed further examination. The study aimed at identifying the effects of code-sharing on the economic aspect of the industry such as the traffic development, market access and competition. It also looked into the legal, consumer, labour, safety, security, facilitation and environment aspects. See 'ICAO Circular on Code Sharing' (1997).

⁴² ICAO Circular on Code Sharing (1997).

⁴³ Ibid.

Code sharing in its early days benefited airlines, rather than the consumers, by way of strengthening their hub-spoke route networks, covering the operating costs and high cost structures as well as increasing their operating profits. Though in some cases the competition among regional airlines resulted in the withdrawal of certain competitors in the market. As the industry developed, many studies have shown that code sharing involving international carriers benefitted both the airlines and the consumers especially by providing low fares and high traffic. The ultimate benefit of code sharing to consumers are the seamless connections in which the consumers enjoy from the schedule coordination, easy baggage transfer, through-fares, single check-in, shared airport lounges and FFP. For airlines, it increases market access to carriers with no rights to service prior to the code sharing. It also increases cost savings and generates extra revenues and provides high and frequent appearance in the CRS. It definitely increases competition in cases where better and improved services are being offered. Some empirical studies conducted on code sharing show that for international flights with interconnections some passengers become better off and when it involves only two operating airlines, both tend to earn high profits and therefore the code sharing agreements could be regarded as Pareto-improving.⁴⁴ In another study, the welfare properties in code sharing between domestic and international airlines (semi-complementary partnership) and between international airlines (complementary partnership) involving either low-cost or big carriers was compared and it showed that a semi-complementary partnership provides higher total welfare but not necessary lower prices.⁴⁵ In term of fares, previous empirical studies have shown that airline cooperation including code sharing reduces the fares for airlines below the traditional interline level.⁴⁶ Codeshare agreements can lead to fare reductions and increases the number of passengers in the market.⁴⁷

However, code sharing could also be regarded as anti-competitive as its impact on airfares could be very complex. Some studies have shown that codeshare agreements can price discriminate between interline and non-interline passengers, specifically in

⁴⁴ Orit Hasin and Oz Shy; 'Code-sharing Agreements and Interconnections in Markets for International Flights', *Review of International Economics* 12(3), 337-352, 2004, p349.

⁴⁵ Volodymyr Bilotkach; 'Complementary versus semi-complementary airline partnerships'; *Transportation Research Part B* 1 (2007) 381-393; p391.

⁴⁶ Jan K Brueckner, Darin N Lee & Ethan S Singer; 'Alliances, Codesharing, Antitrust Immunity, And International Airfares: Do Previous Patterns Persist?' *Journal of Competition Law and Economics* Vol 7 Issue 3 1 September 2011 p573-602.

⁴⁷ Tae Hoon Oum, Jong-Hun Park, Anming Zhang, 'The effects of airline code sharing agreements on firm conduct and international air fares' *Journal of Transport Economics and Policy* 30:187-202 (1996).

complimentary networks and therefore lead to welfare losses.⁴⁸ Another study has shown that code-share increases fares especially for early bookers.⁴⁹ Other studies have identified an increase in airfares charged by code-sharing partners attributed to the “round table” effect and “double marginalization” effect and fares for code shared flights are higher than other airlines not on code sharing agreements in the same market⁵⁰. Code sharing could also pose threats and concerns among airlines, air passengers and governments. For instance, code sharing could discriminate against some competitor airlines. It could be used to achieve or avoid certain air transport policy as evidenced in the US in the 1990s where code sharing was closely associated with and embedded in the bilateral Air Service Agreements (ASAs) and used as a means to avoid the full implementation of the open skies policy as well as to deny cabotage rights for foreign airlines.⁵¹ This arose from the fact that when airlines enter into a CSA, the airline which is not granted traffic rights to operate on a particular route could rely on the other airline in the agreement who is granted with such traffic rights. Another issue concerns safety particularly when code sharing involves various participating airlines with unclear safety records.⁵² This has caught the attention of the public since the crash of Continental Connection Flight 3407 in 2009 where the US Federal Aviation Administration (FAA) called for a stricter review of all code agreements.⁵³

A simple code-sharing exercise involves airlines operating independently on every aspect other than putting one airline's code on another's flight. The share of the revenue and the allocation of tickets between airlines are clearly stipulated. In a more complicated code-sharing exercise which normally forms part of a broader strategic alliance, the airline may cooperate in many other aspects such as blocked-space, baggage and/or ground handling, flight scheduling, FFP, in-flight service, maintenance, major purchases (fuel,

⁴⁸ Czerny A I ‘Code-sharing and its effect on airline fares and welfare’ Centre for network industries and Infrastructure – CNI Working Paper, No. 2006-15 Berlin (October 29, 2006).

⁴⁹ Alderighi M, Gaggero, AA and Piga CA ‘The Effect Of Code Sharing Agreements On The Temporal Profile Of Airlines Fares’ Working Paper, Department of Science, Economics and Politics, University of Aosta Valley (Feb 2015).

⁵⁰ Gilo D and Simonelli F, ‘The Price-Increasing Effects Of Domestic Code-Sharing Agreements For Non-Stop Airline Routes’ *Journal of Competition Law & Economics* 11(1) 69–83 (2014).

⁵¹ Robert F II Barron, ‘Code-Share Agreements: A Developing Trends in U.S. Bilateral Aviation Negotiations’ *Indiana Law Journal* [Vol. 72:529], p542-543.

⁵² Kathryn M Podiadlo, ‘Flying under the Radar: Airline Codeshare Agreements and Their potential Impact on Regional Airline Safety’ *Southwestern Law Review* [Vol 43, 2014], p455-481.

⁵³ See also Accident Report – Loss of control on approach Colgan Air, Inc. operating as Continental Connection Flight 3407 Bombardier DHC-8-400, N200WQ Clarence Center by the National Transportation Safety Board (NTSB) on February 12, 2009. Available online at <<https://www.nts.gov/investigations/AccidentReports/Reports/AAR1001.pdf>>accessed on 29 Jun 2019.

insurance and on-board equipment), exchange of equity, franchising, joint venture, joint marketing and sharing of airport facilities. Hence, it involve various aspects of business strategies and are likely to be more complex. Having said that, there are many ways of categorising the airline code-sharing. In terms of seats, a simple CSA gives the marketing carrier the power to market all of the seats of the operating carriers independently as their own but the operating carrier decides on their availabilities.⁵⁴ In this regard, the risk is solely born by the operating carrier as the marketing carrier acts only as a marketing agent. Airline code-sharing can also be distinguished based on the airline network.⁵⁵ Parallel code-sharing involves two airlines operating on the same routes or sector where both promote and market each other's codes as their own. Complimentary code-sharing, on the other hand, connects adjacent routes or a sector, which one of the airlines airline does not operate. In this type, an airline puts its code on a flight operated by another airline. This is also known as 'network extension code-shares'.⁵⁶ This type of code-sharing can be further extended to include 'behind and beyond route' code-sharing where the operating carriers gives access to its routes network 'beyond the gateway which the marketing carrier does not operate'.⁵⁷

Competition issues were raised as the modes of code-sharing evolved. A simple agreement on sharing the airline designator codes on certain routes and seats may not raise competition issues but as the agreement expanded, the terms and conditions attached to it become more complicated. Therefore, it is necessary look at the salient provisions of a CSA.⁵⁸ A typical CSA normally contains provisions on routes, marketing and product display, in-flight product and quality monitoring, technical and operational requirements, safety and security, passenger handling and airport procedures, inventory control procedures, pricing, revenue management, ticketing, commission payment and financial settlement, taxes, liability indemnification and insurance and exclusivity. The details of the provisions are provided in Table 2: Common terms and condition of code-

⁵⁴ ECA Report on Code Sharing (2006), p266.

⁵⁵ Ibid, p266-267; See also Final Report on 'Competition impact or airline code-share agreement' prepared by Steer Davies Gleave, Beaumont & Son – Aviation at Clyde & Co, and Lewis Scard Consulting for the European Commission dated January 2007; Available at <<http://ec.europa.eu/competition/sectors/transport/reports/airlinecodeshare.pdf>>accessed on 29 June 2019 (SDG/Clyde Report on Code Share).

⁵⁶ SGD/Clyde Report on Code Share (2007).

⁵⁷ ECA Report on Code Sharing (2006), p 267.

⁵⁸ Code-sharing agreement is a commercial contract entered by the airlines and normally confidential. The standard provisions of the agreement are as stated in the SGD/Clyde Report on Code Share (2007).

sharing (attached as Appendix 1). Some of the provisions contain very technical and complex information and procedures. The clause on inventory control procedures, for example, lays down a complicated process of seat allocation between the operating and the marketing carrier, reservation booking system and blocked-space arrangement.⁵⁹

The financial provision in a CSA consists of many elements such as pricing, revenue management, ticketing, commission payments and financial settlement.⁶⁰ For revenue management, airlines can choose whether to follow the standard airline industry frameworks which are based on the 'IATA-sponsored industry-wide rules' governing the interlining, pricing and proration (the default arrangement) or enter into a bilateral service agreement in parallel with the CSA.⁶¹ The IATA industry standard on interlining is mainly formulated in the Multilateral Interline Traffic Agreement (MITA), as discussed in the earlier section on interlining. MITA represents the ability of a carrier to sell a journey on another carrier's services and contains procedures for revenue settlement as well as the payment of the Interline Service Charge (ISC) to the ticketing carrier in recognition of the sales costs incurred.⁶² As interlining forms most of the fundamental part of the industry framework, MITA provides a strong basis for the revenue management in the code-sharing exercise. Nevertheless, if the airlines chose to enter into a parallel separate agreement, this agreement prevails over the MITA.

Further, there are a few mechanisms of revenue management. First, according to the IATA Multilateral Prorate Agreement (MPA), the revenues are prorated based on the through fares.⁶³ The methods of proration can be divided into two; the straight rate proration (fares prorated based on weighted millage) or a proviso (a fixed revenue amount specified by carrier in the event the prorated fares do not cover its selling and operating).⁶⁴ Second, and in most cases, the pricing and the revenue management are concluded in a separate agreement; the Revenue Settlement Agreement (RSA) or Special Prorate Agreement (SPA) which may or may not be entered into at the same time as the CSA.⁶⁵ The SPA also uses a proration method for revenue and consists of two types; the 'gross SPA' and the

⁵⁹ This clause may also be subsumed into the revenue management clause or in a separate agreement.

⁶⁰ These elements may also be concluded in a separate agreement.

⁶¹ SDG/Clyde Report on Code Share (2007), p13.

⁶² Ibid.

⁶³ Ibid, para 3.39.

⁶⁴ Ibid, paras 3.41-3.46.

⁶⁵ SDG/Clyde Report on Code Share (2007), para 3.47.

‘net SPA’. The ‘gross SPA’ applies the straight rate proration, sometimes with provisos and contains the carrier through fares that can be used on various itineraries which may cover all code-share destinations as well as the mapping on the booking class hierarchies. There will be no exact amount to be received by carriers under gross SPA but the types of tickets, fares and itineraries must be specified in order to determine the suitable revenue for the operating carrier. Therefore the booking class mapping is important. The ‘net SPA’ is an alternate approach to gross SPA where the exact amount is specified and there is less concern for the mapping as there is no further payment beyond the net rate of the booking class. RSA is wider in scope than SPA and normally contains divisions of revenue, payment of code share commission and settlement procedures. RSA may also be a substitute for SPA. The code share commission is normally based on revenue accruing to the operating carrier (or prorated revenue when proration is involved) or when the ICS is insufficient. Not all code-sharing operations involve the payment of commission. These arrangements are summarized in Table 3.

Table 3: Pricing, Revenue and Commission Structure in Code-Sharing Agreement

Pricing, revenue management and commissions payment	
IATA standard rules	Bilateral Agreement
MITA MPA <ul style="list-style-type: none"> • Straight Proration - Code-sharing commission • Proviso (fixed amount) 	RSA SPA <ul style="list-style-type: none"> • Gross SPA (Straight Proration or proviso) - Code-sharing commission • Net SPA (fixed amount)

Sources: Final Report for EU (2007)

From the discussion above, CSAs vary significantly from one to another especially in terms of the proration methods, commissions and revenue settlement. Some carriers prefer the industry standard approach while others rely on the SPA. There are also carriers who use a combination of these approaches. Competition issues may not arise out of the implementation of these methods but rather whether similar terms are used between airlines with CSAs as opposed to those airlines without CSAs.⁶⁶ If the terms are significantly different, it is claimed that it is impossible for the latter to offer through fares at prices competitive with those with CSAs. Another provision that can potentially be anti-competitive is the exclusivity clause which disallows airlines to code-share with another third party airline on a certain market as this would potentially pose discrimination issues

⁶⁶ Ibid, para 3.63.

among code share partners. However, it is claimed that even without this exclusivity clause, competition issues can be raised based on the associated fares and revenue allocation mechanism set in a separate agreement that may discriminate in favour of the codeshare partner.⁶⁷

Other provisions of a CSA include the requirements to identify the code-sharing flights, the minimum level of operational, ground and in-flight products to be provided, quality monitoring and the responsibility for technical, operational, safety and security standards compliance. It also specifies the procedures for passengers handling, arrangement of sale of seats and marketing airline tickets. A clause on risk management which includes provisions on liability, indemnification and insurance to be discharged by the carriers is also provided. The more important question to be posed by the competition authority, nevertheless, is not an emphasis on the provisions themselves, but rather how these terms differ from those offered to carriers outside the CSA. If the difference is significant, it is very difficult for third parties to offer a more competitive through fare.⁶⁸

6.3.2.2 Competition Assessment

From the summary of cases listed in Table 4: Summary of Antitrust/Cartel Cases under Article 101 of the TFEU (attached as Appendix 2), it can be observed that almost all alliances had CSAs as part of their larger cooperation agreement or joint venture. Since the main subject matter of a CSA is the sharing of routes, the definition of the relevant market plays a significant role in determining the relevant and any overlapping routes. Like any other competition cases, the Commission has been applying the established concept of O&D city pairs taking into account the types of flights and passengers, overlapping routes, airport substitution, market shares and barriers to entry.⁶⁹ In *SAS/Maersk Air*,⁷⁰ the Scandinavian Airlines System ('SAS') and Maersk Air A/S ("Maersk") notified the EC of a cooperation agreement which consisted mainly of a CSA and FFP's arrangement. The Commission did not only analyse the routes in the agreement notified by the parties but also other routes in a broader arrangement which the parties kept secret between them.⁷¹

⁶⁷ SDG/Clyde Report on Code Share (2007), para 3.33.

⁶⁸ Ibid, p 17.

⁶⁹ Methods of defining market definition in airline industry is discussed in Chapter 5.

⁷⁰ *SAS/Maersk Air* (Case COMP.D.2 37.444) Commission Decision 2001/716/EC [2001] affirmed in T-241/01 *Scandinavian Airlines System AB v Commission* [2005] ECR II-2917.

⁷¹ Ibid, p22-26.

CSAs are generally complex written formal agreements which require extensive agreement on certain important terms and conditions such as the provisions on routes and financial arrangements which need to be clearly specified and monitored. There are also, nevertheless, hidden agendas or secret arrangements (cartel) made between the carriers beyond what have been transpired in the formal CSA. In *SAS/Maersk Air*,⁷² for instance, besides having a formal code-agreement, the Commission discovered a secret arrangement between the parties to share the market at the early negotiation stage. Since the notion of agreement in the competition regime under Article 101(1) also covers unwritten and informal agreements, this kind of arrangement is also caught under the prohibition.⁷³ Code-sharing agreements are always entered into by airlines which are a legal entity and engage in economic activities in the industry. The application of the notion of undertakings enunciated under Article 101(1) of the TFEU which encompasses every entity regardless of their legal status⁷⁴ has not been an issue in cases that involve CSAs.

A CSA is not caught under the prohibition of Article 101(1) of the TFEU unless it restricts competition by having either an anti-competitive object or effect.⁷⁵ In the case of *SAS/Maersk Air*,⁷⁶ although the parties notified the Commission of a CSA which contained provisions on technical details such as schedules of code-shared flights, computer reservation charges, passenger and cargo claims, conditions of carriage and handling of delays and cancellations, in the course of investigation, the Commission discovered a 'hidden agenda' that went beyond what was agreed in the CSA and detected a secret market sharing arrangement. The Commission found a document that indicated the parties' agreement to determine 'which routes should be operated by which carrier',⁷⁷ a request to cease cooperating with other airlines or alliances⁷⁸ and an attempt avoid price competition.⁷⁹ In particular, the Commission found that the parties concluded an overall market sharing in which SAS would be prevented to operate on Maersk's routes and Maersk would not launch any competing services on SAS's routes and they also agreed to cease and swap operations on certain individual routes.⁸⁰ In its decision, the

⁷² *SAS/Maersk Air*.

⁷³ *Ibid.*

⁷⁴ *Hofner and Elser v Macrotron* (Case C-41/90) [1991] ECR I-1979, See also *SAS/Maersk Air*

⁷⁵ *SAS/Maersk Air*; See also ECA Report on Code-sharing Agreements (2006), p273.

⁷⁶ *SAS/Maersk Air*.

⁷⁷ *Ibid.*, para 22.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, para 69.

Commission found that the secret agreements to share the markets between them were by their very nature had the object of restricting competition under Article 101(1) of TFEU.

The Commission also found that the agreements had the effect of significantly restricting competition.⁸¹ There was an actual effect on the Copenhagen-Stockholm and Billund-Frankfurt routes when Maersk and SAS, who were competitors prior to the agreement, withdrew from the routes respectively resulting in the elimination of competition. In the Copenhagen-Stockholm route, Maersk's withdrawal would result in SAS increasing its market share and in the Billund-Frankfurt routes, where Maersk and SAS were the only competitor prior to the agreement, SAS's withdrawal would leave Maersk as the exclusive carrier operating on the route. There was a potential effect from the overall market sharing agreement on the routes where Maersk was prevented from operating to and from Copenhagen and when SAS would not operate the route to and from Billund. A particular concern was raised in this case in that a traditional CSA can be used 'as a disguise for a clear anti-competitive arrangement'.⁸² It could therefore be argued that the CSA in itself was not a threat to competition had it not been accompanied by another arrangement made secretly to pursue a restrictive objective.

In *Alitalia/Volare*⁸³, Alitalia Linee Aeree Italiane S.p.A. ("Alitalia") and Volare Group S.p.A ("Volare") concluded a CSA which involved fourteen Italian domestic routes and eight European scheduled routes serviced by Alitalia and Volare. The Italian Competition Authority (ICA) considered all these routes in its investigation and decided only nine domestic routes out of the fourteen routes were prohibited as there was very little competition and major market entry barriers. This is due to the fact that all the 14 routes represented about 28 percent of all domestic flights in terms both of seat capacity and numbers of passengers carried and it reduced competition between the two airlines on such routes.⁸⁴ The ICA also found that the agreement resulted in the creation of strategic market sharing between the operators. However, ICA accepted the request to authorize a waiver submitted by the parties under section 4 of the Italian Competition and Fair Trading Act for five of the domestic routes because of the improved conditions of the supply and

⁸¹ Ibid, para 69-73.

⁸² ECA Report on Code-sharing Agreements (2006), p274.

⁸³ Italian Competition Authority's Case 1532 *Alitalia/Volare* Decision n. 12185, Bulletin n. 28/2003.

⁸⁴ *Alitalia/Volare*.

the fact that the benefits have been passed on to consumers.⁸⁵ The exemption however does not consider restrictions that eliminate competition.⁸⁶

In terms of barriers to entry,⁸⁷ the agreement enabled Alitalia and Volare to more effectively control the routes into and out of Linate airport, where both airlines continue to operate. On the airport slot congestion, Alitalia and Volare were given almost twice as many slots as all the other competitors put together, and three times more than any other individual airline. The agreement between Alitalia and Volare therefore raised entry barriers against competitors on routes governed by the code sharing agreement into and out of Linate. Hence, the CSA created an overall restriction on competition between Alitalia and Volare on all the domestic routes in question. The ICA also concluded that based on the joint drawing-up of their operational programmes which involved flight plans operated under the CSA, the their repositioning on certain routes created a strategic market-sharing on the domestic markets.⁸⁸ For the international routes, however, the ICA found that competition existed between numerous airlines of high standing and based on the market access conditions, the code sharing exercises did not indicate any substantial entry barriers. This case proved that the CSA could give rise to a restriction in competition through its implementation coupled with certain 'strategic' routes. It can be said that where competition still exists and barriers to entry are not high on certain routes, the code-sharing exercise may not pose any threat to competition.

In 2011, the Commission opened two investigations on the CSAs entered into between Deutsche Lufthansa (Lufthansa) and Turkish Airline (TA) and between TAP Portugal and Brussels Airlines respectively.⁸⁹ The Commission in its press statement acknowledged that although 'code-share agreements can provide substantial benefits to

⁸⁵ Section 4 of the Italian Competition Act, Law No. 287 of October 10th, 1990 provides for the exemptions from the prohibition of agreement restricting competition whereby the ICA may authorise certain prohibited agreements which have the effect of improving conditions of supply in the market and which lead to substantial benefit for consumers taking into account that a necessary level of international competitiveness is guaranteed and the quality of the product or technical progress is improved.

⁸⁶ Ibid.

⁸⁷ The barriers to entry in the airline industry are discussed in the previous Chapter 5.

⁸⁸ *Alitalia/Volare*.

⁸⁹ EC Press Release, 'Antitrust: Commission probes certain co-operation agreements between Lufthansa and Turkish Airlines and between Brussels Airlines and TAP Air Portugal', IP/11/147, 11 Feb 2011; See *Lufthansa/Turkish Airline* (Case COMP/AT39794) and *Brussels Airline/TAP Air Portugal* (Case COMP/AT39860). *Lufthansa/Turkish Airline* case is still pending investigations/ See <http://europa.eu/rapid/press-release_IP-11-147_en.htm>accessed on 29 June 2019.

passengers, some types of such agreements may also produce anti-competitive effects'.⁹⁰ It further stated that the particular type of CSA entered into by the airlines involved the selling of seats on each other's flights in circumstances where all airlines have already operated their own flights between their own hubs ("parallel hub-to-hub code-sharing") and therefore, in principle, are competing with each other.⁹¹ The Commission emphasized that these types of CSAs may distort competition as they have the potential to increase prices and reduce services to customers compared with 'another common form of code-sharing whereby a company sells seats on a partner's flights on routes it does not operate itself in order to extend the reach of services and broaden the choice for customers.'⁹² After almost 7 years into the investigation, the Commission in 2018 decided to close the proceedings in the case of *TAP Air Portugal/Brussels Airline*⁹³ due to insufficient evidence but they did not rule out their concerns that close forms of cooperation between competing airlines can raise competition concerns.⁹⁴ The Commission in this case will continue to monitor the air travel market. The investigation for the case of *Lufthansa/TA*⁹⁵ is continuing and the decision is pending.

These cases strongly suggest that CSAs have the potential to raise competition concerns in situations where the airlines were strong competitors and the scope of code-sharing covers overlapping routes that may give rise to an increase in price. It also suggests that CSAs have begun to gain the attention of the competition authorities and this may be due to the ever increasing complexity and expansive scope of these agreements. While the conduct of CSAs have already indicated some elements of product or service sharing in the industry, the question is to what extent does this 'sharing' restrict competition. From the cases, a competition assessment depends highly on the facts and circumstances. The nature of the agreement that keeps expanding from a simple typical technical agreement to a more complex collaboration where code-sharing forms a part is an important factor to be considered. It is highly possible that a purely technical agreement, when combined with other commercial arrangements, raises serious competition concern.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ (Case COMP/AT39860).

⁹⁴ EC Press Release Daily News, 'Antitrust: Commission closes investigation into Brussels Airlines and TAP Air Portugal codeshare agreement on Brussels-Lisbon route' published on 8.11.2018 (Decision made on 30.8.2018).

⁹⁵ (Case COMP/AT39794).

The terms and conditions of the agreement especially on the pricing mechanism, sharing of routes and its overall effect on competition may amount to anti-competitive behaviour such as price fixing, market sharing and products limits.

6.3.3 Airline cooperative agreements and joint ventures

Airline cooperative agreements and joint ventures are common in the airline authorities due to a possible anti-competitive object or effect. The discussion in this section is focused on a wider scope of agreements which consist of the above various technical agreement whereby one of the parties may not be a member of a mega alliances. This is also the type of agreement which has caught the attention of the competition authorities in *MAS/AirAsia* whereby MAS is a member of the Oneworld alliance while AirAsia is not a member of any of the global alliances.⁹⁶ Various terminologies are used for the airline cooperative agreements such as the 'Cooperation Agreement', 'Alliance Agreement' and 'Joint Venture'. Although the form or the legal status of these agreements is not an issue, under the EU competition law, it is important to distinguish whether these arrangement involve a joint venture agreement or a full-function joint venture agreement in order to determine whether they will be assessed by the EU Merger Regulation⁹⁷ thus falling outside the scope of Article 101(1) of the TFEU. In *Austrian Airlines/Lufthansa*,⁹⁸ the Commission found that the joint venture agreement was not a full-function joint venture as defined under the EUMR as it formed part of a much wider cooperation agreement that falls within the scope of Article 101(1) of the TFEU.⁹⁹ The same findings were made in *Air France/KLM/Alitalia/Delta*.¹⁰⁰ The Commission found that a transatlantic joint agreement created a contractual joint venture but 'does not conduct its business autonomously and at arm's length from its parent undertakings', instead 'it is directly managed by the parent undertakings and it uses their assets as well as their marketing channels'.¹⁰¹ Therefore, it does not qualify as a 'full-function' joint venture under the EUMR.

⁹⁶ MyCC decided that the cooperation agreement infringed section 4(2) of the CA 2010 as the agreement had the object or effect of restricting, preventing and distorting competition. On judicial review, the HC affirmed this decision. The analysis of this case is provided in Chapter 7.

⁹⁷ EU Merger Regulation Art. 2 provides for the appraisal of concentrations which would impede effective competition.

⁹⁸ *AuA/LH* (Case COMP/37.730)

⁹⁹ *Ibid*, para 42.

¹⁰⁰ *Air France/KLM/Alitalia/Delta* (Case AT39964) C(2015)3125 para 36; The same was found in the *Continental/United/Lufthansa/Air Canada* Case (COMP/ AT.39595).

¹⁰¹ *Air France/KLM/Alitalia/Delta* (Case AT39964) C(2015)3125 para 36.

6.3.3.1 Competition Assessment

In *KLM Royal Dutch Airlines/Northwest Airlines Inc.*¹⁰² the Commission found that the KLM-Northwest Cooperation Agreement and the Integration Agreement took the form of an 'Alliance agreement' which included arrangements on code-sharing, revenue and cost sharing, joint pricing, coordination of capacity, network development, marketing and sales, FFP and infrastructure facilities.¹⁰³ Since both parties were active in providing the scheduled air transport between the EEA and the US, the Alliance might affect competition on the parties' hub-to-hub O&D markets for Amsterdam-Detroit and Amsterdam-Minneapolis. The circumstances that led to the existence of the anti-competitive effects were not stated, however. It may be inferred the anti-competitive effects might arise from the cooperation on the key parameters of competition such as the cost and revenue sharing, the pricing mechanism and joint capacity. The parties argued that the agreement did not only expand and improve transatlantic services but created new services between the Europe and US. It led to additional connecting services to routes which were previously unserved and poorly served and provided lower prices. Furthermore, competition was not eliminated because there were reasonable alternative indirect services and no barriers to entry to the hub-to-hub and no regulatory barriers. The Commission adopted a favourable position on the Alliance and decided to close the investigation without any conditions or commitments and no reason were given.¹⁰⁴ In a press release, the Commission stated that though it was concerned with the parties high position on the routes, the Alliance would face competition from substitutable indirect services and found no structural barrier in terms of slot constraints or regulatory barriers.¹⁰⁵

In *British Airways/Iberia/GB Airways*,¹⁰⁶ the airlines entered into a fully-fledged Tripartite Alliance for cooperation on joint routes, pricing, network, capacity, scheduling,

¹⁰² Commission Notice (Case COMP/D-2/36.111) [2002] OJ C 181/C, para 7.

¹⁰³ Ibid.

¹⁰⁴ Ibid, para 18.

¹⁰⁵ EC Press Release, 'Commission closes probe into *KLM/NorthWest* and *Lufthansa/SAS/United Airlines* transatlantic air alliances' IP/02/1569, 29 October 2002. It was also stated that the Commission does not have specific enforcement power to decide on matters involving EU and third countries at that time and this includes the agreement in question. This could be partly the reason for the Commission's decision to close the investigation. The Regulation (EC) No 3975/87 laying down the rules for the application of Article 82 [101] and 82 [102] of the Treaty to air transport at that time was limited to transport service matters within the EU. With the coming into force the Council Regulation 847/2004 on the negotiation and implementation of air service agreement between Member States and third countries the EU has the power to deal with such agreements.

¹⁰⁶ Case COMP/D2/38.479.

code-sharing and FFP for the UK-Spain route. The Alliance involved seven non-stop overlap routes and eleven non-overlap routes. The Commission was of the view that since the cooperation involved key parameters of competition and two parties were actual competitors there was a restriction of actual competition on the overlap routes where competition would be eliminated.¹⁰⁷ Additionally it was of the view that the agreement had an appreciable effect on the non-overlap routes. The parties' argument for exemptions under Article 101(3) was accepted but for the effects on the time sensitive passengers on the overlap routes, there appeared to be a need for an appropriate remedy. The parties were given exemptions and their commitments were accepted for six years until 12 September 2009.¹⁰⁸ BA and Iberia are members of Oneworld but GB Airways ceased to be a member since 2012.

6.4 Strategic Alliances

As markets are further liberalized, endless opportunities are created for companies to enter into new markets. In the airline industry, incumbent airlines and newcomers are forced to adopt organisational forms suited to coping with this highly competitive and volatile climate.¹⁰⁹ There is the need to acquire increased competitive ability to survive in such an environment that is characterised by fierce competition. Thus, global airline alliance groups are formed because such an organisational form is flexible, has rapid growth potential and promises to provide a worldwide network within which member airlines can offer a seamless global service.¹¹⁰ Moreover, members of the alliance group have the opportunity to reap the benefits of cooperation and expansion while avoiding the regulatory impediments to mergers.¹¹¹

It is submitted that the unique economic characteristics of the airline industry have partly contributed to the way that strategic alliances are formed. The industry is very sensitive to external costs such as fuel and demand, notwithstanding the strong market position held by the incumbent airlines. The structural and regulatory barriers such as the slot availabilities and the restrictions imposed by the governments on traffic rights to entry

¹⁰⁷ Ibid, para 37.

¹⁰⁸ Ibid, para 114.

¹⁰⁹ Agusdinata B and Klein W, 'The Dynamics of Airlines Alliances' *Journal of Air Transport Management* 2002 8 201-2110.

¹¹⁰ Ibid.

¹¹¹ Birgit Kleymann and Hannu Seristo, 'Managing Strategic Airlines Alliances', Ashgate (2004), p2.

are also considerable. These factors have made the entire business costly and risky. Airlines therefore strive to create strategic initiatives to overcome these limitations. It is also claimed that the industry may not fully benefit from economies of scale due to its high fixed and variable costs but the benefits may be reaped through the alliancing of synergies and cooperation on certain important areas such as joint procurement of fuel or facility sharing.¹¹² The industry may benefit more from the economies of density and scope. In the context of air transport, it is proposed that the economies of density could be achieved through the coordination of the carriage of air passengers in a flight or in between one O&D city pair (link density) and the fleet utilisation over the whole network (network density). The benefits are reaped through the increase in the number of passengers carried in a flight and the efficiencies in fleet utilization. The economies of scope is probably the most significant and beneficial to the industry as the airlines cooperate on various distinct-but-related products such as the code-shares and FFP. The distribution of the traffic across several hubs by using the alliance partners' route system is the most inexpensive and quickest way to achieve the benefit as no physical expansion of routes is required. It will not only create the most visible 'benefit of scope' through the value enhancement in that customers are able to enjoy the seamless air travel across the world, but the airline can also enjoy the reputation effect in the alliance. These economies of scale, density and scope can only be achieved however through a very high level of integration between the airlines and involve several different types of cooperative agreements such as the code-sharing, cost sharing, asset pools, prorated agreements, integrated feeder, marketing and branding, joint ventures and equity stakes.

According to Kleymann and Seristo, the airline alliance membership operates on a three-tier structure; the dense 'core', the 'second tiers' and the contributors.¹¹³ This also reflects the level of integration among the partners. The first tier consists of the dense 'core' members which are linked tightly with each other through a multilateral alliance. Their relationship is almost non-hierarchical and often involves serving particular agreed markets through joint ventures. The 'second tiers' comprise members that are linked to one of the dense 'core' members but within a form of loose integration. Their operations are normally intended to cover some of the geographical areas not covered by the core members. Regional feeders are one of the examples of members of the second tiers. The third tiers

¹¹² Kleymann & Seristo (n 111) ch6, p 6.

¹¹³ Ibid.

or the contributors are technically non-members operating outside the alliance but cooperate with one of the members on the route by-route basis through bilateral agreements. They also cooperate with members from other alliance groupings.

This three-tier structure has been in the industry since the 1980s.¹¹⁴ The SAS group attempted to establish an alliance with a few airlines including Danair, LAN UK, Continental Airlines and Spanair through the purchase of their stakes but it did not materialize as SAS failed to gain management control over these airlines.¹¹⁵ SAS, together with Air Canada, Lufthansa, Thai Airways and United Airlines, then founded Star Alliance in 1997. The European Quality Alliance (EQA) was established in the 1990s by SAS, Swissair and Austrian Airlines which focussed on technical cooperation and marketed as a 'seal of quality'. EQA changed its name to Alqazar in 1993 but was halted due to the significant disagreements among its members especially in deciding on their US partner airlines, cost reduction through consolidation and their unwillingness to give up sovereignty. Both Swissair, now known as SWISS, and Austrian Airlines joined the Star Alliance in 2006 and 2000 respectively. In the same era, Iberia Airlines indulged in a massive investment in several Latin American airlines such as Aerolineas Argentinas, VIASA of Venezuela and LADECO of Chile in its attempt to become a leading European carrier on the routes to South America. It also established three regional hubs in Miami, Santo Domingo and Buenos Aires which were mainly fed by its intercontinental flights. The alliance then encountered serious issues, most of which were cost-related, in the management and the operational viability of these invested airlines which led it to withdraw from the alliance. Iberia joined the Oneworld alliance in 1999. KLM and Alitalia merged in 1998. It was approved by the EU Commission but after a few months into operation the merger was terminated and it did not proceed due to Alitalia's failure in undertaking its internal reorganization.¹¹⁶ Both airlines joined the Skyteam; Alitalia in 2001 and KLM in 2004. In 1998, Swissair initiated the Qualiflyer Group by acquiring equity stakes in various European airlines such as Sabena in Belgium, Air Outre Mer, Air Littoral and Air Liberte in France, LOT Polish Airline in Poland and LTU in Germany thereby allowing it to gain a hub

¹¹⁴ Ibid, p12.

