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Malaysian Aviation Commission
Suruhanjaya Penerbangan Malaysia
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Draft Guidelines On

NOTIFICATION AND APPLICATION PROCEDURES FOR AN ANTICIPATED MERGER OR A MERGER

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Contents

1. Background

1.1 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 procedures relating to the notification of an anticipated merger under section 55 and the notification of a merger under section 56 of the Act.

1.2 The types of conduct or factors which may be considered by the Commission in evaluating a merger provided in these Guidelines are not exhaustive and the examples are for illustrative purposes only. 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 4 of Part VII of the Act.

1.3 These Guidelines serve to supplement 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 particularly the Guidelines on the Substantive Assessment of Mergers.

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

1.5 The Commission may revise these Guidelines from time to time taking into account developments in competition law and the civil aviation industry.

1.6 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.

1.7 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. Notification and Application Regime for an Anticipated Merger or a Merger

Voluntary Notification and Application

2.1 Sections 55 and 56 of the Act respectively provides for a voluntary notification regime for an anticipated merger and a merger. A merger party has the option to notify the Commission of its anticipated merger or merger and to apply for a decision as to whether the merger in question infringes or will infringe the prohibition under section 54 of the Act. Further explanation on the prohibition under section 54 of the Act is provided in the Guidelines on the Substantive Assessment of Mergers.

2.2 For the purpose of these Guidelines, unless stated otherwise, the term "notification" refers to a notification of an anticipated merger or a merger under paragraph 55(1)*(a)* or 56(1)*(a)* of the Act and the term "application" refers to an application for a decision under paragraph 55(1)*(b)* or 56(1)*(b)* of the Act.

2.3 A merger party shall carry out its own assessment to determine whether a merger occurs within the meaning of section 54 of the Act and whether a notification and an application to the Commission under section 55 or 56 may be appropriate. The self-assessment should be carried out in light of the provisions of the Act, the Guidelines on the Substantive Assessment of Mergers and these Guidelines. In general, a merger party should notify the Commission of an anticipated merger or a merger and apply for a decision if the merger party is of the view that the merger may result in an SLC within any aviation service market.

2.4 Merger parties should exercise caution in exchanging commercially sensitive information during the pre-merger period to avoid conducts that may infringe section 49 of the Act. This includes, among others, the sharing of data on prices, costs, supply and customer information. A merger party should have in place internal compliance

procedures to ensure compliance with Part VII of the Act at all times in relation to an anticipated merger or a merger.

2.5 The Act does not provide for any process for a merger party to consult or seek guidance from the Commission on whether an anticipated merger or a merger would infringe section 54 of the Act or should be notified to the Commission and applied for a decision.

Power to Investigate

2.6 A merger party that fails to notify the Commission of an anticipated merger or a merger and apply for a decision carries the risks of being investigated by the Commission if such merger raises competition concerns under the Act. The Commission may initiate an investigation under section 83 of the Act where there is reason to suspect that an anticipated merger or a merger would infringe the prohibition under section 54 of the Act. If the Commission finds that an anticipated merger or a merger infringes the prohibition under section 54 of the Act, the Commission shall require that the infringement be ceased immediately which may entail the modification or dissolution of the anticipated merger or merger. The Commission may also give any direction as provided under paragraphs 59(1)*(b)* to *(d)* of the Act.

2.7 The Commission is more likely to enquire or initiate an investigation into an anticipated merger or a merger if —

(a) the combined turnover of the merger parties in Malaysia in the financial year preceding the anticipated merger or the merger is at least RM50 million; or

(b) the combined worldwide turnover of the merger parties in the financial year preceding the anticipated merger or the merger is at least RM500 million.

In any case, the Commission has the power to investigate an anticipated merger or a merger where there is reason to suspect that it has resulted, or may be expected to result, in an SLC in any aviation service market even where the above turnover thresholds are not met.

