



**Malaysian  
Aviation Commission**  
*Suruhanjaya Penerbangan Malaysia*

**DRAFT**

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Case number: MAVCOM/ED/CC/DIV4/2021(1)

**SECTION 55 OF THE MALAYSIAN AVIATION COMMISSION ACT 2015 [ACT 771]**

**ANTICIPATED MERGER**

**Proposed Decision by the Malaysian Aviation Commission on the Voluntary Notification and Application of an Anticipated Merger under Section 55 of the Malaysian Aviation Commission Act 2015 by Korean Air Lines Co., Ltd. and Asiana Airlines, Inc.**

**23 July 2021**

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**Summary of the Proposed Decision:**

1. The Anticipated Merger between Korean Air Lines Co., Ltd. and Asiana Airlines, Inc. falls within the scope of section 55 of the Malaysian Aviation Commission Act 2015 [*Act 771*]. The Anticipated Merger is a failing firm defence merger, with Korean Air Lines Co., Ltd. entering into a share subscription agreement with Asiana Airlines, Inc. on 17 November 2020. Asiana Airlines, Inc. has been in a situation of financial distress for some time and cannot be rehabilitated but for the Anticipated Merger.
2. Upon assessing the notification and by virtue of section 55 of Act 771, the Commission has concluded that the merger, if carried into effect, would not infringe the prohibition in section 54 of Act 771.

## Contents

1.	BACKGROUND.....	4
	The Parties of The Merger.....	4
	Main Transaction of The Merger.....	5
	Purpose of The Merger.....	6
2.	THE SUBSTANTIAL LESSENING OF COMPETITION TEST .....	7
	Defining The Relevant Aviation Service Market.....	7
	Developing A Theory of Harm: Analysing Market Power and Market Concentration .....	13
	Developing Counterfactual Scenario: Analysing Competitive Effects Arising From The Merger.....	16
	Economic Efficiencies and Social Benefits.....	27
3.	THE COMMISSION'S CONCLUSION OF THE SLC TEST .....	30
4.	THE COMMISSION'S DECISION.....	31
5.	APPENDIX I: IATA AIRPORT AND AIRLINE CODES .....	33
6.	APPENDIX II: PASSENGER VOLUME BY AIRLINES, 2015-2020.....	36
7.	APPENDIX III: PASSENGER MARKET SHARE BY AIRLINES, 2015-2020 .....	38
8.	APPENDIX IV: AVERAGE AIRFARE BY AIRLINES, 2015-2020 .....	40
9.	APPENDIX V: MONETARY ESTIMATES FOR OTHER QUANTITATIVE EFFICIENCY GAINS.....	42
10.	APPENDIX VI: INVESTORS' INTERNAL REVIEW AND CONFIRMATION OF INTENTION (SUMMARY OF KEY OVERLAPPING FEEDBACK) .....	44
11.	APPENDIX VII: DETAILED INVESTORS' INTERNAL REVIEW AND CONFIRMATION OF INTENTION .....	46

## BACKGROUND

1. On 19 March 2021, the Malaysian Aviation Commission (“**MAVCOM**” or “**Commission**”) received a Voluntary Notification and Application of an Anticipated Merger (“**Notification**” or “**Application**”) under section 55 of the Malaysian Aviation Commission Act 2015 (“**Act 771**”). The Parties to this merger are Korean Air Lines Co., Ltd. (“**KE**”) and Asiana Airlines, Inc. (“**OZ**”) (collectively referred to as “**Parties**”). The Application was submitted by KE with the consent of OZ for the benefit of both Parties (“**Applicant**”).
2. The Anticipated Merger concerns the scheduled air passenger services between Malaysia and South Korea. Between 2015 and 2020, this route accounted for [x] of KE’s and [x] of OZ’s total number of passengers, respectively<sup>1</sup>.
3. The Anticipated Merger is also a failing firm defence merger, with KE entering into a share subscription agreement with OZ on 17 November 2020. OZ has been in a situation of financial distress for some time and cannot be rehabilitated but for the Anticipated Merger.
4. On 1 April 2021, MAVCOM published a summary of the Notification on its website. MAVCOM invited the relevant industry players and the public at large to provide any written feedback on the Notification within the period of 1 April – 1 May 2021. MAVCOM also emailed relevant airline competitors to inform them of the Application and solicit their feedback on questions pertaining to market definition, business plans for the relevant markets, and barriers to entry within the same period. The Commission received written feedback from only one (1) airline, namely [x] on 30 April 2021.
5. This Proposed Decision takes full consideration of the Notification, feedback received from all Parties, and MAVCOM’s research and analysis.
6. This Proposed Decision refers to airports and airlines according to the airport and airline codes as defined by the International Air Transport Association (“**IATA**”). The IATA airport and airline codes used are provided in **Appendix I**.

### The Parties of The Merger

#### **Korean Air (“KE”)**

7. KE is a Full-Service Carrier (“**FSC**”) with a global route coverage. It operates a hub-and-spoke network, with its principal hub at the Incheon International Airport, South Korea.
8. KE has a sister company, Jin Air (“**LJ**”), which is a Low-Cost Carrier (“**LCC**”). LJ is currently active in domestic routes in South Korea and certain international routes that are mostly short-haul. It is one of the main carriers from Seoul to Kota Kinabalu. LJ also provides limited cargo transportation using the available belly space in its passenger aircraft.

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<sup>1</sup> Based on MAVCOM’s analysis with data sourced from AirportIS.

9. KE's majority shareholder is Hanjin KAL Co., Ltd. ("**Hanjin KAL**"). Hanjin KAL owns [x] of the shares in KE and is the holding company of Hanjin Group. Hanjin KAL also has equity interests in LJ [x]. Hanjin KAL is a publicly listed company. Its largest shareholder, Chairman Won-Tae (Walter) Cho, and persons related to him, holds [x] of Hanjin KAL's outstanding shares. Hanjin KAL is engaged in the airline, hotel, and travel-related services through its various subsidiaries.
10. KE engages primarily in the air passenger and cargo transportation services, the aerospace industry, and the hotel industry. KE's air passenger and cargo transportation services represented [x] of its revenue stream for the first three quarters of financial year 2020. In light of KE's limited activities in relation to the aerospace industry, the hotel industry, and other activities, and in the absence of overlaps in Malaysia between the Parties for these activities, the Commission does not analyse and discuss these business areas further.

### **Asiana Airlines ("OZ")**

11. OZ is an FSC with a global route coverage, headquartered in Seoul, South Korea. OZ engages primarily in the domestic and international airline services, including both air passenger and cargo transportation services, a telecommunication business, and air transport support services.
12. OZ and its affiliates, Air Busan ("**BX**") and Air Seoul ("**RS**"), operate the airline services. BX is active in the passenger transportation but not in the air cargo transportation. RS operates both the air passenger and cargo transportation services, but its activity in the air cargo transportation is limited. OZ's Malaysian activities include the passenger flight operations to and from Kota Kinabalu through RS.
13. OZ's majority shareholder is Kumho Industrial Co., Ltd. ("**KICL**"), which holds [x] shares in OZ. KICL is primarily engaged in the construction business.
14. Asiana IDT operates the telecommunication business and provides IT services, while Asiana Air Port operates the air transport support services, such as air cargo loading and ground operations. OZ's airline activities accounted [x] of its revenue stream for the first three quarters of financial year 2020. In light of OZ's limited activities related to the telecommunications, air transport support services and other activities, and in the absence of overlaps in Malaysia between the Parties for these activities, the Commission does not analyse and discuss these business areas further.