¹¹⁵ LAN UK is now known as LATAM Airlines, Danair merged into British Airways in 1992 and Spanair ceased operation in 2012. Spanair was a subsidiary of SAS Group and a member of Star Alliance from 2003 until 2012.

¹¹⁶ Kleymann & Seristo (n 111) ch1, p 27.

in the European Community at that time.¹¹⁷ The Qualifier Group was said to have first started as a FFP before Swissair commenced its stake acquisitions in most of the member airline. It was dissolved in 2002 due to the weak financial performance of the acquired airlines. As mentioned earlier, Swissair, now known as SWISS, joined the Star Alliance in 2006.

The industry currently consists of three main alliances; Star Alliance, SkyTeam and Oneworld.¹¹⁸ StarAlliance was founded in 1997 by Air Canada, Lufthansa, Scandinavian Airlines System (SAS), Thai Airways International and United Airlines and today it has 19 member airlines.¹¹⁹ Oneworld was founded in 1998 by American Airlines, BA, Cathay Pacific and Qantas and now it has 13 members.¹²⁰ SkyTeam was founded in 2000 by AeroMexico, Air France, Delta Airline and Korean Air and currently has 19 members.¹²¹ The potential impact of these global alliances on market access, competition and consumer welfare can be significant and these issues have been subject to considerable attention by the regulatory competition authorities.¹²² Competition concerns may arise if alliances give rise to overlapping routes and if they involve coordination on sensitive key parameters of competition like price, schedule of routes and sharing of capacity, revenue and costs¹²³ in which case competition may be restricted or even eliminated. Some commentators have argued that the underlying philosophy of these types of alliances is not so much an emphasis on the effective use of resources like labour, capital and national resources but rather reliance on the strategy of location shared by various airlines.¹²⁴ The discussion of these alliances will focus on cooperation agreements entered into by the member airlines of any of the mega alliances.

¹¹⁷ LOT Polish was legally established as Polskie Linie Lotnicze LOT S.A. and LTU Germany was legally incorporated as LTU Lfttransport-Unternehmen GmbH ceased operation in 2009 when it merged into Air Berlin.

¹¹⁸ ICAO Doc 9626, para 4-8-1.

¹¹⁹ Available at <<https://www.skyteam.com/en/about/>>accessed on 10 April 2019.

¹²⁰ Available at <<https://www.oneworld.com/member-airlines/overview>>accessed on 10 April 2019.

¹²¹ Available at <<https://www.skyteam.com/en/about/>>accessed on 10 April 2019.

¹²² ICAO Doc 9626; para 4-8-1.

¹²³ DAF/COMP(2014)14, Airline Competition – OECD Background paper by Secretariat, 12 June 2014.

¹²⁴ Abeyratne (n 28) ch6.

6.4.1 Competition Assessment

The majority of the competition cases involving airlines concern the agreements entered into by the members of the global alliances.¹²⁵ That said, there have been no EU cases that found the establishment of any of the global alliances such as the Star Alliance, Oneworld and SkyTeam to have infringed Article 101(1) of the TFEU. Most of the Commission's decisions were based on the consequences of the cooperation between the members. Nevertheless, in 2006, the Commission in the case of *SkyTeam*¹²⁶ began its investigation on the entirety of the SkyTeam corporation which included all agreements between all members in all geographical areas although the initial concern was arising from the likely restrictive effects of agreements by eight members of the alliance on the EU-US routes. The Commission's preliminary assessment revealed that the members had enhanced their cooperation on most routes on all key parameters of competition (revenues, pricing and capacity). This would likely have anti-competitive effects in view of their strong market positions coupled with significant barriers to entry; slot constraints, hub dominance and network effects.¹²⁷ SkyTeam proposed a Commitment Package which included remedies on slots, interlining and FFP.¹²⁸ The Commission closed the proceedings because it found the commitments offered by the parties could counterbalance the competition concerns. The decision was taken 'as part of the priority-setting process in light of significant changes in the circumstances on the relevant market' and that the members are not relieved 'from assessing their behaviour and ensuring that they comply with EU competition law'.¹²⁹ It may be reasonably argued at this stage that the establishment of the alliance in itself does not amount to restricting competition rather the effects of the cooperation among its members. It is the objectives or the effects of the cooperation agreements between the members of the global alliances that makes competition more likely to be distorted, restricted and prevented especially when it involves a multiple and complex global network. Therefore, the essential considerations in a competition

¹²⁵ See Table 4. About 65% of the antitrust cases involved agreement in which parties were all members of the alliances.

¹²⁶ *SkyTeam* (Case COMP/37.984) (2007/C 245 13) OJ C245/46 (Commission Notice).

¹²⁷ *SkyTeam*, para 6.

¹²⁸ *SkyTeam*, (Case DCOMP/37/984) (Commitment Package).

¹²⁹ EC Press Release, 'Antitrust: Commission opens a probe into transatlantic joint venture between Air France-KLM, Alitalia and Delta and closes proceedings against eight members of SkyTeam airline alliance', IP/12/79.

assessment involving alliances are likely to be the network effects and barriers to entry.¹³⁰ While network effects are often considered in defining the relevant market they are not addressed as part of the competition assessment. The disruptive competition effects on network routes are therefore often overlooked when too much emphasis is given to overlapping routes.¹³¹ Barriers to entry on the other hand may arise from airline infrastructures (slot, gate, feeder access) and the airlines' own business model¹³² which combine participating airlines' infrastructures and this may lead to horizontal and vertical foreclosure effects. These may create competition restrictions.¹³³

The definition of the relevant market in strategic alliance cases may have additional consideration as some aspects of the network effects of the strategic alliance may be considered within the O&D framework.¹³⁴ In *British Midlands/United Airlines*,¹³⁵ network effects such as competition between hubs and alliances were described within the broader competition issues which must be discussed in addition to the individual O&D market.¹³⁶ In *Air France/KLM*,¹³⁷ it was concluded that though the demand substitutions could justify the use of the O&D approach, in cases involving corporate customers, the demand was driven by both the O&D consideration and network effects should be considered. In this case, the Commission found that the customers' choice was determined by network competition rather than the competition on individual city pairs.¹³⁸ It is still debatable however whether this aspect of network effects into the market definition as an alternative to the O&D approach should be considered though it has been considered on case-by-case basis.

In *Oneworld Alliance - Deutsche Lufthansa AG/ Austrian Airlines*,¹³⁹ Lufthansa and Austrian Airlines concluded a cooperation agreement on 19 October 1999 and had a long-

¹³⁰ Kleymann & Seristo (n 111) ch6, p15.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Report of the European Competition Authorities (ECA) Air Traffic Working Group - Mergers and alliances in civil aviation; (2007); para 25 (ECA Report on Mergers and Alliances)

¹³⁵ Case CP/1535-01-*British Midlands/United Airlines* OFT; See also *Swissair/Sabena* EU Case IV/M.616-; para 22

¹³⁶ ECA Report on Mergers and Alliances (2007).

¹³⁷ Case COMP/M.3280.

¹³⁸ Ibid.

¹³⁹ *AuA/LH* - Both airline provide air transport for passengers and goods and is engaged in activities relating to air transport. Lufthansa was fully privatised in 1997 and has some 350 000 shareholders. Lufthansa's main subsidiaries at that time were Lufthansa Cargo (100 %), Lufthansa Technik (100 %), LSG (100%), Lufthansa City Line (100%), Eurowings (25%), British Midland (20%), Air Dolomiti (26%) and Luxair (13%). Austrian Airlines was controlled by the Austrian State (39,7%), institutional investors (10.6%), private investors (38.2%), Credit Suisse First Boston (10%) and by Air France (1.5%). In terms of achieved turnover,

term objective for world integration of their network.¹⁴⁰ The cooperation included creating an integrated air traffic system in commercial activities, marketing and operational activities.¹⁴¹ The agreement however contained mainly a declaration of intent and details on all major areas of cooperation were specified in a number of specific implementation agreements. The main elements of the agreements were, therefore, the joint venture for Austrian-German traffic where profit and loss was shared, worldwide cooperation on joint network, joint pricing policy and joint budgeting which included FFP, code sharing harmonisation of service levels and integration of data processing, a single market strategy, involvement of subsidiaries and associated companies, organization of the hub system and sharing of airport facilities.¹⁴²

In determining the relevant market, the Commission adopted the O&D pair approach, considered the direct and indirect flights and distinguished between premium and non-premium passengers.¹⁴³ The Commission also considered the overlapping catchment areas did not play an important role for traffic between Austria and Germany.¹⁴⁴ Other means of transport do not offer an alternative for time-sensitive travellers and direct routes.¹⁴⁵ The parties had a combined market share of 100% on 27 out of 33 routes making them the strongest competitors on the Austrian-German air transport market.¹⁴⁶ With the conclusion of the cooperation agreement around half of all air passengers travelling between the two countries depend exclusively on Austrian Airlines and Lufthansa. It was apparent that the cooperation between the two former competitors restricted actual and potential competition between the parties and their cooperation increased market power even further by raising additional entry barriers for other suppliers as a result of the coordination of resources. By excluding any actual and potential competition between the Parties and given their position on the market, the joint venture appreciably restricted competition for air transport between Austria and Germany.¹⁴⁷

revenue passenger-kilometres (RPKs) flown in Europe in 2000, world traffic, operating routes, fleet size, scheduled cargo transport, Lufthansa had a greater market share than Austrian Airlines.

¹⁴⁰ *AuA/LH*, para 1.

¹⁴¹ *Ibid*, para 26-28.

¹⁴² *Ibid*, para 29-40.

¹⁴³ *Ibid*, para 44-53.

¹⁴⁴ *Ibid*, para 54-56.

¹⁴⁵ *Ibid*, para 57-60.

¹⁴⁶ *Ibid*, para 62-73.

¹⁴⁷ *Ibid*.

In determining whether the agreement has the object or effect of restricting competition, many of the cases have shown that the alliances have the high potential to restrict competition. In April 2009, the European Commission opened two separate formal antitrust proceedings in relation to the compatibility with Article 101 of the TFEU on cooperation agreements between certain airlines on transatlantic routes.¹⁴⁸ The first investigation concerned both existing and planned cooperation between four current or prospective members of the Star Alliance namely Air Canada, Continental, Lufthansa and United Airlines. The second investigation related to proposed cooperation between three members of the Oneworld; American Airlines, BA and Iberia. In *Air Canada/United Airlines/Continental Airlines/Lufthansa*,¹⁴⁹ four members of the Star Alliance at that time, namely Air Canada, United Airlines Inc. (“United”), Continental Airlines¹⁵⁰ (“Continental”) and Deutsche Lufthansa AG (“Lufthansa”) announced their intention to conclude an agreement to form a joint venture on 19 June 2008 covering all their passenger air transport services on all transatlantic routes between Europe and North America.¹⁵¹ Air Canada is Canada's largest full service network airline, United and Continental operate hubs in the United States of America and Lufthansa, is a German airline. The cooperation was to coordinate the airlines' commercial, marketing and operational activities on hundreds of transatlantic routes (principally routes between the European Union and North America). According to the Commission, the level of cooperation seemed to be far more extensive than the general cooperation between these airlines and other airlines which are part of the alliance and in particular, the parties intended to jointly manage schedules, capacity, pricing and revenue management on transatlantic routes, as well as share revenues and sell tickets on these routes without preference between these carriers. When calculating market share, the Commission aggregated the market shares of the parties and of those other airlines with which they currently enjoy U.S. antitrust immunity.¹⁵² Members of the Star Alliance that were not exempted by US antitrust were regarded as competitors.

¹⁴⁸ Commission Memo 09/168, Antitrust: Commission open formal proceedings against certain members of Star and Oneworld alliances, 20 April 2009.

¹⁴⁹ *Continental/United/Lufthansa/Air Canada* (Case Comp/AT. 39595)

¹⁵⁰ In 2010, Continental Airlines and United Airlines merged and United Airlines was a party to this case until the date of merger's completion.

¹⁵¹ The Commission concluded that since the joint venture did not qualify as ‘full-function’ under the control of EU Merger Regulation, it is subject to Article 101(1) of TFEU.

¹⁵² In this case, the Commission considered the fact that certain airlines in the Star Alliance have been granted the immunity from the US Department of Transportation for concluding cooperation agreement on international routes (as provided by US antitrust law). On this immunity, see Final Order 2009-7-10 (Docket DOT-OST-2008-0234).

The Commission found that the aim of the agreement is full metal neutrality,¹⁵³ an agreement which each 'Party will be incentivised to treat all flying, regardless of airline, within the scope of the agreement as flying on its own network and in which customers will also become neutral to the choice among the parties as airlines and among itineraries on any given route'.¹⁵⁴ The parties cooperate extensively on key parameters of airline competition including capacity requirements, potential schedule patterns, new project and product shares, joint revenue management, combine pricing functions, and align pricing policy and sharing FFP. Based on this, the agreement by its very nature aimed at, and had the potential of, restricting competition. This is because the parties' cooperation in the joint venture completely eliminated competition between the parties on key parameters of competition, such as price and capacity. Within the metal-neutral revenue-sharing joint venture the parties undertook all possible means to eliminate their own incentives on the market and focused on the common interest and benefit of the joint venture'.¹⁵⁵ The Commission further concluded that the agreement had the actual or potential effect of appreciably restricting competition on the route Frankfurt-New York for premium passenger.

In determining whether the cooperation agreement could be considered to fall within the exemption provided under Article 101(3) of TFEU, on efficiency gains, the Commission accepted that there was a causal link between the joint venture and the types of efficiencies claimed such as time saving in schedule delay economies of density benefits from reciprocal lounge access and significant reduction in the double marginalization.¹⁵⁶ On the indispensability of the restriction, the Commission accepted the arguments put forward by the parties that less restrictive alternatives (such code-sharing and two-tariffs agreements) generated substantially less efficiencies and concluded that the agreement was indispensable.¹⁵⁷ On in-market efficiencies, particularly the time savings and lounge access as claimed by the parties, the Commission concluded that it was likely to be

¹⁵³ This term indicates the practise, or rather the privilege, of a member alliance (pursuant to a comprehensive arrangement between airlines) to use another member's aircraft as its own, thus 'metal-neutral', whereby the member alliance can also benefit from the sales arising from such aircraft. This concept was originated from US. See Brian F Havel, Gabriel S Sanchez, 'The Principles and Practices of International Aviation Law; Cambridge University Press ISBN 9781139104210 (2014) ch 4. See <<http://0-ebooks.cambridge.org.pugwash.lib.warwick.ac.uk/ebook.jsf?bid=CBO9781139104210>>assessed 24 May 2016.

¹⁵⁴ *Continental/United/Lufthansa/Air Canada* (Case Comp/AT. 39595).

¹⁵⁵ *Ibid*, para 37.

¹⁵⁶ *Ibid*, para 64-65.

¹⁵⁷ *Ibid*, para 66-69.

insufficient to compensate the premium passengers travelling on the concerned routes.¹⁵⁸ On the possibility to eliminate competition, the Commission found that the joint venture would not afford the parties the possibility to eliminate competition.¹⁵⁹ Nevertheless, in conclusion, the Commission found that the level of demonstrated efficiencies was insufficient to outweigh the significant negative effects resulting from the elimination of competition in the Frankfurt-New York route and the inability of competition to provide competitive constraints due to high barriers to entry.¹⁶⁰

The parties offered commitments to address the Commission's concerns pursuant to Article 9 of Regulation 1/2003.¹⁶¹ The final commitments were on slots, fare combinability, special prorate agreement and FFP.¹⁶² In terms of slot allocation, the parties agreed to make slots available at Frankfurt. Subject to availability and at the option of the competitors, slots at New York JFK or Newark Liberty airports would also be offered up to one daily slot pair. This was based on the Commission's findings that the main barrier to entry was within the New York airports. Hence, the commitment made on the slot allocation may reduce the high barriers to entry and promote new entrants.¹⁶³ In terms of fare combinability, the parties were willing to combine their frequency schedules with both the existing and potential competitors. Based on this commitment, the competitors will offer the combined frequency schedules of the parties in one direction by combining it with their own frequencies and schedules in other directions.¹⁶⁴ This commitment was designed to lower the barriers to entry. There was however a deadline for a fair combinability agreement to be entered into by the parties and the Commission needed to approve such an agreement.¹⁶⁵ For the special prorate agreement, the parties agreed to enter into the agreement for up to 20 feeder routes whereby in this case the routes had been determined to be the O&D pairs within the geographical area of Europe and Israel and North America Caribbean and Central America. This would, according to the Commission, attract feeder traffic and be able to sustain the operation in the long-haul routes. The special prorate

¹⁵⁸ Ibid, para 70-76.

¹⁵⁹ Ibid, para 77.

¹⁶⁰ Ibid, para 79.

¹⁶¹ Article 9 of Regulation 1/2003 provides that the Commission may adopt a decision based on the commitments offered by the parties to the agreement.

¹⁶² *Continental/United/Lufthansa/Air Canada* (Case Comp/AT.39595).

¹⁶³ Ibid, paras 110-123.

¹⁶⁴ Ibid, para 124-127.

¹⁶⁵ Ibid.

agreement also needed to be approved by the Commission.¹⁶⁶ In terms of FFP, competitors that had commenced services on the Frankfurt-New York routes were to have access to the other parties' FFP. The Commission was of the view that this would reduce the parties' advantages under the programme prior to the finalization of the commitment.¹⁶⁷ Other commitments included the reporting obligations by the parties on its operations to the Commission and the review of clauses of the commitment. It was also agreed that if Lufthansa, Air Canada or United were to breach their commitments, the Commission could impose a fine of up to 10% of their total turnover without having to prove a violation of competition rules.¹⁶⁸

In *Oneworld Alliance - Deutsche Lufthansa AG/ Austrian Airlines*,¹⁶⁹ the Commission viewed the agreement as having a high probability of elimination of actual competition in the German-Austria market. Although the liberalisation of air transport in the Internal Market removed legal barriers to market entry, the cooperation created new barriers and enhanced the difficulties for third carriers to enter the market. This eliminated competition on a substantial part of the market. The parties argued that the agreement would contribute to the economic progress within the meaning of Article 101(3) of TFEU but the Commission was not convinced and imposed some conditions on the commitments proposed by the parties so as to ensure it would not impede competition. The conditions were pertaining to slots, frequencies, fares, blocked space agreements, interlining, FFP and intermodal series.¹⁷⁰ With regard to slots, the Commission imposed that if a new entrant wished to commence a new non-stop service on one or more Austria-Germany city pairs, the parties were obliged to make available the slots on the condition that at least one pair of slots must be made available and up to a maximum of 40% of the slots on which the parties operated.¹⁷¹ In terms of frequencies, the parties were not allowed to add any frequencies for a new entrant city pair for a minimum of four consecutive IATA traffic seasons. Further, the parties shall apply the same reduction on three other Austria-

¹⁶⁶ Ibid, para 128-133.

¹⁶⁷ Ibid, para 134-135.

¹⁶⁸ Commission Press Release: 'Antitrust: Commission renders legally binding commitments from Star alliance members Air Canada, United and Lufthansa on transatlantic air transport passenger market', IP 13/456 dated 23 May 2013.

¹⁶⁹ *AuA/LH* (Case COMP/37.730).

¹⁷⁰ It is noted that in this case that there were no commitments agreed rather conditions and obligations imposed by the Commission. See *AuA/LH* (Case COMP/37.730), Annex.

¹⁷¹ *AuA/LH* (Case COMP/37.730), Annex, para I. Other conditions included 45 minutes slot if requested by the new entrant and not more than 90 minutes in the case of one-stop services. Also the new entrant shall make a clear written request at least 6 weeks prior to IATA slot conference.

Germany city pairs where they do not face any competition if they wished to reduce the fares for new entrant. The parties could also only enter into a block spaced agreement with the new entrant if the number of frequencies offered is lower than that operated by the parties. The parties were also obliged to enter into an interlining agreement if it was requested by a new entrant. Such agreement must be based on a fixed number of seats. The parties shall also allow the new entrant to participate in its frequent flyers programme if requested by a new entrant. Lastly, the parties shall enter into an intermodal agreement if requested by a railway or other surface transport company operating between Austria and Germany.

6.6 US Perspective

Air carriers in the US are subject to the Sherman Act¹⁷² and Clayton Act¹⁷³ and they are exempted from the Federal Trade Commission Act.¹⁷⁴ The ultimate goal of antitrust law is to maintain the integrity of the free market by protecting not the individual competitor but the competition as a whole.¹⁷⁵ As in the other sectors, generally there are two main tests developed by the US courts in determining the violation of the antitrust law under s1 of the Sherman Act; the *per se* rule¹⁷⁶ for the obvious and clear anti-competitive object present in an agreement and in the absence of the anti-competitive object, the rule of reason¹⁷⁷ is applied in cases where there is a need to examine further the anti-competitive effects of such agreement. For airline cooperation agreements which normally include CSAs, joint FFP and marketing, revenue and risks, carriers are required to submit the agreements to the Department of Transportation (DOT) for review. The review does not however amount to approval but to ensure that the implementation does not harm the public and not anti-competitive.¹⁷⁸ For code-sharing between foreign and US carriers, an authorization must be obtained according to the Department's economic regulations¹⁷⁹ which approves it on

¹⁷² Act of July 2, 1890, Chapter 647.

¹⁷³ Act of October 15, 1914, Chapter 323.

¹⁷⁴ Act of September 26, 1914, Chapter 311.

¹⁷⁵ Scott Kimpel, 'Antitrust Considerations in International Airline Alliances'; *Journal of Air Law and Commerce*; Volume 63 (1997); p479; See also *Brown Shoe Co. United States*, 370 U.S. 294, 344 (1962) and *McGlinchy v. Shell Chem. Co*, 845 F.2nd 802, 815 (9th Cir. 1988).

¹⁷⁶ *United States v Topco Associations Inc.* 405 U.S. 596, 609 (1972); *Palmer v BRG of Georgia, Inc.* 498 U.S. 46, 48-50 (1990).

¹⁷⁷ *Standard Oil 221*, U.S. at 64-67; *Broadcast Music Inc. v Columbia Broad System Inc.* 441 U.S. 1, 23-24 (1979).

¹⁷⁸ See <<https://www.transportation.gov/po>>accessed on 6 July 2018.

¹⁷⁹ 14 CFR 212.10 – Application for Statement of Authorization.

the basis of public interest. A few considerations are made in the assessment of public interest; whether the code-sharing is included in the bilateral air service agreement, the benefits to public in fares and services and the impact on competition and most importantly the foreign carrier must pass the safety test imposed by the Federal Aviation Authority.¹⁸⁰ For alliances,¹⁸¹ the same approval is needed but this approval refers to the antitrust immunity. Carriers almost always apply for antitrust immunity before implementing any alliance agreement. This would enable them to operate on certain aspect such as fares and capacity which otherwise would have been prevented. The granting of the immunity depends on whether or not the agreement is adverse to public interest as it reduces substantially or eliminate competition completely. Thus, airline cooperation in the US airline industry are subject to competitive analysis prior to their implementation.¹⁸²

6.7 Conclusion

A starting point for the Commission in all of the competition cases is to carry out a thorough market definition regardless of the types of restrictions contained in the agreements. As we have seen the common framework used for aviation market definition of the O&D pair may have to be adjusted when considering alliances that exhibit network effects. Based on the analysis of cases, both technical and commercial agreements have indeed the tendency to affect competition in the airline industry, though the degree varies. While CSAs involve complex financial arrangement, they do not affect competition rather they provide commercial benefits to the airlines and the passengers. The potential anti-competitive effect may arise when different financial terms are offered to different airline partners. The anti-competitive issue is also likely to be raised when the code-sharing occurs in a market with high barriers to entry. The more serious anti-competitive effects come from the commercial arrangement; the tactical and strategic alliances. In cooperation agreements, the -competitive concerns are always raised when the arrangements involve the key parameters of competition such as the pricing mechanism, joint capacity, route scheduling and risk and revenue sharing. Collaboration on these areas has the tendency to reduce competition between airlines as it strengthens the positions of the parties in the

¹⁸⁰ See <<https://www.transportation.gov/po>>accessed on 6 July 2018.

¹⁸¹ 49 U.S.C s41308 (1994); See <<https://www.transportation.gov/policy/aviation-policy/competition-data-analysis/alliance-codeshares>>accessed on 6 July 2018.

¹⁸² Ibid.

market thus increasing the barriers to entry. In the cases of strategic alliance, the anti-competitive effect on competition is more obvious. This is so in cases where the agreement creates the 'metal-neutrality' cooperation where the parties undertook all possible means to eliminate their own incentives on the market and focused on the common interest and benefit of the joint venture there by elimination competition in total.

When airlines cooperate on the fare structure, for example, the possibility to increase the price increase is high. Route scheduling on the other hand may give the opportunity for airlines to allocate certain routes between them thus allowing market to be shared. These circumstances if coupled with strong market position of the airlines would seriously impede competition. The airlines' position in the market play an important role in order to determine whether they are actual competitors prior to entering such alliances. Whether or not the alliances would create or increase the barriers to entry is another important factor to be considered. In fact, this factor is used to determine the appropriate remedies in most cases. It is noted that in considering and accepting the proposed commitments the Commission always give serious regard to minimise the barriers to entry which normally concern the entry into the market through the availability of slot allocation. It is important to note that in most of the cases where anti-competitive effects were found, benefits to consumers were also generated thus qualifying the exemptions under Article 101(3) to be granted. In most cases the Commission will grant exemptions, except those that concerned a cartel such as *SAS/Maersk Air*. The Commission, nevertheless, would give serious consideration to the proposed commitments by airlines as a means to remedy the competition concerns. This demonstrates that the Commission has indeed taken a positive approach towards airline alliances and the focus is on counterbalancing the anti-competitiveness of the cooperation with the efficiency gains. As the definition and concept of agreements in the airline industry are the main issues discussed in the *MAS/AirAsia* case, the analysis and the findings provided in this Chapter are pertinent and serve as an important guide for a developing jurisdiction like Malaysia in enforcing the competition law in the industry. These are considered in the following chapter that provides for a case analysis of *MAS/AirAsia*.

CHAPTER 7 – CASE ANALYSIS: *MAS/AIRASIA*

7.1 Introduction

The *MAS/AirAsia*¹ case was the first competition case in Malaysia that involved the aviation sector since CA 2010 came into force in 2012. The case concerned a collaboration agreement among local airlines and was brought to the attention of MyCC, which found the collaboration to be anti-competitive and infringed the Act. This was also the first time a MyCC decision had been reviewed and overturned by the CAT and was later challenged at the HC in a judicial review proceeding in which the MyCC decision was reinstated.² The HC found that the CAT decision had misapplied s4(2) of the CA 2010 and therefore had committed an error of law by taking into account an irrelevant consideration. In setting aside the MyCC decision, the CAT's judgment provides an important overview of its approach to the interpretation of CA 2010 and the implementation of competition law in Malaysia, both generally and in the aviation sector specifically. In reinstating MyCC decision, the HC provided an important judgment reflecting the stance and 'limited' understanding of the CAT with regards to competition law. The case is now pending appeal at the Court of Appeal.³ This case therefore marks an important milestone in the implementation of competition law in the airline industry. A separate chapter providing a comprehensive analysis of the case is therefore justified.

This Chapter aims to critically examine the decision in the light of established EU competition law principles and to analyse the extent to which reference to the EU judicial precedents is required and appropriate. It starts with the background of the case and followed by the decisions of the competition authorities and the HC. The several important issues raised by the case are then analysed these issues include: the interpretation of the concept of 'agreement', the standard of analysis required for the determination of object

¹ Decision of Competition Commission: Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd. Dated 31 March 2014 [No. MyCC.0001.2012] (MyCC Decision on *MAS/AirAsia*), *Malaysian Airline System Berhad & Anor v Competition Commission* [2016] MLJU 903 (CAT Decision on *MAS/AirAsia*) and *Competition Commission v Competition Appeal Tribunal, Malaysian Airline System Berhad and AirAsia* [No:WA-25-82-05/2016] dated 20 December 2018 (High Court Judgment on *MAS/AirAsia*).

² High Court Judgment on *MAS/AirAsia*.

³ The Court of Appeal has set 13 December 2019 for the hearing of the appeal. Available at <<https://www.competitionpolicyinternational.com/malaysia-malaysia-airlines-airasias-appeal-fine/>> and <<https://www.theedgemarkets.com/article/malaysia-airlines-airasias-appeal-against-rm10m-fine-be-heard-dec-13>> accessed on 29 January 2019.

restriction, the importance of market definition and finally the extent to which the reference to EU cases has been made. Next, an alternative view should the case be dealt with under the newly passed sectoral competition regulations; the MACA 2016, is provided. The final section provides a conclusion that highlights the overall observations and lessons learnt from the analysis made.

7.2 Factual Background

The case involved three national airlines namely, the Malaysian Airline System Berhad (“MAS”) (now known as “Malaysian Airline Berhad” or “MAB”), AirAsia Berhad (“AirAsia”) and AirAsia X Sdn Bhd (“AirAsia X”). MAS, AirAsia and AirAsia X were scheduled passenger airlines operating in Malaysia.⁴ MAS, the first national carrier in Malaysia, has been providing full-service flights, both domestic and international, since its incorporation in 1972. At the time of entering into the CCFA, MAS was owned by Khazanah Malaysia Berhad (“Khazanah”), which had a 69.43% shareholding, making it the single largest shareholder.⁵ Khazanah is a wholly owned government investment company via “Minister of Finance Inc.”, of which the Prime Minister of Malaysia is the Chairman.⁶ MAS also wholly owned FlyFirefly Sdn Bhd (“Firefly”) which was incorporated in 2007. Firefly provides connections to various destinations within Malaysia, Thailand, Singapore and Indonesia⁷. There was a plan by MAS to establish a new subsidiary known as Sapphire to take over Firefly’s operations, but this plan was abandoned.⁸ It is also important to state that MAS became a member of the major global alliance, Oneworld alliance, in 2013. AirAsia, on the other hand, is Malaysia’s first low-cost carrier, and was established in 1993 to provide domestic and international passenger flight services. AirAsia X, a subsidiary of AirAsia, was incorporated in 2006 and provides air transport services mainly in the Asia-Pacific region. It is an undisputed fact that AirAsia and AirAsia X form a single economic

⁴ The background details of each of these airlines are provided in Sections 4.2.2.2 and 4.2.2.3 of Chapter 4.

⁵ MAS Annual Report 2012, p 109.

⁶ The Khazanah website can be found at <<http://www.khazanah.com.my/About-Khazanah/Corporate-Profile>>accessed on 29 April 2019.

⁷ The details of these airlines are provided in Section 4.2.2.3 of Chapter 4; See also <<http://www.fireflyz.com.my/about/company-profile> and <https://www.maswings.com.my/About-us>>accessed on 29 April 2019.

⁸ Flight Global, ‘MAS to start new regional carrier called Sapphire’, 22 August 2011 available at <<https://www.flightglobal.com/news/articles/mas-to-start-new-regional-carrier-called-sapphire-361074/>> and News Straits Time Online, ‘Sapphire comeback’, 10 August 2014 available at <<https://www.nst.com.my/news/2015/09/sapphire-comeback>>accessed 29 April 2019.

entity and therefore were regarded as a single 'enterprise' in this case.⁹ The three airlines entered into a Comprehensive Collaboration Framework Agreement ("CCFA") on 9 August 2011. Clause 1.2 of the CCFA states that the agreement was based on the premise that:

"(a) MAS operates an airline business as a full-service carrier, while AirAsia and AirAsia X operate airline businesses as low-cost carriers.

(b) The parties wish to establish a framework under which they will explore possibilities for mutual co-operation in accordance with the terms and conditions set forth in this Agreement."¹⁰

The aim of the agreement is to focus on the core competencies of the parties, to deliver better products and choices for customers and ultimately to create greater value for all stakeholders.¹¹ This is provided in Clause 3 which sets out the overarching principles for the collaboration as follows:

"3.1 The parties wish to explore the possibilities of collaboration in order to 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."¹²

Clause 4.1 and 4.2 of the CCFA contain the antitrust provisions which state:

"4.1 Notwithstanding to the contrary, the Agreement does not give rise to any binding commitment as to any particular form of collaboration, or give effect to any form of collaboration, until anti-trust analysis have been complete in respect thereof..."¹³

"4.2 To the extent that there is any anti-trust, competition or other Legal Requirements¹⁴ that is applicable to any matter or transaction under this Agreement, such that the matter or transaction cannot be proposed and/or undertaken unless certain Legal requirement are complied with..."¹⁵

⁹ MyCC Decision on *MAS/AirAsia*, paras 16-25.

¹⁰ High Court Decision on *MAS/AirAsia*, para 81 and CAT Judgment on *MAS/AirAsia*, para 79.

¹¹ MyCC Decision on *MAS/AirAisa*, para 2.

¹² High Court Decision on *MAS/AirAsia*, para 8 and CAT Judgment on *MAS/AirAsia*, para 80.

¹³ CAT Judgment on *MAS/AirAsia*, para 109.

¹⁴ 'Legal Requirements' is defined under the CCFA as "...all laws, decrees, statutes, ordinances, orders, administrative guidelines, rules, regulations, permits, licenses, authorizations, directions, circulars and/or requirements of all regulatory and/or governmental authorities which, now hereafter, may be applicable to a party, and "Legal Requirement" shall be construed accordingly."

¹⁵ CAT Judgment on *MAS/AirAsia*, para 109.

Clause 5 of the CCFA provides the following:

“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 of affiliate. For the purposed 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 AA, it intends to focus on being a regional low cost-carrier (“LCCT”).

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

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 Fire Fly 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 Firefly Sdn Bhd to form Sapphire.”¹⁶

Clause 7 of the CCFA provides the ‘flow and feed’ of the traffic management which ensures no overlapping routes between the parties.¹⁷ Clause 9 of the CCFA provides for the establishment of a Joint Collaboration Committee (JCC) to administer and oversee the collaboration which states that:

¹⁶ As restated in the MyCC Decision on *MAS/AirAsia*, para 7 p4 (*emphasis added*).

¹⁷ High Court Judgment on *MAS/AirAsia*, para 81. Clause 7 of the CCFA provides that “7. Flow and Feed

7.1 Subject always to clauses 4 and 9, MAS and AirAsia shall as soon as practicable:

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 maybe) does not operate any overlapping route; and

Assess the viability of enabling selective interlining passengers transiting from MAS (or Sapphire, as the case maybe) points of origin of AirAsia flights, where MAS (and/or Sapphire, as the case maybe) does not operate any overlapping route; and if either of clause 7.1 (a) or (b) is assessed as viable, agree on a plan to implement the same in the shortest possible timeframe 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, maybe 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 in 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 AirAsia X, where MAS does not have and 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 arrangement to the extent that its operations and services are not materially and adversely impacted.”