3. Notification and Application Procedures for an Anticipated Merger or a Merger

3.1 A merger party may notify the Commission of an anticipated merger or a merger and apply to the Commission for a decision on whether such anticipated merger or merger would infringe the prohibition under subsection 54(1) of the Act. This is provided for in subsections 55(1) and 56(1) of the Act respectively.

When and How to Make a Notification and an Application

3.2 With regard to an anticipated merger, a merger party may make a notification and an application to the Commission when —

(a) the merger parties have a bona fide intention to proceed with the anticipated merger;

(b) details of the anticipated merger are available; and

(c) the anticipated merger has been made public by any party or may be made public by the Commission through the publication of a summary of the notification and application as stated in paragraph 3.10 of these Guidelines.

3.3 As for a merger that has already been completed, the notification and application to the Commission may be made at any time. A merger party is encouraged to make a notification and an application to the Commission as soon as possible after the merger is completed.

3.4 A notification and an application under section 55 or 56 of the Act shall be made in the form and manner determined by the Commission supported by the required documents and information.

Incomplete Application

3.5 The Commission may refuse to accept an application if it is —

(a) incomplete;

(b) not accompanied by the relevant supporting documents;

(c) not made in the form determined by the Commission; or

(d) not made in accordance with any provision of the Act, any applicable regulations, guidelines or application requirements determined by the Commission.

3.6 The Commission may also consider an application to be incomplete until the payment of any applicable fee as prescribed by the relevant regulations is made.

Duration for the Assessment of an Application

3.7 The duration for the assessment of an application will be determined on a case by case basis depending on factors such as the complexity of the issues and the timeliness and the completeness of the information provided by the enterprises.

Preliminary Issues

3.8 Upon receiving a complete application, the Commission will first determine whether an anticipated merger or a merger will occur or has occurred within the meaning of section 54 of the Act.

3.9 In the event the Commission finds that an anticipated merger or a merger will not occur or has not occurred within the meaning of section 54 of the Act, the Commission will proceed to inform the applicant accordingly.

Publication of Summary of Application

3.10 If the Commission finds an anticipated merger or a merger is within the meaning of section 54 of the Act, the Commission will publish a summary of the application in the manner that it sees fit for the purpose of public consultation. Any person or enterprise may submit feedback within thirty days from the date of publication of the summary of application or any other period as may be determined by the Commission. At the end of such period, the Commission will proceed with the Phase 1 Assessment.

Phase 1 Assessment

3.11 The Commission will evaluate the possible competitive effects of an anticipated merger or a merger during the Phase 1 Assessment of an application. The Phase 1 Assessment entails the gathering of information about the competitive effects of an anticipated merger or a merger from various sources as the Commission deems appropriate including from the applicant, a merger party, buyers and competing enterprises in the relevant aviation service market, third party data providers or other regulatory bodies such as competition authorities or government departments. The Commission will also consider any feedback received from the public consultation as stated in paragraph 3.10 in the Phase 1 Assessment.

3.12 If the Commission, upon the completion of the Phase 1 Assessment, finds that an anticipated merger or a merger does not raise any competition concern in light of section 54 of the Act, the Commission will proceed with the following steps:

(a) Prepare a proposed decision and give notice of its proposed decision of non-infringement to the applicant

- The proposed decision shall contain the facts on which the Commission bases its finding and the reasons for such finding.

(b) Provide an opportunity to the applicant, a merger party or any other relevant person or enterprise to peruse the proposed decision prior to its publication for the purpose of determining whether there is any confidential information contained in the proposed decision

- In the event where there is a claim of confidential information in the proposed decision, the Commission will consider and determine whether there is merit to such a claim.

- If the Commission decides that the information is confidential, such information will be redacted.

(c) Publish its proposed decision in the manner that it sees fit for the purpose of public consultation

- Any person or enterprise may submit feedback within thirty days from the date of publication of the proposed decision or any other period as may be determined by the Commission.