### **Main Transaction of The Merger**

15. KE entered into a Share Subscription Agreement ("**SSA**") with OZ on 17 November 2020, pursuant to which KE agreed to subscribe for and purchase from OZ [x].<sup>2</sup> This represented [x] of the total issued and outstanding capital stock of OZ.
16. According to the SSA, KE has agreed to pay the acquisition price based on the following payment schedule:
  - (a) [x];

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<sup>2</sup> Based on exchange rate as at 23 April 2021 of KRW1 = RM0.0037.

(b) [REDACTED];

(c) [REDACTED].

17. Additionally, KE and OZ entered a convertible bonds subscription agreement on 17 November 2020. Under the agreement, KE agreed to subscribe for convertible bonds of OZ in the aggregate amount of [REDACTED].

[REDACTED]

18. [REDACTED].

19. [REDACTED].

20. [REDACTED].

### **Purpose of The Merger**

21. OZ has been in a situation of financial distress for some time and cannot be rehabilitated but for the Anticipated Merger. According to OZ's 2020 Semi-Annual Report, its total capital is significantly lower than its paid-in-capital, which shows about [REDACTED] of capital impairment. Furthermore, the capital will likely have been further impaired given the Coronavirus Disease 2019 ("**COVID-19**") pandemic's effect on the airline industry in the second half of 2020.
22. OZ is currently under the management and supervision of a group of creditors, including Korea Development Bank ("**KDB**"), which owns [REDACTED] of Hanjin KAL. The Parties claimed that OZ is a company which cannot be rehabilitated but for the Anticipated Merger. Thus, the Anticipated Merger should occur for its rehabilitation and promotion of economic and industry development in South Korea.

## THE SUBSTANTIAL LESSENING OF COMPETITION TEST

### ***Legal Framework***

23. Subsection 54(1) of the Act does not prohibit all mergers. Instead, only mergers that have resulted or may be expected to result in the Substantial Lessening of Competition (“**SLC**”) are prohibited. Mergers that are found to be pro-competitive, neutral towards competition or having a trivial effect of lessening competition are not prohibited under subsection 54(1) of the Act.
24. Based on Paragraph 4.4 of the Commission’s Guidelines on Substantive Assessment of Mergers (“the Guidelines”), the determination of whether a merger has resulted or may be expected to result in an SLC would entail the following steps:
  - (a) defining the relevant aviation service market;
  - (b) developing a theory or theories of harm;
  - (c) developing a counterfactual scenario; and
  - (d) assessing the competition in a relevant aviation service market and compare it with a counterfactual scenario
25. Based on Paragraph 4.5 of the Guidelines, the Commission is to consider the following factors when carrying out the SLC test:
  - (a) aviation service market definition;
  - (b) market power and concentration;
  - (c) competitive effects arising from horizontal mergers;
  - (d) entry and expansion; or
  - (e) countervailing buyer power

### **Defining The Relevant Aviation Service Market**

#### ***Legal Framework***

26. Section 47 of Act 771 defines an “aviation service market” as “*a market for aviation services in Malaysia or in any part of Malaysia*”. MAVCOM’s Guidelines on Aviation Service Market Definition provides that an aviation service market could include a group of services, which are substitutable or competitive with one another.<sup>3</sup>
27. MAVCOM’s Guidelines on Aviation Service Market Definition further states that the identification of the relevant aviation service market should generally consider two dimensions of the market—the service market and the geographic market.<sup>4</sup> An aviation service market definition depends on the facts of each case.

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<sup>3</sup> Paragraph 2.1 of the MAVCOM’s Guidelines on Aviation Service Market Definition, GL/Competition.ASMD/2018 (19 January 2018).

<sup>4</sup> Paragraph 3.1 of the MAVCOM’s Guidelines on Aviation Service Market Definition.

## ***Parties' Submissions***

### Focal Aviation Services

28. The Parties submitted that the focal aviation services for which the Notification is sought are the scheduled air passenger services between Malaysia and South Korea.

### O&D City-pairs

29. The Parties submitted that the starting point for the product market definition for passenger air transport services is the point of origin and point of destination city-pair approach. Each combination of a point of origin and a point of destination can be regarded as a separate market (the “**O&D route**” approach). Each O&D route is considered on a bi-directional basis since most passengers purchase return flights’ tickets.
30. The Parties also submitted that the relevant market may be defined geographically in relation to the substitutability of different airports from a passenger’s perspective. As such, the Parties considers Kuala Lumpur International Airport (“**KUL**”) and Sultan Abdul Aziz Shah Airport (“**SZB**”) (collectively “**KUL**”) to be substitutable and should be considered as belonging in the same market given that they are within the same catchment area. Similar arguments were also made regarding Incheon International Airport (“**ICN**”) and Gimpo International Airport (“**GMP**”) (collectively “**SEL**”).
31. The Parties submitted the following relevant O&D city pairs service market between Malaysia and South Korea:
- (a) SEL (ICN/GMP) – KUL (KUL/SZB);
  - (b) SEL – Kota Kinabalu (SEL-BKI);
  - (c) SEL – Johor Bahru (SEL-JHB); and
  - (d) Busan – Kota Kinabalu (PUS-BKI).
32. The Parties submitted that of the four (4) O&D city pair routes listed, there is only one (1) overlapping route in their passenger transport services, which is the SEL-BKI O&D pair route (“**Overlapping Route**”). This is because KE’s LCC sister, LJ, and OZ’s LCC affiliate, RS, both fly the ICN-BKI route as competitors. Since there is no overlap between KE and OZ on the remaining Malaysia – South Korea routes, the Parties submitted that no further competition analysis is required for these routes.

### Direct and Indirect Services

33. As a starting point, the Parties provided a competitive assessment of the Malaysia – South Korea O&D route markets encompassing direct flights only. However, in view of the distance between Malaysia and South Korea, the Parties viewed that some one-stop flights can be considered by passengers as alternatives to direct flights.
34. The Parties also submitted that they face strong competition from one-stop competitors, in particular AirAsia (“**AK**”), Malindo Air (“**OD**”), and MH, which would carry passengers arriving from SEL to KUL via other international carriers onwards to BKI.