“9. Joint Collaboration Committee

9.1 For the purpose of administering and overseeing such collaboration, the parties shall forthwith establish a committee constituted by persons representing each of them in order to enable the parties to plan, direct and manage jointly all issues and matters pertaining to the Agreement”¹⁸

The CCFA also entailed a share swap plan between MAS and AirAsia, as a result of which AirAsia, through its subsidiary Tune Air Sdn. Bhd. was able to obtain a 20.5% stake in MAS, while Khazanah obtained a 10% stake in AirAsia.¹⁹ This share swap became controversial as it seemed to allow AirAsia to gain a certain amount of control over the national carrier²⁰ and created a monopoly in certain sectors of the aviation industry.²¹ Following the CCFA, MAS withdrew four of Firefly’s operations in East Malaysia, particularly from the Kuala Lumpur–Kuching and Kuala Lumpur–Kota Kinabalu routes on 30 October 2011, and from Kuala Lumpur–Sandakan and Kuala Lumpur–Sibu routes on 4 December 2011 (“the withdrawal of flights”).²² There was a huge public outcry at the time as the cancellation affected passengers travelling to Sabah and Sarawak.²³ A complaint was lodged by the Federation of Malaysian Consumers Association on 24 February 2012 to the MyCC regarding the share swap, which was accused of possible anti-competitive practices relating to price fixing and market sharing.²⁴

Based on its own ‘reasonable suspicion’, MyCC started an investigation²⁵ and issued a notice pursuant to section 18 of the Act requesting further information from MAS and AirAsia on 4 April 2012.²⁶ On 2 May 2012, MAS and AirAsia entered into a

¹⁸ CAT Judgment on *MAS/AirAsia*, para 51.

¹⁹ MyCC Decision on *MAS/AirAsia*; para 6.

²⁰ BBC News; ‘Air Asia and Malaysian Airlines agree a share swap deal’; <<http://www.bbc.co.uk/news/business-14471135>>accessed on 7 February 2018.

²¹ See ‘AirAsia-MAS deal, unfair to Sabah and Sarawak’, <<http://www.freemalaysiatoday.com/category/nation/2011/08/18/airasia-mas-deal-unfair-to-sabah-swak/>>accessed 24 April 2019.

²² MyCC Decision on *MAS/AirAsia*, para 9.

²³ ‘Community airlines begins silent cancellation leaving passengers and tour operators fuming’, The Star Online, Friday, 30 September 2011; See also; ‘Firefly starts cancelling routes to Sarawak, 16 September 2011; ‘Firefly unsure of flights’, 2 Oct 2011; ‘Firefly bad experience with cancellation’, 11 September 2011; ‘TV3 reports 40 passengers disappointed over JHB-BKI cancellation’, 11 September 2011; ‘Firefly flight cancellation affect Sarawak tourism’, 17 September 2011; ‘Firefly 737 planes to be used Sapphire Airline’, 18 September 2011; ‘Firefly B737 flights that risk cancellation’, 18 Sept 2011; ‘Firefly intended to drop B737 flights as early as August’, 11 September 2011.

²⁴ “FOMCA wants AirAsia’ share swap investigated”, the StarOnline, February 25, 2012.

²⁵ Section 14(1) of the CA 2010 empowers MyCC to conduct any investigation as it thinks expedient where there is a reason to suspect that any enterprise has infringed or is infringing any prohibition under the Act.

²⁶ MyCC Decision on *MAS/AirAsia*, para 3.3.

Supplemental Agreement to amend the CCFA, deleting Clauses 5 and 9 and thereby aborting the share swap deal, with both parties reverting to the original structure of their respective shareholdings and disbanding the JCC.²⁷ MyCC issued a Proposed Decision on 6 September 2013 to which both MAS and AirAsia responded on 17 Oct 2013 and 18 Oct 2013 respectively, and which was followed by oral presentations on 15 Jan 2014.²⁸ It was after considering these responses and presentations that MyCC issued a Final Decision on 31 March 2014.²⁹ The parties appealed to the CAT and on 18 February 2016 the CAT reversed the earlier MyCC decision. In a judicial review brought by MyCC against the CAT's judgment, the HC found that CAT had erred in law and reinstated the MyCC decision.³⁰

7.3 Judgment

7.3.1 MyCC Decision

MyCC found that the CCFA had the object of sharing markets within the air transport services in Malaysia, and that MAS and AirAsia had infringed section 4(2)(b) of the CA 2010 as a restriction of competition by object.³¹ The wording of Clause 5 expressly contained an agreement between the parties to focus on their respective market areas and not to enter into the areas specially allocated to each other.³² This clearly set out the intention of the parties, or “object” of the agreement, to share the market in relation to sectors and categories of aviation services.³³ MyCC relied its main findings on Clause 9 of the CCFA which provided for the establishment of a Joint Collaboration Committee (JCC) to monitor the implementation of the CCFA.³⁴ According to MyCC, the JCC provided a possible means for the two competitors to become involved in a decision making process which was clearly anti-competitive.³⁵

²⁷ MyCC Decision on *MAS/AirAsia*, para 31, 43, 46.

²⁸ *Ibid*, para 4.

²⁹ *Ibid*, para 5.

³⁰ The case is pending appeal at the Court of Appeal.

³¹ *Ibid*, para 49.

³² *Ibid*, para 8

³³ *Ibid*.

³⁴ *Ibid*, para 41-44.

³⁵ *Ibid*, para 44.

In addition to the clauses of the agreement, MYCC established that Firefly had withdrawn flights. Although the parties claimed the main purpose of the CCFA was to optimise efficiency and competitiveness, the withdrawal of flights which resulted in AirAsia becoming the sole low cost carrier, was in line with the stated objectives of Clause 5 of the CCFA, in which MAS intended to review Firefly's operations. Moreover, prior to the CCFH, the main purpose of the establishment of Firefly was to compete with AirAsia in the domestic low-cost market, and there was a drastic drop in the latter's market share thereafter. The CCFA was therefore entered into by the parties with the aim of maximising their commercial revenues by the sharing of markets. From these facts and the objectives provided under the agreement, it follows that the restriction to competition was obvious. The parties agreed not to compete with each other, either through themselves or their subsidiaries, thereby eliminating any possibility of competition between them. This would, as a result, give each party the freedom to operate within their market segments and to impose high prices to maximise their profitability without any competition.

The parties argued that MyCC failed to conduct a proper object analysis since no market definition was carried out and the relevant economic context was not considered in ascertaining the object of their conduct. The parties further argued that MyCC failed to examine the actual and potential competition that would have been existed between them in the absence of the CCFA and that an effect analysis should have been conducted. In response to these arguments, MyCC referred to the MyCC Guidelines on Anti-Competitive Agreements which stated that certain kinds of horizontal agreements as stated in Section 4(2) of the Act are deemed to have the object of significantly preventing, restricting and distorting competition, and that there is no necessity for MyCC to examine the competitive effects of such an agreement. Paragraph 3.25 of the MyCC Guidelines 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, 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 competitive effect of such agreements.”.

This is reiterated in the preceding paragraphs of the Guidelines, which provide that, once the object is shown, MyCC does not need to examine the anti-competitive effects of the agreement. On the need to define the market, MyCC relied on the Guidelines on Market

Definition which state that it is under no obligation to conduct a precise market definition in respect of the infringement under section 4(2) of the Act. Paragraphs 1.09 and 1.10 of the Guidelines state that:

“1.9 However, it should be noted that for certain kind 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.”³⁶

“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 judgment. In some cases, it may not even be 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.”

As far as the airline cooperation is concerned, MyCC acknowledged that some airline alliances, such as code-sharing, revenue and cost sharing, coordination of capacities and routes and schedule planning, may be pro-competitive and cited the cases whereby joint ventures between Delta Airlines and Virgin Atlantic, and Singapore Airlines and Virgin Australia were approved.³⁷ The nature of the CCFA was, nevertheless, beyond any alliance arrangement as it provided for a clause on market sharing which was by its nature anti-competitive.³⁸ Although there was a clause on antitrust compliance as provided in the CCFA, it did not by itself serve as any form of immunity to the parties.³⁹

Finally, according to the MyCC, MAS and AirAsia should have invoked the exemptions provided under section 5 of the CA 2010, which provides a defence for an infringement under section 4(2) of the Act.⁴⁰ Section 5 provides the enterprise with a relief of liability for the infringement of the prohibition if the anti-competitive agreement contains four cumulative conditions; significant identifiable technological, efficiency and social benefits; that benefits could not have reasonably been gained without restricting competition; that detrimental effects and benefits to competition are proportionate; and that

³⁶ MyCC Guidelines on Market Definition, paras 1.9-1.10.

³⁷ MyCC Decision on *MAS/AirAsia*, para 66.

³⁸ *Ibid*, para 67.

³⁹ *Ibid*, para 68.

⁴⁰ *Ibid*, paras 74-75.

restrictions do not allow for the complete elimination of competition.⁴¹ The MyCC was, nevertheless, of the view that the parties did not satisfy the requirements of Section 5 as the burden was not discharged by the parties. A penalty of RM10 million (equivalent to GBP 1.9 million) was imposed on each of the parties.⁴²

7.3.2 CAT Decision

The parties appealed the decision to the CAT in accordance with Section 51 of the CA 2010, which provides for any aggrieved party or parties whose interests are affected by the MyCC's decision the right to appeal to the CAT.⁴³ On appeal, CAT reversed MyCC's decision.⁴⁴ In determining the object of the agreement, CAT held that MyCC had failed to take into consideration all of the terms and conditions of the CCFA based on the principle of construction.⁴⁵ Based on its analysis CAT found the intention of the parties was simply to explore the possibilities of collaboration in order to utilize each other's core competencies. Although CAT acknowledged that the CA 2010 adopted a deeming provision to establish a case of anti-competitive agreement, whereas other jurisdictions rely on 'market impact cases',⁴⁶ CAT held that, MyCC failed to establish that the object of the CFFA is to share the market and no reason or analysis for finding that the object of the agreement was provided.⁴⁷ Moreover, MyCC had failed to carry out a proper market definition.⁴⁸ One important remark made by CAT in this case is that it is inappropriate to apply the deeming provision simplistically with regard to the airlines business considering 'the widespread practices among airlines to undertake alliances' due to the nature of its business, which is capital intensive and requires a high level of efficiency.⁴⁹ No proper

⁴¹ Section 5 of the CA 2010.

⁴² MyCC Decision on *MAS/AirAsia*; para 93.

⁴³ Section 51 of the CA 2010.

⁴⁴ CAT summarized the appeal on the following grounds: (i) The CA had no anti-competitive object and the Commission misinterpreted the CA; (ii) The CA was never implemented; (iii) The Commission did not establish (and did not even attempt to establish) a causal link between the CA and route withdrawals; (iv)(a) The improper retrospective application of the Act and (b) The Commission should have conducted an effect analysis instead of object analysis; (v) Procedural fairness; and (vi) Disproportionate and discriminatory penalty assessment." See CAT Decision on *MAS/AirAsia* para 42, p18-19.

⁴⁵ CAT referred to Malaysian cases on contract law such as *Pioneer Shipping Ltd and Others v BTP Tioxide Ltd The Nema* [1981] 2 All ER (Pioneer Shipping), *Investor Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 (ICS) and *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [] 1 CLJ 269 (*Berjaya Times Square*) for the principles of construction of an agreement. See CAT Decision on *MAS/AirAsia*; para 75 - 84.

⁴⁶ MyCC Decision on *MAS/AirAsia*, para 90.

⁴⁷ CAT Decision *MAS/AirAsia*; para 89. CAT referred to a Malaysian case of *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800.

⁴⁸ CAT Decision *MAS/AirAsia*; para 90.

⁴⁹ *Ibid*, para 90.

assessment and evaluation of the agreement were made to invoke the application of the deeming provision and further documentary evidence was required. The plain reading of the terms in the agreement did not give rise to the CCFA having the object of significantly preventing, restricting and distorting competition in any market of goods or services.⁵⁰ Another important findings by CAT is on the legal status of the agreement where it found the agreement as conditional, as expressly provided by Clause 4 of the agreement.⁵¹ The agreement has no binding commitments and is subject to an anti-trust compliance as well as 'Legal Requirements' being fulfilled.⁵² Therefore, the agreement was clearly conditional and would only be enforceable upon compliance with the anti-trust provision and the legal requirements.⁵³ CAT was also of the view that MyCC had failed to establish the link between the agreement and the withdrawal of flights and that the latter was made based on an independent commercial decision pursuant to Firefly's financial instability.

7.3.3 High Court Judgment

Following the CAT's decision, MyCC filed an application for a judicial review at the HC and leave was granted on 26 July 2016 on the basis of public interest.⁵⁴ The application was made pursuant to Order 53 Rule 3(2) of the Rules of Court 2012.⁵⁵ The relief sought by MyCC include an order of certiorari to quash the decision of CAT, or alternatively a declaration that the decision is illegal, irrational, suffers from procedural impropriety, an abuse of process, an error of law and arbitrary, and that the decision issued by MyCC be reinstated in its entirety.⁵⁶ In dealing with the appeal, the HC found that the application

⁵⁰ Ibid, para 91.

⁵¹ Ibid, para 99. CAT referred to the case of *The CAT* based its decision on the case of *Aberfoyle Plantations Ltd. V. Khaw Bian Cheng* [1959] 1 LNS 3 where the Privy Council held that an agreement exists upon the affirmation of its conditional terms.

⁵² Ibid, paras 108-110.

⁵³ Ibid, para 111.

⁵⁴ The Sun Daily, 'MyCC allowed to challenge the CAT's decision to set aside RM10m fine imposed on AirAsia, MAS', 26 July 2016, available online at <<https://www.thesundaily.my/archive/1913094-CSARCH382970>>accessed on 3 May 2019.

⁵⁵ Order 53 of the Rules of Court 2012 provides for the application of judicial review. Order 53 Rule 3(2) specifically states that '(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.'

⁵⁶ MyCC's application for the judicial review were based on the following grounds; (i) the Tribunal misconstrued section 4 of the Competition Act 2010; (ii) the Tribunal's interpretation of the Collaboration Agreement between the 2nd respondent and 3rd respondent as failed to take into account key factors and is unreasonable; (iii) the Tribunal's decision was unreasonable that no reasonable authority could ever have come to it and also failed to provide adequately reasoned grounds for its decisions; (iv) the Tribunal has taken into account irrelevant considerations on whether the Collaboration Agreement was implemented; and (v) the tribunal acted contrary to principle of procedural fairness by failing to consider and take into account

substantially centred upon the interpretation of the application of Section 4 of the CA 2010. The HC was of the view that Section 4 of the Act is 'unambiguous, plain and clear' and 'must be given their natural and ordinary meaning.'⁵⁷ Further, the word 'or' has to be read disjunctively so that, to prove an infringement under section 4 the Act, MyCC has to prove only that either the object or the effect of the agreement is an anti-competitive.⁵⁸ Once the anti-competitive object is established and proven, there is no requirement for an effect analysis to be conducted.⁵⁹ In determining whether the object of the agreement is anti-competitive, it is pertinent to look into the terms of the agreement and the factual background prior to the conclusion of the agreement.⁶⁰ In this case, despite being competitors, the Court discovered that MAS had 'taken aggressive steps to compete with AirAsia'⁶¹ by undertaking two main projects in its strategies to compete with AirAsia: the 'Project Riesling' and the establishment of a 'MAS USD100million War Chest by MAS' to 'mitigate the impact of a likely price war with AirAsia'.⁶²

Despite these strategies, MAS proceeded to conclude the agreement that aimed to explore the feasibility of a strategic cooperation through the redeployment of capacity to match demand, to coordinate business activities based on customer segmentation and comparative advantage, to coordinate routes to avoid unsustainable pricing, and to ensure gains of equal proportion.⁶³ There were also proposals to redeploy seventeen MAS routes to AirAsia, and for the relocation of forty-four other overlapping routes.⁶⁴ From AirAsia minutes of meetings, it was discovered that the collaboration was aimed at deterring

the Competition Commission's evidence and submission. Other reliefs sought were for necessary and consequential directions be given, costs of an occasioned by the application be provided for and such other reliefs as the court thinks fit. See High Court Judgment on *MAS/AirAsia*, para 1 and 2.

⁵⁷ High Court Judgment on *MAS/AirAsia*, paras 65-67.

⁵⁸ High Court Judgment on *MAS/AirAsia*, paras 68-71; Note that in para 68, the word 'conjunctive' is used. A conversation with a MyCC officer revealed that it was a type error. The subsequent explanation also resonates a 'disjunctive' approach.

⁵⁹ High Court Judgment on *MAS/AirAsia*, para 72.

⁶⁰ *Ibid*, para 73.

⁶¹ *Ibid*, para 75.

⁶² Project Riesling contained MAS strategy to establish Firefly as a low-cost carrier to compete with AirAsia and to have Firefly assist MAS with its unprofitable routes and routes which faced intense competition (the Batman and Robin Plan), and to focus on the AirAsia routes with the highest frequencies and profitability and to adopt a cannibalistic strategy by price differentiation (the Darth Vader Plan). The second project, on the other hand, would require MAS to continue to compete directly with AirAsia and a sum of USD100 million was reserved as part of the 'war chest' to mitigate any likely price war between them. The competition between these two carriers was also publicly acknowledged in Parliament during the debate on the Competition Bill 2010 by the House of Common. See Hansard of Parliament dated 20 April 2010, p 145 and High Court Judgment on *MAS/AirAsia*, para 76.

⁶³ High Court Judgment, paras 78-79.

⁶⁴ High Court Judgment on *MAS/AirAsia*, para 79.

irrational competition with MAS and to achieve substantial cost savings.⁶⁵ Therefore, Clauses 1.2, 5 and 7 of the CCFA strongly suggest the parties' intention to eliminate competition between them as they focus on their respective market segments and there would be no overlapping routes between the carries.⁶⁶ This would give the parties the freedom to operate their own routes as areas without competition and thus to be able to control the pricing of airline business to the disadvantage of the consumers.⁶⁷ In its entirety, the Court viewed the agreement as having the object of restricting, preventing or distorting competition, and thereby infringing section 4(2) of the Act.

Further, the Court viewed Section 4(2) of the Act as an express provision which contains a presumption of law enacted by Parliament, the purpose of which is to facilitate the finding of an infringement.⁶⁸ It is obligatory to invoke the deeming provision once the prerequisite facts have been established. It was clear therefore, the object of the agreement was to share the market and that the deeming provision was applicable. As a result of this, the infringement under section 4(2) was held to have been proven.⁶⁹ The HC clarified that a market definition is not a requirement in applying the deeming provision. By imposing this as a requirement, CAT had taken into account irrelevant considerations and misapplied the Act and had put words into the clear wordings of the statute that had the effect of usurping the powers of Parliament.⁷⁰ Additionally, the Court stated that the deeming provision is applicable in all sectors of the economy, and the airline industry is no exception once the prerequisite facts have been established. Thus the CAT's statement that a simplistic use of the deeming provisions in the airline industry is improper was misplaced.⁷¹

⁶⁵ Ibid, para 80.

⁶⁶ Ibid, para 82.

⁶⁷ Ibid, para 83.

⁶⁸ The HC in this regard referred to the Malaysian cases of Supreme Court case of *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 419 in which the words 'shall be deemed' were interpreted as 'shall be regarded' and the case of *Attan Ghani v PP* [1970] 2 MLJ 143 in which the Court held that it is obligatory to invoke the deeming provision once the prerequisite facts have been proven. The Court also referred to the case of *Muhammad Hassan v PP* [1991] 2 MLJ 493 in which the Court regarded the deeming provision as a compelling presumption which must be invoked upon proof of certain facts. The last two cases are criminal cases.

⁶⁹ High Court Judgment on *MAS/AirAsia*, para 90.

⁷⁰ Ibid, paras 93-94.

⁷¹ Ibid, paras 97-98. The Court in this regard was guided extensively by the provisions of the MyCC Guidelines on Anti-Competitive Agreement particularly paragraphs 1.1, 1.2, 2.14, 2.15, 3.25, 3.26, 3.27.

On the issue of the legal status of the agreement, it was held that CAT had failed to consider the definition of ‘agreement’ under Section 2 of the CA 2010, which clearly includes any agreement, regardless of its legality, and holds that the most important element required to find an agreement anti-competitive is that it has the object prohibited under Section 4(2).⁷² Simply having a clause on antitrust analysis is not sufficient to prevent the object of an agreement from being anti-competitive.⁷³ In its judgment, the Court found many instances that proved the agreement to be unconditional and enforceable; the timelines specified in the agreement which needed to be adhered to; the Supplemental Agreement that shows the enforceability of the agreement and the share swap deal that shows the agreement had, to a certain extent, been implemented.⁷⁴ The HC was also of the view that the withdrawal of flights was clearly consistent with Clause 5 of the agreement and supported the MyCC’s contention that the agreement was anti-competitive. Although MAS contended that the decisions to withdraw the routes was purely based on economic reasons, it did not alter the fact that it fulfilled the terms of the agreement.⁷⁵ The Court concluded that the CCFA had infringed Section 4(2) of the Act, and that the Appellants were not able to take advantage of the exemption under Section 5 of the Act. It also found that the penalty imposed is proportionate with the severity of the offence.⁷⁶

7.4 Analysis

7.4.1 The concept of ‘agreement’

The most controversial issue in CAT’s judgment was the approach it took in defining an agreement. From the perspective of competition law, the concept of an agreement is unique. It is a settled jurisprudence that the concept of agreement ‘arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way.’⁷⁷ CAT disregarded the definition and claimed that the agreement was conditional, unenforceable and was never implemented. Obviously CAT places great importance on the legality of the agreement as defined by the law of contract rather than ‘collusion’ between the parties in the sense of competition law. This is clearly

⁷² Ibid, paras 106-107.

⁷³ Ibid, para 108.

⁷⁴ Ibid, para 112.

⁷⁵ Ibid, para 110.

⁷⁶ Ibid, paras 113-114.

⁷⁷ Case 41/69 - *ACF Chemiefarma v Commission* [1970] ECR 661, para 112.

an error in interpretation by CAT, as Section 2 of the Act includes a non-legally enforceable agreement as a 'valid agreement'⁷⁸ and did not provide any reason for the inapplicability of the definition to this case. The contractual approach taken undoubtedly contradicts the basic and fundamental concept of agreement under competition law. According to Mervyn, the implication of requiring the establishment of the agreement in the contractual sense is that it shuts down any discussion of enforcement against a more expansive scope of anti-competitive agreement, such as tacit collusion.⁷⁹ As far as the issue of implementation is concerned, the fact that an agreement was never implemented is irrelevant so long as it is found that the agreement was intended to pursue a restrictive object.⁸⁰ The Commission in the case of *Brasseries Kronenbourg, Brasseries Heineken (French Beer)*⁸¹ held that the facts that some details of the armistice agreement were to be negotiated at a later stage and that the agreement was never implemented, do not in any way affect the existence of an agreement.⁸²

The HC held that the CAT had misinterpreted the agreement. The HC pointed out how the CCFA could be regarded as a valid agreement by its adherence to the timelines and the making of the Supplemental Agreement. One may argue that although the HC's judgment is most welcomed, the Court should have clarified the concept of agreement more precisely from a competition law perspective, by not emphasizing the validity of an agreement but showing how an informal agreement, particularly with regards to the concerted practices, could have restricted, prevented and distorted competition.

In the airline industry, the same concept of agreement is applicable. As discussed in the previous Chapter 6, the question of the existence of an agreement in the airline industry is almost never in doubt because, in such a regulated industry, cooperative arrangements between airlines are formally concluded. In the EU, the question on the form of agreement may only be raised when the Commission needs to determine whether a particular agreement falls within the ambit of Article 101(1), or to be treated as a full function joint

⁷⁸ Section 2 of the CA 2010.

⁷⁹ Mervyn (n 214) ch5, p15.

⁸⁰ Case COMP/C.37.750/B2 *Brasseries Kronenbourg, Brasseries Heineken (French Beer)*, Commission decision dated 29 September 2004, para 65.

⁸¹ *French Beer*.

⁸² It was found that the 'armistice' agreement in this case 'had as its object the restriction of competition, in particular by requiring a freeze on acquisitions and by establishing equilibrium between the parties' distribution networks.' *French Beer*, para 64 and 65.

venture under the scope of EUMR. Several other cases have also shown that airlines could be liable for their anti-competitive conduct without a 'legal' agreement being concluded; that airlines are susceptible to involvement in concerted practices. In the case of *SAS/Maersk Air*,⁸³ the airlines' secret collusion to share the market was held to be anti-competitive and therefore prohibited under the competition law regime. The Commission not only investigated the routes agreed by the airlines in a CSA entered by the parties, but also the routes secretly agreed between them in a broader arrangement outside the agreement. The Commission discovered a 'hidden agenda' that indicated the parties' agreement to determine specific routes to be operated in an attempt to avoid price competition.⁸⁴ The cases of Airfreight and Freight Forwarders also show that airlines are inclined to involve themselves in secret collusion by coordinating their pricing behaviour.⁸⁵ In a case involving a Malaysian airline, a penalty of \$6 million (Australian dollars) was imposed by the Australian Federal Court on a MAS subsidiary, Malaysia Airlines Cargo Sdn Bhd, for its involvement in an international air freight price-fixing cartel between 2002 and 2006.⁸⁶ This was following a proceeding instituted by the Australian Competition and Consumer Commission (ACCC) against MAS in 2010 for its participation in fixing fuel and security surcharges and customs fees relating to air freight carriage from Indonesia, with fourteen other international airlines including BA, Air France, KLM, Qantas, Singapore Airlines, Thai Airways and Emirates.⁸⁷ One could possibly argue that the parties in *MAS/AirAsia* could have emphasised the importance of these competition law cases as far as the agreement is concerned.

Some commentators argued that parties in *MAS/AirAsia* could have been involved in a concerted practices.⁸⁸ This was based on the withdrawal of flights that took place subsequent to the CCFA. Both parties were engaging with each other, particularly through the JCC, and both were active in the market prior to and at the time of the conclusion of the CCFA. There was also proof from the minutes of meetings attended by the parties.

⁸³ *SAS/MAERSK Air*.

⁸⁴ *Ibid*.

⁸⁵ These cases were discussed in Chapter 5.

⁸⁶ This is confirmed during the interview made with officers of MAS on 21 August 2017 (See Appendix 5).

⁸⁷ See <<https://www.accc.gov.au/media-release/malaysia-airlines-cargo-sdn-bhd-penalised-6-million-for-price-fixing-cartel>> and <<https://www.accc.gov.au/media-release/accc-appeal-upheld-in-air-cargo-case>> accessed on 24 April 2019.

⁸⁸ Nasarudin Abdul Rahman & Haniff Ahamat, 'Appeal Decision on MAS-AirAsia Case: Case Commentary', *The Law Review*, Sweet & Maxwell (2016), p425.

Before the signing of the CCFA, it was stated in MAS Special Board of Directors' Meeting dated 9 August 2011 that:

“(iv) MAS and AirAsia competition leads to unsustainable pricing and the collaboration solution is MAS and AirAsia to coordinate on domestic routes. AirAsia would fly low yield routes while MAS shifted to high yield routes

(v) a proposal for 17 MAS routes to be deployed to AirAsia. The other proposal is for route reallocation, in particular the 44 identified overlapping routes. This will result in significant synergy or financial gain.”⁸⁹

It is submitted that the element of causal connection is established in a concerted practise and it is not required to be presumed in an agreement. The principle on the causal connection was established in the case of *Commission v Anic Partecipazioni Spa (Anic)* where the ECJ held that ‘a concerted practice implies, besides undertakings’ concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.’⁹⁰ Further, unless the parties could adduce evidence to prove otherwise, ‘there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market...’.⁹¹ MyCC has therefore rightly rejected the argument submitted by MAS that it was an independent action because, in the light of the market position at that time, many routes that were previously operated by MAS and Firefly were seen to be taken up by AirAsia. There were concerted actions by the parties in the market, which constituted such an obvious coincidence that the argument by MAS was not acceptable. Both the existence of an agreement and the concerted practices were discussed in *Anic* where the ECJ held that, due to the complex infringement involved, it is possible to characterise the conduct of the parties as one that falls within the ‘agreement’ and the other a ‘concerted practise’, as the aim of Article 101(1) is to catch different forms of coordination and collusion between undertakings.⁹² This dual categorisation did not alter the burden of proof for each of the types of the alleged infringement as all forms of coordination under Article 101(1) are prohibited, regardless of their effect when they have an anti-competitive object.⁹³ Further,

⁸⁹ High Court Judgment on *MAS/AirAsia*, para 79.

⁹⁰ *Anic*, para 118.

⁹¹ *Anic*, para 121. See also *T-Mobile* para 53 and *Hulz* para 161-163.

⁹² *Anic* para 131.

⁹³ *Anic*, para 123.

the parties still have the right to challenge the findings based on the constituent elements of the various forms of the infringement.⁹⁴ Nevertheless, the issue of a concerted practise was not raised and given that this is the most difficult area in competition law, perhaps there was reluctance to apply the concept of concerted practise by the authorities.⁹⁵ Some have suggested that, as the case was the first of its kind, the CAT may have been reluctant to conclude the existence of the agreement based only on indirect and circumstantial evidential.⁹⁶

7.4.2 The determination of object restrictions

7.4.2.1 The determination of object or effect restriction

The approach taken by CAT in determining the object of the agreement is also questionable. CAT applied the rule of construction and referred to the cases decided based on contract law principles. CAT was guided by *ICS Case*,⁹⁷ in which the Court, in applying the rules of construction, disregarded the background of the previous negotiations of the parties and their declarations of subjective intent from the law.⁹⁸ The danger of applying the contract rules of construction in a competition assessment is that the interpretation is confined within the four corners of the agreement, and the importance of the factual background surrounding the case is ignored. Whereas, in determining an object restriction, it may be necessary to consider not only its express terms but also the behaviour of the parties.⁹⁹ The EU Guidelines on Article 101(3)¹⁰⁰ provides a clear guidance on the factors to be considered in determining the object restrictions, one of which is the actual conduct and behaviour of the parties in the market. This leads to the need to examine 'the facts underlying the agreement and the specific circumstances in which it operates,' because 'the way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.'¹⁰¹ Clearly the use of the rule of construction runs counter to the notion of object restriction.

⁹⁴ *Anic*, paras 133-136.

⁹⁵ Nasarudin & Hanif (n 8) ch3, p42 whereby the author acknowledged that concerted practise is the most difficult area in competition law and its application in Malaysia remains to be seen.

⁹⁶ Mervyn (n 214) ch5, p15.

⁹⁷ *Ibid*.

⁹⁸ As restated in CAT Decision on *MAS/AirAsia*, para 100.

⁹⁹ Jones & Sufrin (n 11) ch2, p194.

¹⁰⁰ Guidelines on Article 101(3), para 22.

¹⁰¹ Guidelines on Article 101(3), para 22.

The CAT also emphasized the importance of the parties' mutual intention in determining the object of the agreement, and referred to several contract law cases, including the *Tan Tien* and *ICS*. The issue to be determined in *Tan Tien*¹⁰² was whether the agreement entered into by the parties for the sub-sale of a car was a hire purchase agreement or a Bill of Sale under the Malaysian Bills of Sale Ordinance 1950.¹⁰³ In its decision, the Federal Court stated that it was important to determine the true rights and interests of the parties by looking at the real nature of the agreement and held that the agreement was a Bills of Sale.¹⁰⁴ Further, *ICS*¹⁰⁵ involved the interpretation of a contractual document within an investment business. The House of Lords had to determine whether the investors' rights arising out of the transaction against the financial advisor had been assigned to the Investors Compensation Scheme Ltd (ICS) by virtue of a claim form signed by the investors and provided by the ICS. The House of Lords in this case held that the claims, damages and compensation had been validly assigned to the ICS, and that such claims could be maintained by ICS and not the investors. Relying on these cases the CAT found that the intention of the parties was simply to explore the possibilities of collaboration and not to share the market between them. Clearly, these cases did not involve competition issues and no economic analysis was required as they were decided purely according to contractual principles.

It is indeed important to ascertain the intention¹⁰⁶ of the parties in the agreement in order to determine its object. This must be determined objectively,¹⁰⁷ but it must be assessed within the legal and economic context. In the case of *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission*¹⁰⁸ the Commission stated that 'the object of an agreement must be determined by reference to the aims objectively pursued by that agreement as they appear to an observer, in the light of the economic context in which the agreement must be applied.' The intention is not an essential criterion and is not determinative in finding the object restriction, although it can be taken into account. The Court in the case *IAZ International v Commission (IAZ)*¹⁰⁹ stated that 'the

¹⁰² *Tan Tien*.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ *ICS*.

¹⁰⁶ Case 41/59 - *ACF Chemiefarma v Commission*, para 124.

¹⁰⁷ Jones & Sufrin (n 11) ch2, p194; See also Okeoghene Odudu, 'Interpreting Article 81(1): Object as Subjective Intention' (2001) 26 *European Law Review* 60.

¹⁰⁸ Cases 29/83 and 30/83, p1695.

¹⁰⁹ Cases 96/82—*IAZ International Belgium NV v Commission (IAZ)*, p3390.

intention of the parties and the actual consequences of the agreement, decision or concerted practice may also be relevant. However, the two parties need not have the intention of restricting competition.’ In *General Motors BV v Commission General Motors*),¹¹⁰ the Court held that ‘it is true that proof of that intention is not a necessary factor in determining whether an agreement has such a restriction as its object,’ but ‘there is nothing to prohibit the Commission or the Community courts from taking that intention into account.’ In the absence of express terms, the implementation of the agreement and the conduct of the parties may reveal a restriction of competition by object.¹¹¹ Had the CAT based its assessment on this concept of intention, it would have not stopped at just evaluating the intention within what is stated in the agreement, but would have considered the other factors. The outcome of the assessment would have also been different. Most importantly, the CAT missed one crucial point at this stage; ‘the legal and economic context’. This settled concept of intention clearly conflicts with the manner in which the intention is ascertained under the contract law principles.

In contrast, the HC gives considerable weight to the terms of the agreement and its factual background in finding an infringement under section 4(2).¹¹² The HC held the clauses of the agreement strongly suggest that competition would be highly likely to be eliminated, thus giving the parties freedom to operate without competition and so dictating prices of airline services to the disadvantage of consumers.¹¹³ The Court also took into account the position of the parties in the market as direct competitors and the strategies undertaken by each of them to compete with each other prior to the agreement. These formed the basis of the Court’s judgment when it found the agreement to have an object that restricts, prevents or distorts competition, and thus in breach of section 4(2) of the Act.

7.4.2.2 The standard of analysis and the deeming provision

The CAT found that MyCC failed to provide any reason or analysis for the finding of infringement and that a proper market definition should have been carried out.¹¹⁴ It was also decided that the object restriction cannot be deemed to be significant when it involves

¹¹⁰ Case C-551/03P [2006] ECR I-3173 (*General Motors*), paras 78-79.

¹¹¹ Guidelines on Article 101(3).

¹¹² High Court Judgment on *MAS/AirAsia*, para 73.

¹¹³ *Ibid*, para 83.

