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Malaysian
Aviation Commission
Suruhanjaya Penerbangan Malaysia

Guidelines On

ANTI-COMPETITIVE AGREEMENTS

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Malaysian Aviation Commission
Suruhanjaya Penerbangan Malaysia
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1. Background

1.1 The application of the competition provisions under Part VII the Act will be based on fair competition principle which is consistent with the functions of the Commission under section 17 of the Act and the general policy on economic regulation of the civil aviation industry of the International Civil Aviation Organisation. In applying the fair competition principle, the Commission will consider benefits to the public as one of the factors in its competition analyses.

1.2 These Guidelines are issued by the Commission in the exercise of its power pursuant to section 65 of the Act to provide explanation on the prohibition of anti-competitive agreements under section 49 of the Act and the application of the relief of liability provision under section 50 of the Act.

1.3 The fair competition principle is applicable in determining relief of liability under section 50 of the Act where any significant social benefits arising directly from an agreement will be considered.

1.4 Factors which may be considered by the Commission in evaluating anti-competitive agreements and examples provided in these Guidelines are for illustrative purposes only and are not exhaustive. The Commission will consider the specific facts and circumstances of each case and may take into account any other factors that the Commission deems relevant in the implementation of Division 2 of Part VII of the Act.

1.5 These Guidelines serve as a supplement to Part VII of the Act or any regulation relating to the same. These Guidelines should be read together with all other guidelines issued by the Commission pursuant to section 65 of the Act.

1.6 The concepts and principles in these Guidelines are based on the domestic and international best practices relating to competition law.

1.7 The Commission may revise these Guidelines from time to time taking into account developments in the civil aviation industry.

1.8 Enterprises providing aviation services are advised to conduct self-assessment exercises of their businesses in respect of their conduct, procedures, management and control. Enterprises are also advised to have competition compliance procedures in place for their employees at all levels including the top management and the governing body, where applicable.

1.9 Any enterprise in doubt about how its commercial activities may be affected by Part VII of the Act may wish to seek independent legal advice.

2. The Prohibition under Section 49 of the Act

2.1 Pursuant to section 49 of the Act, an agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any aviation service market.

Agreement

2.2 The term "agreement" is defined in section 47 of the Act. It covers any form of contract, arrangement or understanding between enterprises that is legally or not legally enforceable.

2.3 An agreement may be tacit, verbal or written.

2.4 An agreement may be concluded between enterprises that operate at the same level in the production or distribution chain (horizontal agreement) or at different levels in the production or distribution chain (vertical agreement).

2.5 Apart from the above, an agreement under section 49 of the Act also includes the following:

(a) An airline code sharing

(b) An alliance

(c) A partnership or joint venture agreement

- A joint venture agreement that falls under section 49 of the Act should be differentiated from a joint venture that amounts to a merger under paragraph 54(2)*(d)* of the Act, which is a joint venture that is created to

perform all the functions of an autonomous economic entity on a lasting basis. In the event of the latter, Division 4 of Part VII of the Act would apply.

(d) A decision by an association

- Associations such as trade associations generally carry out legitimate functions intended to promote the competitiveness of their respective industry sectors. However, a decision by an association, either binding or non-binding upon its members, may constitute an agreement under section 49 of the Act if the object or effect of the decision is to influence the conduct or to coordinate the activity of the members.

- A decision by an association may take many forms such as resolutions, binding decisions or recommendations of the management, the committee or the members of the association.

(e) Concerted practices

- This refers to any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition. This may include any practice which involves direct or indirect contact or communication between enterprises that has the object or effect to —

  (i) influence the conduct of one or more enterprises in a relevant aviation service market; or

  (ii) disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a relevant aviation service

market in circumstances where such disclosure would not have been made under normal conditions of competition.

- For example, an exchange of information between competing enterprises relating to their respective pricing practices or output plans may amount to a concerted effort where there is an understanding that such an exchange would reduce strategic uncertainties in the market and facilitate collusion between these enterprises.