3.13 Upon considering any feedback received through the public consultation in subparagraph 3.12(c), the Commission may —

(a) proceed to make its final decision of non-infringement; or

(b) proceed with the Phase 2 Assessment, if the Commission finds that the anticipated merger or merger raises competition concerns in light of section 54 of the Act.

Phase 2 Assessment

3.14 In the event the Commission, during the Phase 1 Assessment, finds that an anticipated merger or a merger raises competition concerns in light of section 54 of the Act, the Commission will inform the applicant that it will proceed to the Phase 2 Assessment of the application.

3.15 The Phase 2 Assessment of the application entails a more detailed and extensive examination of the effects of an anticipated merger or a merger. The applicant may be required to submit detailed information regarding the businesses of the merger parties and the relevant aviation service market within the period determined by the Commission. The submission of the detailed information by the applicant shall be in the form and manner determined by the Commission.

3.16 Upon the completion of the Phase 2 Assessment, the Commission will proceed with the following steps:

(a) Prepare a proposed decision and give notice of its proposed decision to the applicant

- The proposed decision will provide details such as whether there will be or has been an infringement of the prohibition in section 54 of the Act, the facts on which the Commission bases its decision and the reasons for such decision.

(b) Provide an opportunity to the applicant, a merger party or any other relevant person or enterprise to peruse the proposed decision prior to its publication for the purpose of determining whether there is any confidential information contained in the proposed decision

- In the event where there is a claim of confidential information in the proposed decision, the Commission will consider and determine whether there is merit to such a claim.

- If the Commission decides that the information is confidential, such information will be redacted.

(c) Publish its proposed decision in the manner that it sees fit for the purpose of public consultation

- Any person or enterprise may submit feedback within thirty days from the date of publication of the proposed decision or any other period as may be determined by the Commission.

(d) If the proposed decision contains a finding that an anticipated merger will infringe or a merger has infringed the prohibition in section 54 of the Act, the applicant will be given an opportunity to make a written representation to the Commission pertaining to the proposed decision within a period determined by the Commission

3.17 The Commission will give due consideration to any feedback received through the public consultation and in the case of a proposed infringement decision, any written representation by the applicant, before making its final decision.

Undertaking

3.18 As mentioned in subparagraph 3.16(d), in responding to the proposed decision made by the Commission upon the completion of the Phase 2 Assessment, an applicant will be given an opportunity to make a written representation to the Commission. In the written representation, an applicant or a merger party may propose an undertaking to do or refrain from doing anything in order to address any competition

concern arising from the anticipated merger or merger that are raised in the proposed decision.

3.19 An applicant or a merger party is encouraged to propose an undertaking pursuant to section 62 of the Act to resolve any foreseeable competition concerns that may arise from such anticipated merger or merger. The undertaking must be aimed at preventing or remedying the identified adverse effects of an anticipated merger or a merger to competition.

3.20 An undertaking may be proposed at any time either at the time of making an application to the Commission under section 55 or 56 of the Act, during the Phase 1 or Phase 2 Assessment or in responding to a proposed decision proposed by the Commission at the end of the Phase 2 Assessment.

3.21 In some situations, the Commission may invite a merger party to offer an undertaking if the Commission finds the anticipated merger or merger that would likely result or have resulted in an SLC may be remedied by undertakings.

3.22 An undertaking is usually considered to be appropriate where the competition concerns and the undertaking proposed by the applicant or the merger party to address the competition concerns are clear. The undertaking must be sufficient to address the anticipated merger or merger's SLC effects, proportionate to remedy such adverse effects and capable of being implemented. In addition, the undertaking should not give rise to new competition concerns or require substantial monitoring by the Commission.

3.23 Upon receiving the proposed undertaking by an applicant or a merger party that the Commission considers as a suitable remedy, the Commission may publish the proposed undertaking for the purpose of public consultation within a period determined by the Commission.

3.24 The Commission will give due consideration to the feedback received in response to the proposed undertaking before deciding whether the proposed undertaking is appropriate and may be accepted.