¹¹⁴ CAT Decision on *MAS/AirAsia*, para 89.

the airline industry.¹¹⁵ The decision provided no guidance as to the appropriate standard to be used in the case. It only concluded that there must be 'a proper assessment and evaluation' carried out which must be based on 'any other documentary evidences'. It is submitted that, the standard applied in determining an object restriction has always been subject to two main issues: whether a more analytical approach is required or whether there is need for an effect analysis to be carried out.

As we have seen, Section 4(2) of CA 2010 deems certain conducts in a horizontal agreement to be anti-competitive and therefore prohibited. Once an object restriction is established, it is deemed to significantly restrict, prevent or distort competition, thus excluding legally the need to prove the 'significant restrictions' on competition.¹¹⁶ It also disregards the need to have a market definition.¹¹⁷ The issue here is, therefore, whether a more analytical analysis is required apart from what was carried out by MyCC. It can be seen from the MyCC's decision that some analysis has been carried out on the agreement. MyCC's decision was based on the clauses of the CCFA which clearly holds that the objective intention of the parties was to share the market and the JCC that aims to implement the joint venture and become a platform for a decision-making process between the parties. MyCC also considered the position of the parties in the market as direct competitors, and the withdrawal of flights. MyCC had also analysed the likely effect of these clauses on competition by stating that the sharing of the market would eliminate competition between MAS and AirAsia, thus granting them the freedom to dictate higher prices for their aviation services. This would eventually have a detrimental effect on consumers.¹¹⁸ It can therefore be reasonably submitted that MyCC had considered the precise purpose of the agreement in its 'legal and economic context,' although it was carried out rather briefly. This approach seems to be in tandem with the requirement of the deeming provision which absorbs the need to have 'significant restrictions' and the market definition. Some may also argue that MyCC has conducted more than the legally required analysis under the Act.¹¹⁹

¹¹⁵ Ibid, para 90.

¹¹⁶ The significant restrictions are assessed based on the safe harbour rule as contained in the MyCC Guidelines on Anti-Competitive Agreement, para 3.4. As discussed earlier, the requirement of 'significant restrictions' under CA 2010 is equivalent to the concept of 'appreciability' under Article 101(1) of the TFEU that uses the *De Minimis Rule*.

¹¹⁷ MyCC Guidelines on Market Definition, paras 1.9-1.10.

¹¹⁸ MyCC Decision on *MAS/AirAsia*, para 58.

¹¹⁹ Mervyn (n 214) ch5, p8.

On the issue of whether an effect analysis should have been conducted, assuming that the object restriction had been rightly established, it can be argued therefore that it is legally unnecessary as to do so would negate the purpose of having the deeming provision in the first place. It would also seem to encroach on the division established for the standard of proof between the object and effect restrictions discussed in *STM*. Moreover, in cases involving object restrictions, such as market sharing and price fixing, the principle seems to be settled that they amount to ‘hard core’ restrictions and challenges to such findings may not be possible.¹²⁰ In *GlaxoSmith*, the ECJ overruled the GC’s decision which found that a parallel trade did not by itself establish a presumption of having an anti-competitive object and required further analysis to determine whether the effects of the agreement constituted a restriction on competition to the detriment of final consumers.¹²¹ The ECJ held that, agreements aimed at prohibiting or limiting parallel trade have, in principle, the prevention of competition as their object;¹²² therefore, ‘by requiring proof that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object and by not finding that that agreement had such an object, the Court of First Instance committed an error of law’.¹²³ This case confirms that an effect analysis has no place in object restriction cases once it has been established that the agreement has its object, which restricts, prevents or distorts competition. Furthermore, if the legal and economic analysis were to be too extensive, there is a risk that it might turn the object analysis into an effect analysis thus undermining the object-effect distinction.¹²⁴ One important observation that can be made from the debates surrounding the issue on the object and effect analysis is that, the most controversial cases have concerned vertical agreements, which are ‘by their nature, often less damaging to competition than horizontal agreements’.¹²⁵ Given that the CCFA entered into by MAS and AirAsia was a purely horizontal agreement entered into by direct competitors, the principle raised in *GlaxoSmith* is more relevant to confirm the finding of the object restriction.

It is also noted that the controversy around object analysis seems to have been put to rest, since the judgment in *Cartes Bancaires*, in which the ECJ overruled the decision of

¹²⁰ Whish & Bailey (n 1) ch1, p123.

¹²¹ *GSK*, para 42.

¹²² *GSK*, para 59; The ECJ referred to the case of *Miller International Schallplatten v Commission* [1978] ECR 131, para 7 and 18 and *BMW Belgium and Others v Commission* [1979] ECR 2435, para 20-28 and 31.

¹²³ *GSK*, para 64.

¹²⁴ Whish & Bailey (n 1) ch1, p126; See also Opinion of AG Kokott in *T-Mobile Case-08/08*, para 45.

¹²⁵ *Allianz*, para 43.

the GC which found certain pricing measures adopted by the CB Group to constitute an object restriction. The ECJ held that the GC had erred in law in characterising the measures as a restriction by object, and referred back the case to the GC to ascertain the restrictions based on effect analysis.¹²⁶ It was also held that the concept of object restrictions should be interpreted restrictively.¹²⁷ This case is important as it confirms the long established principle on object restriction cases that they must be confined only to objects that reveal sufficient degrees of harm, and should not be expanded unduly. Following the stricter approach, one may argue that the analysis carried out by the MyCC was too simplistic and straight forward, as no further examination was made of the ‘harm’ that the agreement could have caused to the competition by its exclusive reliance on the wordings of the agreement and the facts surrounding it. It should be noted, however, that the *Cartes Bancaires*¹²⁸ involves a complex market, whereby the banking services in question involved a two-sided market and required further effects analysis to determine the actual impact on competition, whereas in *MAS/AirAsia*, it is clear from the airlines industry that such an arrangement would naturally create market sharing between the two competing airlines. Although the judgment in *Cartes Bancaires* is welcomed, *MAS/AirAsia* actually falls within the ambit of cases in which the obvious object reveals a sufficient degree of harm to competition.

The CAT stated that ‘a simplistic use of the deeming provision upon airline business may not be proper’ because there are ‘widespread practices among airlines to undertake alliance and code sharing as well as maintenance of aircraft on behalf of others’.¹²⁹ It is submitted that, if the CAT required a different standard of analysis to be applicable to the airline industry, the EU competition cases involving the airlines have not shown that there must be a different standard applicable in the airline industry.¹³⁰ For that matter, there has been no judicial precedent, nor a legal requirement to show that a different standard of analysis is applicable to different sectors of the economy. In *GlaxoSmith*, the ECJ accepted the opinion of the Advocate General that the prohibition of an agreement aimed at limiting parallel trade applies to the pharmaceutical sector, thereby rejecting the GC’s argument that an effect analysis is required considering the specific characteristics of the

¹²⁶ *Cartes Bancaires*, para 95-99.

¹²⁷ *Ibid*, para 58.

¹²⁸ *Ibid*.

¹²⁹ CAT Decision on *MAS/AirAsia*, para 90.

¹³⁰ These cases are discussed in detailed in Chapter 6.

pharmaceutical sector.¹³¹ Further, it can be strongly inferred from the EU competition cases that each case has been analysed differently according to the respective nature and characteristics of the business involved. The Court in *Consten Grundig* considered and assessed each of the situations arising from the implementation of the agreement differently.¹³² This truly reflects the established concept of ‘legal and economic’ analysis.

In this regard, as the first level decision-making and enforcement authority, it may be argued that MyCC must at least provide more comprehensive ‘justifications,’ ‘rather than’ ‘reasoning’ on how the restrictive object is found to be restrictive.¹³³ They could have referred to the established EU competition cases that examined the distinction between the object and effect analysis, and cases that decided certain business conduct in the market, such as market sharing and price fixing, to be highly anti-competitive from the perspective of competition law. The cases of *STM*, *ENS*, and *BIDs* provide a strong basis for these issues, and, by highlighting the legal and the economic reasons supporting the Court decisions in them, drawing the comparable important elements, and applying them to the present case would provide a more solid and concrete decision that the parties would be more appreciative of. Secondly, the nature and characteristic of the industry, such as the importance of the routes and the network, could at least be introduced, and, most importantly, the various types of airline cooperation agreement should be discussed and considered. In this regard, the EU cases involving the airline industry would contribute highly to the understanding of the nature of the airline cooperation agreements. This would necessarily require more analysis, particularly a more analytical approach established in the EU cases cited above, but not to the extent of a full-fledged effect analysis. A more detailed discussion of the object restriction in the airline industry is provided below.

7.4.2.3 Object restriction in the airline industry

Based on the analysis of cases involving airlines in the EU,¹³⁴ in most cases the object of the agreement was found to be obviously restrictive because these areas of cooperation were normally expressly stated in the cooperation agreement, thus making the

¹³¹ *GlaxoSmith*, para 45, 60.

¹³² *Consten Grundig*, p240.

¹³³ It is observed that since the *MAS/AirAsia* case, the decision by MyCC has included a more analytical approach in its decision. See MyCC Decision on *Seven Tuition and Daycare Centres* (Case No. 700.1.1.43.2017).

¹³⁴ The analysis of the cases is presented in Table 4, Appendix 2 and is discussed in Chapter 6.

determination of the object restriction less complicated. The obvious objectives of the parties would effortlessly meet the requirements for the hard core restrictions established in *ENS*.¹³⁵ In *SAS/Maersk Air*,¹³⁶ SAS and Maersk were found to have infringed Article 101(1) of the TFEU in a market-sharing agreement. The Commission found a document containing a market sharing arrangement, in which both airlines agreed not to operate on certain routes was found. Generally, SAS would agree not to operate on Maersk Air's routes out of Jutland, and Maersk agreed not to operate on SAS's routes from Copenhagen. Moreover, specifically, on individual routes, Maersk would be compensated for ceasing to fly between Copenhagen and Stockholm, while SAS would stop operating between Copenhagen and Venice, with these routes being taken over by Maersk Air.¹³⁷ In its competition assessment, the Commission decided that 'by their very nature, these market-sharing agreements have the object of restricting competition,'¹³⁸ and therefore came under Article 101(1) of TFEU. Although having the restrictive object is sufficient, the Commission further found that the agreements had the actual and potential effect of significantly restricting competition.¹³⁹ In discussing whether the agreements could be exempted under Article 101(3) of the TFEU, the Commission took the view that the market-sharing agreements are the clearest example of 'hard core' competition restrictions and therefore could not benefit from an individual exemption under Article 101(3).¹⁴⁰ A fine was imposed on each of the parties.

This case seems to resemble the facts of the *MAS/AirAsia* case, except that, in the latter case, Clause 5 of the CCFA clearly states the intention of the parties to share the market.¹⁴¹ In *SAS/Maersk*, the market-sharing arrangement was not stated clearly in any of the notified agreements, but was detected later, upon further investigation by the Commission. It is clear that the Commission emphasized the severity of market-sharing activity in the airline industry. It is also observed from the case that the Commission rejected the parties' arguments that their withdrawals were unilateral decisions, as the facts suggested otherwise and the parties did not object to these facts.¹⁴² Hence, in deciding

¹³⁵ *ENS*, para 13.

¹³⁶ Case COMP.D.2 37.444 .

¹³⁷ *Ibid*, para 69.

¹³⁸ *Ibid*, para 71.

¹³⁹ *Ibid*, para 72.

¹⁴⁰ *Ibid*, paras 76-77.

¹⁴¹ As restated in MyCC Decision on *MAS/AirAsia*, para 7.

¹⁴² *SAS/Maersk*, para 64.

the case of *MAS/AirAsia*, it is reasonably submitted that the approach taken by the MyCC is in conformity with the competition assessment established by the EU in the airline industry. Some may argue, however, that the MyCC's approach was rather formalistic, given the obvious objective of the agreement to share the market, but MyCC should have been able to at least have acknowledged the economic context in which the agreement was to have operated and have taken a more detailed and rigorous legal and economic analysis.

The *SAS/Maersk* case involved a hard core cartel, and it can be seen from the decision that the case did not benefit from the exemption under Article 101(3). The other cases involving hard core cartels and where fines were imposed by the Commission are *Airfreight* and *Freight Forwarders*.¹⁴³ In cases where object restrictions were found in the 'agreement' rather than through a 'cartel', the Commission decided that they still amount to an infringement of Article 101(1) if the object is by very nature harmful to competition, and the parties' application under Article 101(3) and their proposed commitment were mostly accepted as a form of remedy to address the competition concerns raised by the Commission. In *Continental/United/Lufthansa/AirCanada*,¹⁴⁴ the parties extensively cooperated on the key parameters of airline competition, including capacity requirements, joint revenue management, production shares and pricing and functions.¹⁴⁵ The Commission, in its preliminary view, found the agreement to be 'by its very nature aimed at, and had the potential of, restricting competition' and, despite cooperation on the key competition parameters, the cooperation completely eliminated competition.¹⁴⁶

One important observation made after the analysis of the cases is that, in every competition assessment, the assessment was not only made on the determination of the object or effect restriction, but a full and comprehensive assessment on the economic

¹⁴³ This is discussed in section 7.4.1, Chapter 7.

¹⁴⁴ Commission Decision dated 23/05/2013, Case COMP/AT.39595 - *Continental/United/Lufthansa/AirCanada*.

¹⁴⁵ Ibid, para 36.

¹⁴⁶ Ibid, para 36, 37 and 54. The case an agreement with the concept of 'metal-neutrality' as discussed in Chapter 6 where the Commission found the whole concept to be in conflict with the Treaty's inherent concept of competition since it 'substituted competition with full cooperation for the risk of competition'. Therefore the agreement was found to be restrictive of competition by object. It is important to note that the Commission went a step further by examining the actual and potential anti-competitive effects of the agreement on certain identified routes, and concluded that it also restricted competition by effects. See also *AirFrance/KLM/Alitalia/Delta* Commission Decision dated 12/5/2015, para 40, Commission Decision dated 5.7.2002 - *AuA/LH* Case COMP/37.730, para 76 and Commission Decision dated 7.4.2004 - *AirFrance/Alitalia* Case COMP/38.284/D2, para 129.

efficiencies required under Article 101(3) was also carried out. As a result, in order to remedy the competition concerns raised by the Commission in the economic assessment, the decision would also include the proposed and finalized commitments of the parties. The commitments would be published and reviewed, not only by the Commission, but also other interested third parties including actual and potential competitors. The final decision to approve the commitments lies with the Commission. The Commission's decisions therefore were very detailed and comprehensive, providing a thorough market definition covering and analysing all routes, hubs and network in question, passenger types and transport substitutes, and both the object and effect analysis. Almost all the agreements assessed by the Commission were granted exemptions, with or without conditions, and with the proposed commitments by the parties. It is submitted that these decisions reflect the complexity of the airline alliances involved and the positive approach adopted by the Commission towards the airline alliances, whereby the economic efficiencies were highly regarded. In this regard, it is strongly suggest that the objective of the competition law in the Malaysian airline industry is of utmost importance. In future cases, MAVCOM has to set out clearly the approach it wishes to take in implementing competition law in the aviation sector as the object of the law has a major bearing on the outcome of the cases. One may argue that these decisions are incomparable with the case at hand as the CCFA did not involve a complex arrangement. Nevertheless, the manner in which the standard of analysis is applied and considered in determining the object restriction in each case is of utmost importance. It provides a highly authoritative guidance for the competition authorities to appreciate and consider.

7.4.2.4 The 'quick look'/truncated rule under the US anti-trust law

Some comparable issues to the object or effect distinction arise in the US under section 1 of the Sherman Act which can provide useful guidance for Malaysian courts. While it is argued that a 'more analytical' approach is to be applied in the EU for the object restriction cases, the comparable approach in the US is the 'quick look' approach that stands in between its 'per se' approach for the object restriction and the 'full analysis' approach for the effect restriction cases. In the case of *NCAA v. Board of Regents*,¹⁴⁷ the Supreme Court held that it would be inappropriate to evaluate the conduct under *per se*

¹⁴⁷ 468 U.S. 85 (1984).

rules, but that it could still be condemned without conducting an elaborate rule of reason analysis.¹⁴⁸ In this case, there was a restriction on the output and price that would have been regarded as ‘naked restraints’ or ‘hard core’ restrictions. The restrictions were on the number of football games that the NCAA member universities could televise, and a guaranteed minimum price agreed between NCAA and a broadcast company for member schools to have broadcast rights. The Supreme Court took a ‘quick-look’ into the business justification proffered for the NCAA’s television plan and concluded it was not legitimate or procompetitive. This ‘quick look’ rule was also applied in the case *Indiana Federation of Dentists*,¹⁴⁹ in which the Supreme Court upheld the decision made by the FTC that the agreement made by the trade association of dentists to withhold x-rays to an insurance company was illegal in circumstances where no market definition was established. In a ‘quick-look’ approach, the court seems to take a further analysis into the anti-competitive conduct but not to the extent of a full effect analysis. It is submitted that this approach may provide an alternative perspective given the controversy surrounding the standard of analysis to be applied in object restriction cases and may be highly considered to be the solution in the context of *MAS/AirAsia* as it requires a further analysis and justification to be provided but not to the extent of a full-effect analysis.

7.4.3 Market Definition

In this case, the HC has confirmed that market definition is not a requirement in applying the deeming provision and by imposing the requirement CAT had considered irrelevant considerations and misapplied the Act. This is the interpretation to be applied in all sectors of the economy, including the airline industry. It is submitted, therefore, that the market does not necessarily need to be defined in *MAS/AirSia* as it involved an object restriction. From its past decisions, it is observed that MyCC did not provide a market definition in all cases involving object restrictions. In its first case, that of *Cameron Highlands Floriculturists Association*,¹⁵⁰ an association of floriculturist was found to infringe section 4(2)(a) by fixing a selling price for flowers. In that case, the market was simply stated as being the ‘floriculture market’ or ‘floriculture industry’. In the case of *Sibu*

¹⁴⁸ Ibid, paras 98-104.

¹⁴⁹ 476 U.S. 447 (1986).

¹⁵⁰ Decision of Competition Commission, Infringement of Section 4(2)(a) of the Competition Act 2010 *Cameron Highlands Floriculturists*, 6 December 2012, (Case No. MyCC/0003/2012(ACA)).

Confectionary and Bakery Association,¹⁵¹ the MyCC merely stated that the market involved was either the ‘confectionary and bakery products in Sibul, Sarawak’ or the ‘confectionary and bakery business in Sibul, Sarawak’. In another case, that of *Ice Manufacturers*, the MyCC defined the market as simply ‘edible tube ice and block ice in Malaysia’.¹⁵² A market definition was, however, conducted in cases involving the determination of effect restrictions under section 4(1) of the Act. Market definition has been defined extensively in *Container Depot Operator* as the ‘market for the provision of IT software that manage the inflow and outflow of empty containers at depots in Penang port’.¹⁵³ It was found that there was significant market power possessed by the enterprise, which provided IT services in a vertical agreement entered into with several enterprises providing logistic services.¹⁵⁴

Nevertheless, in *MAS/AirAsia*, although market definition is not a prerequisite for cases under section 4(2) of the Act, it can be argued that, MyCC should at least have conducted a brief definition of a relevant market in the airline industry, considering the small number of airlines operating in the airline industry. Most importantly, because the state of implementation of competition law in Malaysia is still in its infancy, the parties involved in a dispute need a clear and concrete understanding of the importance of the law and the severe impact that the anti-competitive object or effect has on competition in order to appreciate any views or decisions made. This is equally important for the decision maker so as to ensure that the decision made will not be challenged. MyCC should perhaps have acknowledged the context and examined the aviation market in more detail. Overly easy classification of conduct as coming within categories subject to the deeming provision may result in false positives and this may demand that there is a more detailed examination of the ‘legal and economic context’ of the provision than was perhaps undertaken in this case.

¹⁵¹ Decision of Competition Commission, Infringement of Section 4(2)(a) of the Competition Act by *Fifteen (15) Members of the Sibul Confectionary and Bakery Association*, 12 February 2015, (No.MyCC.0045.2013)

¹⁵² Decision of Competition Commission, Infringement of Section 4(2)(a) of the Competition Act 2010 by *Twenty For (24) Ice Manufacturers of Kuala Lumpur, Selangor and Putrajaya*, 30 January 2015, (No.MyCC.700.20001.2014).

¹⁵³ Decision of Competition Commission, Infringement of Section 4(2)(a) of the Competition Act 2010 by *Container Depot Operators (Container Depot)*, 1 February 2016, (No.MyCC.700.20001.2014)

¹⁵⁴ *Container Depot*, p5. The same approach was also taken in the case of *My E.G. Services Sdn Bhd*¹⁵⁴ in which the relevant market was defined as ‘the downstream market which is the market for the sale of Mandatory Insurances for online PLKS renewal application in Malaysia’. It was found that the enterprise had been abusing its dominant position in the market by imposing different provisions to equivalent transactions with its competitors. However this case deal with the abuse of a dominant power. See Decision of Competition Commission, Infringement of Section 4(2)(a) of the Competition Act 2010 by *My E.G. Services Sdn Bhd*, 24 June 2016, (No.MyCC.700.20001.2014) (MyEG), paras 58 and 69.

In this regard, the Commission approach in providing such a comprehensive market definition in almost all of its competition cases involving airlines should be seriously considered.¹⁵⁵ One must note however, besides the fact that the EU air transport has been fully liberalised and the competition assessment are far more developed and consistent, the Commission has taken a positive approach in dealing with antitrust cases in the airline industry. This has resulted in exemptions being granted to airlines (with approved commitments) which may require a full market definition and analysis to be carried out. Although the conduct here so clearly had a market sharing object and market definition for the analysis of effects did not seem necessary, this practise may be useful and become a best practise but not compulsory in the airline sector in Malaysia.

7.4.4 References to competition law principles and cases

Competition law principles and cases have only briefly been considered by all the competition authorities (MyCC, CAT and HC) in dealing with the case. Considering that EU competition law and its established and settled jurisprudence were largely adopted in the CA 2010, the Act should be interpreted accordingly by drawing upon EU cases dealing with similar issues, only substantial circumstances should justify divergence from EU precedents.¹⁵⁶ It is submitted that, although the decision of the Court in the judicial review proceedings is desirable, there is insufficient reasoning provided from the perspective of competition law. First, apart from the wrong approach taken by the CAT, the Court still resorted to contractual principles constituting a 'valid' and 'legal' agreement, rather than providing instructive guidance on the concept of agreement in the competition regime. Established EU cases dealing with the issues of agreement that could provide important guidance are in abundance. In dealing with the standard of analysis required for the object or effect analysis, it is crucial that the rationale and importance of the distinction made in *STM* be explained. Instead, the Court relied on the literal rule of interpretation and criminal, as well as contract law, cases to confirm the disjunctive nature of the object-effect analysis. While the use of the rule of interpretation is not entirely wrong, it is certainly inaccurate. The distinction is not merely based on the use of the word 'or' but also on the importance of having to start with the determination of the object restriction first, then, in the absence of anti-competitive effects, the effect analysis, as illustrated in *STM*. In interpreting the

¹⁵⁵ Case T-177/04 *EasyJet v Commission*; Case T-2/93 *Air France v Commission*; Case COMP/39596 *British Airways/American Airlines/Iberia*.

¹⁵⁶ Mervyn (n 214) ch5, p1.

deeming provision, the reasons to exclude the ‘significant effects’ and the market definition from the object restriction analysis should be stressed, as well as the need to establish facts relating to object restriction. Finally, on the application of the competition law in the airline industry, it is strongly submitted that the EU jurisprudence be referred to as the implementation of competition law in the aviation sector is far more advanced.

It is also important to note that the reference to EU competition practices comes with limitations. The EU competition cases have been decided on the basis of a ‘single market’ concept as the Treaty’s main objective. As Jones and Sufrin put it, the role of competition law as an instrument of single market integration is crucial to the understanding of EU competition law as it differentiates the law from other competition law jurisdictions.¹⁵⁷ In *Consten Grundig*, a distribution agreement was found to have its object the restriction of competition, on the basis it was incompatible with the objective of the single market.¹⁵⁸ In the case of *GSK*, the ECJ rejected the decision of the GC that the restriction on parallel trade was anti-competitive by effect and not by object because past experience shows that a restriction on parallel trade is contrary to the objective of single market as envisaged in the Treaty and this is a restriction by object.¹⁵⁹ In considering and appreciating the EU cases as a guidance, one must always critically distinguish this particular and unique objective of the TFEU.

7.4.5 The role of MAVCOM and MACA 2015

The next crucial question to be asked at this juncture is whether the outcome would be different if the *MAS/AirAsia* had been decided by the MAVCOM. The salient points of correspondence between the two pieces of legislation, however, are worth examining in answering this question. First, the MACA 2015 adopts a similar deeming provision for the object restriction and the MAVCOM Guidelines on Anti-Competitive Agreements¹⁶⁰ provide a similar process for the standard of analysis required in identifying the object restrictions on competition. The MAVCOM Guidelines expressly state that, if a horizontal agreement is found to have an object that restricts competition, there is a legal presumption that it has

¹⁵⁷ Jones & Sufrin (n 11) ch2, p35.

¹⁵⁸ *Consten Grundig*, p341.

¹⁵⁹ GlaxoSmith, paras 59-62.

¹⁶⁰ MAVCOM Guidelines on Anti-Competitive Agreements published on 19 January 2018.

the object of significantly restricting competition in the aviation services market, even if the combined market shares are low.¹⁶¹ It further states that the effect analysis would only be carried out if the object restriction is not found.¹⁶² It is important to observe at this point, however, that the Guidelines stress the need to examine the combined market shares of the enterprises in the market, although it seems irrelevant for the purpose of determining the object restriction. This may mean that MAVCOM may still conduct a market analysis in order to determine the market shares of the parties as they are not precluded from carrying any market analysis in the object restriction case. This is quite different from MyCC Guidelines on Market Definition, which clearly state that there is no necessity for MyCC to 'precisely define the market'.¹⁶³ Though the principle of the deeming provision is still applicable, an examination or 'quick look' at the market context may have strengthened the finding in this case. There is no decided competition case as yet under the MAVCOM Act 2015¹⁶⁴ so any comparison with CA 2010 is difficult, but it may be argued that the similar wording should lead to the same interpretation.

Secondly, while MyCC Guidelines on Anti-Competitive Agreement focus on the common intentions of the parties to the agreement and the aims pursued in order to establish an object restriction, the MAVCOM Guidelines provide a more 'specific-to-aviation market' criterion that ensure that, besides looking into the intention of the parties and the purpose of the agreement in light of the economic context, MAVCOM will consider the nature of the service and the structure and conditions of the relevant aviation service market.¹⁶⁵ It is within the aviation context that the *MAS/AirAsia* case would be assessed under the MAVCOM Act 2015. It would still be difficult however to see a different outcome to the one determined by MYCC, given the similarity in the wording of the legislation. MAVCOM is also empowered to conduct a market review, meaning a more detailed analysis of the specific services in the industry could be undertaken, which would contribute to a more accurate and appropriate competition assessment. Thirdly, it is specifically mentioned in the MAVCOM Guidelines that it will use the concepts and principles of the domestic, as well as the international, best practices relating to competition law and its

¹⁶¹ Ibid, para 2.11.

¹⁶² Ibid, para 2.12.

¹⁶³ See MyCC Guidelines on Market Definition, para 1.10.

¹⁶⁴ See MAVCOM website at <<http://www.mavcom.my/en/resources/licensing-and-permits/>> accessed on 7 February 2018.

¹⁶⁵ MAVCOM Guidelines on Anti-Competitive Agreement, para 2.9.

development in defining the relevant market.¹⁶⁶ Looking at the international nature of the industry itself, this approach is welcomed. Based on many competition cases worldwide, especially in the EU, there is an abundance of cases that could provide valuable guidance on how competition law is applied to the aviation sector. Finally, as a special body which regulates aviation related matters, MAVCOM is expected to have the necessary skills, competence and expertise specific to the aviation industry. The members of MAVCOM who are appointed by the Minister, after consultation with the Prime Minister, are those who have the 'experiences or have shown the capacity and professionalism in matters relating to economics, finance, aviation, business, administration and law',¹⁶⁷ relevant to the functions of the MAVCOM. Particularly, in assessing any competition cases, the MAVCOM members are expected to better appreciate and evaluate the issues in the context of the aviation industry by having such special knowledge and skills peculiar to the industry. In the *MAS/AirAsia* case, this may be of great importance as one of the issues raised by the CAT was the lack of analysis by the MyCC from the perspective of the aviation industry.

7.5 Conclusion

The analysis of the case reveals several significant legal implications and observations, from the perspective of the competition law generally and its application to the aviation sector, specifically. From the perspective of the competition law in general, although the CA 2010 was drafted largely based on the EU competition law, it includes an important difference whereby certain defined conduct is deemed to come within the 'object' restriction. This has important implications on how the law is implemented and it can be seen from the case analysis above. First, the deeming provision clearly employs the bright-line policy in the object restriction assessment. This could be seen as the legislative intention to provide legal certainty to the identification of conduct which will always infringe the provision. This may be especially important on a developing country jurisdiction which has only relatively recently adopted competition law, such as Malaysia. Greater clarity may be required for the undertakings in the market as to what conduct will always be regarded as in itself detrimental to competition. Object restrictions facilitate proof by the Commission

¹⁶⁶ MAVCOM Guidelines on Market Definition, para 1.4.

¹⁶⁷ Section 5(1)(c) of MACA 2015.

of these most pernicious forms of anticompetitive conduct without the need of establishing effect (which can require considerable resources, expertise, time and cost). While these strong arguments are beneficial in younger and developing jurisdictions, there must be clarity with regards to the circumstances in which the deeming provisions can be invoked and the requirement in the many EU case law especially *Cartes Bancaires*¹⁶⁸ to examine the 'legal and economic context' before an object restriction is established is important.

Secondly, following the bright-line rule, the MyCC has clearly adopted an orthodox approach in finding an infringement under the Act, and in doing so they recognised that the conduct here had so clear a market sharing object that market definition for the analysis of effects did not seem necessary. This serves to clarify to the industry what conduct will always amount to anti-competitive conduct under the Act, especially when the adoption of the competition regime is still new and awareness is still lacking. Importantly, the approach of MYCC was approved by the HC. Overly easy classification of conduct as coming within the categories subject to the deeming provision may result in false positives, however, and this may demand that there is a more detailed examination of the 'legal and economic context' of the provision than perhaps was undertaken in this case. As a developing nation with little experience in implementing the law, Malaysia has the opportunity to look for the best practise that suits its needs. In this case, a 'quick look' analysis under Article 1 of the Sherman Act may be adopted rather than a full-scale market definition with the assessment of effects, as to do so would undermine the purpose and object of the provision, which is to punish 'hard core' restrictions. In this way there could have been some acknowledgment that some collaboration between airlines can have efficiency producing outcomes. Thirdly, the case analysis seems to confirm the perception surrounding the object restrictions assessment; the standard of object analysis will always be controversial. Even with the deeming provision, the issue of the appropriate standard of analysis still exists and this proves that each and every case needs a comprehensive assessment peculiar to the facts of the cases.

Fourthly, the approach taken by the CAT reveals its true capacity and capability in handling competition reviews in the country. The CAT's judgment unfortunately shows an inadequate appreciation of the legal principles of the competition law. It also reflects the

¹⁶⁸ *Cartes Bancaires*, p345.

level of expertise employed. There is also little reference to the EU case law. Although, as a developing country, Malaysia needs to develop its own unique model of law that suits its national needs and necessities, given the fact that the Act was drafted mainly on the basis of EU law, the reference to the EU cases as a guidance is still highly required, unless for certain possible unique circumstances that requires it to differ.¹⁶⁹ As the CAT holds a significant role in ensuring the smooth and successful implementation of the competition law in the country, it needs to develop its analytical expertise in order to gain industry support and public trust. The judgment by the HC as the first instance of judicial review of the CA 2010, while fully endorsing the statutory construction and approach of MyCC could perhaps have gone further in its elaboration of the principles of competition law, so that business certainty could be improved in accordance with the objectives of the Act.

From the perspective of the airline industry, although the case was not subject to the MAVCOM Act 2015, the 2015 Act adopts a similar competition provision and it is therefore highly unlikely that the competition assessment would be carried out differently from the CA 2010. Nevertheless, as a specific sector regulator, MAVCOM will be mindful to take account of the specific context of the airline industry market in its decision-making. Given that the Government is still finalising the national aviation policy, the actual policy context for those decisions remains uncertain. The EU competition cases which grant exemptions and allow commitments to remedy the competition concerns, can provide good examples where the line can be drawn between anticompetitive agreements which restrict competition and pro-competitive airline co-operation through alliances. These cases provide useful guidance to the regulation of competition in the Malaysian airline industry. Further, with the specific competition regulations in place, it is hoped that MAVCOM will have the necessary expertise to address more directly aviation-specific competition questions. It will also have the power to carry out a more extensive industry analysis, than that conducted by MyCC, through the power to conduct specific market investigations.

¹⁶⁹ Mervyn (n 214) ch5, p1.

CHAPTER 8 – ABUSE OF DOMINANCE IN THE AIRLINE INDUSTRY

8.1 Introduction

This chapter discusses the abuse of dominance provisions under the EU and the Malaysian competition law that apply to the airline industry. As discussed in the previous Chapter 5, Article 101 of the TFEU applies only to an agreement between two or more undertakings.¹ Unilateral conduct is subject to Article 102 of the TFEU which prohibits undertakings from abusing their dominant position in the market but it is the abuse of a dominant power that is prohibited and not the mere possession of such power. Thus, an agreement may infringe Article 101 and at the same time the behaviour of the dominant undertakings is subject to Article 102.² The ECJ in the case of *Hoffman La Roche*³ held that the fact that an anti-competitive agreement might fall under Article 101(1) and 101(3) does not preclude the application of Article 102. It is also claimed that Article 101 and Article 102 share the same objectives and the Commission is at liberty to choose whether to proceed with the investigation under Article 101 or Article 102 if the issue involves an exclusive requirements agreements by a dominant undertaking.⁴

This chapter starts by introducing the scope and the main elements of the prohibition under Article 102. It discusses the European Commission's Guidance Paper in applying Article 102 in the airline industry. Next, it examines the equivalent legal provisions under the competition legislation in Malaysia, specifically referring to Section 10 of the Competition Act 2010 and Section 53 of the MACA 2015 and their application to the airline industry. The cases of abuse of dominance are analysed where it focusses on the areas of abuse that are most relevant to the aviation industry: discounts and rebates, predatory pricing, refusal to supply and refusal to grant access to essential facilities.⁵ The airline industry possesses certain unique characteristics in terms of its market structure and activities⁶ and as the sector is liberalised, airlines compete vigorously on prices and services. Rebates and discounts are often used to attract air passengers with a view to

¹ See Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383.

² Jones & Sufrin (n 11) ch2, p281.

³ C-85/76 *Hoffman-La Roche & Co AG v Commission* (Hoffman-La Roche) [1979] ECR 461.

⁴ Jones & Sufrin (n 11) ch2, p280.