Object or Effect of Significantly Preventing, Restricting or Distorting Competition in Any Aviation Service Market

2.6 As mentioned in paragraph 2.1, section 49 prohibits any agreement between enterprises that has –

(a) the object of significantly preventing, restricting or distorting competition in any aviation service market; or

(b) the effect of significantly preventing, restricting or distorting competition in any aviation service market.

2.7 In other words, an agreement would infringe the prohibition under section 49 of the Act if it has either anti-competitive object or anti-competitive effect. Such object or effect should be read disjunctively.

Infringements by Object

2.8 An agreement may have an anti-competitive object if the objective of an agreement and the nature of the coordination is highly likely to harm competition.

2.9 In determining whether an agreement has an anti-competitive object, the purpose of the agreement will be considered in light of the economic and legal context surrounding the agreement including but not limited to —

(a) the nature of the services;

(b) the structure and the conditions of the relevant aviation service market; and

(c) the intention of the enterprises who are parties to the agreement.

Agreements Deemed to Have the Object of Significantly Preventing, Restricting or Distorting Competition in an Aviation Service Market

2.10 Subsection 49(2) of the Act deems the following horizontal agreements to have the object of significantly preventing, restricting or distorting competition in any aviation service market:

(a) An agreement that has the object to directly or indirectly fix a purchase or selling price or any other trading conditions in connection with aviation services

- Price fixing includes directly fixing of the price itself or an element of the price such as setting a discount, a percentage of price increase, a permitted range of prices to be imposed or the price of transport charges or fuel surcharges.

- Indirect price-fixing may occur through —

(i) recommended pricing;

(ii) sharing of price lists before prices are increased, either directly or indirectly, through an association;

(iii) requiring competitors to consult each other before setting their respective prices to be imposed on buyers; or

(iv) sharing of information on demand forecast or factors to be considered in setting prices in the future.

- The fixing of purchasing prices may occur where enterprises agree or coordinate between themselves on the price that they are prepared to pay to upstream enterprises. In addition, enterprises may be found to fix trading conditions by imposing standards or similar terms and conditions for their services.

(b) An agreement that has the object to share aviation service market or sources of supply in connection with aviation services

- Market sharing may occur where enterprises agree or coordinate to reduce competition by —

(i) allocating customers between themselves;

(ii) staying out of each other's geographic territory or customer base; or

(iii) specialising in certain aviation services that differ from each other.

- An example of sharing of sources of supply is an agreement by competing enterprises to buy only from certain suppliers.

(c) An agreement that has the object to limit or control production in connection with aviation services

- For example, an agreement between enterprises to limit or control the supply of services to artificially and consistently cause demand to exceed supply.

(d) An agreement that has the object to limit or control market outlets or market access in connection with aviation services

(e) An agreement that has the object to limit or control technical or technological development in connection with aviation services

- This includes an agreement —

  (i) not to introduce new services;

  (ii) to set technological standards collectively so that it prevents other competitors from selling or providing certain services; or

  (iii) not to buy technology from certain suppliers.

(f) An agreement that has the object to limit or control investment in connection with aviation services.

- Examples are agreements not to increase investment or to coordinate future investment plans.

(g) An agreement that has the object to perform an act of bid rigging in connection with aviation services

- Tendering procedures are designed to encourage competition between enterprises in which enterprises are to prepare and submit bids independently in order to win a contract.

- Bid-rigging would defeat the purpose of a tendering process and it occurs where enterprises agree or coordinate in order to take turns in winning competitive tender contracts or maximise the collective profit of all enterprises involved. For example —

  (i) enterprises may coordinate the bids that they submit in order to allow one enterprise to win the bidding. The other enterprises may get payments in exchange for the submission of their cover bids, i.e. bids that are intentionally made in unfavourable terms so that they would be unsuccessful in the bidding process;

  (ii) enterprises may agree that only one of them would submit a bid for a particular contract (bid suppression); or

  (iii) enterprises may agree to take turns to win contracts (bid rotation).

