LEGAL UPDATE

# COMPETITION LAW UPDATE

**9 October 2013**

# CCS GIVES GO AHEAD TO QANTAS-JETSTAR'S PROPOSED COOPERATION STRATEGY

On 5 September 2013, the Competition Commission of Singapore ("**CCS**") issued a clearance decision on the proposed conduct ("**Proposed Conduct**") between the following parties:

(a) Qantas Airways Limited ("**Qantas**");

(b) Jetstar Airways Pty Limited ("**Jetstar**"), a wholly owned subsidiary of Qantas;

(c) joint venture entities owned by Qantas/Jetstar and local partners (generally full service airlines) (*eg* Jetstar Asia Airways Pte Ltd, Valuair Limited, Jetstar Japan Co., Ltd, Jetstar Pacific Airlines Aviation Joint Stock Company, Jetstar Hong Kong Airways Limited) ("**Jetstar JVs**"); and

(d) local full service airline partners (*eg* Japan Airlines Corporation, Vietnam Airlines Company Limited, and China Eastern Airlines Co. Ltd).

The Proposed Conduct involved cooperation between the relevant parties with regard to network, scheduling, pricing, marketing, purchasing, customer service and resourcing decisions, amongst others, on three distinct levels:

(a) between Qantas, Jetstar and all the Jetstar JVs;

(b) between each Jetstar JV and its respective local partner airline shareholder; and

(c) between a Jetstar JV, its local partner airline shareholder and any other airline in the Jetstar Group, to the extent that overlaps or potentially overlaps exist in the relevant areas of cooperation.

## BACKGROUND

Qantas mooted the Proposed Conduct as part of its "Jetstar Pan-Asia Strategy", which involved investments in Jetstar JVs in a number of Asian jurisdictions by Qantas/Jetstar and local partners, to operate low cost carriers under the Jetstar brand and business model. Coordination between the Qantas/Jetstar, the Jetstar JVs, and the local full service airline partners was also envisaged.

As the Proposed Conduct included routes that had Singapore as one of its destinations, there were concerns that it could breach section 34 of Singapore's Competition Act (Cap. 50B) ("**Act**"), which prohibits undertakings from entering into agreements which have as their object or effect the prevention, restriction or distortion of competition within Singapore ("**Section 34 Prohibition**").

Under section 44 of the Act, parties to an agreement can voluntarily notify CCS of the agreement and apply for a decision on whether the agreement contravenes the Section 34 Prohibition. Once CCS has cleared the agreement, the parties will receive immunity from financial penalties if the agreement subsequently infringes the Section 34 Prohibition. In accordance with section 44 of the Act, Qantas and Jetstar notified CCS of the Proposed Conduct on behalf of all the parties involved on 6 August 2012, and requested for a decision on whether the Proposed Conduct would infringe the Section 34 Prohibition.

## THE DECISION

In its assessment, CCS determined that each individual route from a specific point of origin to a

specific point of destination formed a separate relevant market, because passengers generally want to travel to specific destinations and will not substitute another destination when faced with a small, non-transitory increase in price. It further narrowed the relevant markets by limiting them to only leisure or economy class passengers, and not first or business class passengers.

As the Proposed Conduct involved cooperation between competitors on scheduling, pricing, marketing and resourcing, amongst others, CCS was of the view that it generally amounted to a price fixing and/or production control agreement between competitors and would therefore have the object of preventing, restricting or distorting competition in the relevant markets.

However, CCS also determined that the Net Economic Benefits ("**NEB**") generated from the Proposed Conduct, in the form of expanded networks and greater destination choices for Singapore consumers, streamlined scheduling for customers, additional flight options and increase in capacity and competition on certain routes, amongst others, was sufficient to exclude the Proposed Conduct from the scope of the Section 34 Prohibition. Consequently, CCS issued a decision allowing the Proposed Conduct to be implemented.

## FURTHER OBSERVATIONS

In the following section, we discuss several noteworthy features of CCS's decision.

### Treatment of wholly-owned subsidiaries

The Section 34 Prohibition does not apply to agreements where there is only one undertaking (*eg* between entities which form a single economic unit). In particular, the CCS Guidelines on the Section 34 Prohibition ("**CCS Guidelines**") notes that "an agreement between a parent and its subsidiary company…will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence."

In this decision, CCS considered Jetstar and Qantas to be a single economic entity as the former is a wholly-owned subsidiary of the latter. Notably, CCS observed (at [59]) that:

> "Given that Jetstar Airways is a wholly-owned subsidiary under Qantas Airways, there is a presumption that Qantas Airways would have total control of, and consequently decisive influence over Jetstar Airways' affairs." [emphasis added]

CCS recognised that a presumption of control and decisive influence over the subsidiary arises when the subsidiary is wholly owned by the parent, and they will therefore be presumed to be a single economic entity. However, such presumptions can always be rebutted on the facts if it can be shown that the subsidiary was in fact operating independently and apart from its parent entity. The CCS Guidelines therefore conclude that "ultimately, whether or not the entities form a single economic unit will depend on the facts and circumstances of each case."

### Definition of relevant market

Apart from defining each relevant market as the specific combination of a point of origin and a point of destination, CCS further narrowed the relevant markets by limiting them to only leisure or economy class passengers and not first or business class passengers, on the basis that the Proposed Conduct only involved coordination between competitors in the market for leisure or economy class passengers.

As Jetstar and the various Jetstar JVs are considered low cost carriers, only the economy class services provided by the full service airlines would be in the same relevant product market as the air passenger services provided under the Jetstar group. First and business class passengers were not included in the relevant market because "fundamental differences [existed] between leisure and non-leisure passengers", with the latter being less price-sensitive and more concerned about travel time and fare flexibility and thus willing to pay a "substantial difference in air fares".

### Assessment of NEB

CCS noted that Qantas/Jetstar's intention of establishing a regional Jetstar model, with a single brand, an integrated network and a common sales

platform, was a legitimate objective because it generated efficiencies and benefits for consumers. Consumers would, for example, be able to utilise an integrated Jetstar JVs network and travel to new destinations that would otherwise not be possible without the cooperation of the various Jetstar JVs.

Notably, CCS recognised that it was impossible to establish such a regional Jetstar model through the structure of a single economic entity (*ie* where Qantas/Jetstar operated from different countries via its wholly owned subsidiaries) because of foreign ownership and control restrictions that existed in the various countries. Therefore, CCS accepted that a joint venture structure, coupled with coordination between the Jetstar JVs, was indispensible to establishing a regional Jetstar model.

## References

Please click on the following link to access CCS's full decision:

**Proposed conduct between Qantas Airways Limited and Jetstar Airways Pty Limited in relation to the Jetstar Pan-Asia Strategy**

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For more information on this matter, please contact Drew and Napier LLC's **Competition Law and Regulatory Practice Group**:

**Cavinder Bull, SC**
Director, Competition Disputes and Litigation
T: +65 6531 2416
E: cavinder.bull@drewnapier.com

**Lim Chong Kin**
Director, Competition Advisory, Compliance and Transaction
T: +65 6531 4110
E: chongkin.lim@drewnapier.com

**Ng Ee Kia**
Head, Competition and Regulatory Economics
T: +65 6531 2274
E: eekia.ng@drewnapier.com



Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906