### Business versus Leisure Travel

35. The Parties submitted that most of the passengers travelling on the SEL-BKI route are leisure travellers, who are non-time-sensitive travellers.
36. The Parties submitted that there is a high tendency for Koreans to visit Kota Kinabalu for leisure purposes and provided the supporting evidence below:
- (a) The Kota Kinabalu City Mosque is the second most-visited place for many Korean tourists in Sabah and the Tanjung Aru beachfront in Kota Kinabalu is dubbed to be one of the best places for sunset viewing.
  - (b) The Sabah Tourism Board statistics showed that nearly 30,000 Koreans visited Sabah in 2019 and amongst the popular locations are Tanjung Aru and the KK Explanade in Kota Kinabalu.
  - (c) Big data analysis indicated that Kota Kinabalu has the best reputation as a travel destination for Korean customers.
  - (d) Kota Kinabalu was the fourth most popular travel destination in July/August 2019, according to Interpark Tour.
37. The Parties also submitted<sup>5</sup> that from 2018 to 2020, the ICN-BKI passengers were predominantly Koreans, accounting for [x] of the passengers. Only [x] of the passengers were Malaysians. The significant imbalance in the nationality of travellers suggests that the demand for the ICN-BKI route is more likely driven by Korean tourists for leisure purposes.

### Full-Service Carriers and Low-Cost Carriers

38. The Parties submitted that the scheduled air passenger services provided by the LCCs are substitutable with the services provided by the FSCs on the Overlapping Route. Accordingly, the LCCs should be considered as part of the same relevant market as the FSCs.
39. According to the Parties, the introduction of Ultra-Low Cost Carriers (“**ULCCs**”) have undermined the price-competitiveness of the LCCs, which pushed the latter to venture into longer distance flights to improve profitability in response. This, in turn, has diluted the distinction between the traditional FSCs and the LCCs. This is especially relevant for an O&D route like SEL-BKI, where the LCCs and the ULCCs are in prime positions to capture the market share with their aggressive pricing strategies.

### Conclusion

40. The Parties submitted that the focal aviation services are the scheduled air passenger services between Malaysia and South Korea.
41. The Parties further submitted that for the purpose of this Application, the assessment should focus on the O&D city pairs where both Parties operate the services between Malaysia and South Korea, namely the Overlapping Route, which is SEL-BKI.

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<sup>5</sup> Parties’ response to MAVCOM dated 29 April 2021.

42. In relation to the other routes between Malaysia and South Korea, the Parties submitted that they are not relevant in the competition assessment as there is no overlap between KE and OZ on those routes.

### ***MAVCOM's Analysis***

#### Focal Aviation Services

43. As regards the service market, the Commission agrees with the Parties that the focal aviation services are the scheduled air passenger services between Malaysia and South Korea.

#### O&D City-pairs

44. In terms of the geographic market, the Commission notes that air travellers generally travel to a specific destination for a reason and are not likely to switch to another destination when faced with a small but significant, non-transitory increase in price. Thus, the relevant geographic market for air transport services is commonly defined based on the O&D city-pair. The Commission finds no reason to depart from this general approach.
45. The Parties submitted that the two (2) airports in Kuala Lumpur (KUL and SZB) are located within the same catchment area and, thus, belong to the same market. Similar argument was also made regarding ICN and GMP in Incheon, South Korea.
46. In this regard, the Commission notes that in its *ANA/United Decision*<sup>6</sup> and *MH/JL Decision*,<sup>7</sup> it had considered several factors in assessing the substitutability between airports, such as:
- (a) the catchment radius of each airport and the substitutability between airports;
  - (b) the connectivity between potentially substitutable airports;
  - (c) the scheduling and frequency of flights; and
  - (d) the convenience and quality of airport services.
47. Based on the Commission's past analysis<sup>8</sup>, it had found that KUL and SZB are, to a large extent, substitutable airports serving Kuala Lumpur.
48. For ICN and GMP, the Commission agrees with the Parties that both airports belong in the same market given the distance between the two airports is about 33 kilometres. ICN and GMP are also connected to each other via the Airport Railroad Express All Stop service, which runs at a frequency of up to one train every 6 minutes, with the journey taking 53 minutes between both airports.
49. As such, the Commission views that KUL and SZB, as well as ICN and GMP, belong in the same respective markets for Kuala Lumpur and South Korea for the purpose of this Notification's assessment.

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<sup>6</sup> Paragraph 6.1.5 of the ANA/United Decision.

<sup>7</sup> Paragraph 29 of the MH/JL Proposed Decision.

<sup>8</sup> MH/SQ Individual Exemption Case which was closed on 20 July 2020.

50. The Commission notes that there are four (4) O&D city pair routes between Malaysia and South Korea. Of these four routes, only one (1) Overlapping Route was identified, namely on the SEL-BKI O&D pair route. However, the Commission views all four routes should be assessed to have a complete analysis of the Parties' market shares in Malaysia. For the purpose of this Notification, focus will mainly be on the Overlapping Route, SEL-BKI, as the Parties do not overlap on the other O&D pair routes.

#### Direct and Indirect Services

51. The Commission agrees that for the purpose of this assessment, direct and indirect services provided by other airlines between Malaysia and South Korea can be considered as substitutes.
52. The Commission also notes that the Parties are facing strong competition from one-stop competitors, in particular AK, OD, and MH, which could carry passengers arriving from SEL to KUL via other international carriers onwards to BKI.
53. **Table 1** shows the passenger traffic on direct and indirect flights and the weekly frequency of direct flights on the relevant service market between Malaysia and South Korea in 2019.

**Table 1: Direct and Indirect Flights and Passengers for Malaysia – South Korea, 2019**

Route	Direct Services		Indirect Passengers <sup>9</sup> (%)
	Weekly Frequency <sup>10</sup>	Passengers <sup>11</sup> (%)	
SEL-BKI	[✂]	[✂]	[✂]
SEL-KUL	[✂]	[✂]	[✂]
SEL-JHB	[✂]	[✂]	[✂]
PUS-BKI	[✂]	[✂]	[✂]

Source: MAVCOM Analysis

54. The Commission concludes that while there is only a small percentage of indirect flights for the routes between Malaysia and South Korea, the Commission finds that the outcome of its route competition analysis in paragraphs 65 – 77 of this Proposed Decision would not materially change, regardless of whether it considers the direct and indirect flights as belonging to the same market for Malaysia – South Korea routes.

#### Business versus Leisure Travel

55. The Commission notes that majority of the passengers on the ICN-BKI route originates from ICN. **Table 2** shows the percentage of originating passengers from ICN and BKI on the ICN-BKI route from 2018 to 2020.

<sup>9</sup> MAVCOM's Analysis. Data for year ending 2019.

<sup>10</sup> MAVCOM's Analysis. Frequency data for year as at December 2019.

<sup>11</sup> MAVCOM's Analysis. Data for year ending 2019.

**Table 2: Passengers Originating from ICN and BKI on the ICN-BKI route, 2018-2020**

Originating Airport	2018		2019		2020	
	Passenger Number	Passenger Share (%)	Passenger Number	Passenger Share (%)	Passenger Number	Passenger Share (%)
ICN	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
BKI	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: Parties' Submission

56. The Commission also notes that the ICN-BKI passengers were predominantly Korean nationals from 2018 to 2020. The significant imbalance in the nationality of travellers suggests that the demand for the ICN-BKI route is more likely driven by tourists for leisure purposes.
57. The Commission also notes that the 2019 Tourism Malaysia Statistics showed that 94.5% of all visitors from Korea to Malaysia were for holiday and shopping, while only 1.2% were for business.<sup>12</sup>
58. The Commission is also satisfied with the supporting evidence submitted by the Parties, which indicates that BKI is a major tourist destination for the Korean nationals. Based on these factors, the Commission agrees with the Parties that the majority of the passengers on the SEL-BKI route are non-time sensitive and mostly are travelling for leisure purposes.