- More than one of these bid-rigging practices could occur at the same time. For example, if one enterprise is designated to win a particular contract, the other enterprises could avoid winning that contract either by not bidding or by submitting a cover bid.

2.11 If a horizontal agreement is found to have any of the objects listed under subsection 49(2) of Act 771, there would be a legal presumption that such agreement has

the object of significantly preventing, restricting or distorting competition in an aviation service market even if the horizontal agreement is between enterprises with very low combined market shares in a relevant aviation service market.

2.12 If it is not clear that an agreement has the object of significantly preventing, restricting or distorting competition in an aviation service market, consideration would be given to whether the agreement has the effect of significantly preventing, restricting or distorting competition in an aviation service market.

Infringements by Effect

2.13 In practice, the anti-competitive effects of an agreement would be examined if it is not clear that the agreement has an anti-competitive object.

2.14 In determining whether an agreement has the effect of significantly preventing, restricting or distorting competition in an aviation service market, an assessment of the impact of the agreement in relation to the relevant aviation service market would be conducted.

Significant Anti-Competitive Effect

2.15 The term “significantly” used in subsection 49(2) of the Act shows that the prohibition only applies to an agreement that has a significant anti-competitive effect. An agreement that has a trivial anti-competitive effect in a relevant aviation service market would fall below the threshold of prohibited agreements under section 49 of the Act.

2.16 In order to assess whether or not an agreement has a significant anti-competitive effect, consideration would be given to the combined market shares of the enterprises involved in a relevant aviation service market as indicators to determine the effect of the agreement to the aviation service market.

2.17 In general, an agreement may not be considered to have the effect of significantly preventing, restricting or distorting competition in an aviation service market if —

(a) the parties to the agreement are competitors in the same relevant aviation service market and their combined market shares in that market does not exceed twenty percent (20%); or

(b) the parties to the agreement are not competitors and each party has less than twenty five percent (25%) share in any relevant aviation service market.

2.18 The fact that the market shares of the parties to an agreement exceed the threshold levels mentioned in paragraph 2.17(a) and (b) by itself, does not mean that such agreement has the effect of significantly preventing, restricting or distorting competition in an aviation service market. Consideration would be given to other factors in determining the effect of an agreement on a case by case basis such as —

(a) the market power of the parties to the agreement;

(b) the content of the agreement; and

(c) the structure and conditions of the relevant aviation service market.

Effect of Vertical Agreements

2.19 In general, vertical agreements are less likely to be harmful to competition than horizontal agreements. A vertical agreement may have anti-competitive effect if either the buyer or the aviation service provider has enough market power to have some influence over the other party to an agreement but it falls short of the significant market power required for abuse of dominant position. In such situation, a vertical agreement may

reduce competition significantly in either the upstream relevant aviation service market in which the aviation service provider competes or the downstream relevant aviation service market in which the buyer competes.

Examples of Agreement That May Have the Effect of Significantly Preventing, Restricting or Distorting Competition in an Aviation Service Market

2.20 The following are non-exhaustive examples of agreements that may have the effect of significantly preventing, restricting or distorting competition in an aviation service market:

(a) Information sharing

- As mentioned in paragraph 2.10(a), the sharing of information regarding price may fall under subsection 49(2)*(a)* of the Act particularly if it involves prospective or real-time information.

- In relation to the sharing of non-price information, it may be prohibited under section 49 of the Act if it could inform competitors of each other's strategies which may significantly prevent, restrict or distort competition in an aviation service market.

- The sharing of information is more likely to have a significant anti-competitive effect if the number of competitors in a relevant aviation service market is small and these competitors frequently exchange confidential information amongst themselves.

- In determining whether or not information sharing falls under section 49 of the Act, several factors such as the type of information shared,

whether the information is prospective or historical, the frequency of the information shared and the level of detail of the information, among others, will be considered.

(b) Vertical agreements involving price and non-price restriction

- Vertical agreements involving price restriction are more likely to be anti-competitive than vertical agreements involving non-price restriction.