3.25 In the event that the Commission accepts an undertaking by an applicant or a merger party, the Commission shall, in relation to an infringement, close the investigation without making any finding of infringement and shall not impose a penalty on the applicant or the merger party. In the event that a proposed undertaking is not accepted by the Commission, the Commission will continue to assess the anticipated merger or merger and make a decision on whether there will be or has been an infringement of the prohibition in section 54 accordingly.

3.26 Any undertaking accepted by the Commission shall be in a document available for public inspection in a manner determined by the Commission.

Execution of an Anticipated Merger During the Assessment of an Application

3.27 Due to the voluntary nature of the notification and application regime under the Act, merger parties may decide to execute an anticipated merger while an application to the Commission of such merger under section 55 of the Act is being assessed by the Commission. In such situation, the Commission may —

(a) pursuant to subsection 55(5) of the Act, treat the application as if it were an application for a merger made in accordance with section 56 of the Act and make a decision under that section; or

(b) pursuant to subsection 55(7) of the Act, refuse to make a decision in respect of such application and require the merger party to make a new application for the merger under subsection 56(1) of the Act.

Final Decision

3.28 As stated in subparagraph 3.13(a) and paragraph 3.17, the Commission will consider any feedback received through the public consultation and in the case of a proposed infringement decision, any written representation by the applicant before making its final decision.

3.29 The Commission will then give notice of its final decision to the applicant and provide an opportunity to the applicant, a merger party or any other relevant person or enterprise to peruse the final decision and to indicate whether there is any confidential information contained in the final decision. If the Commission decides that the information is confidential, such information will be redacted before the Commission publishes its final decision.

3.30 The final decision shall contain the facts on which the Commission bases its finding and the reasons for such finding.

Non-Infringement Decision

3.31 The Commission may make a non-infringement decision if –

(a) the anticipated merger will not infringe or the merger has not infringed the prohibition in section 54 of the Act;

(b) the anticipated merger will not infringe or the merger has not infringed the prohibition in section 54 of the Act because of an exclusion, as further elaborated in the Guidelines on the Substantive Assessment of Mergers; or

(c) the Commission accepts an undertaking pursuant to section 62 of the Act.

Validity Period of a Non-Infringement Decision for an Anticipated Merger

3.32 A non-infringement decision with regard to an anticipated merger may be limited to a period specified by the Commission. In such situation, a non-infringement decision for an anticipated merger would only be valid for a specified period and if the merger parties decide to proceed with the anticipated merger, it must be carried out within the specified period.

3.33 The Commission will take into account the circumstances of the anticipated merger in determining the validity period of a non-infringement decision. If an applicant is unable to execute an anticipated merger within the period specified in the decision of the Commission, the applicant may make an application to the Commission for an extension of the period. The applicant must notify the merger parties of the application for extension within two working days from the date of such application.

3.34 An applicant shall make an application to extend the validity period in writing. The application shall include the following details:

(a) the reasons that the anticipated merger could not be executed within the period specified in the decision of the Commission;

(b) the proposed period of extension and its reasons;

(c) whether or how the competitive environment has changed since the decision was issued and how it may be expected to change further within the proposed period of extension; and

(d) whether or how the competitive impact of executing the anticipated merger within the proposed period of extension will differ from the competitive impact of executing the anticipated merger within the initial period specified in the decision of the Commission.

3.35 The Commission will consider an application to extend the validity period on a case by case basis. The Commission may grant such extension subject to certain conditions. In general, the extension is more likely to be granted if —

(a) there is no material change in the competitive environment since the decision was issued; and

(b) the competitive impact from executing the anticipated merger within the proposed period of extension will not be materially different than if the anticipated merger were executed within the initial period specified in the decision of the Commission.

3.36 The Commission may reject an application to extend the validity period if the application requires significant analysis of the competitive impact of an anticipated merger due to material change in the competitive environment and impact of the execution of the anticipated merger. In such situations, the merger party may wish to make a fresh application under section 55 of the Act.