#### Full-Service Carriers and Low-Cost Carriers

59. The Commission agrees with the Parties that the scheduled air passenger services provided by the LCCs are substitutable with the services provided by FSCs on the Malaysia – South Korea routes, especially considering the nature of the route, which is for leisure travel. Thus, the LCCs are considered as part of the same relevant market as the FSCs.
60. [REDACTED]<sup>13</sup> also highlighted that the FSCs represent only [REDACTED] of the passenger volume market shares in 2019 between Malaysia and South Korea. This shows that the LCCs are dominant on the Malaysia – South Korea market.

#### Conclusion

61. Based on the above considerations, the Commission concludes that the relevant aviation service markets are the scheduled air passenger services for each O&D combination between Malaysia and South Korea, with focused analysis on the Overlapping Route, SEL-BKI.
62. The scope of the scheduled air passenger transport includes both direct and indirect flights and does not differentiate FSCs and LCCs due to the nature of the route which is mostly for leisure travel.

<sup>12</sup> Parties' response to MAVCOM dated 12 May 2021.

<sup>13</sup> Written feedback by MH dated 30 April 2021.

## Developing A Theory of Harm: Analysing Market Power and Market Concentration

### Parties' Submission

63. The Parties submitted that for the SEL-BKI route, KE (via LJ) has a market share of [x] and OZ (via RS) has a market share of [x] respectively, giving the Parties a combined market share of [x]. The competitors on this route include Eastar Jet (“ZE”) and Jeju Air (“7C”).
64. The Parties claimed that the SEL-BKI route features a total of four regular air carriers, meaning all four, including the Parties, will have a material share. In any case, despite the material market shares, the Parties submitted that high market share does not necessarily correspond to significant market power and that this overlap should not cause any competition concerns.

### MAVCOM's Analysis

65. As stated in paragraphs 43 – 62 of this Proposed Decision, the relevant markets comprise scheduled air passenger services for the O&D pairs between Malaysia and South Korea including both direct and indirect flights.
66. As a starting point, the market power and concentration of the Anticipated Merger on competition was analysed based on the following considerations:
- (a) Annual passenger volume; and
  - (b) Market concentration based on the Herfindahl-Hirschman Index (“HHI”). In particular, the Commission looked at the post-Merger HHI<sup>14</sup> and the change in the HHI resulting from the Anticipated Merger (“delta HHI”).<sup>15</sup>

### SEL-BKI

67. **Table 3** shows the yearly passenger volume, Parties' combined market share, pre-Merger HHI, post-Merger HHI, and delta HHI for SEL-BKI, which is the only route in which the Parties overlap. The breakdown of the passenger volume, passenger market share, and average airfares by airlines can be found in **Appendices II – IV**.

**Table 3: Passenger Volume, Parties' combined market share, pre-Merger HHI, Post-Merger HHI, and Delta HHI for SEL-BKI, 2015 – 2020**

SEL-BKI	2015	2016	2017	2018	2019	2020
Passenger Volume	[x]	[x]	[x]	[x]	[x]	[x]
Parties' Combined Market Share (%)	[x]	[x]	[x]	[x]	[x]	[x]
Pre-Merger HHI	[x]	[x]	[x]	[x]	[x]	[x]
Post-Merger HHI	[x]	[x]	[x]	[x]	[x]	[x]
Delta HHI	[x]	[x]	[x]	[x]	[x]	[x]

Source: MAVCOM Analysis

<sup>14</sup> The market shares of the Parties and their sister companies/affiliates are combined for the calculation of the post-Merger HHI for the four O&D pair routes.

<sup>15</sup> Delta HHI is calculated as: Delta HHI = post-Merger HHI - pre-Merger HHI.

68. In 2020, the SEL-BKI market shows a relatively high delta HHI of 0.2 – 0.3 and post-Merger HHI of 0.6 – 0.7. In this regard, the Commission notes that the Parties' combined market shares have consistently been above 65.0% – 75.0% in recent years. The Parties' combined market share was approximately 70.0% – 80.0%, while their main competitor, 7C's market share was 20.0% – 30.0% in 2020.
69. In calculating the HHI and market shares for the SEL-BKI market, the Commission has removed ZE from the analysis. ZE, a competitor of the direct service on this route had recently exited the market in 2020 due to financial difficulties. ZE has suspended most of its services, as its Air Operator Certificate expired in May 2021.<sup>16</sup> This would result in a higher market share and HHI of the Parties post-Merger in the SEL-BKI market.

### SEL-KUL

70. **Table 4** shows the yearly passenger volume, Parties' combined market share, and HHI for SEL-KUL.

**Table 4: Passenger Volume, Parties' combined market share, and HHI for SEL-KUL, 2015 – 2020**

SEL-KUL	2015	2016	2017	2018	2019	2020
Passenger Volume	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Parties' Combined Market Share (%)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
HHI	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: MAVCOM Analysis

71. The SEL-KUL route is only operated by three players, namely KE, MH, and AirAsia X ("D7"). KE's market share is approximately 20.0% – 30.0% in 2020. The biggest player on this route is AirAsia X ("D7"), which records a market share of 45.0% – 55.0% in 2020. The market shows a HHI of 0.3 – 0.4. Since the Parties do not overlap on this route, there will be no changes in market concentration as an effect of the Anticipated Merger. Considering the overall profile of the SEL-KUL market, the Commission is of the view that the Anticipated Merger would not cause an SLC on this market.

### SEL-JHB

72. **Table 5** shows the yearly passenger volume, Parties' combined market share, and HHI for SEL-JHB.

**Table 5: Passenger Volume, Parties' combined market share, and HHI for SEL-JHB, 2015 – 2020**

SEL-JHB	2015	2016	2017	2018	2019	2020
Passenger Volume	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Parties' Combined Market Share (%)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
HHI	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: MAVCOM Analysis

<sup>16</sup> <https://www.flightglobal.com/strategy/eastar-eyes-service-return-following-fresh-investment-report/142505.article>

73. As for the SEL-JHB route, the Commission found that the market shows a very high HHI of 0.9 – 1.0. KE (via LJ) dominates the market share on this route, with LJ recording a market share of 90.0% – 100.0% in 2020. This is because LJ is the sole carrier, which offers direct flights on the SEL-JHB route since 2018. Despite the high market share of the Parties in this market, the Anticipated Merger itself would cause no changes to the market concentration as the Parties do not overlap on this route. The Commission also notes that the passenger volume on the SEL-JHB route is relatively small, where the highest recorded passenger volume was approximately 80,000 – 90,000 in 2019. Considering the overall profile of the SEL-JHB market, the Commission is of the view that the Anticipated Merger would not cause an SLC on this market.