⁵ Paul Stephen Dempsey, 'Predation, Competition & Antitrust Law: Turbulence in the Airline Industry', p689.

⁶ The special characteristic of the airline industry is explained in the discussion of market power in Chapter 5.

increasing capacity and profit maximisation. Intense price competition, often coinciding with the entrance to the market by low-cost carriers, can lead to the use of predatory pricing by dominant firms to harm other competitors. Dominant firms can also injure or eliminate competitors through a refusal to supply or refusal to provide access to essential facilities. If the dominant firm and airline carrier is also the owner of airport infrastructure it can use its market power to deny access to competing airlines to essential facilities such as airport slots. The competition regulation of airport slots therefore often overlaps with the sector-specific regulation which deals with access to and allocation of airport slots. These instances are considered and examined in detailed in the analysis. Finally, a conclusion is provided at the end of the chapter.

8.2 The prohibition of the abuse of a dominant position under Article 102 of the TFEU

Article 102 prohibits any abuse by one or more undertakings of a dominant position within the internal market in so far as it affects the trade between member states by imposing unfair prices, limiting production, applying dissimilar conditions to equivalent transactions or making the conclusion of a contract subject to unnecessary conditions.⁷ This list of abusive conduct is, however, not exhaustive.⁸ The burden of proof of the infringement relies on the party or the authority who alleges it.⁹ Unlike Article 101, there are no exemption provisions provided for the prohibition on the abuse of a dominant position but that does not preclude the dominant undertaking from pleading a proportionate 'objective justification'.¹⁰ There is also no equivalent *de minimis* threshold as applicable in

⁷ Article 102 of the TFEU states that, 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. Such abuse, may in particular, consists in; (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying the dissimilar conditions to equivalent transactions with other trading parties, thereby placing at a competitive disadvantage; (d) making 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.'

⁸ C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* (Continental Can) [1973] ECR 215; *Tetra Pak International SA v Commission* (Tetra Pak II) [1996] ECR I-5951, para 37; *British Airways v Commission* [2007] ECR I-2331, para 57; *Deutsche Telekom v Commission* [2010] ECR I-955, para 173.

⁹ See Regulation 1/2003, Art 2.

¹⁰ The concept of 'objective justification' is established by the EU Courts. See C-209/10 *Post Danmark A/S v Konkurrenceradet* (Post Danmark I) EU:C:2012:172, para 40. The Court first identified objective necessity and efficiencies as the two grounds of justification.

Article 101. Many of the most controversial Commission decisions have been made under this provision where large fines have recently been imposed on dominant networks in digital markets for exclusionary practices.¹¹ As with Article 101(1), the approach taken by the EU Courts to the identification of abusive conduct has been criticised as formalistic as more emphasis is given to the form and the conduct from which a presumption is drawn rather than analysing the actual effects on the market.¹²

The approach to Article 102 was reviewed in 2004 by the Commission as part of the Modernization of EU competition law¹³ with the aim of introducing a 'more economic approach' to its interpretation.¹⁴ It resulted in the DG Comp Staff Discussion Paper 2005¹⁵ and the Guidance Paper.¹⁶ The Guidance Paper contains principles, rather than a statement of law, in guiding the Commission on deciding when to intervene¹⁷ as the focus has shifted to conduct from a more formal approach to an examination of what some would argue is a 'more effects' based examination of the conduct on consumers and not to protect a less efficient competitor.¹⁸ Although the EU Courts are not bound by the Guidance Paper and view it as merely an administrative instrument to be implemented by the Commission,¹⁹ this does not mean that it does not have any influence on the application of Article 102. It does provide a useful point of reference and in some cases, the EU Courts adopt a stricter approach than that proposed in the Guidance Paper.²⁰ Though some commentators suggest that the difference between the approach taken by the Commission and the EU Courts might raise serious questions regarding legal certainty, one must always remember; the Guidance Paper remains as a set of guidelines for the Commission to set its enforcement priorities. It is clearly stated in the Guidance Paper that the enforcement

¹¹ Whish & Bailey (n 1) ch1, p181-182; See *Microsoft, Intel* and *Google*.

¹² *Ibid.*

¹³ See (n 215) ch3.

¹⁴ Jones & Sufrin (n 11) ch2, p274.

¹⁵ Available at <<http://e.europa.eu/competition/antitrust/art82/discpaper2005.pdf>>accessed on 24 April 2019.

¹⁶ Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/2 (Guidance Paper).

¹⁷ Guidance Paper, para 3.

¹⁸ Guidance Paper, para 20.

¹⁹ See C-23/14 *Post Danmark A/S v Konkurrenceradet* (Post Danmark II) EU:C:2015:651, para 52. The ECJ in *Post Danmark II* explicitly stated that the Guidance Paper is not binding on the national competition authorities and the court.

²⁰ See C-52/09 *Konkurrensverket v TeliaSenora Sverige AB* (TeliaSenora) [2011] ECR I-527 and C-T-155/06 (GC) C-549/10P (ECJ) *Tomra System v Commission*.

priorities are given to the exclusionary abuses rather than the exploitative abuses.²¹ The emphasis on exclusionary conduct is to safeguard the effective competitive process in the internal market rather than to simply protect competitors.²² Therefore, in investigating cases, the priorities are given to cases with the likelihood of conduct that could cause anti-competitive foreclosures that ultimately causing harm to consumers.²³ Exclusionary abuses refer to the conduct that impedes competition by excluding competitors from the market such as exclusive dealings, tying, refusal to supply, exclusivity rebates and bundling whereas exploitative abuses are those which directly affect the consumer, such as excessive pricing.

The prohibition consists of several important elements to be established; the existence of an undertaking, the determination of dominance and collective dominance, the substantial effect on trade between member states and the proof of abuse. Article 102 shares the same concept of undertaking under Article 101 as it concerns an entity that is engaged in economic activities. Public bodies or bodies performing public functions are also subject to Article 102 for as long as the entity is involved in an economic activity.²⁴ There are however several pertinent points to be noted on the application of Article 102 to the public sectors under the EU law;²⁵ a public undertaking with a legal monopoly is still subject to Article 102, Member States have the duty to ensure competition is not distorted²⁶ by not doing anything that could jeopardise the Union's objective such as the giving of immunities to undertakings except to the extent permitted under Article 106(2) of the TFEU,²⁷ that the non-application of competition rules to public bodies entrusted with special

²¹ Guidance Paper, para 2, 5 and 6; See also Jones & Sufrin (n 11) ch2, p257.

²² Guidance Paper, para 6.

²³ Guidance Paper, para 20.

²⁴ Jones & Sufrin (n 11) ch2, p 263.

²⁵ See Whish & Bailey (n 1) ch1, p185.

²⁶ Article 4(3) of the TEU states that, 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

²⁷ Article 106(2) of the TFEU states that. '.... Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'

rights as provided under Article 106(2) must be interpreted narrowly and Member States shall not discriminate in favour of their own state monopolies.²⁸

An important and difficult element to prove under Article 102 is the element of 'dominance'; to prove that an undertaking holds a dominant position in a market. This relates to a firm's market power on a particular market and is not based on the size of the market or firm.²⁹ In *United Brands*³⁰, the ECJ defined 'dominance' as 'economic strength' and the ability to act independently on the market. A 'dominant position' is a 'position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent of independently of its competitors'.³¹ Market power on the other hand is the ability of the firm to profitably charge a higher price above the competitive level for a significant period of time.³² Dominance can be established based on the firm's market shares in a relevant market. This was discussed in the case of *Continental Can*³³ where a two-stage procedure was followed; the relevant market was first defined and the position of the firm which was determined based on its market shares taking into account the competitive constraints faced by the firm (barriers to entry and expansion).

Article 102 will also apply to 'one or more undertakings' if they are in a position of 'collective dominance'. Thus, a single dominant firm could be held responsible on its own or when the dominance is acquired collectively with other undertakings. The concept of collective dominance was first accepted in the case of *Flat Glass* where the GC examined entities which had common economic links to hold a dominant position in the same

²⁸ Article 37 of the TFEU provides that, '1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others. 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States. 3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.'

²⁹ Jones & Sufrin (n 11) ch2, p268.

³⁰ [1979] ECR 461.

³¹ Ibid.

³² The concept of market power is discussed in Section 5.2.1, Chapter 5.

³³ Case 6/72 [1973] ECR 215.

market.³⁴ Although the GC held that the undertakings were found liable under Article 101, it stated that Article 102 could apply to an independent undertaking not within the same corporate group.³⁵ In the case of *Airtours v Commission*, the GC stated that a collective dominant position would exist if the dominant firms in a market 'consider it possible, economically rational, and hence preferable, to adopt on a long lasting basis a common policy on the market with the aim of selling at above a competitive price without having to enter into an agreement or resort to a concerted practise.'³⁶ In this case the GC considered three conditions in finding a collective dominance; the ability of each member of the oligopoly market to know of the other's behaviour where there must be a means of knowing that the others are adopting the same strategy, a sustainable tacit collusion with the incentives not to depart from the common policy and a proof that it is foreseeable that the reaction of current and future competitors as well as consumers would not jeopardise the results expected from the common policy.³⁷ The GC in this case held that the Commission erred in its assessment as it failed to establish the three said conditions and annulled the Commission's decision that found the merger proposed by Airtours was incompatible with the common market and.³⁸ This case was said to be a landmark case and has set a markedly higher evidentiary standard than previously applied by the Commission.³⁹ Some commentators suggest that the GC in this case may have delved too far into the substantial merits of the Commission's assessment, drawn too close an analogy between tacit collusion and an explicit anti-competitive agreement and combined too many aspects of the merger prohibition test.⁴⁰ The case also highlighted that certain features of the airline

³⁴ Cases T-68, 77 and 78/79.

³⁵ *Flat Glass* also established two types of collective dominance; 'oligopolistic' in which the collective dominance arises in a highly oligopolistic market where the collusion is tacit and 'non-oligopolistic' where the collective dominance arises through the express collusion between dominant undertakings based on their commercial or contractual or structural links. The condition of 'structural links' is further discussed in *Genco v Commission*, Case T-102/96, [1999] ECR II-753, para 273-276. For the type of collective dominance found through contractual links, see *Trans-Atlantic Conference Agreement (TACA)* [1999] OJ L95/1, *French-West African Shipowner's Committee (FWASC)* [1992] OJ L134/1 and *CEWAL* [1993] OJ L34/20 where a collective dominance was found among the ship owners which concluded an agreement regulating trade on shipping routes.

³⁶ Case T-342/99, *Airtours v Commission*, [2002] ECR II-2585 para 61.

³⁷ *Airtours*, para 62. This approach is supported by the judgments in the case of *Laurent Piau v Commission* [2005] ECR II-209

³⁸ *Airtours*, para 294- 295

³⁹ Ioannis Kokkoris, 'The reform of the European Control Merger Regulation in the aftermath of the *Airtours* case – the eagerly expected debate: SLC v dominance test', [2005] *European Competition Law Review*, p2.

⁴⁰ *Ibid*, p7; See also, Scott A., 'An Immovable Feast? Tacit Collusion and Collective Dominance in Merger Control after *Airtours*' [2002], Available at www.ccr.uea.ac.uk/workingpapers/ccr02-6.pdf, p.12.i ; The concept of collective dominance is interpreted in the same way for both Article 102 and the EU Merger Regulation and therefore judgments from merger cases are often relied on in Article 102 cases and vice versa.

industry such as the high degree of price transparency and the multi-market contact among the airlines did contribute to the facilitation of the coordinated behaviour.⁴¹

The next important element is the 'abuse' because it is the abuse, rather than the holding of a dominant position, which is prohibited under Article 102. Article 102 does not define what is an 'abuse' but it describes the circumstances in which the abuse may occur.⁴² In this chapter, the types of abuses discussed are chosen based on the most common type that involve the airline sector and these include loyalty rebates, predatory pricing and refusal to supply. Other factors that are considered in determining the abuse of a dominant position is the effect of the abuse on internal market and the substantial part of it and the effect on trade between Member States. The elements of the 'internal market' and 'affect on trade between Member States' define the jurisdictional power of the EU. However, having a dominant position in a substantial part of the internal market is not measured geographically as the court will take into account the pattern, volume and the consumption of the products as well as the habits and economic opportunities of the vendors and purchasers in the market.⁴³ Particularly in transport cases, 'substantial part' can be very subjective as it depends heavily on the nature of the market. In *Sealink/B&I Holyhead: Interim Measures*,⁴⁴ the Commission decided that the port of Holyhead constituted a substantial market of the Common Market because it provided the main links between two Member States; Great Britain and the Republic of Ireland as it was the most popular ferry route among passengers.⁴⁵ In *Port of Roscoff*,⁴⁶ the Commission emphasized the importance of the catchment area and in *Merci Convenzionali Porto de Genova SpA v Siderurgica SpA*,⁴⁷ the Court considered the market of Genoa port to be a substantial part of the Common Market based the overall volume of the import and export activities. These transport cases seem to suggest that once the significant routes or traffic has been established, the element of 'substantial part' is considered satisfied. This interpretation is indeed important and crucial in the air transport cases particularly in the airline industry as it involves mainly 'hub and spoke' networks.

⁴¹ Ibid, p2.

⁴² Article 102 of the TFEU, para (a) – (d).

⁴³ *Coöperatieve Vereniging 'Suiker Unie' UA v Commission* [1975] ECR 1663, para 371.

⁴⁴ [1992] 5 CMLR 255; Commission's XXII and Annual Report on Competition Policy 91992), point 219

⁴⁵ Ibid.

⁴⁶ *Irish Intercontinental Group v CCI Morlaix* [1995] 5 CMLR 177, para 58.

⁴⁷ [1991] ECR I-5889, para 15.

8.3 The prohibition of the abuse of dominant position under the Malaysian legislation

8.3.1 CA 2010

Section 10(1) of CA 2010 prohibits an undertaking from engaging in any conduct which amounts to the abuse of a dominant position, whether independently or collectively.⁴⁸ A non-exhaustive list of conduct that may amount to abuses prohibited by the Act is provided under section 10(2) of the Act. These include the direct and indirect imposing of unfair purchase and selling prices or trading conditions, limiting output, refusing to supply, imposing supplementary conditions with no connection to the contract, predatory behaviour, buying up scarce goods or resources and applying different conditions to equivalent transactions.⁴⁹ The Act further provides that a dominant firm having a reasonable commercial justification may be exempted from the prohibition and the fact that the market share of a firm is above or below any particular level shall not in itself be a conclusive evidence of its dominance.⁵⁰ It is important to discuss the provision of CA 2010 before embarking into its equivalent provision under MACA 2015 as the CA 2010 has been implemented before the MACA 2015 and many abuse of dominance cases have been dealt with under the CA 2010. This provides a good indication on how the law on the abuse of dominance is being implemented by the competition authorities and the courts under the general competition law in Malaysia and the influence it would have on MACA 2015.

⁴⁸ Section 10(1) of the CA 2010 provides that, '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.'

⁴⁹ Section 10(2) of the CA 2010 provides that "(a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer; (b) limiting or controlling—(i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment, to the prejudice of consumers; (c) refusing to supply to a particular enterprise or group or category of enterprises; (d) applying different conditions to equivalent transactions with other trading parties to an extent that may—(i) discourage new market entry or expansion or investment by an existing competitor; (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market; (e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract; (f) any predatory behaviour towards competitors; or (g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.'

⁵⁰ Section 10(3) and (4) of the CA 2010.

Since its establishment, MyCC have dealt with three cases of abuse of dominance: *Pangsapuri Perdana*,⁵¹ *MegaSteel Sdn Bhd*⁵² and *My E.G. Services Sdn Bhd*⁵³. *Pangsapuri Perdana* involved an investigation on the alleged monopoly of construction work by a single contractor at a condominium called 'Pangsapuri Perdana' upon the direction made by the Minister pursuant to section 14(2) of the Act. MyCC however dismissed the case because there was no merit to the complaints made.⁵⁴ The *Megasteel* case involved the market for scrap metal-based of hot rolled coil in Malaysia where Megasteel Sdn Bhd was allegedly using its dominant position in the market to undercut the prices of metal. MyCC found that there was no practise of margin squeeze by Megasteel Sdn Bhd based on its investigation.⁵⁵ The recent case of *My E.G. Sdn Bhd* provides a clear indication of how the law on abuse of dominance is being implemented by MyCC, CAT⁵⁶ and the HC.⁵⁷ The case involved the upstream market of online permit renewal for foreign workers where My E.G. Sdn Bhd (MyEG) was the sole provider for the online application and the downstream market involving insurance providers forming part of the compulsory requirement in completing the online application for the permit renewal where MyEG took part as one of the insurance providers. It was alleged that MyEG had used its dominant position as the sole provider in the upstream market to impose different conditions to equivalent transactions to its competitors. MyCC found that MyEG had infringed section 10(2)(d)(iii) of CA 2010.⁵⁸ MyEG appeals to the CAT⁵⁹ and the HC⁶⁰ have been dismissed. This case is the first and the only case thus far that MyCC had found the undertaking to abuse its dominant position in the market by imposing different conditions to the equivalent transactions. It has been commented that MyCC has failed to properly define the relevant market and market power in this case and the fact that My E.G. was made a sole provider for the online services by the Government was not taken into consideration in the decision.⁶¹ Further, there should be more references made to the EU law and other best international practices in this case so that the approach taken by the Malaysian courts are

⁵¹ MyCC Decision on *Pangsapuri Perdana* dated 12 February 2015 (MyCC:700.2.008.2014).

⁵² MyCC Decision on *Megasteel Sdn Bhd* dated 15 April 2016 (MyCC/002/2012).

⁵³ MyCC Decision on *My E.G. Sdn Bhd* dated 24 June 2016 (MyCC (ED) 700-1/1/2/2015).

⁵⁴ MyCC Decision on *Pangsapuri Perdana*, para 16.

⁵⁵ MyCC Decision on *Megasteel Sdn Bhd*, para 50.

⁵⁶ *My E.G. Sdn Bhd v MyCC* dated 28 December 2017 (Appeal No. TRP 3-2016) (CAT Decision).

⁵⁷ *My E.G Sdn Bhd v MyCC* dated 19 April 2019 (WA-25-81-03/2018) (High Court Decision).

⁵⁸ MyCC Decision on *My E.G. Sdn Bhd*, para 158.

⁵⁹ CAT Decision on *My E.G. Sdn Bhd*, para 58.

⁶⁰ High Court Decision on *My E.G. Sdn Bhd*, paras 94-96.

⁶¹ Knut Fornier, 'The MyEG case: the first Malaysian finding of abuse of dominance reveals issues with the regulator's methodology, and an opportunity to play an advocacy role', *European Competition Law Review* (2018) ECLR 39, 366-375.

at par with other advanced jurisdictions.⁶² Though this case does not involve the airline industry and the areas of abuse to be discussed in the later sections, it provides an indication on the current state of competence and expertise acquired by the competition authorities and courts in Malaysia in implementing the law on the abuse of dominance.

8.3.2 MACA 2015

The prohibition of the abuse of market power in the Malaysian airline industry is provided under Section 53 of the MACA 2015. The Act prohibits an enterprise from engaging in any conduct which amounts to an abuse of a dominant position in any aviation service market, whether independently or collectively.⁶³ The Act also provides a defence that a dominant enterprise is not prohibited 'from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor'.⁶⁴ Further, it provides that the fact that an enterprise falls within a specified threshold of market share is not conclusive evidence that it 'occupies, or does not occupy, a dominant position in that market'.⁶⁵ The types of abuse are not described in the Act but MAVCOM may issue guidelines specifying the prohibited types of abuse.⁶⁶

The MAVCOM Guidelines on Abuse of a Dominant Position⁶⁷ state that an abuse of a dominant position is determined based on a detailed assessment of the relevant aviation services market and the effects of the dominant enterprise's conduct on competition.⁶⁸ This assessment involves two steps; the determination of dominance and abuse.⁶⁹ A dominant power refers to the possession of significant power to adjust prices or output or trading terms without having effective constraints from existing and potential competitors in a relevant aviation services market.⁷⁰ Dominance could be possessed by an enterprise which provides for or acquires aviation services.⁷¹ Hence, the Act prohibits the dominant enterprise from abusing its power either as a buyer of aviation services or the provider of

⁶² Fornier (n 61) ch8, p375.

⁶³ Section 53(1) of MACA 2015.

⁶⁴ Section 53(3) of MACA 2015.

⁶⁵ Section 53(4) of MACA 2015.

⁶⁶ Section 53(2) of MACA 2015.

⁶⁷ MAVCOM Guidelines on Abuse of Dominant Position, first published on 19 January 2018.

⁶⁸ MAVCOM Guidelines on Abuse of Dominant Power, para 2.3.

⁶⁹ Ibid, para 2.4.

⁷⁰ Ibid, para 3.1.

⁷¹ Ibid, para 3.2.

such services. The concept of collective dominance is also described in the Guidelines. In assessing the presence of collective dominance, the links or factors that connect the dominant enterprises will be considered to the extent that it constitutes a collective entity in the market.⁷² Such links may include ownership interests, a co-operation agreement or market structure which may lead to the adoption of a common policy to protect their collective dominance in the market.⁷³

The MAVCOM Guidelines on Market Definition⁷⁴ takes into consideration the product, geographical and temporal market in the aviation service market. In determining market power, market shares are used as a starting point and the Guidelines provide that a market share above 60% may indicate dominance in the aviation market.⁷⁵ Market shares are not the only indicator to determine the market power of an enterprise as other factors such as constraints by existing and potential competitors and other constraints which affect the ability of the enterprise to exercise its market power will also be taken into account.⁷⁶ Therefore, an enterprise with a market share of 60% and above may not have the market power if its ability to set its prices is constrained by existing or potential competitors and an enterprise with a market share below 60% could be said to have the market power if it benefits from imposing a price above the competitive level for a sustainable period. The Guidelines specifically provide for methods of calculating markets shares in the aviation service market and this includes the sales revenue or value in monetary unit, sales volume (the number of passenger or volume cargo carried) and capacity (the number of available seats).⁷⁷ The method varies from one case to another depending on the nature of the relevant aviation services but normally the enterprise's data, third party database, data from the trade association, market research report and internal market review will be used.⁷⁸ In assessing the constraints by existing competitors, factors such as the degree of differentiation and the responsiveness of buyers to the price increase and the competitors will be taken into consideration.⁷⁹ For potential competitors, the focus is placed on the barriers to entry, particularly the possibility to enter the market with ease and in a timely

⁷² Ibid, para 3.4.

⁷³ Ibid.

⁷⁴ MAVCOM Guidelines on Aviation Service Market Definition, first published on 19 January 2018.

⁷⁵ MAVCOM Guidelines on Abuse of Dominant Position, para 3.11.

⁷⁶ Ibid, para 3.13.

⁷⁷ Ibid, para 3.18. The Guidelines also specifies that for ground handling services, the unit applicable would depend on the types of ground handling services such as volume of fuel or food supplied to the airlines.

⁷⁸ Ibid, para 3.20.

⁷⁹ Ibid, para 3.21.

manner, such as the sunk costs, economies of scale and scope, regulated entry, access to essential facilities and the conduct of existing enterprises.⁸⁰ Other constraint includes countervailing buyer power.⁸¹

Upon the establishment of dominance, the evaluation of abuse will then be made based on the actual and/or likely adverse effect of the dominant enterprise's conduct on the consumers and the competitive process.⁸² The conduct of a dominant enterprise, however, would not amount to an abuse if it can prove that it has reasonable commercial justification or its conduct represents a reasonable commercial response to market entry or conduct by a competitor.⁸³ Further, it is also stated that the abuse and the effects of the abuse need not be in the same market. The effects can be established in a market where the undertaking is not dominant.⁸⁴ The Guidelines clearly emphasizes that the prohibition applies to both exclusionary and exploitative conduct as it provides a non-exhaustive list of such conduct. The Guidelines define exclusionary conduct as conduct of a dominant enterprise which dictates the level of competition by preventing an equally efficient competitor from entering the market or significantly harming the existing competitors by driving them out of the market or preventing them from competing effectively.⁸⁵ The Guidelines therefore adopt the 'as efficient competitor' test.⁸⁶ This conduct ultimately harms consumers when the dominant enterprise strengthens its dominance and is able to increase the price.⁸⁷ The exclusionary conduct is assessed on its effects on competition and not competitors.⁸⁸

The Guidelines specifies that exclusionary conduct include predatory pricing, discriminatory conduct, margin squeeze, exclusive dealing, refusal to supply and access to an essential facility, discount schemes and tying and bundling⁸⁹ and describes the criteria for assessment for each area of conduct. The exploitative conduct, on the other hand, refers to conduct that directly affects consumers, such as excessive pricing.⁹⁰ The

⁸⁰ Ibid, para 3.24.

⁸¹ Ibid, para 3.26.

⁸² Ibid, para 4.2.

⁸³ Ibid, para 4.3.

⁸⁴ Ibid, para 4.5.

⁸⁵ Ibid, para 4.7.

⁸⁶ Ibid, para 4.10.

⁸⁷ Ibid, para 4.8.

⁸⁸ Ibid, para 4.9.

⁸⁹ Ibid, para 4.7.

⁹⁰ Ibid, para 4.12 & 4.13.

assessment is based on whether there is a reasonable relation to the economic value of the aviation services provided and whether there is a likelihood that such excessive price is constrained by existing or potential competitors.⁹¹ The assessment involves a detailed economic analysis relating but not limited to costs, prices, profit margin and market concentration.⁹² As to date, there are no cases involving the abuse of dominant power in the aviation sector in Malaysia. As will be seen the approach taken in Malaysia follows closely that of the EU. The MAVCOM Guidelines, however, provide a more specific-to-sector framework for the analysis of the abuse of a dominant position in the context of the aviation sector. This includes a useful assessment of the mode of calculating the market shares in the Malaysian aviation services market.

8.4 The similarities and differences between Article 102 of the TFEU and the Malaysian competition

From the previous discussion, the CA 2010 and the MACA 2015 have largely similar provisions for the prohibition of abuse of a dominant position except that the latter specifies its abusive conduct in its guidelines rather than in the Act itself. It can be reasonably submitted that there is also a significant adoption of Article 102 of the TFEU in the Malaysian law on the prohibition of the abuse of a dominant position. Though there are several differences between the two legislations: the elements of ‘internal market’ and the effects on Member States, other elements remain the same. The differences between these legislations are provided in *Table 5*.

8.5 The abuse of a dominant position in the airline industry

The cases involving the airline industry under Article 102 show that an abuse of a dominant position occurs in several areas: the implementation of discount and rebates system in the airline loyalty programmes, pricing mechanisms, refusal to supply, and refusal of access to essential facilities.

⁹¹ Ibid, para 4.14.

⁹² Ibid, para 4.15.

8.5.1 Discounts and rebates

Discounts and rebates are common pricing strategies offered by many firms in a market. They are ubiquitous; buyers rarely complain about them, as they get a lower price and make buyers more likely to switch to competitors.⁹³ Nevertheless, when undertakings are in a dominant position, their giving of discounts and rebates are constrained.⁹⁴ The words 'discounts' and 'rebates' connote the same meaning, and they are often used interchangeably, though technically, a discount is a deduction from a price and a rebate is a refund from the paid price, made retrospectively.⁹⁵

⁹³ Neils, Jenkins & Kavanagh (n 4) ch2, p223.

⁹⁴ Jones & Sufrin (n 11) ch2, p434.

⁹⁵ Jones & Sufrin (n 11) ch2, p435.

Treaty on the Functioning of the European Union (TFEU)	Competition Act 2010 (CA 2010)	Malaysian Aviation Commission Act 2015 (MACA 2015)
<p>Article 102</p> <p>Any abuse by one or more undertakings of a dominant position within <u>the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.</u></p> <p>Such abuse may, in particular, consist in:</p> <p>(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;</p> <p>(b) limiting production, markets or technical development to the prejudice of consumers;</p> <p>(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;</p> <p>(d) making 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.</p>	<p>Chapter 2</p> <p><i>Abuse of dominant position</i></p> <p>Abuse of dominant position is prohibited</p> <p>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. (2) <u>Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—</u></p> <p><u>(a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;</u></p> <p><u>(b) limiting or controlling—</u></p> <p>(i) <u>production;</u></p> <p>(ii) <u>market outlets or market access</u></p> <p>(iii) <u>technical or technological development; or</u></p> <p>(iv) <u>investment to the prejudice of consumers;</u></p> <p><u>(c) refusing to supply to a particular enterprise or group or category of enterprises;</u></p> <p><u>(d) applying different conditions to equivalent transactions with other trading parties to an extent that may—</u></p> <p>(i) <u>discourage new market entry or expansion or investment by an existing competitor;</u></p> <p>(ii) <u>force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or</u></p> <p>(iii) <u>harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;</u></p> <p><u>(e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;</u></p> <p><u>(f) any predatory behaviour towards competitors; or</u></p> <p><u>(g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.</u></p> <p>(3) This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.</p> <p>(4) The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.</p>	<p>Division 3</p> <p>Abuse of Dominant Position</p> <p>Abuse of dominant position is prohibited</p> <p>53. (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 aviation service market.</p> <p>(2) The Commission may publish guidelines specifying the types of conduct which would or would not be prohibited under subsection (1).</p> <p>(3) This section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.</p> <p>(4) The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.</p>

Table 5: Comparison between Article 102 of the TFEU, Section 10 of the CA 2010 and Section 53 of MACA 2015

8.5.1.1 The regulations of discounts and rebates under the EU law

There are many terminologies used for discounts and rebates, such as quantity rebates, loyalty rebates, fidelity or exclusivity rebates, target rebates, rolled-back rebates, incremental rebates, standardised or individualised rebates, and aggregated rebates.¹ Under the EU law, the GC in *Intel v Commission* distinguished three main categories of rebates: the quantity rebates, the exclusivity rebates, and rebates that fall neither in these categories, but may have the exclusionary effects.² The least contentious category of rebate is the quantity rebate, which relates solely to the quantity purchased by the customer from the dominant undertaking. It is a settled law, confirmed by the ECJ in *Post Danmark II*, stating that quantity discounts linked solely to volume of purchase from manufacturer do not infringe Article 102.³ In this case, however, standardised retroactive rebate was held not to qualify as a simple quantity rebate scheme.⁴ This case referred to the case of *Hoffman-La Roche*, which drew a sharp distinction between quantity rebates and loyalty rebates.⁵ Quantity rebates are presumptively lawful, because they are deemed to reflect an efficiency gain and economies of scale⁶ unless the price charged is predatory.⁷ Quantity rebates are fixed, must be applied to all customers, and must not be discriminatory in nature and in fact.⁸

In contrast with quantity rebates, exclusivity rebates⁹ are conditional rebates made upon the purchase by a customer, of all or most of its requirements for a product from a

¹ See Jones & Sufrin (n 11) ch2, p435; Quantity rebates is when deductions of price are made based on an objective amount paid by consumers. Loyalty or fidelity or exclusivity rebates given in return of exclusivity purchasing made by purchasers who normally buy all or part of the particular good. Target rebates are given to purchasers who bought more than the targeted threshold in a certain period. The target may be set based on customer's previous purchase. It can retroactive, incremental standardised or individualised. The rolled-back rebates are given when a certain threshold is achieved where rebates are considered on each and every goods bought and in excess of that threshold. Incremental rebates are given only on the above threshold. Standardized rebates are rebates given to customers based on the similar conditions. Individualised rebates are given based on the different thresholds set among customers. Aggregated (multi-product or bundled) rebates are discounts given on an aggregated purchase of products from different markets. There are also other terms used to describe the rebates such as the loyalty-inducing or fidelity-building rebates which is established by EU as having the analogous effects as loyalty rebates and this is often used in target rebate schemes.

² Case T-386/09, *Intel* EU:T:2014:547, para 74 – 78; See also Jones & Sufrin (n 11) ch2, p437.

³ Case C-23/14, *Post Danmark II* EU:C:2015:651, para 27.

⁴ *Post Danmark II*, para 28.

⁵ *Hoffman-La Roche*; para 90.

⁶ *Intel*; para 75 (GC)

⁷ Case C-62/86, *AKZO* [1991] ECRI-3359

⁸ Case C-163/99; *Portugal v Commission* [2001] ECR I-2613

⁹ The term 'exclusivity'; is used in *Intel* case but it is also used in other decisions of the courts as loyalty rebates or fidelity rebates.

dominant undertaking.¹⁰ The nature of exclusivity rebates relates to a contract that commits a buyer to buy all requirements of a product from the dominant supplier, and which may have the same effect as the exclusive purchasing agreement, and therefore infringe Article 102.¹¹ In *Suiker Unie v Commission*, the Court held that royalty rebates were designed to prevent customers from obtaining their supplies from competing producers through the grant of the financial advantages¹² which have an exclusionary effect. Since *Hoffman-La Roche*, exclusivity rebates have been regarded as a 'by object' abuse although many commentators have argued that they may be pro-competitive, as they may allow an efficient recovery of fixed costs, better incentives to retailers, the reduction of double marginalisation, and the resolution of the hold-up problem.¹³ In *Hoffman-La Roche*, it was made clear that when a dominant undertaking ties its purchasers under an obligation of a contract to buy all or most of their requirements exclusively, it abuses its dominant position under Article 102, whether or not it is linked to the grant of rebates.¹⁴ Purchasers have the incentive to buy exclusively from the dominant supplier, and this deprives or restricts the purchasers from a choice of other suppliers in the market.¹⁵ The illegality is not based on the assessment of effects on the market, because it is already assumed that the rebates given by the dominant firm are highly likely to have an exclusionary effect on competitors.¹⁶

In *Intel*, the GC confirmed that exclusivity rebates are a 'by object' abuse, as they permit leverage from the non-contestable portion of demand to the 'contestable' portion, and are by their very nature capable of restricting competition.¹⁷ The GC went on to state that, even if an assessment of the circumstances of the case were necessary to demonstrate the potential anti-competitive effects of the exclusivity rebates, it would not be necessary to apply the 'as efficient competitor' test.¹⁸ In order to establish a potential anti-

¹⁰ Jones & Sufrin (n 11) ch2, p436.

¹¹ Ibid, p436.

¹² Case 40/73, *Suiker Unie v Commission* [1975] ECR 1663

¹³ Jones & Sufrin (n 11) ch2, p437.

¹⁴ *Hoffman-La Roche*, para 89.

¹⁵ *Hoffman-La Roche*, para 90.

¹⁶ Subsequent cases that applied the same principles are *BPB Industries and British Gypsum*, *Soda Ash* and *Tomra*.

¹⁷ 'It should moreover be noted that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of foreclosing competitors. A financial advantage granted for the purpose of inducing a customer to obtain all or most of its requirements from the undertaking in a dominant position means that that customer has an incentive not to obtain, in respect of the part of its requirements concerned by the exclusivity condition, supplies from competitors of the undertaking in a dominant position.'
Intel, para 87 (GC).