Infringement Decision

3.37 If the Commission decides that an anticipated merger or a merger infringes the prohibition in section 54 of the Act, subsection 59(1) of the Act provides that the Commission —

(a) shall require the infringement to be ceased immediately;

(b) may specify appropriate steps to be taken by the infringing enterprise to bring the infringement to an end;

(c) may impose a financial penalty which shall not exceed ten percent of the worldwide turnover of the enterprise over the period of the infringement; or

(d) may give any other direction as it deems appropriate.

The Commission, in making an infringement decision, shall include its directions in its decision. The Commission must, within fourteen days of making that decision, notify its infringement decision to any person affected by the decision.

Imposition of Directions in an Infringement Decision

3.38 The Commission's main consideration in deciding on the appropriate directions to be given is to remedy, mitigate or prevent an SLC effect resulting from an anticipated merger or a merger.

3.39 Examples of directions that may be imposed by the Commission include the following:

(a) prohibiting an anticipated merger from being carried into effect;

(b) requiring a merger to be dissolved or modified;

(c) requiring a merger party to enter into agreements designed to prevent or lessen the anti-competitive effects arising from an anticipated merger or a merger;

(d) requiring a merger party to dispose such businesses, assets, shares or rights in a manner that may be specified by the Commission; and

(e) providing a performance bond, guarantee or other form of security on such terms and conditions as may be determined by the Commission.

Types of Remedy in an Infringement Decision

3.40 There are two main categories of remedy which may be directed by the Commission in its decision –

(a) Structural remedy

- Structural remedy refers to remedy intended to maintain or restore the competitive structure of a relevant aviation service market. Since an anticipated merger or a merger involves a structural change to a relevant aviation service market, a structural remedy may be appropriate if the anticipated merger or merger would result in an SLC.

- Structural remedy may involve the sale of one or more businesses, physical assets or other rights of any merger party to address the competitive concerns arising from an anticipated merger or a merger.

- Structural remedy may be preferable to behavioural remedy because it —

  (i) clearly addresses the market structure issues resulting from an anticipated merger or a merger that give rise to the competition concerns;

  (ii) could be simple, certain, readily implemented and could be accomplished in a short period of time; and

  (iii) requires little monitoring by the Commission once the merger parties implement it.

- In the case of the sale of a business, such business must be capable of being fully separated from the merger party. The Commission may specify that the sale must be completed within a certain period of time.

- The Commission may require the approval of the purchaser before the sale of any business. This is to ensure that the proposed business purchaser has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in a relevant aviation service market. An enterprise that is willing to pay a commercially reasonable price for a business may be considered as an alternative purchaser even if the price is lower than the price that a merger party is prepared to pay for the acquisition of that business. The Commission may also provide that if the divestiture fails to be completed within the specified period, an independent trustee may be appointed, to monitor the operation of the business pending disposal or to handle the sale at the expense of such merger party.

(b) Behavioural remedy

- Behavioural remedy refers to an ongoing remedy that is designed to modify or constrain the future conduct of a merger party. Unlike structural remedy, behavioural remedy does not restructure a merger party or the ownership of assets or rights. Instead, behavioural remedy subjects a merger party to specific operating rules.

- Behavioural remedy seeks to change the behaviour of any merger party in a relevant aviation service market with the aim to encourage competition through the imposition of conditions or prohibitions to

prevent a merger party from behaving in a manner that undermines competition.

- The Commission may consider behavioural remedy in situations where —

  (i) divestment will be impractical or disproportionate to the nature of the competition concerns arising from an anticipated merger or a merger; or

  (ii) behavioural remedy is necessary to support structural divestment. For example, where the Commission directs a partial divestment remedy, the Commission may direct a merger party not to approach the former buyers of the divested business for a limited period in order to allow the buyers of the divested business to be a viable and effective competitor.

3.41 The Commission may decide to impose more than one type of remedy in order to remedy, mitigate or prevent an SLC effect resulting from an anticipated merger or a merger.