#### PUS-BKI

74. **Table 6** shows the yearly passenger volume, Parties’ combined market share, and HHI for PUS-BKI.

**Table 6: Passenger Volume, Parties’ combined market share, and HHI for PUS-BKI, 2015 – 2020**

<b>PUS-BKI</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>
Passenger Volume	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Parties’ Combined Market Share (%)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
HHI	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: MAVCOM Analysis

75. The PUS-BKI shows a high HHI of 0.8 – 0.9 in 2020. BX, which is OZ’s affiliate, has a high passenger market share of 90.0% – 100.0%, while its main competitor was previously ZE, which has since exited the market as stated in paragraph 69 of this Proposed Decision. Similar to the rest of the non-overlapping markets, the Anticipated Merger would not result in any changes of market concentration in the PUS-BKI market. The Commission is of the view that the Anticipated Merger would not cause an SLC on this market.

#### **Conclusion**

76. Based on the considerations mentioned above, the Commission concludes that, the Anticipated Merger would not cause an SLC on the three O&D route pair in which the Parties do not overlap.
77. For the SEL-BKI route, the fact that the Parties’ post-Merger combined market shares would be above 65.0% – 75.0% does not per se indicate that the Anticipated Merger would allow the Parties to exercise market power or cause significant detrimental effect on competition. The Commission will discuss the competitive effects in the SEL-BKI route arising from the Anticipated Merger in the following section of this Proposed Decision.

## Developing Counterfactual Scenario: Analysing Competitive Effects Arising From The Merger

### *Unilateral Effects*<sup>17</sup>

#### Parties' Submission

78. The Parties submitted that there will be no unilateral effects that would arise from the Anticipated Merger on the SEL-BKI route, as detailed in paragraphs 79 – 84 of this Proposed Decision.
79. The Merger Parties will continue to face intense competition and will remain constrained by major competitors.
- (a) The Parties submitted that BKI is a tourist destination. This means that passenger traffic will for the majority originate in South Korea, travel for leisure purposes, and then return. This has two major effects:
- i. passengers on the SEL-BKI route will be price-sensitive, which is typical of leisure travellers; and
  - ii. alternative carriers will most likely be attractive to passengers from Korea since passengers tend to prefer to fly with carriers from their home jurisdiction and served in their native language.
- (b) The Parties submitted that they will remain to be constrained on the SEL-BKI route by intense competition from LCCs such as 7C and ZE. These are the second and third largest operators respectively, and will continue to price aggressively, thus constraining the Parties.
80. A hypothetical price increase above competitive levels will attract entry or expansion by competing carriers.
- (a) The Parties submitted that a number of carriers have yet to operate the SEL-BKI route, including South Korean carriers such as [✂] are also potential entrants.
- (b) The Parties also submitted that any hypothetical price increase by the Parties can attract entry or expansion by competing carriers, which always look to optimise their route networks and capture underserved demand.

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<sup>17</sup> “Unilateral effects refer to the anti-competitive effects of a merger that can result from unilateral actions by a merger party or any other enterprise in a relevant aviation service market”. For further details on unilateral effects, refer to Paragraphs 7.3 – 7.8 of the MAVCOM’s Guidelines on Substantive Assessment of Mergers.

81. Airfares will continue to be strictly controlled by the South Korean authorities constraining the Merger Parties' ability to increase airfares above competitive levels.
- (a) The Parties submitted they will not be able to increase airfares, which are strictly controlled by the South Korean government. Under the Aviation Business Act (“**ABA**”) 2016, an air transport service provider operating international flights must obtain an approval from the South Korean Ministry of Land, Infrastructure and Transport (“**MOLIT Approval**”), or file a report with MOLIT (“**MOLIT Report**”) for passenger airfares on its international routes (ABA, Article 14(1)).
  - (b) The Parties claimed that the ABA is also strictly enforced in practice, as the MOLIT reviews stringently any request for MOLIT Approval or filing of MOLIT Report in respect of airfares. Any request for MOLIT Approval or filing of MOLIT Report must include underlying documents explaining with justification how the service provider determined its airfares, and, for any changes thereof, the reason for such changes must be explained with justification. Based on the submitted documents and explanations with justifications, the MOLIT may decide to refuse any request for MOLIT Approval or acceptance of a MOLIT Report.
  - (c) Accordingly, even if KE acquires OZ, the merged entity will find it difficult to raise airfares for international routes, as the MOLIT will continue to closely monitor airfares charged by air transport service providers operating international flights.
82. Limited impact on Malaysian passengers.
- (a) The Parties submitted while the Merger Parties have a material market share for the SEL-BKI route, there will be limited or no impact on competition for Malaysian passengers. This is because the route is believed to be increasingly used by Korean tourists and reflects the fact that BKI is a leisure destination.
  - (b) The Parties claimed that they face strong competition from one-stop competitors, in particular AK, OD, and MH, which would carry passengers arriving from SEL to KUL via other international carriers onwards to BKI. In the event where passengers choose to transit in KUL before flying to BKI, or from BKI to transit in Kuala Lumpur before flying to SEL, tourists tend to be price-sensitive and may be willing to accept 2 to 3 hours in additional flight time if the airfare is materially lower than a direct flight from BKI to SEL.
83. Limited impact on competition due to route being relatively thin.
- (a) The Parties submitted the SEL-BKI route is a relatively thin route with a lower number of total passengers. In 2019, there were a total of [x] passengers on the SEL-BKI route, compared to [x] passengers on the SEL-KUL route and [x] passengers on the SEL-SIN route in the same period.
  - (b) The Parties also submitted the route will in any event remain competitive with three direct carriers and five indirect carriers likely to remain active following the Anticipated Merger.

84. The economics of aviation incentivises carriers to keep airfares competitive.
- (a) The Parties submitted that the international air passenger services are characterised by high fixed costs, including leasing or purchasing aircraft, insurance costs, renting terminals and facilities, and other ancillary expenses. A majority of seats on a flight would usually need to be sold just for an airline to cover the high fixed costs of operating a flight.
  - (b) The Parties submitted that KE (including LJ) will be incentivised to offer competitive airfares to achieve a high load factor, particularly given the trend for consumers becoming more price sensitive, especially on a leisure route like SEL-BKI. If the Parties were to increase fares, even the loss of a small proportion of passengers to indirect operators could render that price rise unprofitable. Further, such a price rise has the potential to move a flight from profitable to loss-making, especially with two other direct competing carriers and numerous one-stop competitors being alternatives.