¹⁸ *Intel*, para 144-146 (GC).

competitive effect, it is sufficient to demonstrate the existence of a loyalty rebate.¹⁹ On appeal, however, the ECJ set aside the judgment and reinstated the importance of the AEC test. The ECJ ordered the case to be referred back to the GC to determine in the light of Intel's arguments whether the rebates are capable of restricting competition.²⁰ The ECJ stated that the Commission was required to examine all the circumstances of the case, including the share of the market of the dominant undertaking, the share of the market covered by the challenged practice, the duration and amount of the rebates, and whether there is a strategy to exclude competitors at least as efficient as the dominant undertaking from the market'.²¹

The third category of rebates are neither quantity nor exclusivity rebates, but they have exclusionary effects because they are 'loyalty-inducing' or 'fidelity-building'.²² The concept of the loyalty-inducing effect was established in the *Michelin II* case, and has been applied to target rebates that depend on the attainment of individual sales objectives.²³ Target rebates and their abusive nature were discussed in the case of *Michelin I*, where the ECJ held that the rebates were an abuse, as they removed and restricted buyers' freedom to choose their sources of supply.²⁴ The application of Article 102 to discounts that are conditional upon attainment of sales targets covers practices that are likely to affect the structure of market, where competition has already been weakened by the presence of the dominant firm, and which hinder the maintenance and the development of the existing competition.²⁵ Further, the discount system at issue in this case was not a mere quantity discount, as it involved a progressive scale of previous years' turnover, and was not solely linked to the volume of purchases.²⁶ In deciding whether there was an abuse, the court stated that there was a need to consider all the circumstances. This includes; the criteria and rules of the discount, and to determine whether the financial advantage provided (which was not based on economic service justifying it) removes buyers freedom to choose their sources of supply, bars competitors to access the market, applies dissimilar conditions to equivalent transactions or strengthens the dominant position by distorting

¹⁹ *Intel*, para 147 (GC).

²⁰ *Intel*, Appeal case, (2017/C 374/02) (ECJ).

²¹ *Intel*, para 139 (ECJ).

²² *Intel*, para 78.

²³ *Michelin II*, para 67.

²⁴ *Michelin I*, para 73; This is also in line with the discussion of loyalty rebates in *Hoffman-La Roche*.

²⁵ *Michelin I*, para 70.

²⁶ *Michelin I*, para 72.

competition.²⁷ It was also held that a discount system which was based on a long period of time had the inherent effect of pressuring the dealer to achieve the target sales so as to avoid losses, because any variation of the discount would affect the dealer's margin of profit.²⁸ This would put the dealers under appreciable pressure.²⁹ In *Michelin II*, the GC held that, therefore, the Commission was right to conclude that the rebates tied the truck tyres dealers to Michelin by the granting of the financial advantages—which were not based on economic reasons³⁰—and to find that the rebates were loyalty inducing, and infringed Article 102.³¹

8.5.1.2 Loyalty programmes in the airline industry

In the airline industry, loyalty programmes are a common and developed commercial strategy, offered by airlines to air passengers and air travel agents in order to influence them to become more inclined to seek the airlines' products and services. Loyalty programmes are a form of bonus or discount programme. The most important types are frequent flyer programmes (FFPs), corporate discount schemes (CDSs), and travel agent commissions (TACOs).³² These programmes are the focus of the discussion in this section, as their loyalty-inducing features often raise competition issues, especially when offered by dominant airlines. FFPs are offered to all types of air passengers, but they are mainly targeted at the more lucrative business travellers. The FFPs often reward passengers with free travel or similar benefits, based on the accumulated points earned from every air ticket purchased. These two characteristics (the rewards and the points system) have distinguished FFPs from other loyalty programmes. In terms of reward, unlike other types of loyalty programmes, FFPs offer non-monetary rewards such as free products (free travel, hotel accommodation, car rental and similar benefits) and services (fast-track check-in, special access, priority boarding and seating). The other characteristic of the FFPs is the operation of a sophisticated points system. Members earn points from each flight, and the number of points depends on the destinations, distances and class of travel. FFPs

²⁷ *Michelin I*, para 73.

²⁸ *Michelin I*, para

²⁹ *Michelin I*, para 83.

³⁰ *Michelin II*, para 110.

³¹ *Michelin II*, para 103.

³² European Competition Authorities (ECA) Discussion Paper, 'Loyalty programmes in civil aviation – an overview of the competition issues concerning frequent flyer programmes, corporate discounts schemes and travel agent commissions', p3.

usually have an entry threshold, where points are only redeemable after a pre-determined number of points have been achieved. Consequently, these lucrative features will make a particular airline more attractive than its rivals, although other offers may include a lower or a more suitable travel alternative.³³ At the time of writing this thesis, there have been no cases tried before the EU courts that involve FFPs.³⁴ In *SAS/Lufthansa*, the Commission found the airlines' cooperation on FFPs to be a barrier to entry, and therefore infringed Article 101(1) but the case was given a conditional approval whereby other airlines operating on the disputed routes were to be afforded the opportunity to participate in the FFPs if they so wished.³⁵

The second form of loyalty programmes are CDSs, where discounts are given to a company of a large group of passengers. This requires a bilateral agreement between the airline and the passengers' company, whereby discounts will be given on certain agreed routes, and the company agrees to underwrite a minimum turnover.³⁶ This could be another type of price discrimination, because it often involves a specific and large target group, where the customers could use their buyer power to obtain special fare contracts with the airline.³⁷ The CDSs normally involve customers of a national flag carrier, where they are able to negotiate lower fares on the airline's network that operates flights to major destinations.³⁸ These 'discounts' on fares are normally based on the percentage of total sales over a certain period of time. The programme therefore provides a strong incentive for the group of buyers to choose only a particular airline, and the anti-competitive effects may arise out of these circumstances, where the larger carriers have the inherent advantage.³⁹

³³ EEA Discussion Paper, p5.

³⁴ According to EEA Report, two European national competition authorities have challenged the loyalty programmes involving FFP. (1) On 27 February 2001, the Swedish Market Court, upon hearing the case brought before it by the Swedish Competition Authority, found that SAS had abused its dominant position by applying the EuroBonus programme according to Section 19 of the Swedish Competition Act and ordered SAS to cease applying it. (2) On 18 March 2002, the Norwegian Competition Authority ordered SAS to stop awarding FFP points on domestic routes.

³⁵ EEA Discussion paper, p21.

³⁶ Ibid, p7.

³⁷ Ibid.

³⁸ Ibid, p18.

³⁹ Ibid. According to EEA Report, three European national competition authorities have investigated the CDS in their respective countries; the Finnish Competition Authority had examined the DCDS offered by their national carrier Finnair, the Norwegian Competition Authority banned the SAS's CDS in 2003 and the German Competition Authority intervened in the Lufthansa's CDS as it contravened section 20(1) Act against Restraints of Competition.

The TACOs are another form of loyalty programme, but it is offered to travel agents, not the air passengers. The TACOs involve a different form of a 'buyer-and-seller' market in the airline industry (normally the airline is regarded as the seller of the air tickets or the provider of the air services, and the air passengers are the buyers), because it requires the travel agents to act as intermediaries for airlines. Air travel agency services have been recognised as a distinct market in the airline industry, because although they act on behalf of airlines, an agency 'constitutes independent intermediaries carrying on an independent business of providing services'.⁴⁰ In the air travel agency services market, therefore, the travel agent is the seller of the air services and the airline is the buyer. The TACOs contribute to the raising and maintaining of the airlines' market shares because, by making the commission dependant on the sales that become the airlines' revenue, the TACOs offers a strong incentive for the travel agents to remain loyal to a particular airline, and sell tickets exclusively from that particular airline.⁴¹ A competition issue may arise from the fact that they are capable of generating loyalty, hence, the discounts are not quantity-based but a loyalty discount.⁴² It is important to note that TACOs refers to the additional bonuses granted periodically on the total sales, and is not a standard commission given for each and every ticket sold.⁴³

A significant EU case concerning rebates that involved the airline industry and the travel agent is the case of *British Airways Plc v Commission*.⁴⁴ It provides an important analysis of the treatment of questions of market definition, dominance, abuse, and the defences available, as EU competition law is applied to the airline industry. This case is particularly significant as it involved a market on the buying side (procurement market) whereby BA was held to be in a dominant position, not as supplier, but as a buyer. BA entered into agreements with the UK travel agents accredited by the IATA, where the latter were entitled to a basic standard commission which amounted to 9% on sales of

⁴⁰ It was decided in the case of *British Airways v Commission* Case T-219/99, p II 5952. This case is discussed in detailed in the preceding paragraph of this section.

⁴¹ EEA Discussion Paper, p5.

⁴² Ibid, p4–5.

⁴³ Ibid, p13-18. According to EEA Report, a number of European national competition authorities have opposed to the TACO. The Finnish Competition Authority investigated the TACPO granted by Finnair (will verify the status). The Italian Competition Authority in 2001 found that incentives schemes granted by Alitalia Spa to the travel amounted to the target loyalty rebates. The Spanish Competition Court found that the incentive bonus programme called 'Creciberia' offered by the Iberia to infringe section 6 of the Spanish Competition Act.

⁴⁴ C-95/04 (ECJ) [2007] ECR I-2331, T-219/99 (GC) [2003] ECR II-5917 and *British Airways* 1999.

international tickets, and 7.5% for ticket sales on domestic flights.⁴⁵ Apart from the agreement, BA also concluded agreements relating to three other distinct systems of financial incentives, namely: the marketing agreements, the global agreements, and the performance reward scheme.⁴⁶ Virgin Atlantic, in 1993, lodged a complaint on anti-competitive practices pertaining to the marketing agreement.⁴⁷ The Commission decided that BA was a dominant buyer in the UK air travel agency services market, and had abused its dominant position.⁴⁸ BA was regarded as the buyer for numerous travel agency services and the product market was a market for the acquisition of the travel agent services, which is created for the purpose of distributing and marketing their airline tickets.⁴⁹ The Commission determined that BA was dominant, with a 39.7% share of the market. This was the only time that a firm with less than 40% market share has been found to be dominant. BA was fined £6.8 million for abusing its dominant position through the imposition of loyalty rebates. The rebates were applied retroactively, in that once the travel agent obtained a certain level of sales, a rebate was applied to all future sales, but also on all the sales made prior to that target. This had a fidelity building effect, particularly at the margin, as the agent approached the target amount, increasing the switching costs for purchases from other competitor airlines.

In 1999, BA brought an application to the GC to annul the Commission's decision but it was dismissed.⁵⁰ A further appeal was filed in the ECJ in which the issue of the exclusionary effects of the scheme was again pleaded.⁵¹ BA claimed that the GC wrongly assessed the exclusionary effect of the scheme and concluded that there was no economic consideration. In dismissing the appeal, the ECJ confirmed the GC's decision and held that the exclusionary effects arise from the goal-related discounts, linked to the attainment of the sales objectives, and where the pressure exerted upon the co-contractors is not only based on the sales but also on the whole of the turnover relating to the sales.⁵² The 'rolled-back' and retroactive effects of the system coupled with the dominant position of the firm,

⁴⁵ *British Airways* (ECJ), para 4.

⁴⁶ *Ibid*, para 5.

⁴⁷ The Commission decided to conduct an investigation. A statement of objection was issued in 1996, and BA presented its oral observation in a hearing in 1997.⁴⁷ After the hearing, BA introduced a new system of performance rewards to all travel agents to be applied in January 1998, to which Virgin Atlantic lodged another complaint and the Commission issued a decision in March 1999.⁴⁷ *British Airways*, para 12-19.

⁴⁸ *British Airways* (ECJ), para 20-22.

⁴⁹ *Ibid*, para 89.

⁵⁰ *Ibid*, para 38.

⁵¹ *Ibid*, para 71.

⁵² *Ibid*, para 73.

increased the switching costs and made it difficult for BA's competitors to outbid in the face of discounts based on overall sales volume.⁵³ Consequently, BA's dominance in the market made it an unavoidable trading partner.

The ECJ agreed that the case of *Michelin II* was particularly relevant in this case and reaffirmed the requirements mentioned in that case based on the similarities of the discount schemes.⁵⁴ It is necessary to look at all circumstances particularly the rules and criteria governing the discount and to investigate whether, without having economic justification, the system removes or restricts buyers' freedom of choice to sources of supply, provides barriers to entry for competitors, applies dissimilar conditions to similar transactions, or strengthens the firm's dominant position through the distorted competition.⁵⁵ Therefore, BA's scheme was judged based on two criteria: whether the discount system is capable of producing the exclusionary effect (such as in making the market entry difficult or impossible for competitors and for buyers to choose the sources of supply), and whether there is any objective justification.⁵⁶ The ECJ seemed to follow closely the reasoning provided in *Michelin II*, and refused to review the findings of the GC of the exclusionary effects, particularly because of the strong effect at the margin and the inability of competitors to counter-offer, besides the fact that the assessment of facts was not within its appeal jurisdiction.⁵⁷

The ECJ also agreed that there was no economic justification for the system⁵⁸. In its argument, BA claimed that the discount system was justified because, given the level of fixed cost in the air transport business, the improvement in capacity utilisation lowers the average unit cost and yielded BA a cost saving that it is entitled to share with agents and customers.⁵⁹ However, the GC found that the fidelity-building character of the discount system could not be economically justified as there was no link between the additional remuneration received by the agents and BA's efficiency gain nor cost saving. The retrospective application of the commission could only entail that 'the sale of certain BA

⁵³ Ibid, para 75.

⁵⁴ Ibid, para 65 and 74.

⁵⁵ Ibid, para 67 where *Michelin II* was referred.

⁵⁶ Ibid, para 69; See also Jones & Sufrin (n 11) ch2, p459.

⁵⁷ Ibid, p 458.

⁵⁸ *British Airways* (ECJ), para 81-91. The ECJ again refused to review such findings based on its limited jurisdiction.

⁵⁹ Ibid, para 267.

tickets at a price disproportionate to productivity gain obtained by the BA from the sale of those extra tickets'.⁶⁰ Thirdly, the selling of extra seats by the agents could not be regarded as reducing the high fixed-cost of the industry, but in fact could considerably reduce any advantages that the better rate of occupancy might have had, due to the extra costs incurred by the BA in giving the additional remuneration to the agents.⁶¹ Therefore, the BA's counter claims concerning the high level of fixed cost and the importance of the aircraft occupancy rates in the air transport industry were not examined in detail.

Following this case, it is a settled law that the target rebates can be objectively justified, but, in this case, BA failed to submit convincing evidence. There were means of obtaining these efficiencies less restrictive to competition. From the perspective of a sectoral industry, it could also be argued that the nature of the airline industry, particularly by having a very high level of fixed cost, could not counterweigh the exclusionary effects of the discount system, and therefore could not be considered as an economic justification to the giving of the fidelity-building rebates to the travel agents. It could also show that the abusiveness of a dominant firm's conduct does not depend on the nature and specific characteristic of a particular sector of the economy, rather the overall circumstances that rule and govern that particular conduct and its anti-competitive effects. Therefore, the BA's counter claims concerning the high level of fixed cost and the importance of the aircraft occupancy rates in the air transport industry were not examined in detail.

The ECJ also made an important judgment in this case. It confirmed that the prohibition enunciated under Article 102 is aimed at practices which may cause not only a direct prejudice to the customers, but also 'which are detrimental to them through their impact on an effective competitor structure'⁶². To show that the abusive conduct is detrimental to the consumers, it is sufficient to conclude that there is a restrictive effect on competition. The ECJ refused to apply the effect-based approach to cases of abuse of dominant power, and consequently rejected any notion of proof of consumer harm.⁶³ This could mean that in determining the exclusionary effect of a conduct, there is no requirement to prove the concrete effects, as long as the conduct is capable of restricting competition, which was proven by the system having a 'very noticeable effect at the margin', the inability

⁶⁰ Ibid, para 284.

⁶¹ Ibid, para 285.

⁶² Ibid, para 105 and 106.

⁶³ Jones & Sufrin (n 11) ch2, p460.

of competitors to make competitive counter-offers, and that Article 102 aims to protect the competition structure rather than the consumer welfare.⁶⁴

The same case was brought before a US court by the Virgin Atlantic Airways Limited, also alleging that BAs had used an anti-competitive incentive agreement to leverage and archive monopoly power in air travel market by engaging in a 'predatory foreclosures and the bundling of ticket sales in an attempt to foreclose transatlantic competition' under Section 2 of the Sherman Act.⁶⁵ The US Court of Appeal, nevertheless, affirmed that the incentive given did not constitute below-cost pricing, nor did it constitute an attempt to leverage a monopoly position in one market to achieve gains in other market.⁶⁶ This case illustrated how the different approaches applied by the courts of different jurisdictions could produce disparate outcomes.⁶⁷ Further, as we have seen, the decision of the ECJ in the *Intel* case, may indicate that the EU courts are now ready to take a 'more economic' approach and apply the AEC test to the competition questions on loyalty discounts. While the Commission found Intel's rebate dispensation was capable of anti-competitive foreclosure, and the GC upheld this decision in its entirety⁶⁸ and the decision was criticised as the court took a form-based approach.⁶⁹ When the ECJ ruled that the case be referred back to the GC, it clearly stated that an examination of the factual and economic evidence needed to be carried out in order to determine the restrictive effects of the rebates.⁷⁰ It is argued by many that the *Intel* case has changed the law on rebates, as the move now is towards an effect-based approach.⁷¹ It is therefore reasonable to infer that the case of *British Airways* may be applied differently today, and the outcome would have been different.

⁶⁴ Jones & Sufrin (n 11) ch2, p454.

⁶⁵ *Virgin Atlantic LTD v British Airways PLC* 257 F.3d 256 (2dCir. 2001), p265.

⁶⁶ *Virgin Atlantic LTD v British Airways PLC* 257 F.3d 256 (2dCir. 2001), p257.

⁶⁷ Neils, Jenkins and Kavanagh (n 4) ch2, p182.

⁶⁸ Case T-286/09.

⁶⁹ Whish & Bailey (n 1) ch1, p749.

⁷⁰ Case C-413/14 P, para 149.

⁷¹ Whish & Bailey (n 1) ch1, p752.

8.5.1.3 The treatment of rebates and discounts under Malaysian Competition Law

In the Malaysian airline industry, unlawful rebates and discounts fall under the prohibition of the abuse of a dominant position under section 53 of the MACA 2015.⁷² The MAVCOM Guidelines on Abuse of a Dominant Position provide that discounts and rebates are a common form of price competition; however they can amount to abuse of a dominant position if they are harmful to competition in the way that they eliminate competitor and competition without any reasonable commercial justification.⁷³ The concept of unlawful rebates and discounts in the Guidelines is treated very generally and there is little guidance to differentiate lawful from unlawful rebates. It is likely however, given previous court decisions, that should a case arise in the future in the airline sector, the approach in the EU courts is likely to be followed.

8.5.2 Predatory Pricing

Another form of abuse is predatory pricing, a deliberate conduct by a dominant firm to lower the price of its goods and incur some short-term losses, with the aim to eliminate competitors or to prevent entry in order for it to be able to charge a monopolistic price in the long-term.⁷⁴ Low prices generally benefit consumers and are pro-competitive. However, they will be found abusive if they are priced so as to drive competitors out of the market, and to strengthen the power of the dominant undertaking to the prejudice of consumers.⁷⁵ The predator's strategy is to sacrifice short-term profit in order to reap monopoly profits in the long term.⁷⁶ Predatory pricing, therefore, can amount to an infringement of Article 102. The Areeda-Turner test, which was first established in US antitrust law, has much influenced and formed the basis of how predatory conduct is identified in many competition law regimes. The test, which relies exclusively on cost analysis, suggests that prices below short-run marginal cost (SRMC) are predatory, and prices equal to or higher than the SRMC are not.⁷⁷ Nevertheless, because SRMC is impossible to compute in practice, the test uses the average variable cost (AVC) as a

⁷² Section 53(1) and (3) of MACA 2015.

⁷³ MAVCOM Guidelines on Abuse of Dominant Position, para 4.11(f).

⁷⁴ Neils, Jenkins and Kavanagh (n 2) ch2, p198.

⁷⁵ Jones & Sufrin (n 11) ch2, p385.

⁷⁶ Ibid.

⁷⁷ Philip Areeda and Donald Turner, 'Predatory Pricing and Related Practices Under Section 2 of Sherman Act', *Harvard Law Review*, Vol. 88 No. 4 (Feb, 1975) p716.

surrogate for SRMC.⁷⁸ Thus, when the prices are set below the AVC, it should be conclusively presumed to be unlawful, and prices set at or above AVC should be conclusively presumed lawful. There is also a requirement to prove recoupment in US antitrust law and it is a key component in unlawful predation as it helps to show that the predator is able to recoup the losses through its exercise of market power in the future.⁷⁹

8.5.2.1 Predatory pricing in EU law

In the EU, the rule on predatory pricing was first laid down in *AKZO v Commission*⁸⁰, where the ECJ established two standards in determining whether a price is predatory. When a dominant firm sells below AVC—where it could be argued that it is acting abusively as every sale is a loss—and when it sells above AVC, but less than the average total cost (ATC), when it is done as part of a plan or strategy to eliminate competition, this is a predation.⁸¹ This is different to the Areeda-Turner test, under which there is no predation when prices are above AVC.⁸² In this case, AKZO, a dominant firm in the benzoyl market, reduced its price in order to harm a small UK firm, ECS. The Commission decided that AKZO had abused its dominant position and imposed a fine of £10mil. The ECJ upheld the Commission's decision. The rule in *AKZO* was applied in the case of *Wanadoo Interactive*⁸³, where the Commission imposed a €10.35 million fine on a subsidiary of France Telecom for having priced a residential broadband internet services at different times, both considerably below AVC and ATC. In the case of *France Telecom SA v Commission*,⁸⁴ the ECJ confirmed the approach to costs, but added that cost analysis involved a broad complex economic assessment, and the Commission must be given a broad discretion.

The intention to eliminate competition is relevant under the EU law, and this was clearly stated in the decision of AKZO. There is a strong presumption that eliminatory intent is present in cases where prices are set below AVC, and when prices are set between the

⁷⁸ Areeda & Turner (n 77) ch8, p716.

⁷⁹ Recoupment is, however, not recognized under the EU law as the pre-condition in deciding a predatory conduct. This element of recoupment will be further discussed in a later section of this chapter.

⁸⁰ *AKZO v Commission* OJ [1985] L 374/1.

⁸¹ *AKZO*, para 71-72.

⁸² Jones & Sufrin (n 11) ch2, p389.

⁸³ *Wanadoo*, COMP/38.233.

⁸⁴ *France Telecom*, Case C-202/07P [2009] ECR I-2369.

AVC and the ATC the proof of such intention is necessary.⁸⁵ The law on predatory pricing was further developed in the case of *Post Danmark A/S v Konkurrencerådet (Post Danmark I)*⁸⁶ in a way that described the position where the price was fixed above AVC, but below ATC, and no intention to eliminate competition was established.⁸⁷ In this case, the Konkurrencerådet (Danish competition council) found that Post Danmark did not abuse its dominant position by predatory pricing when it fixed its prices to be below ATC but above average incremental cost (AIC) because, following AKZO's case, they couldn't establish the intention to eliminate competition.⁸⁸ However, the Danish competition council found that selective price reductions amounted to price discrimination when Post Danmark pursued a different pricing policy between its former and existing customers.⁸⁹ This decision was upheld by the Konkurrenceankenævnet (Danish competition appeals tribunal)⁹⁰ and the Østre Landsret (eastern regional court).⁹¹ Post Danmark appealed against this decision to the Højesteret (Danish Supreme Court) which brought the case to the ECJ for a preliminary reference regarding the pricing policy. It is to be noted that the Danish competition authority based its decision on the concept of AIC, rather than AVC, which took account of the shared infrastructure costs associated with universal service obligations. The ECJ ruled that Article 102 was to be interpreted to mean that the pricing policy by a dominant undertaking might not amount to an exclusionary abuse merely because it was set at a price lower than the ATC but above AIC.⁹² The Court said that '...it is necessary to consider whether that pricing policy, without objective justifications, produces an actual or likely exclusionary effect to the detriment of competition and thereby of consumers' interests.'⁹³ There was no evidence of a predatory plan to eliminate

⁸⁵ The ECJ held 'The exclusionary consequences of a price-cutting campaign by a dominant producer might be so self-evident that no evidence of intention to eliminate a competitor is necessary. On the other hand, where the low pricing could be susceptible of several explanations, evidence of an intention to eliminate a competitor or restrict competition might also be required to prove an infringement.', *AKZO*, para 65.

⁸⁶ *Post Danmark I*, Case C-209/10.

⁸⁷ Jones & Sufrin (n 11) ch2, p391.

⁸⁸ *Post Danmark I*, para 13.

⁸⁹ *Post Danmark I*, para 8.

⁹⁰ *Post Danmark I*, para 12.

⁹¹ *Post Danmark I*, para 16.

⁹² *Post Danmark I*, para 45.

⁹³ *Post Danmark I*, para 45, the Court of Justice ruled that 'Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests'.

competitors, but it was necessary to assess the anti-competitive effects in such circumstances.

It could be reasonably concluded from the decision of *Post Danmark I* that for cases where prices are set between AVC and ATC, the proof of anti-competitive effects could be an alternative to the proof of intention to eliminate competition as decided in AKZO's case.⁹⁴ The ECJ also confirmed that price reductions may not necessarily be regarded as exclusionary abuse unless it produces actual or likely exclusionary effects to the detriment of competition and consumer.⁹⁵ However, it is for the national competition authority to make such findings and decide accordingly.⁹⁶ The ECJ stated it was necessary to apply the AEC test, and in doing so, the court seems to think that the price set by the dominant undertaking was able to cover the bulk of its costs and it was possible for an 'as efficient competitor' to compete with those prices.⁹⁷ It is also noteworthy that the concept of AIC was accepted by the ECJ for the purpose of the rulings made by the Danish competition council, though the court did add some common costs to the ATC as well as the AIC.⁹⁸

The concept of predatory pricing is based on the assumption that the dominant undertaking sacrifices its short-term profits in order to gain a long-term profit.⁹⁹ There is a strong possibility that the predator is able to recoup its losses through a monopoly price, once relevant competitors are driven out of the market. The question is whether it is necessary to prove recoupment in order to find a price predatory. In *AKZO*, the GC acknowledged the importance of recoupment but did not confirm that it was a pre-condition to the determination of predatory pricing. The important element was that predatory pricing eliminates competition. It was further clarified in *Tetra Pak International SA v Commission*¹⁰⁰ where the ECJ stated that it would not be appropriate to require additional proof of recoupment when there was a risk of a competitor being eliminated by the predatory conduct of the dominant undertaking.¹⁰¹ There was an attempt to apply the recoupment requirement in *France Telecom*, but the ECJ stated that proof of the possibility

⁹⁴ Jones & Sufrin (n 11) ch2, p394.

⁹⁵ *Post Danmark I*, para 37.

⁹⁶ *Ibid*, p 40.

⁹⁷ *Ibid*, p 38.

⁹⁸ Jones & Sufrin (n 11) ch2, p393.

⁹⁹ *Ibid*, p 412.

¹⁰⁰ *Tetra Pak* C-333/94P, [1996] ECR I-5951.

¹⁰¹ *Tetra Pak*, para 44.

of recoupment was not a necessary precondition to establish that predatory pricing is abusive¹⁰²—although it was a relevant factor, and the Commission was not precluded from finding it.¹⁰³ In contrast, the possibility of recoupment is a requirement for a finding of predatory pricing in the US under s2 Sherman Act. The US courts will not find predatory pricing an abuse unless there is proof that the predator has a dangerous probability of recouping its investment in below-cost prices through future (discounted) profits.¹⁰⁴ In the case of *Brooke Group Ltd v Williamson Tobacco Corp*,¹⁰⁵ the Supreme Court ruled that recoupment is the ultimate object of the unlawful predatory pricing scheme.¹⁰⁶ Therefore, it could be inferred in the US that the existence of below-cost prices and anti-competitive intent to eliminate competition will not violate s2 Sherman Act, if there is no proof of recoupment.¹⁰⁷

8.5.2.2 Predatory pricing in the airline market

A number of cases have considered the application of competition rules on predatory pricing in the aviation market in the EU and US. In the *Lufthansa-Germania*¹⁰⁸ case, the Bundeskartellamt (Germany Competition Authority/Federal Cartel Office(FCO)) found that Deutsche Lufthansa AG (Lufthansa) abused its dominant position on the Berlin-Frankfurt route ‘by charging flight tariffs which are not at least € 35 above the price charged by Germania Fluggesellschaft mbH (Germania) in the market without any objective justification.’¹⁰⁹ The decision was made following the prohibition of abusive exploitation by a dominant undertaking as provided under Section 19(1)(4) of the German Act Against Restraints Of Competition. In this case, when Germania started its first scheduled flight on the Frankfurt-Berlin route on 12 November 2001 with a price fare of Euro 99 for a flexible

¹⁰² *Franc Telecom*, para 110.

¹⁰³ *Franc Telecom*, para 111.

¹⁰⁴ Jones & Sufrin (n 11) ch2, p412.

¹⁰⁵ 509 US 209, 113 S.Ct 2578.

¹⁰⁶ *Brooke Group*, para 223.

¹⁰⁷ See also *Matsushita Electric Industrial Co. v Zenith Radio Corp.*, 475 U.S. 574, 588-590.

¹⁰⁸ Decision of the Bundeskartellamt of 18 February 2002 in the administrative proceedings against Deutsche Lufthansa AG; B9-144/01, 9th Division Decision; Available at <[<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?__blob=publicationFile&v=4>](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2002/B9-144-01.pdf?__blob=publicationFile&v=4)>; Also available at <https://www.concurrences.com/en/bulletin/news-issues/February-2002/The-German-Competition-Authority-66651>>accessed on 10 April 2019; See also; OECD, Roundtable Discussion on Predatory Foreclosure, Note by Germany, 28 September, DAF/COMP/WD(2004)41.

¹⁰⁹ Decision of the Bundeskartellamt of 18 February 2002 in the administrative proceedings against Deutsche Lufthansa AG; B9-144/01; para B.

one way ticket and Euro 198 for a round-trip ticket, Lufthansa reacted by introducing a new tariff of Euro 100 for its one-way ticket and Euro 200 for a round-trip ticket for the economy class. A series of price wars took place between the two airlines, and when Germania announced that it would not be able to continue operations for economic reasons on the route, it filed the petition to the FCO. The FOC was of the view that the new fares introduced by Lufthansa were below its own ATC, and constituted predatory behaviour which was intended to impede Germania's opportunity to compete on the route.¹¹⁰ Such conduct had caused serious impediment to the competition on the market entirely and was aimed at driving the competitor out of the market.¹¹¹ The FCO found that the price war instituted by Lufthansa matched that of Germania, and was targeted to undercut that price; Lufthansa had, in the past, instituted the same pricing strategy to force Go-Fly out of its other monopoly market, and the new price was significantly below the price of its tickets on its other competitive market (Berlin-Munich), where Deutsche BA was the competitor. It is argued that these findings led to the presumption that Lufthansa was using a strategy to drive Germania from the route, and the FCO had proven Lufthansa's predatory intent based on that presumption.¹¹² It was also argued that the FOC used ATC as the yardstick in this case because the use of marginal cost (MC) and AVC were not appropriate in the airline industry.¹¹³ One of the reasons is that flight prices are highly differentiated according to the restrictions or booking class, and the profitability calculation is always based on these restrictions to cover the average cost.¹¹⁴ Therefore the use of ATC is more appropriate than the AVC. Some argued that the decision in this case 'reflects an uncommon willingness to force incumbents to make room for entrants and to dictate the terms of that accommodation with precision.'¹¹⁵

Unlike the EU, airlines in the US have been subjected to consistent price wars and predatory practices. Predatory pricing is often used by the established airlines against the 'low cost' new entrants.¹¹⁶ New airline entrants are able to offer low fares in accordance

¹¹⁰ Decision of the Bundeskartellamt of 18 February 2002, para B.

¹¹¹ Decision of the Bundeskartellamt of 18 February 2002, para B.

¹¹² Kai Huschelrath, 'How To Prey On Predators – The Lufthansa-Germania Case'; WHU Graduate School of Management, Institute for Industrial Organization, 2003, p10.

¹¹³ OECD, Roundtable Discussion on Predatory Foreclosure, Note by Germany, 28 September, DAFE/COMP/WD(2004)41, p 6.

¹¹⁴ Ibid.

¹¹⁵ See 'Predatory Foreclosure' at <https://www.jftc.go.jp/eacpf/05/APECTrainingProgramDecember2004/West_Predatory.pdf> accessed on 2 January 2009.

¹¹⁶ Dempsey (n 5) ch8, p689.

with their low-cost structure, but they cannot survive if the incumbent airlines are willing to sacrifice short-term losses through predatory pricing in order to remove the small airlines from the market.¹¹⁷ In the case of *United States of America v American Airlines*¹¹⁸, American Airlines reacted to the entry of certain low-cost carriers on various routes centred in DallasFort Worth Airport in 1995-1997 by lowering its fares, and increasing the number of flights serving the routes. These low-cost carriers had entered the market, charging markedly lower fares on certain routes, and there was a huge increase in the number of passengers. As a result of the price reduction and capacity expansion by American Airlines, some of the low-cost carriers ceased operations, and American Airlines resumed its prior market strategy by reducing some of its flight capacity and raising its fares. The US government alleged that American Airlines had violated section 2 of the Sherman Act by expanding its capacity such that the incremental cost incurred could not be covered by the incremental revenue it added. Nevertheless, the US Court of Appeals affirmed the summary judgment entered in favour of American Airlines, by finding that American Airlines did not price its route-wide fares below AVC and rejected the government's incremental cost measures.¹¹⁹ According to the government, the low-cost carrier could not survive the oversupply of the seats placed on the market by American Airlines. The government in this case focused on the expansion of the capacity rather than the predatory costs. The Court of Appeal rejected this approach, and referred to the case of *Brooke Group Ltd v Williamson Tobacco Corp*¹²⁰ where two requirements were established to prove a predatory claim: the price below an appropriate measures of cost, and the probability of recoupment. For the cost measures, the Court of Appeal found that the two categories of tests used by the government to measure the incremental costs and short-run profit maximisation were 'invalid as a matter of law, fatally flawed on their application and fundamentally unreliable'.¹²¹ Some argued that this case is significant because 'the court treated a predatory capacity expansion claim in exactly the same manner as a predatory pricing claim' and acknowledged that "recent scholarship" had shown that predation can be profitable, "especially in a multi-market context where predation can occur in one market

¹¹⁷ Ibid, p702.

¹¹⁸ *United States v. AMR Corp.*, US District Court for the District of Kansas - 140 F. Supp.2d 1141, 1152-53 (D. Kan. 2001).

¹¹⁹ *United States v. AMR Corp.*, US Court of Appeals for the Tenth Circuit - 335 F.3d 1109 (10th Cir. 2003)

¹²⁰ 509 US 209, 113 S.Ct 2578

¹²¹ *United States v. AMR Corp.*, US Court of Appeals for the Tenth Circuit - 335 F.3d 1109 (10th Cir. 2003), para VI.

and recoupment can occur rapidly in other markets.”¹²² Comparing this case and the case of *Lufthansa-Germania*, it could be argued that the US courts are more inclined to find the pro-competitive rather than predatory value of price cutting.