3.42 The Commission may consider various factors in deciding the appropriate remedy to be included in its decision including —

(a) whether the remedial action will restore the competition that would be substantially lessened as a result of an anticipated merger or a merger;

(b) whether the remedial action would be effective to bring the infringement to an end or to remedy, mitigate or prevent an SLC effect resulting from an anticipated merger or a merger; and

(c) the cost of monitoring the remedial action.

3.43 In deciding a remedy relating to a merger application made pursuant to section 56 of the Act, the Commission may not consider the costs of divestment which the merger party would have to incur since the merger party has had the option to notify the Commission of the merger prior to its execution under section 55 of the Act.

Imposition of Penalties in an Infringement Decision

3.44 A notification of an anticipated merger or a merger is unlikely to result in an imposition of a financial penalty under paragraph 59(1)*(c)* of the Act. The Commission may impose financial penalty in relation to an anticipated merger or a merger that is notified and applied to the Commission where the Commission is satisfied that the infringement was committed intentionally or negligently. For example, the Commission may, in its final decision, impose a financial penalty on a merger party that had executed an anticipated merger after the Commission had issued a proposed infringement decision in relation to the said anticipated merger.

4. Enforcement of Decision

4.1 Pursuant to subsection 61(1) of the Act, the Commission may bring proceedings before the High Court against any person who fails to comply with its decision under section 59 of the Act.

4.2 The High Court, if upon finding that there is failure to comply with the Commission's decision, shall make an order requiring the person to comply with the decision. Any breach of an order of the High Court will be punishable as a contempt of court.

5. Exemption and Appeal

Exemption

5.1 As mentioned in paragraph 3.37, the Commission must, within fourteen days of making an infringement decision, notify its decision to any person affected by the decision. Additionally, any person affected by the decision may, within fourteen days of the date of notice, apply to the Minister for the anticipated merger or the merger to be exempted from the prohibition on the ground of any public interest consideration. This is provided for in subsection 59(2) of the Act.

5.2 The term "public interest consideration" as it appears in subsection 59(2) of the Act shall be construed narrowly and it has a different meaning from "social benefits" which is used by the Commission in assessing whether an anticipated merger that may be expected to result in an SLC or a merger that has resulted in an SLC in any aviation service market should be allowed because of an exclusion as provided under subparagraph 55(2)*(b)*(i) or 56(2)*(b)*(i) of the Act. The term "public interest consideration" in subsection 59(2) of the Act shall be confined to matters of public or national security and defence only.

5.3 This approach in the interpretation of "public interest consideration" creates a clear demarcation between the basis of assessment by the Commission as the competition authority for aviation service markets and the Minister, thus avoiding potential conflict or confusion.

5.4 An exemption granted by the Minister pursuant to subsection 59(2) of the Act may be revoked if the Minister has reasonable grounds to suspect that the information on which he based his decision was materially incomplete, false or misleading.

Appeal

5.5 Any person or body aggrieved by any decision of the Commission under Part VII of the Act may appeal to the High Court within three months from the date on which the decision was communicated to him. This right to appeal is provided for under section 88 of the Act.

6. Glossary

1.	Act	Malaysian Aviation Commission Act 2015 [*Act 771*].
2.	applicant	A merger party that notifies the Commission of an anticipated merger or a merger and applies to the Commission for a decision under subsection 55(1) or 56(1) of the Act.
3.	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.
4.	Commission	Malaysian Aviation Commission.
5.	Guidelines	Guidelines on Notification and Application Procedures for an Anticipated Merger or a Merger.
6.	merger party	An enterprise that is a party to an anticipated merger, or a party involved in a merger. This may refer to an enterprise that merges with another enterprise, an enterprise that acquires another enterprise, an enterprise that is acquired by another enterprise, or the merged entity, whichever is applicable.
7.	merger parties	All enterprises that are parties to an anticipated merger, or parties involved in a merger.
8.	SLC	substantial lessening of competition.