#### MAVCOM's Analysis

85. The Commission does not agree with the Parties' claims that they will continue to face intense competition and will remain constrained by major competitors. Indeed, the Commission finds that the Parties' combined market share is high post-Merger and they would face less competition instead. As mentioned in paragraph 69 of this Proposed Decision, this is due to the exit of one of their main competitors on the direct services, ZE, in 2020. Before ZE's exit, ZE held 15.0% – 25.0% of the passenger volume market share on the SEL-BKI route.
86. The Commission agrees with the Parties' claims mentioned in paragraphs 80(a), and (b), that a hypothetical price increase above the competitive levels will attract entry or expansion by competing carriers. However, with MOLIT regulating the international airfares on the SEL-BKI market, carriers would not be able to arbitrarily increase prices above competitive levels.
87. The Commission has considered other claims submitted by the Parties and finds that there are several arguments that would indicate that the Anticipated Merger would not cause any unilateral effects, particularly the following:
- (a) Airfares will continue to be strictly controlled by the South Korean authorities constraining the Merger Parties' ability to increase airfares above competitive levels
    - i. Although the post-Merger market share of the Parties is high on SEL-BKI, the Commission finds that the Parties will not be able to increase the airfares above competitive levels as the airfares are strictly controlled by MOLIT.

- ii. The Commission notes that the proposed airfares for international passenger services departing from Korea must secure MOLIT's approval by filing a report. Such report must include a justification on how the service provider determined its airfares or fees, and, for any changes thereof, the reasons for such changes must be explained with justification. MOLIT has the right to refuse any fare change.<sup>18</sup>
- (b) Limited impact on Malaysian passengers
- i. The Commission notes that Malaysian passengers would still have the option to fly via one-stop on the SEL-BKI route since most of the passengers are travelling for leisure purposes.
- (c) Limited impact on competition due to route being relatively thin
- i. The Commission notes that the passenger volume for the SEL-BKI market were 621,056 and 135,908 in 2019 and 2020, respectively. The Commission agrees with the Parties that this is a relatively thin market compared to the total Malaysia – South Korea market passenger volume (2019: 2,111,734 passengers; 2020: 405,292 passengers).
- (d) The economics of aviation incentivises carriers to keep airfares competitive
- i. The Commission agrees with the Parties that demand on a leisure route such as SEL-BKI is elastic. This means that travellers are price sensitive. Passengers may opt for services that offers more competitive prices since direct and indirect services are substitutable.
  - ii. The Commission also notes that the Parties will not be able to increase the airfares above competitive levels as the airfares are strictly controlled by MOLIT.
88. Based on the consideration above, the Commission concludes that although the Anticipated Merger would result in a high market share of the Parties post-Merger, the Parties would not be able to increase airfares due to the regulation by MOLIT. As such, the Commission views it is difficult for the Parties to exercise its market power to unilaterally impose a price increase or behave anti-competitively in a sustainable and profitable manner in the market.

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<sup>18</sup> Parties' response to MAVCOM dated 29 April 2021.

## ***Coordinated Effects***<sup>19</sup>

### Parties' Submission

89. The Parties submitted that the Anticipated Merger will not lead to coordinated effects on the SEL-BKI route.
90. The Parties claimed that the Parties could not, in any way, effectively monitor the prices of their competitors continuously and adopt a price coordination strategy.
91. The Parties also submitted that it is impossible to reach an agreement, whether tacit or otherwise, to coordinate prices with competitors given the number of carriers involved on these routes, the asymmetric nature of the market, and the way in which air transport services are priced. In other words, the prospect of winning new business, i.e. passengers, will drive competition on the route obviating any hypothetical risk of coordination.

### MAVCOM's Analysis

92. The Commission notes that airfares submitted by a reporting airline to MOLIT are not disclosed to other airlines, but the airfares approved by MOLIT is openly accessible to all airlines and travel agencies through IATA's Global Distribution System.
93. The Commission also notes that the actual airfares charged to consumers are not disclosed through the MOLIT process, and these are only accessible to the reporting airline and travel agencies designated by the reporting airlines.
94. In consideration of the above, the Commission concludes that it is difficult for the other airlines to monitor the airfare changes of the reporting airline and therefore to monitor continuously. These considerations are valid for each reporting airline individually, making any kind of pricing coordination difficult.

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<sup>19</sup> "Coordinated effects refer to anti-competitive effects of a merger that can result from coordinated actions by the enterprises in a relevant aviation service market. Coordinated effects do not require the existence of an express collusion between the enterprises in a relevant aviation service market". For further details on coordinated effects, refer to Paragraphs 7.9 – 7.14 of the MAVCOM's Guidelines on Substantive Assessment of Mergers.

## ***Entry And Expansion***

### Parties' Submission

95. The Parties submitted that in the past five years, the Korean market has seen the entry of numerous new South Korean-based airlines (e.g., RS, 4V, RF, and YP) and overseas airlines (e.g., Air Belgium (“**KF**”), AirSial (“**PF**”), Aero Dili, Jasmin Airways (“**JO**”), AirGotland, HiSky, and OWG).
96. The Parties also submitted that despite the material market shares held by KE and OZ in the SEL-BKI market, LCCs like 7C and ZE have both expanded their services in the last 5 years to include the SEL-BKI route.
97. Additionally, the Parties submitted that there is less slot constraint or congestion in BKI. In 2019, BKI reported only 15.0% of the passenger traffic of KLIA. Slot availability is not an issue in BKI, since pre-COVID-19 estimates indicated BKI’s maximum capacity would only be reached in 2037. As such, the barriers to entry on the SEL-BKI route is low.

### MAVCOM's Analysis

98. The Commission notes that 7C and ZE have both expanded their services in the last 5 years on the SEL-BKI route. For example, 7C, which entered the SEL-BKI market in 2016 had significantly increased its seat capacity from 60,822 in 2016 to 159,516 in 2019 (162.3% increase in seat capacity). Additionally, LJ and RS both had increased their seat capacities by 115.0% – 125.0% and 385.0% – 395.0%, respectively during the same period. This shows that there is little barrier to entry and expand on the SEL-BKI route.
99. The Commission also notes that there is less slot constraint in BKI. The Commission agrees that the slot availability is not an issue in BKI, since pre-COVID-19 estimates indicated that BKI’s maximum capacity would only be reached in 2037. The Commission has confirmed the slot availability with the National Slots Coordination Malaysia (“**NSCM**”).
100. MH<sup>20</sup> indicated that there may be a congested airspace in South Korea. Since MH is expecting a rationalization of seat capacity by KE and OZ arising from the Anticipated Merger, MH expects the airspace to be less congested post-Merger.
101. In consideration of the above, the Commission concludes that the barriers to entry and expand are low on the SEL-BKI route.

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<sup>20</sup> Written feedback by MH dated 30 April 2021.

## ***Countervailing Buyer Power***

### Parties' Submission

102. The Parties submitted that with the increase of online travel agencies (“**OTAs**”) and meta-search services, passengers exercise countervailing buyer power against carriers, which makes it very difficult for them to increase airfare in any meaningful way.
103. One of the key characteristics of the passenger air transport services is that consumers can readily access each air carrier’s airfares, while the quality of services offered by each carrier does not differ much across the carriers. In fact, there are a number of online websites, which compare each air carrier’s fare, thus making it difficult for the Parties to increase airfares.
104. The Parties also submitted OTAs and meta-search engines are of particular relevance in relation to the SEL-BKI route. Given the price sensitivity of passengers flying this route, they can be expected to rely on OTAs and meta-search engines to look for the best available offers on the route.