The same allegations of predatory pricing and capacity expansion were made in the case of *Spirit Airline v Northwest Airline*¹²³, when Northwest drastically reduced its fares to match that of Spirit's and increased its daily non-stop round flights when Spirit, a low-cost airline, started operation in two routes involving Northwest's hub in Detroit. Spirit then filed a claim under Section 2 of the Sherman Act against Northwest for anti-competitive and exclusionary practices including the predatory pricing.¹²⁴ The District Court held in favour of Northwest and agreed that the price-cost comparison should consider all types of passengers along the disputed routes, and that the price was not set below AV—but the Court of Appeals reversed the judgment based on the finding that Northwest's predatory conduct was capable of recoupment.¹²⁵ The case applied the traditional cost measure of AVC.¹²⁶ It is argued that the structure of the airline industry contributes to the increased concerns about the anti-competitive behaviour of the incumbent legacy carriers, but the courts remain wary in interfering too directly in circumstances of price competition which they view as beneficial to the consumer.¹²⁷

8.5.2.3 Predatory pricing under Malaysian Competition Law

In the Malaysian airline industry, predatory pricing is dealt with under section 53 of the MACA 2015, where it prohibits a dominant enterprise from engaging in any abusive conduct in any aviation services market, and this includes any exclusionary conduct such as predatory pricing.¹²⁸ The Guidelines on the Abuse of Dominant Position elaborate on the concept of predatory pricing in the Malaysian aviation services.¹²⁹ Conduct by a

¹²² See 'Predatory Foreclosure' at https://www.jftc.go.jp/eacpf/05/APECTrainingProgramDecember2004/West_Predatory.pdf accessed on 29 January 2019, p 33-34.

¹²³ *Spirit Airlines Inc. v Northwest Airlines*, 431 F.3d 917 (2005).

¹²⁴ *Spirit Airlines Inc. v Northwest Airlines*, para B.

¹²⁵ *Spirit Airlines Inc. v Northwest Airlines*, para B.

¹²⁶ See 'Predatory Foreclosure' at https://www.jftc.go.jp/eacpf/05/APECTrainingProgramDecember2004/West_Predatory.pdf accessed on 29 January 2019.

¹²⁷ Erica Wessling, 'Spirit Airlines Inc. v Northwest Airlines Inc : A Case For Increased Regulation of the Airline Industry'; William & Mary *Business Law Review*, Volume 6, Issue 2, Article 9 (2015), p711-738.

¹²⁸ Section 53(1) and (3) of the MAVCOM Act 2015.

¹²⁹ MAVCOM Guidelines on Abuse of Dominant Position, para 4.11(a).

dominant undertaking may be considered predatory when it sets a lower price with the intention of ousting the competitor from the market and the competitor is no longer able to compete.¹³⁰ This element of intention is commensurate with the requirement established in the *AKZO* case. The Guidelines further state that the intention of the dominant undertaking in incurring short term losses in order to obtain a long term benefit is relevant to the question of predation.¹³¹ It is not explicit, however, on whether the concept of recoupment is necessary in establishing the predatory element under the Guidelines. The level of barriers to entry is also important, as these prevent the affected competitor from re-entering the market. In terms of cost measures, the Guidelines provide various non-exhaustive measurements that may be used in evaluating the predatory pricing, and they adopt the cost standards used under EU competition law.¹³² The Guidelines adopt the cost measures such as the Average Variable Cost (AVC), Average Avoidable Cost (AAC), Long-Run Average Incremental Cost (LRAIC) and Average Total Cost (ATC), and state that other cost measures can be used, depending on the circumstances and conditions of the relevant aviation services market.¹³³

There have been no predatory pricing cases in the Malaysia aviation sector so far. Nevertheless, there were many price war incidents in the past, involving MAS and AirAsia.¹³⁴ In 2008, MAS was accused by AirAsia of charging a predatory price when it launched its 'Everyday Low Fares' campaign.¹³⁵ It was argued that MAS had no intention of driving AirAsia from the market at that time, as all airlines were facing challenging economic conditions due to an increase in oil prices, and there was no possibility that MAS could recover from the low prices.¹³⁶ It is interesting to note that the issue was not raised to the competition authority¹³⁷, but as the airline industry is fast developing, the price war is expected to continue and the issue of predatory pricing will be an important factor to

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid, para 4.11

¹³⁴ See <<https://www.thestar.com.my/news/nation/2014/05/23/major-price-war-in-the-air-mas-and-airasia-x-slash-ticket-prices-by-more-than-half/>>; and <<https://www.malaysiakini.com/letters/54577>> 29 April 2019.

¹³⁵ See <<https://www.thestar.com.my/news/nation/2008/05/05/mas-to-launch-zero-fare-tickets-for-domestic-destinations-today/>> and <<https://www.thestar.com.my/news/nation/2008/06/08/mas-launches-third-wave-of-low-fares-campaign/>> accessed 29 April 2019.

¹³⁶ Tengku Akhbar Tengku Abdullah; 'Competition in the airline industry: The case of price war between Malaysia Airlines and AirAsia', *Central Asia Business Journal* 3, November 2010

¹³⁷ Given the competition legislation in Malaysia was first introduced in 2012 by the coming into force of the CA 2010, there was no appropriate body for AirAsia to raise the predatory pricing issue.

manage.¹³⁸ Once again, the EU standards for the assessment of predatory pricing, with their focus on standards of costs rather than the ‘pro-market’ US recoupment approach, will continue to be more relevant to the Malaysian aviation market, which is characterised by high barriers to entry, large levels of public ownership and less developed structures conducive to market competition.

8.5.3 Refusal to supply and essential facilities

8.5.3.1 Refusal to supply and essential facilities under EU law

Firms with dominant power are generally free to choose their customers.¹³⁹ In certain situations, nevertheless, refusal to supply could amount to an abuse and is capable of infringing Article 102. This type of abuse was first established in the EU case of *Commercial Solvent v Commission*¹⁴⁰, where the ECJ held that a refusal by the dominant undertaking Commercial Solvent to supply ZOJA with aminobutanol (a raw material in the production of ethambutol) amounted to an abuse under Article 102.¹⁴¹ The general rules under Article 102 on refusal to supply overlap with the so-called ‘essential facility doctrine’, in circumstances where the downstream competitors need access to some indispensable and crucial facilities owned by a dominant undertaking.¹⁴² The Commission did not use the phrase ‘essential facilities’ until in the case of *Sealink B& I Holyhead* where the Commission said that a dominant undertaking which controlled an essential facility, and refused its competitor access to such facility, or granted access based on less favourable conditions, placed upon the competitor a competitive disadvantage and thereby infringed Article 102.¹⁴³ The discourse on refusal to supply has always been associated with ‘essential facilities’—one scholar suggested it is ‘the epithet that dares not speak its name’.¹⁴⁴ The term ‘objectively necessary’ is used in the Guidance Paper to refer to the issues on essential facilities.¹⁴⁵

¹³⁸ See <http://www.theedgemarkets.com/article/price-war-looms-malaysian-skies>; <https://www.thestar.com.my/business/business-news/2016/07/26/price-war-among-airlines-seen-intensifying/> accessed on 29 April 2019.

¹³⁹ Jones & Sufrin (n 11) ch2, p496.

¹⁴⁰ Cases 6, 7/73, [1974] ECR 223.

¹⁴¹ [1974] ECR 223, para 25.

¹⁴² Jones & Sufrin (n 11) ch2, p500.

¹⁴³ IV/34.174, *Sealink/B&I Holyhead*: Interim Measures, Commission Decision on 11 June 1992, para 41.

¹⁴⁴ Steven D Anderman, ‘The Epithet That Dares Not Speak Its Name: The Essential Facilities Concept in Article 82 EC and IPRs After the *Microsoft* Case’ in Ezrachi, n. 41, 87.

¹⁴⁵ Guidance Paper, para 83.

The difficulties of the essential facilities concept arise from the fact that not every facility of a dominant undertaking should be regarded as essential, so as to force it to share with its competitors and thus interferes with its own right.¹⁴⁶ It is crucial that 'essential' is defined narrowly, to include those facilities that are truly indispensable, and which, if access is denied, would amount to having an anti-competitive effect. It is also to be noted that some essential facilities are, by their very nature, physically limited to a number of users, and the intervention by the authority maybe needed to avoid excessive charges.¹⁴⁷ It is argued that there is no general duty to share the essential facilities, and even if there is, it should be exceptional, so as to ensure effective competition or improve competition.¹⁴⁸ *Oscar Bronner's* case is important in this respect, as it emphasised the importance of limiting the circumstances in which the concept of essential facilities could be applied. The concept must not be used to contravene the dominant undertaking's right to choose a trading partner, and the right to dispose of its own property. There must be 'a careful balancing of conflicting consideration' between the long-term and the short-term competition benefits, and that the primary purpose of Article 102 is to protect competition and not competitor.¹⁴⁹ In this case Oscar Bronner, a new entrant to the Austrian newspaper market, was denied access by Mediaprint to its extensive home delivery service for newspapers. Oscar Bronner had argued that by reason of its small size it was unable to replicate the home delivery service of the established incumbent and thereby compete with the existing newspapers.

The ECJ stated that four main criteria must exist before a refusal could be said to be abusive: the elimination of competition, the absence of objective justification, the indispensability of the facilities, and the absence of actual and potential substitute for the facilities.¹⁵⁰ The ECJ found that other methods of distributing newspapers, though less advantageous, did exist, and there were no technical, legal or economical obstacles preventing Oscar Bronner from establishing its own home-delivery scheme, and it was not

¹⁴⁶ Jones & Sufrin (n 11) ch2, p502.

¹⁴⁷ *GT-Link A/S v De Danske Statsbaner (DSB)*; Case C-242/95, ECR I-4449.

¹⁴⁸ Philip Areeda, 'Essential facilities: An Epithet in Need of Limiting Principles' (1990) 58 *Antitrust Law Journal*, 841, p852-53.

¹⁴⁹ Opinion of Advocate General Jacobs, Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECR I-779, para 56-58.

¹⁵⁰ Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECR I-779, para 41; See also Jones & Sufrin (n 11) ch2, p506.

sufficient to merely argue that the establishment was not economically viable by reason of the small circulation.¹⁵¹ Oscar Bronner was also not prevented from using alternate means of selling its newspaper to consumers through kiosks, etc. In the light of these considerations, the ECJ decided that the refusal to allow a rival newspaper distributor to have access to a dominant undertaking's home-delivery scheme did not constitute an abuse of a dominant position within the meaning of Article 102.¹⁵²

8.5.3.2 Refusal to supply and essential facilities in the airline industry

The issues of refusal to supply essential facilities has becoming increasingly important in the liberalised economy, where physical infrastructure and networks are owned by the privatised or liberalised monopoly.¹⁵³ This is particularly true in the case of airline industry. The case of *London-European Sabena*¹⁵⁴ described how a refusal to supply access to a computer reservation system would amount to an abuse. In this case, Sabena, a dominant airline in Belgium, refused access to a computer reservation system to a rival airline. The Commission found that it was an abuse as it was done with the aim of pressurising the airline to withdraw from certain routes or raise prices, and was implemented as punishment for not using its ground-handling services.¹⁵⁵ In the case *British Midland v Aer Lingus*¹⁵⁶, Aer Lingus refused to provide interlining facilities to British Midland when the latter entered the London Heathrow-Dublin route. This case involved Aer Lingus, the national airline of Ireland and British Midland, which had participated in the IATA's Multilateral Interline Traffic Agreement since 1964. In 1989, Aer Lingus decided to terminate its agreement with British Midlands. The Commission stated that Aer Lingus's conduct was intended to affect the structure of competition by penalising a competitor entering into the market.¹⁵⁷ The Commission thus decided that the refusal to interline had deprived British Midland of the opportunity to compete on an equal footing, and ordered Aer Lingus to grant access.¹⁵⁸ The Commission held that Aer Lingus held a dominant position in the route concerned, and its refusal to interline with British Midlands affected

¹⁵¹ *Oscar Bronner*, para 43 – 45.

¹⁵² *Oscar Bronner*, para 47.

¹⁵³ Jones & Sufrin (n 11) ch2, p500.

¹⁵⁴ *Sabena*, [1998] OJL317/47.

¹⁵⁵ *Sabena*, para 31.

¹⁵⁶ [1992] OJL96/34, recitals 14-30

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

the competition on that route. This case applied the essential facilities doctrine, where the Commission stated that those holding dominant positions should not withhold facilities which the industry traditionally provides to all other airlines. In particular, the Commission found that the refusal hinders maintenance or the development of competition.¹⁵⁹

Another important area in the sector, which could be the subject of the essential facilities claim in principle, are airport facilities. In many cases courts have recognised that the airports are the sole provider of certain facilities. Airport operation services generally include the landing and taking off of aircraft, the manoeuvring, parking and servicing of aircraft, the arrival and departure of passengers and cargo, the process of baggage, and the arrival and departures of airport workers—but the services do not cover air traffic services and the other retail business at the airport.¹⁶⁰ It is important to note that the EU has imposed three main Directives relating to airports: airlines access to congested facilities,¹⁶¹ airport charges¹⁶² and the vertical relationship between airports and ground handling companies.¹⁶³ The ECJ has held that the airport authority is the sole owner or provider of the ground handling services, which services are indispensable to the airlines in the case of *Aéroport de Paris v Commission*.¹⁶⁴ Private actions have also concerned the issue of access to essential facilities such as the parking facilities in the case of *Purple Parking Anor Ltd v Heathrow Airport Ltd*¹⁶⁵ and the bus operators in the case of *Arriva The Shires Ltd v London Luton Airport Operations Ltd*,¹⁶⁶ *Lothian Buses v Edinburgh Airport*¹⁶⁷,

¹⁵⁹ The Commission states that 'whether a duty to interline arises depends on the effects on competition of the refusal to interline; it would exist in particular when the refusal or withdrawal of interline facilities by a dominant airline is objectively likely to have a significant impact on the other airline's ability to start a new service or sustain an existing service on account of its effects on the other airline's costs and revenue in respect of the service in question, and when the dominant airline cannot give any objective commercial reason for its refusal (such as concerns about creditworthiness) other than its wish to avoid helping this particular competitor', [1992] OJL96/34, para 26.

¹⁶⁰ Civil Aviation Authority, 'CAA Competition Working Paper: A Discussion of National and European Competition Cases Law Relevant to the Aviation Sector'; CAP 1370; published by the UK Civil Aviation Authority (2016).

¹⁶¹ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community Airports [1993] OJ L14/1.

¹⁶² Airport Charges Directives; 'Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges'.

¹⁶³ Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airport OJ L/272.

¹⁶⁴ Case C-82/01 P *Aéroport De Paris v Commission* [2002] ECR I-9297.

¹⁶⁵ Court of Appeal - Chancery Division, April 15, 2011, [2011] EWHC 987 (Ch).

¹⁶⁶ Case No. HC13d01784.

¹⁶⁷ Unreported, see www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife13293436.

and *Arriva Scotland West Limited v Glasgow Ltd*¹⁶⁸, where airports have been recognised as the dominant undertaking, having the control of certain facilities within an airport.

A major issue concerning the refusal to supply airport facilities is that of airport-slot allocation. In the airline industry, airport slots have been regarded as an essential tool in the operation of the globalised industry.¹⁶⁹ In the EU, as mentioned earlier, the allocation of slots has been regulated since 1993 through its common rules on allocation of slots at Community airports.¹⁷⁰ The aim of the regulation is to ensure that the available landing and take-off slots are used efficiently, non-discriminatory and in a transparent way.¹⁷¹ One study suggests that the abuse of a dominant position in the airport-slot allocation is likely to arise when the operators of the airports seek to alter the allocation according to their main customer-airline.¹⁷² It can be reasonably inferred from the study that slot allocation is also an essential facility for airline.¹⁷³ In this regard, it is important that the principle of essential facilities, as put forward in *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs*¹⁷⁴, where the Court emphasised the concept of indispensability of the facility, be thoroughly examined and analysed. So far, there have been no cases involving slot allocation that have been tried in the European Courts.

8.5.3.3 Refusal to supply under Malaysian Competition Law

The slot allocation in Malaysia is administered by the National Slot Coordination Malaysia (NSCM) under the jurisdiction of the Malaysia Airport Holdings Berhad (MAHB), but the MAVCOM regulates the process.¹⁷⁵ Under the MAVCOM Act, slot allocation is defined as the 'allocation of time slots for the purpose of granting aircraft access to aerodrome facilities for landing and taking-off at specific dates and times'.¹⁷⁶ MAVCOM

¹⁶⁸ Outer House, Court of Session, [2011] CSOH 69 CA170/10, Available at <<https://www.scotcourts.gov.uk/searchjudgments/judgment?id=44998aa6-8980-69d2-b500-ff0000d74aa7>> accessed 29 January 2019.

¹⁶⁹ Steven Truxal, 'Risk of abuse of dominance in airport slots for 'better' European airport?', [2014] *European Competition Law Review*, 35(6), p299

¹⁷⁰ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community Airports [1993] OJ L14/1.

¹⁷¹ Ibid.

¹⁷² NERA Report as mentioned in Steven (n 169) ch8.

¹⁷³ Truxal (n 169) ch8, p14.

¹⁷⁴ *Oscar Bronner*, [1998] ECR II 7791, [1999] 4 CMLR 112.

¹⁷⁵ Section 17(1)(c)(e) of MACA 2015.

¹⁷⁶ Section 67(3) of MACA 2015.

has also the power to prescribe regulations and principles for slot allocation¹⁷⁷ though it has yet to issue any guidelines and the administration of airport slots is still under the NSCM.¹⁷⁸ There have been no reported cases pertaining to the slot allocation in the Malaysian airports. Nevertheless, as MAHB handled 96.6% of the total passenger traffic in Malaysia through the 39 out of 42 airports it operates in Malaysia,¹⁷⁹ MAHB is still the dominant airport operator in Malaysia having the control of the airport facilities including the responsibility for the slot allocation process, and therefore could be subjected to the principle of essential facilities.

The concept of refusal to supply and essential facilities is clearly provided in the MAVCOM Guidelines on Abuse of a Dominant Position.¹⁸⁰ Generally, all enterprises¹⁸¹ are free to do business with the trade partners of their choice¹⁸², and this concept is in line with that established in *Oscar Bronner*.¹⁸³ However, a refusal may become abusive if the refusal to supply the aviation services or to allow access to essential facilities would harm competition and exclude competitors, unless such conduct is objective and commercially justified.¹⁸⁴ These elements of eliminating competition and objective consideration are also in line with the criteria in the *Bronner* case. However, under the MAVCOM Guidelines on Abuse of Dominant Position, the objective consideration must be 'commercial'. The term 'commercial' is not defined in the Guidelines, but from the examples provided, the failure to pay for the facilities may be considered a commercial justification for a refusal of access to facilities.¹⁸⁵ The requirement of commercial justifications may exclude more 'public policy' justifications, however. The requirement of 'indispensability', as set out in *Bronner*, is not explicitly required under the Guidelines, however; it will be important to see whether future cases will introduce this important limiting principle on a case by case basis, in line with other competition law cases which have tended to follow EU law and principles.

¹⁷⁷ Section 67(2)(d) of MACA 2015.

¹⁷⁸ The airport slots allocation is still under the administration of NSCM.

¹⁷⁹ MAVCOM, Waypoint – Malaysia Aviation Industry Outlook (November 2018), p27.

¹⁸⁰ MAVCOM Guidelines in Abuse of Dominant Position, para 4.11(e)

¹⁸¹ The 'enterprise' under MACA 2015 is literally similar to the 'undertaking' in the TFEU, as discussed in the previous Chapter 5.

¹⁸² MAVCOM Guidelines in Abuse of Dominant Position, para 4.11(e).

¹⁸³ *Oscar Bronner*.

¹⁸⁴ MAVCOM Guidelines in Abuse of Dominant Position, para 4.11(e).

¹⁸⁵ *Ibid*.

8.6 Conclusion

The airline industry has become highly competitive, and this allows for the emergence of many airlines' predatory tactics and strategies. Some of these tactics and strategies have the tendency of becoming anti-competitive when they are engaged in by dominant airlines, and are therefore prohibited, as they pose threats to the elimination of competition and causing harm to consumers. Unlawful rebates and discounts, predatory pricing and refusal to supply are among the most contentious airline practices that come to the attention of the competition regulator. In the Malaysia aviation sector, the MACA 2015 provides competition provisions that regulate all airlines activities. On abuse of a dominant position, MACA 2015 and the MAVCOM Guidelines on Abuse of a Dominant Position have set out general rules and principles for guidance in this area which largely follow EU law. The Malaysian Guidelines on predatory pricing, refusal to supply, and essential facilities are similar to the approach in the EU. The Guidelines on discounts and rebates are similarly reflective of the EU approach but can also be criticised as highly formalistic and it will be important to see whether the 'more economic' approach adopted more recently in the EU courts in the *Intel* decision will be adopted in future Malaysian cases. Nevertheless, it is also important to note the manner the law is being implemented under the CA 2010. Some issues pertaining to the approach taken by the competition authorities (MyCC and CAT) and the HC in defining the relevant market in the abuse of dominance cases must be given serious consideration by MAVCOM. There must also be more references made to the EU law and other international best practices in implementing the law considering the infancy of the competition law implementation in the country.

The EU courts have established extensive principles in these areas, and in many cases have departed from the approach adopted in the US. There are good reasons why the Malaysian competition authorities would prefer to follow the more interventionist approach of the EU, rather than the US approach. The US approach, highly influenced by the Chicago School of antitrust, adopts a very pro-market, efficiency and total welfare model that is not conducive to the structural features of the Malaysian market. The Malaysian aviation market is characterised by high barriers to entry, the presence of large government-owned enterprises, and highly concentrated markets. It can be reasonably inferred from the cases and the discussion above that, apart from the fact that competition assessments are based on each and every specific circumstances of each case, the nature

of the economic sector, the economic analysis, and the overall objective of the competition law of a particular jurisdiction play a very significant role for the courts to consider in making decisions. In this regard, it can be submitted that EU law and cases will continue to have a strong influence in the competition assessment in the Malaysian aviation industry, but with proper and necessary modifications based on the national needs.

CHAPTER 9—CONCLUSION

9.1 Introduction

This research has examined the application of the competition laws in the airline industry in Malaysia. These laws have been largely based on EU competition laws. The interpretation of EU laws have therefore been used as the main comparator as well as other jurisdictions where necessary. The research also identified areas where these comparative approaches may not be relevant in the Malaysian context, due to differences in legislative drafting and the important institutional, political and economic context of the Malaysian market, as a developing economy. It described the economic theories of competition regulation which underlies the interpretation of the goals of competition laws. Doctrinal or case analysis is used to examine critically the application of the law in the context of the Malaysian aviation services market. The competition issues arising from the various types of airline cooperation agreements and alliances are examined, focusing on the significant case of *MAS/AirAsia*. The prohibitions on the abuse of a dominant position as they apply to aviation have also been examined. This Chapter summarizes and concludes the findings and provides possible recommendations.

9.2 Findings and observations

The concepts and theories of competition have greatly influenced the way competition policies and laws are being drafted and implemented worldwide. In the airline industry, competition law is required to prevent anti-competitive practices so as to ensure that competition is maintained and consumers are protected. In Malaysia, competition law only come into force about a decade ago and its implementation is still at its infancy. The country's economic policies and development plans have been heavily moulded and influenced by its colonialization by the British and its legal system. From a minimal intervention before independence, the government has extensive control over the country's economic development with various development plans to overcome the slow economic growth. After independence, many government-linked companies were created to help boost and stabilise the economy and infrastructure. With the global implementation of liberalization and deregulation, the economy has become highly competitive and the

country has realised and acknowledged the importance of having a fair trade policy. Particularly in the airline industry, from having just one national airline which dominated the market for decades, the country has witnessed the emergence of new airlines with new business models. Currently, there are seven scheduled airlines operating in Malaysia with four international airports. This development in the economy led to the enactment of the country's first general competition law in 2010. The CA 2010 applies to all sectors of economy except for the telecommunication and energy sectors. Three years after the CA 2010 came into effect, the country passed the MACA 2015 which created a sector specific regulator for aviation with a comprehensive power to enforce the competition regulations in the airline industry.

The country has also established three important competition agencies: MyCC, CAT and MAVCOM. Each of the agencies has their own powers and functions to ensure the smooth enforcement and implementation of the law. After about a decade in operation MyCC has developed a strong organizational structure in terms of its expertise and resources. It is also noted that although the Minister has considerable powers in the setting up of the authority, the power to make decisions pertaining to competition cases is only granted to MyCC. The decisions issued during its early years arguably lacked depth in legal and economic reasoning. More recently however, there has been considerable improvement in the production of sound legal and economic decisions. The CAT appeal decision in *MAS/AirAsia* has shown however that the tribunal still lacks some skills and knowledge in competition law. This is clearly a serious concern. As the highest administrative body with quasi-judicial power in dealing with competition cases in the country, CAT's decisions set important precedents and impact the interpretation of competition cases in general. With the increasing number of competition cases CAT members must possess a strong foundation in competition law expertise. It is also observed that both MyCC and CAT should refer to more decisions from other developed and mature jurisdictions especially the EU jurisprudence. For the airline industry, MAVCOM was built on a strong foundation in terms of its management and operational team which combine the appropriate level of legal, economic and industry experts. It is unclear however whether the current members have the right skills and capabilities in dealing with competition issues in the industry. Only five persons have been appointed as MAVCOM members. This falls short of the statutory requirement under MACA 2015. The Chairman is a Member of Parliament and this in particular raises concerns regarding the

impartiality, independence and possibility of political influence in issuing decisions. Other members seem to have only general knowledge and experience in the industry and do not possess specific expertise in aviation or competition law. Although MAVCOM has yet to deal with any competition issues, these concerns need to be addressed. MAVCOM members have to have the necessary skills and independence to deal with not only with competition issues but also to advise on all policy matters pertaining to aviation.

The Malaysian CA 2010 and MACA 2015 have similar competition provisions which are modelled upon the EU laws. All the foundational concepts of the EU competition law have been adopted with several key terminologies given a specific legal definition such as 'agreement', 'concerted practices', 'decisions of associations' and 'enterprise' benefitting from the EU settled jurisprudence. The concept of 'significant restrictions' which is equivalent to the EU concept of 'appreciable effects' is also incorporated in the law except that the Malaysian ('safe harbour') threshold is higher than that in the EU (De Minimis Rule). There is also no concept of 'effect on trade' and 'effect on Member States' in the Malaysian laws, thus, leading us to the most important difference between the two jurisdictions; the concept of single market. In most of the EU cases, the ultimate consideration given by the Courts is the concept of single market being the main objective of the TFEU.¹ Unlike the EU, this concept is not applicable in Malaysia and is therefore not considered in its decisions or judgments. The goals and objectives of the respective Acts are to be ultimately interpreted by the Malaysian authorities and courts. In terms of hard core object restrictions, while EU law has developed their meaning through the case law, the Malaysian law has deemed certain hard core object restrictions as statutorily prohibited, subject to the establishment of the object in the agreement. This approach gives more legal certainty to the industry as well as facilitating the enforcement and implementation by agencies which do not have to prove 'effect' on the market. Though the approach seems to ease the burden of proof of such restrictions, the actual implementation may suggest otherwise.² Following this, the requirement of whether the market should be defined for object restriction cases is also questioned.³ It is also noted that market definition plays an important role in the airline industry based on its unique economic characteristics.

¹ The cases of *GlaxoSmith Klines* and *Consten Grundig* are the best examples where the Courts ultimately based their decisions on the integration of single market in the EU.

² This issue is investigated and examined in detailed in Chapter 7.

³ This issue is also addressed in detailed in Chapter 7.

In this respect the *MAS/AirAsia* case raises certain important concerns. The bright line policy adopted by CA 2010 (and MACA 2015) is beneficial in younger and developing jurisdictions but must be implemented with caution. There must be clarity with regards to the circumstances in which the deeming provisions can be invoked. EU case law has dealt with this issue extensively when it examines the 'legal and economic context' before an object restriction is established. MyCC has clearly adopted a formal or orthodox approach, which coincides with the formalist approach taken by the EU in its early years of implementing the competition rules. Although this serves legal certainty to the industry, an overly easy classification of conduct as coming within the categories subject to the deeming provision may result in false positives. It is submitted that a more detailed examination of the 'legal and economic context' may be required or a 'quick look' analysis under the US Sherman Act may be adopted. The case also confirms that object analysis will always be controversial. Even with the deeming provision, the issue of the appropriate standard of analysis still exists and this proves that each and every case needs a comprehensive assessment of the facts. The case also reveals the true capacity and capability of CAT in handling competition reviews in the country. There was also little reference to the EU case law in the decision. As CA 2010 was drafted mainly on the basis of EU law, the reference to the EU cases as a guidance is required (unless important exceptions arise in relation to the Malaysian economy). It is also observed that had the decision been made under the MACA 2015 it would have been largely the same analysis, given the similar competition provisions.

The application of Article 101(1) TFEU to airline cooperation agreements and alliances reveals several important observations. Market definition is crucial in assessing competition issues in the airline industry. Almost all cases define the relevant market regardless of the type of agreements and restrictions. The O&D city pairs has been established as the appropriate approach though in some cases other aspects of network effects such as competition between hubs and alliances may arise. It is strongly submitted that this is due to the unique nature of the airline industry which concerns particular product and geographical substitutions. Both technical and commercial agreements have the tendency to affect competition in the airline industry. Nevertheless, the competition issues are highly likely to be raised when these agreements are combined and airlines cooperate on the key parameters of competition: fare structure, pricing policy and mechanism, routes schedule and allocation as well as risk and revenue sharing. Almost all airline tactical and

strategic alliances cooperate and integrate on these key parameters of competition. Especially in cases where the agreement creates the 'metal-neutrality' cooperation, competition would normally be eliminated. The position of airlines on particular markets or routes is also important. Most airlines serve the same routes and are actual competitors. These factors have greatly contributed to the creating of appreciable effects on competition. The existence of barriers to entry to a particular route, slot allocation and regulatory restrictions, are all important considerations for the authorities to assess.

Most airline alliances, except those involving cartel offences where high penalties are imposed, are considered pro-competitive and to contribute to economic efficiencies. In in most cases, airlines are required or willing to remedy the competition concerns raised through the commitments. Commitments refers to the solutions proposed to be undertaken by airlines which normally include an offer to participate in the FFP or interlining or the allocation of slots to new entrants. This is to ensure that other competitors exist in the market. As a result, airlines are granted exemptions, some with conditions and some without. Article 101(1) enforcement in the airline industry is largely positive and sympathetic to alliances and cooperation as long as there are economic efficiencies and consumer benefits. There is a focus on counterbalancing the anti-competitiveness of the cooperation with the efficiency gains. As the application of the competition law in Malaysia is still at its infancy, the established EU competition law principles in these airline competition cases provide a useful insight and guidance. In adopting these principles, nevertheless, Malaysia needs to be cautious of the differences in the competition objectives as well as the developed and advanced structure of the airline industry in the EU.

The discussion on the abuse of a dominant position by airlines has shown that airlines often resort to commercial tactics such as rebates and discounts, predatory pricing and refusal to supply to maintain its position in the market. These most contentious practices have caused anti-competitive effects and have attracted the attention of competition authorities. Rebates and discounts are considered anti-competitive when they are loyalty inducing and have the exclusionary effects in the market. The main competition concern is that consumers are obliged to make a substantial purchase from an unavoidable trading partner to obtain discounts thereby excluding or damaging other competitors. Predatory pricing is another popular airline strategy to exclude new entrants in the market

by engaging in price wars. Airlines may also deny access to essential facilities to other competitors. This refers to the refusal to allow other competitors to use certain facilities that are provided only by the dominant airlines as a result of which the competitor is driven out from the market. Most cases concerning airlines involve the facilities at the airport such as the use of parking spaces, transport and feeder services and the most controversial is the airport slots. There are extensive principles developed in the EU in these areas and these can provide guidance for Malaysia. It is to be noted however the approach taken by the EU is different from the US as the latter is highly influenced by the Chicago School of antitrust. The US adopts a very pro-market, efficiency and total welfare model that is not conducive to the structural features of the Malaysian market. In this regard, it is strongly submitted that EU law must continue to provide guidance and be a strong influence in the competition assessment in the Malaysian aviation industry but with the necessary modifications to suit the national institutions and economy.

The interviews carried out with the relevant competition authorities have also revealed important and interesting facts. The enactment of MACA 2015 and the idea behind the establishment of MAVCOM were in response to massive need in the industry to restructure in the face of liberalisation and regional as well as global competition. There are still issues and challenges faced by the industry, however, particularly the lack of expertise in competition law and economics. One of the continuing efforts taken by the regulators is the cooperation with regional and international organisations to deal with these issues and to ensure best practices such as UNCTAD, OPECD, ASEAN. There are also issues on the dual roles of MyCC and CAT as investigator and adjudicator. MACA 2015 also provides for the provision of public service obligations by the airlines and this indicates the burden of Malaysian carriers of public service obligations which is common in developing countries. At regional level, although there have been active participation by the ASEAN countries in the ASEAN 'open skies' policy, there is also reluctance by many jurisdictions to fully liberalise their industry, including Malaysia.

9.3 Recommendations

This study concludes that there are three main areas that need improvement to the application of competition law to the Malaysian aviation industry, two of which are immediate and should be given high priority. First, there is a crucial need for the

enforcement and implementation agencies to have competition expertise, be it from the legal or the economic sector. As a developing country moving towards a highly competitive economic market, strong competition law is essential. While the responsibility to advocate and educate the business entities and public has already been taken up by respective agencies (MyCC and MAVCOM) and it is on-going, the right expertise must be in place to ensure competition issues are dealt with appropriately. It is important that competition issues are assessed and developed on the correct principles of competition law so that the aims of the law are not compromised and public confidence remains high. The CAT especially must make sure that the members acquire the right skills, knowledge and expertise so that it can rectify any deficiencies in the decisions made by MyCC. Given that a specific entity has been created for the purpose of regulating the airline industry, it is vital that MAVCOM invest in acquiring experts and sufficient resources. It is recommended that Malaysia take advantage of the resources provided by regional agencies such as ASEAN and international agencies such as the OECD, UNCTAD and the ICN as possible sources of this guidance and expertise.

The second recommendation concerns the use of EU references as a guidance in assessing and deciding the competition cases. Being a young jurisdiction with limited expertise the best possible option is to seek and use the best practices from the developed and mature jurisdictions. In the case of Malaysia, the EU jurisprudence is relevant not only because of its 'organizational structure' but the developed principles and similarities in the legislative provisions that have long been adopted in Malaysia. It is also true that transplanting a model law from developed jurisdictions requires necessary modifications to suit the local and domestic needs. The correct understanding of the law, its principles and development, which can only be obtained from other matured jurisdictions, nevertheless, are crucial at this early stage.