- Vertical agreements involving price restriction may be anti-competitive if they limit the ability of the enterprises reselling the aviation services to freely set its own prices whilst vertical agreements involving non-price restriction may be anti-competitive because they foreclose part of the aviation service market to competitors.

- In determining whether a vertical agreement significantly prevents, restricts or distorts competition, consideration would be given to the following factors:

  (i) the market power of the enterprise imposing such vertical restriction;

  (ii) the justification claimed for the restriction;

  (iii) the extent to which the relevant aviation service market in a vertical relationship may be foreclosed;

  (iv) whether there are entry barriers to the relevant aviation service market; and

(v) whether there is countervailing buyer power where buyers will not be dictated by suppliers.

- Resale Price Maintenance ("RPM") is an example of a vertical agreement involving price restriction. In general, a vertical agreement in an upstream enterprise which imposes a fixed or a minimum re-sell price that a downstream buyer must impose may be considered as being anti-competitive. Other forms of RPM including maximum pricing or recommended retail pricing which serves as a focal point for downstream collusion may also be found to be anti-competitive.

- With regards to a vertical agreement involving non-price restriction, consideration would be given on a case by case basis as to whether the non-price restriction would have significant anti-competitive effect including by assessing the market shares of the enterprises involved as stated in paragraph 2.17(b). Examples of a vertical agreement involving non-price restriction are tying and bundling.

- Tying occurs where buyers buy an aviation service that they want (the tying service) but are required to buy another aviation service (the tied service) from a different aviation service market that they may not want.

- Bundling is similar to tying except that it would normally involve aviation services from the same relevant aviation service market which buyers must buy together.

- Both tying and bundling may have anti-competitive effect by —

  (i) restricting competitors' access to a relevant aviation service market of the tied or bundled services; or

(ii) driving competitors out of a relevant aviation service market of the tied or bundled services.

(c) Agreements requiring a buyer to buy all or most supplies from the supplier

- An aviation service provider may impose conditions in a vertical agreement to require or induce a buyer to buy all or most of its supplies. This may foreclose a substantial part of the downstream relevant aviation service market to other enterprises and cause significant anti-competitive effect in a relevant aviation service market.

Compliance by Enterprises

2.21 To avoid infringing section 49 of the Act, enterprises should seek independent legal advice and institute an internal compliance scheme. In general, enterprises should avoid any communication by its personnel with competing enterprises on prices or engaging in any kind of joint conduct that could restrict competition. Enterprises should also ensure that pricing and marketing decisions are made independently and the basis of those decisions are recorded.

3. Relief of Liability

Requirements under Section 50 of the Act

3.1 Section 50 of the Act provides that an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 49 if —

(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.

3.2 In relation to paragraph 50*(a)* of the Act, any technological benefits, economic efficiency or social benefits arising directly from an agreement will be considered.

3.3 Any claim of significant "social benefits" arising directly from an agreement under paragraph 50*(a)* of the Act would subsequently be examined strictly. The term "social benefits" would be interpreted based on —

(a) the relevant policy objectives of the Act such as improvement of connectivity under subparagraph 17(1)*(a)*(i) of the Act; or

(b) any other relevant public policy objectives such as environmental protection, health and safety and employment.

3.4 Any enterprise claiming the benefits under paragraph 50*(a)* shall identify and provide evidence on the nature of the benefits such as –

(a) the type of benefits;

(b) whether the benefits are one-time or recurring;

(c) the direct causal link between the agreement and the benefits;

(d) how, why and when the benefits would be achieved; and

(e) the likelihood and magnitude of the benefits.

Unsubstantiated claims of benefits would be rejected.

3.5 Paragraph 50*(b)* of the Act requires that the benefits could not reasonably be provided by the parties to the agreement without the agreement having the anti-competitive effect. If the significant identifiable benefits could be provided by any other reasonable means without an agreement of such anti-competitive effect, then the requirements under paragraph 50*(b)* would not be fulfilled.