### MAVCOM’s Analysis

105. The Commission notes that with the increase of OTAs and meta-search services, passengers exercise countervailing buyer power against carriers.
106. The Commission also notes that the OTAs and meta-search engines are of particular relevance in relation to the SEL-BKI route. The majority of the passengers on the SEL-BKI route are price-sensitive passengers. These passengers can be expected to rely on the OTAs and the meta-search engines to look for the best available offers on the route.
107. The Commission also is of the view that the OTAs would constrain and diminish the ability of the Parties to charge high prices as many OTAs automatically create alternative non-direct flight options by combining promotional offers from different carriers. The passengers could easily refuse to buy the ticket of the Parties and choose another cheaper flight operated by other carriers.
108. Based on the consideration above, the Commission concludes that there is a sufficiently strong countervailing buyer power held by the passengers due to the OTAs and meta-search services on the SEL-BKI route.

## ***Failing Firm Defence Assessment***

### Legal Framework

109. According to Paragraph 4.4(c) of the MAVCOM's Guidelines on Substantive Assessment of Mergers, in assessing the failing firm explanation, consideration would be given to all relevant facts including:
- (a) whether a merger party is in such dire situation that it would exit the relevant aviation service market within the near future;
  - (b) whether a merger party is unable to meet its financial obligations in the near future;
  - (c) whether there is any serious prospect of reorganising the business; and
  - (d) whether there is any less anti-competitive alternative to the merger.
110. The failing firm defence must be substantiated with proof and evidence that a merger party is genuinely failing and that it would fail should the merger not occur.

### Parties' Submission

111. The Parties submitted that OZ is facing significant financial challenges and should therefore be considered as a failing firm under paragraph 4.4(c) of the MAVCOM's Guidelines on Substantive Assessment of Mergers ("**Guidelines**"). Absent the Anticipated Merger, there is a genuine risk of OZ's likely exit from the market.
112. The Parties had provided additional details in relation to each criterion in the Guidelines, as detailed in paragraphs 113 – 115 of this Proposed Decision.
113. OZ is in such a dire situation that it is likely to exit the relevant aviation service market within the near future:
- (a) The Parties submitted that OZ's financial woes began well before the COVID-19 pandemic, which only exacerbated its difficulties. OZ had been suffering losses on its passenger routes prior to the COVID-19 pandemic, and such losses expanded significantly in 2020.
  - (b) Even though OZ was profitable until 2018, its cumulative Interest Compensation Ratio has been [§<sup>21</sup>]. With an operating margin of [§], OZ was unable to make significant inroads into its accrued debt during the period.
  - (c) OZ's financial situation continued to worsen, and its debt-to-equity ratio reached [§] in June 2019. According to its financial statements, for the year ending 31 December 2019, OZ's group current liabilities [§]. Its latest financial statements show that [§].
  - (d) OZ's auditor, PwC, noted in its independent auditor's report for OZ's consolidated financial statements for 2019 that there was "material uncertainty which may cast significant doubt about OZ's ability to continue as a going concern" and that there

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<sup>21</sup> [§].

was “substantial uncertainty”, which was dependent on the successful sale of OZ to HDC and Mirae Asset.

- (e) Following both the COVID-19 pandemic and related failure of the sale to HDC and Mirae Asset, OZ’s position has further deteriorated. Since September 2020, OZ has been under the financial supervision of a group of creditors, including KDB.
  - (f) OZ submits that in the absence of the Anticipated Merger, OZ is unlikely to be able to continue operating as a going concern and RS would likely be forced to cease operations between Malaysia and South Korea.
114. OZ is unlikely to be able to meet its financial obligations in the near future and there is serious prospect of reorganising the business of OZ:
- (a) On 27 December 2019, Kumho Industrial entered into an agreement to sell its shares to HDC and Mirae Asset, with a share subscription agreement also being entered into between OZ, HDC, and Mirae Asset to issue new shares amounting to [REDACTED]. However, [REDACTED].
  - (b) [REDACTED].
  - (c) [REDACTED].
  - (d) OZ has been financially supervised by its creditors since September 2020, in particular, KDB. KDB has itself sought to find a buyer with the financial capability to purchase OZ and has contacted several potential bidders, which were considered potentially suitable. However, none of these potential bidders were interested in acquiring OZ.
115. It is unlikely that any less anti-competitive alternative is available to the merger for OZ to remain in operation in the relevant market:
- (a) OZ had explored alternative methods of financing, but such efforts were not successful. In any case, the Parties submit that this anticipated merger is not anti-competitive as it will not result in an SLC in the market.
  - (b) OZ has been managed by its creditors since September 2020, in particular, KDB. In November 2020, KDB contacted [REDACTED] which were considered as potentially suitable purchasers with sufficient financial capability but none of these potential purchasers were interested in acquiring OZ.<sup>22</sup>
  - (c) OZ highlights in this regard that the European Commission (“**EC**”), in *EC Case No. COMP/M.4381 – JCI /Fiamm*, held that there was no less anti-competitive alternative to the merger on the basis that, among other things, no alternative buyer had manifested any concrete interest and that banks or other creditors are unlikely to finance the target entity during the uncertain time required for a third-party buyer to materialise. The EC also noted that new creditors would be unlikely to fund a long-standing unprofitable business given the lack of liquidity and significant operating losses.

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<sup>22</sup> Details on these investors’ internal review and confirmation of intention are included in Appendices VI and VII.

## MAVCOM's Analysis

116. OZ is in such a dire situation that it is likely to exit the relevant aviation service market within the near future:

- (a) The Commission notes that OZ had had been suffering losses on its passenger services routes prior to the COVID-19 pandemic, and such losses had expanded significantly in 2020.
- (b) OZ's business performance and interest expenses by year are shown in **Table 7** below.

**Table 7: OZ's Business Performance and Interest Expenses by Year**

	2015	2016	2017	2018	2019
Operating Profit (KRW tn)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Operating Margin (%)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Net Interest Expenses (KRW tn)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Interest Compensation Rate (%)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

*Source: Parties' Response*

- (c) The Commission notes that the Interest Compensation has been [REDACTED]. OZ's operating margin has been low, and OZ was unable to make significant inroads into its accrued debt. Following the COVID-19 pandemic, OZ's position has deteriorated further.
  - (d) The Commission also notes that OZ's auditor, PwC, had indicated in the auditor's report for OZ's consolidated financial statements for 2019 that there was "material uncertainty which may cause significant doubt about OZ's ability to continue as a going concern".
  - (e) Based on these considerations, OZ has provided enough evidence to prove that it is in a dire situation and that RS would likely be forced to cease operations between Malaysia and South Korea without this Anticipated Merger.
117. OZ is unlikely to be able to meet its financial obligations in the near future and there is serious prospect of reorganising the business of OZ:
- (a) The Commission notes that OZ had explored alternative financing options, as substantiated with evidence. Owing to the difficulties that OZ had in meeting its obligation to its creditors, OZ has shown serious prospect of reorganising the business through the Memorandum of Understanding ("**MOU**") signed between KDB, OZ, and Kumho Industrial on 6 April 2018 to improve OZ's financial structure.
  - (b) Due to the uncertainties in OZ's business caused by the COVID-19 pandemic, the Commission notes that the sale to HDC and Mirae Asset was abandoned in September 2020. [REDACTED].