The third recommendation may not require immediate attention but must be given serious consideration. There must be consistent application of the competition law between the competition authority and the sector regulator. The current setting shows that the relationship between the two can be problematic and cause inconsistency in the interpretation and application of the law. MAVCOM decisions are not subjected to CAT's jurisdiction but to a judicial review by the HC. It is appropriate that decisions of a sector regulator be reviewed administratively before the matters are brought to a higher court.

Issues and concerns that arise from decisions issued by a sector regulator must be harmonised with the general principles of the law and by omitting this one step of administrative judgment it is foreseeable there will be two sets of interpretations and approaches of the same competition provisions. It is undoubtedly true that the aviation sector possesses unique characteristics but every other sector of the economy also has different business elements and each and every competition case is decided individually based on the respective facts and circumstances. It is submitted that in a developing jurisdiction like Malaysia, the inconsistent application of the law should be avoided.

APPENDICES

APPENDIX 1

Table 2: Common Terms and Conditions of Code-Sharing Agreements

Clauses	Provisions
Routes	List of agreed routes
Marketing and product display	Specifies each carrier's way of marketing a flight, the need to disclose that a flight is code-shared, to identify the actual operating carrier and to indicate if there are any traffic restrictions on certain routes as specified in the relevant service agreement.
In-flight product and quality monitoring	Stated the procedures and minimum level of operational, ground and in-flight service for both carriers.
Technical and operational requirements	Dictates the responsibility of the operating carriers, rights to make operational changes as necessary for safety and other reasons. Procedures for handling changes to schedules, delays and cancellations are described
Safety and security	Provides assurance that flights are operated safely with suitable equipment, and the relevant standards set by the relevant authorities.
Passenger handling and airport procedures	Provides procedures for handling passengers, management of disruptions. It is normally for the operating carrier to manage the situation but when a flight is cancelled in advance, the marketing carrier is responsible to rebook for the code-share passengers.
Inventory control procedures*	<p>Specifies the airlines' reservations booking classes and mapping, potential "block space" arrangements and the access to inventory on the operating carrier's flight.</p> <ul style="list-style-type: none"> • Booking classes are "buckets" of seat inventory (often overlapping) and are the basic "raw material" handled by airline and GDS reservations systems. The airline's inventory control system will indicate the level of availability seats associated with each booking class, and reservations systems are able to book passengers into that booking class until its availability reaches zero. Booking classes are distinct from service classes (First, Business, Economy) and there will be more than one booking class associated with each service class. Each booking class is generally associated with particular types of fare (business class, fully flexible, advance purchase, etc.) and/or types of traffic (e.g. flexible-ticket passengers connecting onto long haul services), and hence with particular ranges of yields (i.e. revenue per passenger). • In "freesale" code-share arrangement, the booking classes of the two airlines are mapped automatically. When a passenger tries to book on the marketing carrier, a seat from the booking class relating to the fare being sold by the marketing carrier needs to be allocated. The reservations system will try to access this booking class, which will be automatically mapped to the corresponding booking class of the operating carrier – if seats are available in this booking class on the relevant flight, a booking can be made (otherwise it will be denied). In this way, the marketing and operating carrier book into the same inventory of seats. • In "block space" arrangement, the marketing carrier pre-arranges to reserve a given number ("block") of seats on the operating carrier's flights. This may be an absolute arrangement, whereby the marketing carrier purchases the block of seats at an agreed price (called a "hard block"), or there may be an option to return some of the seats at an agreed number of days before departure ("soft block"). • As a result, a "virtual flight" is created and controlled by the marketing carrier, with a guaranteed availability of seats for the marketing carrier and no real time communication needed with the operating flight.
Pricing, revenue management, ticketing, commission payments and financial Settlement	<p>Specifies whether division of revenues (and payment of commissions) follow standard industry procedures, parallel agreements between the parties or "proration". It also specifies on code-share commission and interline service charge (ISC).</p> <p><i>*these provisions may likely to be concluded in a few separate agreements</i></p>
Taxes	Payment, collection and settlement of relevant taxes and charges.

Liability, indemnification and insurance	Specifies liability of each carrier. Normally the operating carrier indemnifies the marketing carrier for any liability it incurs in relation to non-performance of its obligations to its customer and the former is required to hold suitable insurance.
Exclusivity	Preventing them from entering into further code-share agreements with third party carriers in certain markets. *this provision maybe incorporated in certain agreement

APPENDIX 2

Table 4: Summary of Antitrust/Cartel Cases under Article 101 of the TFEU

	Parties	Types of agreements	Market Definition	Antitrust provisions/ Decisions	Exemptions	Remedies
1.	Lufthansa/ SAS/ United Airlines [COMP/D-2/36.201, 36.076, 36.078] 30.7.2002 Oneworld	Alliance Agreement <ul style="list-style-type: none"> • Alliance Expansion Agreement • Coordination Agreement 	O&D city pairs	<u>Article 81 [101(1)] of the EC Treaty</u> Object and effect of establishing long term alliance Proceedings Closed	<u>Article 81(3) [101(1)] of the EC Treaty</u>	Undertakings <ul style="list-style-type: none"> • Slots • Proposed Regulatory Changes by German Government
2.	KLM /Northwest Airlines, Inc. (Case COMP/D-2/36.111) KLM a member of Skyteam in 2000	'Alliance agreement' <ul style="list-style-type: none"> • code sharing and block space • revenue, cost, pricing, capacity, network and infrastructure, marketing, sales, FFP *definition of 'alliance'	O&D Provision of scheduled air transport of passengers between EEA and US.	<u>Article 85 [101(3)] of the EC Treaty</u> Closure of proceedings	<u>Article 81(3) [101(1)] of the EC Treaty</u> Efficiencies Exemptions without conditions	N/A
3.	SAS/MAERSK (CARTEL) Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) 5.10.2001 SAS a member of Star Alliance	Cooperation & Implementing Agreements <ul style="list-style-type: none"> • EuroBonus Participation • Code-share • Ground Handling • Hosting Services • Special Prorate Agreement Hidden agreement on market sharing	O&D	<u>Article 81(1) [101(1)] of the EC</u> Market sharing by their very nature has the object of restricting competition. *In this case, it was also found that the effect of the agreement significantly restricting competition.	<u>Article 81(3) [101(3)] of the EC</u> Market sharing as clearest examples of 'hard-core' restrictions cannot benefit from exemptions.	Penalties Imposed on SAS and Maersk
4.	Lufthansa/Austrian Airlines (COMP/37.730 — AuA/LH) 5.7.2002 Star Alliance	Cooperation Agreement accompanied by few Implementation Agreements <ul style="list-style-type: none"> • Joint ventures on traffic, routes, schedule and fare structure, pricing policy, budgeting, FFP, code sharing, service level, marketing and airport facilities *JV not a full-function merger	O&D Scheduled air transport of passengers and goods *charter flights do not form an alternative	<u>Article 81 [101(1)] of the EC</u> Agreements restricts actual and potential competition	<u>Article 81(3) [101(3)] of the EC</u> Exemptions subject to strict conditions	Commitments <ul style="list-style-type: none"> • Slots • Frequencies • Fares
5.	Austrian Airlines/ SAS Case COMP/37/749 13.3.2008 Star Alliance	Cooperation Agreement <ul style="list-style-type: none"> • Codeshare, fares, special prorate, FFP, marketing 	O&D	Closure of Proceedings	N/A	Commitments <ul style="list-style-type: none"> • Slots • Interlining • Prorate Agreement • Freeze of Frequencies • Fares

						<ul style="list-style-type: none"> • FFP • Intermodal Facilities
6.	British Midlands/ Lufthansa/ SAS Case COMP/38.712 14.3.2001 Members of Star Alliance	Tripartite Joint Venture <ul style="list-style-type: none"> • Code share • Routes, fares, schedule and capacity 	O&D	<u>Article 85 [101(1)] of the EC Treaty</u> Appreciably restrict competition	<u>Article 81(3) [101(3)] of the EC</u> Exemptions granted	Commitments <ul style="list-style-type: none"> • Slot • New Entrants (FFP, Interlining)
7.	SkyTeam (Aero Mexico/ Alitalia/ Ceske Aeroline/ Delta/ KLM/ Korean/ Northwest/ Air France) CASE COMP/37984 19.6.2006	Cooperation Agreement @ Alliance Agreement	O&D	Closure of Proceedings Object has the effect	N/A	Commitments <ul style="list-style-type: none"> • Slot • Interlining • SPA • FFP
8.	Online Portal Limited Opodo Case COMP/38.006 201.11.2001	Joint Venture Agreement on Setting Up Online Travel Portal Limited Between AF, Aer Lingus, Alitalia, BA, Lufthansa, Finnair, Iberia, KLM and Opodo *vertical agreement	Travel Agency Services	Closure of Proceedings	N/A	N/A
9.	BM / UA Case COMP/38234 21.12.2001	Alliance Agreement	N/A	<u>Article 85 [101(1)] of the EC Treaty</u>	<u>Article 81(3) [101(3)] of the EC</u> Exempted	N/A
10.	Air France/Alitalia Case COMP/38.284/D2 7.4.2004 Star Alliance	Cooperation Agreement @ Bilateral Alliance <ul style="list-style-type: none"> • Revenue, pricing, capacity scheduling, marketing, • Code share, FFP, Cargo 	O&D	<u>Article 101 (1) of the TFEU</u> Appreciable effects	Efficiencies	Commitments <ul style="list-style-type: none"> • Slot • Frequencies • Intermodal passenger interlining
11.	TQ3/Opodo Case COMP/A.38321/D2 TQ3 Travel Solutions GmbH / Opodo Limited 9.12.2002	Joint Venture Agreement on Setting Up Online Travel Portal Limited Between AF, Aer Lingus, Alitalia, BA, Lufthansa, Finnair, Iberia, KLM and Opodo *vertical agreement	Travel Agency Services	Complaints Rejection	N/A	N/A
12.	BA/SN Brussels Airlines Case COMP/A.38.477/D2 10.3.2003 Oneworld	Alliance Agreement Code Share Agreement FFP Agreement Slot Exchange Agreement	O&D	<u>Article 101 (1) of the TFEU</u> Likely to affect competition	Efficiencies Exempted for 6 years (Until 10.12.2008)	Commitments <ul style="list-style-type: none"> • Slot • Fare Combinability • SPA • FFP
13.	BA/Iberia/GB Airways CASE COMP/D2/38.479 10.12.2003 BA Members of Oneworld	Full -ledged Tripartite Alliance <ul style="list-style-type: none"> • Routes, pricing, capacity scheduling • Code share, FFP, network 	O&D	<u>Article 101 (1) of the TFEU</u> Appreciable effects	Efficiencies Exempted for 6 years (Until 12.9.2009)	Commitments <ul style="list-style-type: none"> • Slot • Fare Combinability • SPA • FFP

14.	Airfreight CARTEL Case AT.39258 1.6.2017	Fixing of fuel surcharges by 11 carriers	O&D	<u>Article 101 (1) of the TFEU</u> Cartel- price fixing	Not Applicable	Fines imposed on all companies
15.	International Airline Passenger Services CARTEL Case AT.39419 10.11.2011	International airline passenger sector	N/A	<u>Article 101 (1) of the TFEU</u> Administrative Closure	N/A	N/A
16.	Freight Forwarding CARTEL Case AT.39462 28.3.2012	Various surcharges	O&D	<u>Article 101 (1) of the TFEU</u> Cartel- price fixing	Not Applicable	Fines imposed on all companies
17.	Continental/ United/ Lufthansa/ Air Canada Case COMP/AT.39595 23.5.2015 Star Alliance	Cooperation and Joint Venture Agreement • Routes, pricing, capacity scheduling • Full metal neutrality *JV not a full-function merger	O&D	<u>Article 101 (1) of the TFEU</u> By nature harmful Restriction by object Metal Neutrality vs EU Concept	Insufficient efficiencies	Commitments • Slot • Fare Combinability • SPA • FFP Concept of Proportionality
18.	BA/AA/IB (Case COMP/39.596 – BA/AA/IB) 14.7.2010 Oneworld	Joint Venture Agreement • Revenue, capacity, pricing, schedule	O&D Air passenger transport services • Europe and North America	<u>Article 101 (1) of the TFEU</u> Agreement by nature aimed at restricting competition	No efficiencies due insufficient evidence	Commitments • Slot • Fare Combinability • SPA • FFP Concept of Proportionality
19.	Lufthansa/ Turkish Airlines Case AT 39794 Star Alliance	Code-sharing Agreement	N/A	<u>Article 101 (1) of the TFEU</u> Pending investigations	N/A	N/A
20.	Brussels Airline/ TAP Air Portugal Case AT.39860 27.10.2016	Code-sharing Agreement	N/A	<u>Article 101 (1) of the TFEU</u> Close Investigations Insufficient evidence	N/A	N/A
21.	Air France/ KLM/ Alitalia/ Delta Case AT.39964 12.5.2015 SkyTeam	Transatlantic Joint Venture Agreement • Pricing, capacity, scheduling & revenue management • Metal Neutrality *JV not a full-function merger	O&D Air passenger transport services • Europe and North America	<u>Article 101 of the TFEU</u> By nature harmful Restriction by object Metal Neutrality vs EU Concept	No efficiencies	Commitments • Slot • Fare Combinability • SPA • FFP Concept of Proportionality
22.	Amadeus Case AT.40617 23.11.2018	Agreement between CRS providers, travel agents and airlines	Airline tickets distribution services *vertical agreement	<u>Article 101 of the TFEU</u>	Pending investigation	N/A

APPENDIX 3

SCOPE OF DATA COLLECTION

Title of Thesis:	'The Application of Competition Law In the Airline Industry in Malaysia'
Date of Data Collection:	26 th July 2017 – 31 August 2017
Agencies:	1. Attorney General's Chambers of Malaysia (AGC) 2. Ministry of Transport Malaysia (MOT) 3. Department of Civil Aviation Malaysia (DCA) 4. Malaysian Aviation Commission (MAVCOM) 5. Malaysian Competition Commission (MyCC)

1. AGC

Divisions: Drafting & International Affairs

Proposed date for meeting: 1st & 2nd August 2017

The purpose of the data collection is to get a more detailed background on the promulgation of the Malaysian Aviation Commission Act 2015 (MACA 2015) and its relation to the Competition Act 2010 (CA 2010) and the Competition Commission Act 2010 (CCA 2010). The method is to look at the government policy papers, minutes of meeting and discussions leading up to the promulgation of the respective laws. The data collection is also aimed to obtain more information on any regional and international work or commitment of Malaysia in the area of competition law and the competition in air transport sector. The questions to be asked and areas to look into for MACA 2015 including (but not limited to) the following:-

- Whose idea or initiative was it?
- What is the policy behind it?
- What are the circumstances leading to it?
- What is the main objective?
- What is the policy decision on the sectoral regulation of competition in the aviation sector?
- Why is merger provision included in MACA 2015 and not in CA 2010?
- Why is state aid provision not included in MACA 2015 nor CA 2010?
- To what extent does the implementation of the MACA 2015 is related to the implementation of the CA 2010?
- Does MAS or any other airlines in Malaysia has any contribution to the idea of MAVCOM?

The questions to be asked and areas to look into for the second part of the data collection that is on the regional and international work on competition law and the competition in air transport sector include (but not limited to) the following:-

- Malaysia's involvement in WTO, ICAO, ICN
- Malaysia's commitment in ASEAN
- What is the status of ASEAN Single Aviation Market (ASAM) and Malaysia's position/policy?
- Is there a commitment to harmonize the law or to acknowledge differences?

2. MOT

Divisions: Aviation Division and Legal Division

Proposed date for meeting: 3rd & 4th August 2017

The purpose of the data collection is to get more detailed background on the historical and the development of the competition policy in the aviation sector in Malaysia particularly in the air transport services and the airline industry. As the main policy maker, the data collection is also aimed to get a clearer picture on the government policy with regard to competition in aviation sector. The data collection exercise includes obtaining the relevant documents and statistics. The questions to be asked and areas to look into include (but not limited to) the following:-

- What is the policy with regards to the competition in the aviation sector Malaysia?
- What is the level of competitiveness of the industry from its first existence until today?
- With the coming into force of the MAVCOM 2015, is the aviation policy changed or amended?
- What is the overall change(s) that have been made in terms of jurisdictions of MOT over the aviation sector in Malaysia after MACA 2015?
- What are the functions and powers of MOT under MACA 2015 in particular with regards to the competition provisions (eg. slot allocation and public services obligations)?
- How does MOT monitor the implementation of the MACA 2015 in terms of the competition provisions?
- What is Malaysia/MOT's position with regards to state aid obligation?
- What is the government position relating to MAS and state aid issue?
- How much involvement of ministers in implementing the competition provision?
- Are there efforts (and to what extent) from the government to liberalise the sector even more in the future?

3. DCA

Divisions: Air Transport Division & Legal Division

Person to interview: The Director General of Civil Aviation Malaysia

Proposed date for meeting: 8th & 9th August 2017

The purpose of the data collection is to get more detailed background on the historical and the development of the air transport services and the airline industry. The data collection is also aimed to get a clearer picture on how competitive is the industry and its development. This includes obtaining the relevant documents and statistics on the civil aviation and airlines activities. The questions to be asked and areas to look into include (but not limited to) the following:-

- What is the level of competitiveness of the industry from its first existence until today?
- What is the development of the industry so far? (based on documents, statistics, percentages)
- What is the overall change(s) that have been made in terms of jurisdictions of DCA over the aviation sector in Malaysia after MACA 2015?
- What are the functions and powers of DCA under MACA 2015 in particular with regards to the competition provisions (eg. Slot allocation and public services obligations)?
- To what extent does DCA involve or consulted in the implementation of the MACA 2015 and in particular the competition provisions?

4. MAVCOM

Person to interview: The Director of Economics Division

Proposed date for meeting: 10th & 11th August 2017

The purpose of the data collection is to get a clearer picture on the actual implementation of the competition provisions under the MACA 2015, its issues and challenges. The questions to be asked and areas to look into include (but not limited to) the following:-

- The role of MAVCOM in implementing the competition provisions, is the focus put on the advocacy or the enforcement?
- How much is the minister's involvement/government interference?
- Is there any supervision or collaboration between MAVCOM and MyCC?
- Is the level of competitiveness of the industry suffice for the competition provisions to be implemented?
- How are the competition provisions being implemented and how many guidelines have been issued so far?
 - o Basis for exemptions/block exemptions
 - o Why there are merger provisions for aviation
 - o Why there is still no state aid provision?

- How is the leniency regime being implemented?
- Is the composition of board/technical expertise?
- How are provisions on public service obligations being implemented?
- To what extent does the advocacy role being implemented?
- To what extent does the enforcement being done?
- Can all conduct be authorised including abuse of dominant powers?
- How does the provisions on merges, slots allocation, mediation, dispute resolutions and leniency regime operate?
- In general, to what extent does the law conform with the best practises around the world?
- What are the main issues and challenges in implementing the competition provisions?
- MAVCOM position with regards to the country's regional and international commitment in air transport such as ASAM?

5. **MyCC**

Person to interview: The Chief Executive Officer

Proposed date for meeting: 14th & 15th August 2017

The purpose of the data collection is to obtain further information on the MyCC's role as the competition authority in Malaysia in monitoring the implementation of the competition provisions in the aviation sector under the MACA 2015. The questions to be asked and areas to look into include (but not limited to) the following:-

- What is the level of competitiveness of the aviation industry in Malaysia?
- How does MyCC control or monitor the implementation of the competition provisions in the aviation sector under the MACA 2015?
- Why are the merger and state aid provisions not included under CA 2010?

Prepared by:

Norahimah Fitri

Latest update on 20 July 2017

APPENDIX 4

Updated List of Questions for Ministry of Transport Malaysia (MOT)

For Aviation Division and Legal Division

(1) History of civil aviation in Malaysia

- The first establishment of the department of civil aviation in Malaysia (DCA, now known as CAAM) which was initially placed under the MOT (the date of establishment and initial jurisdiction)
- The annual list of registered scheduled and non-scheduled passenger and cargo airlines (or the list of Air Service Licence (ASL) or Air Service Permit (ASP)) since the establishment of the department and the routes granted until now (this is to establish the development of the airline industry in Malaysia and to show the entry and exit of airlines in the industry).

(2) National aviation policy

- What is the country's current aviation policy? If there is no formal aviation policy, is there any unwritten prevailing policy, such as liberal air transport? (See http://www.dca.gov.my/wp-content/uploads/2015/02/SP_Malaysia_final.pdf).
- There is a National Aviation Consultative Council (NACC) which was established in 2018 by the Ministry of Transport to, among others, formulate the national civil aviation policies for Malaysia (See <https://www.nst.com.my/business/2018/12/437576/mot-establishes-national-aviation-consultative-council>).
- Is there any indication on what kind of policy envisaged by NACC based on the prevailing unwritten policy in the industry (if there is any)?

(3) Air transport liberalization

- Malaysia has decided to liberalise 12 sectors classified under services, one of which is the transport sector which includes air transport. Among the liberalisation initiatives, following Malaysia's commitments under AFAS and WTO, is the autonomous liberalisation on the foreign equity participation which 5 sub sectors have been committed (See <https://www.miti.gov.my/index.php/pages/view/4218?mid=566>).

- Particularly on the air transport, to what extent has the air transport industry been liberalized?
- Is there any policy on the foreign equity participation or on the negotiation of the bilateral air services agreement in terms of air traffic rights, freedom of the air, etc.?
- Are there efforts to liberalise the air transport sector even more in the future?

(4) Equity restrictions on the establishment of airline companies

- Following from the previous question, is there any policy on the equity shareholdings restrictions/requirement imposed by the Ministry of Transport for the establishment of airline companies other than the requirement of ownership control stated in the application form for Air Service License (ASL)/Air Service Permit (ASP) by the Malaysian Aviation Commission? (See <https://www.mavcom.my/en/industry/air-service-licence/>).

(5) Competition law and policy

- The main areas governed by the competition law are anti-competitive agreements between undertakings, abuse of a dominant position by an undertaking and mergers. All of these areas have been regulated under the Malaysian Aviation Commission Act 2015. However, there is no provision regulating the grant of state aid to airlines.
- Does Malaysia have any position or policy on the state aid issue in air transport industry?

(6) International/regional commitment

- As a Member State/Council of ICAO, is there any liberalisation commitments by Malaysia to the ICAO?
- As a Member State of ASEAN, Malaysia's commitment has been in the liberalisation of air transport through the implementation of the ASEAN Single Aviation Market (ASAM).
- How far has the ASAM been implemented?
- What are Malaysia's policy and initiatives in supporting the implementation of ASAM?

Prepared by:

Norahimah Fitri Mohd Hamdan

PhD Researcher

School of Law

University of Warwick

6 March 2019

APPENDIX 5

(A) Response from the Attorney General's Chambers (14 & 15 August 2017)

1. There were no formal interviews carried out with the AGC's officers as all the information obtained were based on the analysis of documents. The AGC's officers, however, confirmed that the MAVCOM Bill was mainly prepared by a private and independent consultant and that the role of AGC was to ensure the MAVCOM Bill was drafted in accordance with the Federal Constitution and appropriate drafting requirements, apart from the policy decision made by the Government. It was the intention to make MAVCOM an independent body and therefore Minister's role is minimal unlike the establishment of MyCC where there was a considerable roles and powers of Ministers given.
2. The information gathered from the documents were in line with the Hansard on MAVCOM Bill dated 8 April 2015.
3. Based on the documents referred to:-
 - (a) Factors considered in the preparation of MAVCOM Bill – The preparation involved all industry stakeholders such as the airport operators, airlines and independent legal consultants. Several international practices were referred to as guidance and these included the TFEU, Australian Fair Trade Commission, UK Office of Fair Trade, Singapore Competition Act and Ireland Aviation Regulation Act 2001.
 - (b) Objective – the focus was given to protect the rights of consumers as well as the industry players. For consumers, there must be fair pricing, wide and competitive choices and for the industry, there must be a fair competitive environment and equal opportunity, competition on quality, support for innovation and maximum efficiencies.
 - (c) Competition provisions – it was emphasized that there was a need to have skilled and experienced experts on competition to implement the competition provisions. The factors considered were:
 - (i) Anti-competitive agreements – A competitive environment among several airlines (domestic and international) and other industry players can create the incentive for horizontal and (the most likely) vertical anti-competitive agreements. (Eg. Resale price maintenance, market sharing, bid-rigging, strategic alliances)
 - (ii) Abuse of a dominant position – The airports are a natural monopoly. Most of the national airlines have significant market shares, which is typical for a developing country. Though this does not lead to a dominant position, these airlines need monitoring (Eg. Common practices include exclusive dealing, loyalty rebates, predatory pricing, refusal to supply)
 - (iii) Anti-competitive partnership – This term was used to refer to mergers between airlines. It was agreed that merger provisions were particularly important in preparation for the ASEAN open skies agreement. The

strategic alliances between airlines were also recognized as having the high potential to distort the competition.

- (iv) Skilled and competent experts - need to have competent and skilled persons with both competition law and aviation regulation knowledge.
- (v) On composition of MAVCOM Board – The Civil Aviation Authority Malaysia (CAAM) is not included but maybe summoned and the role of Executive Chairman is advisory in nature. There is collective responsibility for decision-making.

(B) Response from MAVCOM (16 August 2017)

1. The interview was conducted with the Director of Economics.
2. MAVCOM is still developing its Guidelines. The focus has been on educating and advocacy for the industry and not so much on investigation.
3. There is a cooperation or link between MAVCOM as the sector regulator and MyCC as the overall implementation and enforcement agency for competition law in the country through section 39 of the Competition Act 2010. This is an important forum for all sector regulators to discuss and ensure consistency in implementing the law. For instance, MyCC was still receiving matters pertaining to aviation like complaints made by air passengers on rates and quality of service.
4. The idea of MAVCOM was based on the plan to restructure the national airline (Malaysian Airline Systems (MAS)), which, based on 'Rebuilding A National Plan: The MAS Recovery Plan' prepared and issued by Khazanah Holdings Berhad (a government investment company) dated 29 August 2014. The establishment of an Aviation Commission was part of the plan.
5. Among the issues and future challenges faced by MAVCOM are the slot allocation; the agreement between airport and airlines particularly on the preferential treatment to certain airlines and air services agreements between countries where the issue of state aid has been the challenge for developing countries to address. These issues were not discussed at length, however, as they were still at in the process of gathering information.

(C) Response from DCA (17 August 2017)

1. The interview was carried out with the Director General of Civil Aviation.
2. DCA is the government agency responsible for the technical requirements of the industry. There is a plan to change the legal status of DCA to a corporate body and the

proposed law was in the process of being finalised. The DCA will be called the Civil Aviation Authority Malaysia (CAAM).

3. The new CAAM will only be responsible for the technical parts of the aviation sector which includes aircraft airworthiness, accident investigations, flight operation, security, airport standards and air controllers. The process of granting licences and permits for air services have been taken over by MAVCOM and are no longer the responsibility of DCA/CAAM.

4. Competition is encouraged in the industry in so far as it is allowed based on the routes and airlines as agreed under the air service agreements. The industry however is seeing more and more new airlines entering the market especially by the low-cost carriers like Malindo and Firefly. It is a good indication that the industry is developing.

5. It is important to note that the Malaysian airline industry is also heavily burdened by the public service obligations where airlines need to provide free air services to rural areas determined by the government.

(D) Response from Competition Appeal Tribunal (23 August 2017)

1. The interview was carried out with one of CAT's member.

2. As an appeal body it has the jurisdiction to review the decisions of MyCC and is guided by the law, the CA 2010. Among the issues and challenges are the economic structure of the country, the manner in which business activities are carried out (transparency of business activities) and the geopolitics. With the establishment of MAVCOM, independence is the sole intention of the Government. Therefore, any competition matters in the industry must be dealt with specific body and reviewed by the court.

3. MyCC has the power to investigate but also to adjudicate/judge. This dual role may be a problem in the future. No comment was made on the MAS/Air Asia case, because, a member of CAT was responsible for issuing the judgment and the case was still pending appeal at the High Court, any statement made on the case would only jeopardize the outcome of the case. The only comments made was that all members unanimously agreed on the outcome.

(E) Response from Malaysian Airlines System (MAS) (21 August 2017)

1. A meeting was carried out with the Regulatory Affairs Division of MAS led by its Head of Regulatory Affairs. The main purpose was to inquire of the various agreements entered into by MAS, their awareness on competition issues and of any precautions steps made.

2. MAS has faced with many competition issues even before the CA 2010 was effective. The issues were raised at an international level where anti-competitive practices have been made subject to other national laws on competition. For instance, the Australian Federal Court imposed a penalty on a MAS subsidiary, Malaysia Airlines Cargo Sdn Bhd, for its involvement in an international air freight price-fixing cartel between 2002 and 2006. The CA 2010 and (hopefully the MAVCOM) has provided a clearer implementation of the law.
3. MAS entered into various airline cooperative agreements such as code-sharing (common in the industry where certain prices are agreed) but there will be always caution on the need to avoid anti-competitive practices. In any negotiations between airlines, the legal rights of respective airlines are taken into account. Individuals with sensitive information are not permitted during negotiations. These are seriously supervised especially when more complex agreements such as joint venture collaborations are entered into. A strict protocol is established and strict compliance is expected. On the abuse of a dominant position, the issue has always been on the number of routes an airline operates and slot allocation.
4. MAS is also subject to air service agreements where strict compliance to competition matters is observed. MAS is also part of the interline system established by IATA where profits and revenues are regulated.

(F) Malaysian Competition Authority (MyCC) (23 August 2017)

1. The interview was carried out with the Legal Team of MyCC.
2. MyCC is placed under the supervision of the Ministry of Domestic Trade and Consumer Affairs. Therefore, MyCC is still acting under the instructions of the Minister. MyCC is responsible for all sectors of the economy except those legally excluded under the CA 2010 (energy, telecommunications, petroleum and aviation).
3. The merger provisions were not part of CA 2010 based on the government policy. Based on the questions asked, the officers were of the opinion that state aid provisions were not a priority in the Act.
4. MyCC has been emphasizing on the need to advocate the public and industry and has been cooperating with many competition authorities from other jurisdictions as well as regional and international organizations such as ASEAN, APEC, UNCTAD and OECD. Many memorandum of understandings have also been entered into with higher institutions (public and private) for the awareness of competition law in the country. Training of officers have been made a priority and MyCC have been obtaining technical

assistance from Germany. There is a close cooperation with ASEAN countries on the competition framework.

5. The issues and challenges, among others, were, enforcement activities (where there was lack of procedures and a scarcity of experts to carry out investigations, competition experts and economists).

(G) Ministry of Transport (MOT) (10 April 2019)

1. The interview with the officers of MOT was not carried out during the data collection. No reply was received to emails to the officers. On 10 April 2019, however, the Director of the Air Division agreed to be interviewed *via* telephone.

2. The aviation sector has seen a tremendous change and development since the establishment of MAVCOM and CAAM. Although the national aviation policy is still not finalized, the internal policy has always focused on supporting the liberalization of the aviation sector. Malaysia has always been active in ASEAN to promote the implementation of the ASAM.

3. Nevertheless, there have been consistent issues and challenges on implementing the open skies policy. For instance, the ASEAN countries' willingness to liberalise their routes and air freedom is always questioned. Some of the open skies agreements have already a 'full open skies' provision such as liberalising the 5th and 6th freedoms but in most cases they are not implemented.

4. State aid issues have becoming more pertinent but it is still not the priority.

APPENDIX 6
SUMMARY ON DATA COLLECTION

Title of Thesis: 'The Application of Competition Law in the Airline Industry in Malaysia'

Date of Data

Collection: 26th July 2017 – 31 August 2017

Agencies: 1. Attorney General's Chambers of Malaysia (AGC)
2. Ministry of Transport Malaysia (MOT)
3. Department of Civil Aviation Malaysia (DCA)
4. Malaysian Aviation Commission (MAVCOM)
5. Malaysian Competition Commission (MyCC)
6. Malaysia Airlines (MAS)
7. Competition Appeal Tribunal (CAT)

BIL	AGENCIES	DATE(S)	DATA GATHERED	REMARKS
1.	Attorney General's Chambers <u>Drafting Division</u> (a) 1 st Meeting with Drafting Division – Meeting with Deputy Parliamentary Draftsmen (b) 2 nd Meeting with Drafting Division – review of files on MAVCOM Bill	1 August 2017 14 & 15 August 2017	Brief on Competition Act 2010 and MAVCOM Act 2015 Review of files containing:- - Meeting Notes on Inter-Agency Meeting on MAVCOM Bill - Meeting Notes on Steering Committee for MAVCOM Bill	Circumstances leading to the drafting of MAVCOM Bill and the current status of MAVCOM establishment. A brief on MAS Recovery Plan. Taking notes on the discussion and decisions made in finalizing the bill.

	<p><u>International Affairs Division</u></p> <p>(a) Meeting with Deputy Head of International Affairs</p>	8 August 2017	<p>- Plan Regulatory Working Group (PRWG) Reports and Notes on MAVCOM Bill</p> <p>Background of Competition Act 2010 and a brief on all international commitment for competition work.</p>	To confirm with MOT on ASAM.
2.	<p>Malaysian Aviation Commission (MAVCOM)</p> <p>Meeting/Interview with MAVCOM – Director of Economics</p>	16 August 2017	Based on questionnaires.	As at the time of interview, MAVCOM was still in the process of drafting the relevant guidelines, there was a brief discussion made particularly on the objective of establishment and issues and challenges. See notes.

3.	Department of Civil Aviation Meeting/Interview with Director of Civil Aviation (DGCA) of Malaysia	17 August 2017	Based on questionnaires.	The discussion was more about the roles of DCA (now known as CAAM) after the establishment of CAAM and MAVCOM.
4.	Malaysia Airlines Berhad (MAS) Meeting/Interview with the Head of Regulatory Compliance and meeting with the team	21 August 2017	Discussion on airlines collaborations – code sharing agreements, special prorated agreements, joint ventures, etc. A brief on MAS experiences.	Information obtained was in line with the airline practices in other jurisdictions.
5.	Competition Appeal Tribunal (CAT) Meeting/Interview with a member of CAT - Prof Dr Wan Liza	23 August 2017	Experiences and challenges of CAT in dealing with general competition cases and also MAS/AirAsia Case.	To keep track on the appeal of MAS/AirAsia Case to HC.

6.	Malaysian Competition Commission (MyCC) Meeting with Legal Team	29 August 2017	Discussion on MyCC's Role and with regards to MAVCOM and the MAS/AirAsia case.	To follow up closely the outcome of appeal of the case at Court of Appeal.
7.	Ministry of Transport Communication through email with the Legal Division A brief interview through phone with Director of Air Division	22 August 2017 10 April 2019	Received feedback on 4 September 2017 that information should be obtained from Air Division. A brief explanation of aviation policy and current role of MOT.	Although the national aviation policy is still finalized, MOT has always been guided by the internal policy that encourages liberalisation of air transport.

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