3.6 Paragraph 50*(c)* of the Act requires that the detrimental effect of an agreement on competition must be proportionate to the benefits provided. In assessing the proportionality, the monetary estimates of the value of the benefits and the detrimental effect of the agreement provided by the enterprise would be considered together with the assumptions and reasoning upon which the data relies. Without the detail and

transparency behind the modelling used in the calculations, little weight will be placed on the size of the claims.

3.7 In cases where it is not possible to credibly quantify the benefits and detrimental effect of an agreement, a qualitative assessment of the benefits and detriments will be carried out. A sufficient basis must be provided by the enterprises to support any claim for the benefits and detriments that are likely to arise directly from the agreement. In practice, a qualitative assessment involves making a judgment about the existence and size of the benefit and detriment based on a set of indicators which derive from —

(a) the facts of the exemption application;

(b) the analytical framework under which the various effects of the agreement are identified and analysed according to the relevant aviation service market to determine which effects are likely to be more significant than others; and

(c) submissions from any other person or enterprise and other relevant available material.

3.8 The relief of liability under section 50 of the Act may be granted to agreements prohibited under section 49 through —

(a) an individual exemption under section 51 of the Act;

(b) a block exemption under section 52 of the Act; or

(c) invoking section 50 of the Act as a defence in an infringement proceeding.

4. Individual Exemption and Block Exemption Procedures

4.1 Enterprises can apply to the Commission for an individual exemption pertaining to a particular agreement. The onus is on the enterprises to demonstrate that the agreement fulfils the criteria set out in section 50 of the Act.

4.2 An individual exemption may be granted subject to any conditions, obligations and any limited duration as may be imposed by the Commission.

4.3 The Commission may also consider granting a block exemption to a particular category of agreements based on its own initiative or by way of application by enterprises. The advantage of a block exemption is that similar agreements can be examined at the same time which will allow the Commission to provide a better assessment of the anti-competitive impact and the claimed benefits. It will also relieve enterprises of having to submit separate applications.

4.4 Applications for an individual or block exemption shall be made by way of a form determined by the Commission supported by the required documents and information. Upon receiving a complete application, a summary of the application will be published by the Commission for the purposes of public consultation. Any person or enterprise may submit feedback on the application within thirty days from the date the Commission publishes the summary of the application or within any time frame set by the Commission.

4.5 The time frame for the assessment of an individual or a block exemption application will be determined on a case by case basis depending on factors such as the complexity of the issues and the timeliness and completeness of information provided by the enterprises. In general, the assessment process may take between 9 months to over a year which starts from the date of receiving a complete application.

4.6 Upon the completion of the assessment, the Commission will publish its draft decision for thirty days for public consultation. Members of the public may submit written submissions to the Commission pertaining to its draft decision which shall be given due consideration by the Commission in making its final decision.

4.7 In the case of individual exemption, the Commission may cancel the exemption, vary, remove or impose additional conditions or obligations for the exemption pursuant to subsection 51(6) of the Act.

4.8 In the case of block exemption, the Commission may cancel the exemption pursuant to subsection 52(5) of the Act.

5. Invoking Section 50 of the Act in an Investigation

5.1 Pursuant to an investigation for a breach under section 49 of the Act, enterprises being investigated may rely on relief of liability provided under section 50 of the Act as a defence.

5.2 Similarly, section 50 may also be claimed by enterprises in civil litigation cases involving an alleged breach of section 49 of the Act.

6. Application for Guidance from the Commission

6.1 Other than applications for an individual or a block exemption, the Commission will not entertain any application for guidance on or approval of any potentially anti-competitive agreements.

6.2 Enterprises are advised to seek independent legal advice in carrying out their self-assessment exercise to ensure compliance with the Act.

7. Glossary

1.	Act	Malaysian Aviation Commission Act 2015 [*Act 771*].
2.	Buyer	A consumer, and/or an enterprise that acquires or uses any aviation service primarily for the purpose of resupplying the service or providing any aviation service.
3.	Commission	Malaysian Aviation Commission.
4.	Guidelines	Guidelines on Anti-Competitive Agreements.