- (c) The Commission also notes that OZ has been financially supervised by its creditors since September 2020, in particular, KDB, and has sought to find a buyer with the financial capability to purchase OZ and had contacted several potential bidders. However, none of the potential bidders were interested in acquiring OZ.
118. It is unlikely that any less anti-competitive alternative is available to the merger for OZ to remain in operation in the relevant market:
- (a) The Commission notes, as substantiated with evidence, that KDB had contacted [REDACTED], which were considered as potentially suitable purchasers with sufficient financial capability but none of these potential purchasers were interested in acquiring OZ.
  - (b) The Commission notes that a market exit by RS caused by the failure of OZ would also result in a decrease in available capacity (number of seats) available on the SEL-BKI route. Conversely, with the Anticipated Merger, [REDACTED]. It follows that the Anticipated Merger presents a more advantageous scenario for passengers travelling between SEL and BKI than one where RS's flights simply cease, and its assets are liquidated or otherwise deployed on other routes.

## Economic Efficiencies and Social Benefits

### Legal Framework

119. As regards a notification of a merger, subparagraphs 55(2)(b)(i) and 56(2)(b)(i) of the Act provide that the Commission may make a decision that the prohibition in section 54 of the Act has not or will not be infringed because of the effect of exclusion.
120. A merger that has resulted or may be expected to result in an SLC in any aviation service market may be allowed by way of exclusion if there are significant economic efficiencies or social benefits arising directly from the merger that outweigh such SLC.

### Parties' Submission

121. Increased connectivity and frequencies.
  - (a) The cooperation among the Parties includes joint schedule planning [REDACTED].
  - (b) The Parties submitted that the [REDACTED].
  - (c) The Parties would also become [REDACTED].
122. Increased seat capacity, more optimal fleet structure and more efficient aircraft configuration.
  - (a) The Parties submitted that following the Anticipated Merger, [REDACTED].
123. Sharing operational best practices to maximize consumer benefits.
  - (a) The Parties will cooperate to improve best practices and operations, and to [REDACTED].
  - (b) This cooperation is also expected to deliver additional qualitative benefits to passengers.
124. Improved safety and reduced training costs.
  - (a) The Anticipated Merger is expected to reduce the training costs by [REDACTED].
  - (b) [REDACTED].
125. Efficiencies related to Maintenance, Repair, and Overhaul (“MRO”).
  - (a) KE, using its own technology and domestic infrastructure, meets most of its MRO service needs captively, [REDACTED].
  - (b) This will not have any impact in Malaysia but supports the synergies to be achieved in South Korea.
126. Other quantitative efficiencies.
  - (a) The Anticipated Merger is expected to generate other supply-side efficiencies including [REDACTED].

## **MAVCOM's Analysis**

127. Increased connectivity and frequencies.
- (a) The Parties are unable to substantiate their claims with evidence due to the sensitive nature of the information which may affect the ongoing assessment by KFTC.
128. Increased seat capacity, more optimal fleet structure and more efficient aircraft configuration.
- (a) Similarly, the Parties are unable to substantiate their claims with evidence due to the sensitive nature of the information which may affect the ongoing assessment by KFTC. However, the Parties' have noted that LJ expects a seat capacity of approximately [REDACTED].<sup>23</sup> This is premised on the end of the COVID-19 pandemic.
129. Sharing operational best practices to maximize consumer benefits.
- (a) The Commission notes that passengers will benefit from the increase in flight options due to a [REDACTED]. This benefit arises from the access to [REDACTED].
  - (b) The Commission also notes that the expected efficiencies follow from [REDACTED] is estimated to generate around [REDACTED] of savings annually.
  - (c) Hence, the Commission views that the Parties' claim on efficiencies rising from the sharing of operational best practices to maximize consumer benefits has been sufficiently substantiated with evidence.
130. Improved safety and reduced training costs.
- (a) The Commission notes that the sharing of the Parties' [REDACTED] is expected to reduce the annual costs by approximately [REDACTED].
  - (b) The Commission also notes that the [REDACTED].
  - (c) Hence, the Commission views that the Parties' claim on efficiencies rising from improved safety and reduced training costs is sufficiently substantiated with evidence.
131. Efficiencies related to MRO.
- (a) The Commission notes that the expected efficiencies related to optimisation of MRO contracts is estimated to be around [REDACTED].
  - (b) The Commission notes that the expected efficiencies related to the optimisation of the method of purchasing maintenance parts is estimated to be between [REDACTED].
  - (c) Hence, the Commission views that the Parties' claim on efficiencies related to MRO has been sufficiently substantiated with evidence.

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<sup>23</sup> Parties' response to MAVCOM dated 29 April 2021.

132. Other quantitative efficiencies.

(a) The Parties presented the following items as other quantitative efficiencies<sup>24</sup>:

- i. The efficient operation of organisation and personnel;
- ii. Improved asset and IT utilization;
- iii. Improved aircraft efficiency; and
- iv. Optimised purchasing.

(b) The Commission views that the Parties' claim on other efficiencies is sufficiently substantiated with evidence.

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<sup>24</sup> Details on the monetary estimates for other quantitative efficiency gains can be seen in Appendix V.

## THE COMMISSION'S CONCLUSION OF THE SLC TEST

133. **Market power and market concentration:** the Commission finds that the Anticipated Merger would impact only one O&D pair route, namely SEL-BKI as both the Parties' sister company/affiliate (LJ and RS) are operating on the route. The Parties' post-Merger combined market share for the SEL-BKI route is approximately 70.0% – 80.0% in 2020 (2019: 70.0% – 80.0%). In 2020, the market shows a relatively high delta HHI of 0.2 – 0.3 (2019: 0.2 – 0.3) and post-Merger HHI of 0.6 – 0.7 (2019: 0.6 – 0.7).
134. **Unilateral effects:** although the post-Merger market share of the Parties is high for the SEL-BKI route, the Commission finds that the Anticipated Merger would have limited unilateral effects as the Parties will not be able to increase the airfares above competitive levels as the airfares are strictly controlled by MOLIT. The Commission also notes that the SEL-BKI route is a relatively thin route. Given the nature of the route where majority of the passengers are non-time sensitive, there is limited impact on the passengers as they would always have the option to choose one-stop services instead.
135. **Entry and expansion:** the barrier to enter and expand is low as demonstrated by the rapid expansion of seat capacity by 7C from 2016 to 2019 on the SEL-BKI route. LJ and RS had also expanded their seat capacity considerably during the same period. The total seat capacity for the SEL-BKI route increased from 506,923 in 2016 to 806,508 in 2019.
136. **Countervailing buyer power:** due to the increase of OTAs and meta-search services, the Commission views that passengers can exercise strong countervailing buyer power against the Parties on the SEL-BKI route. The Commission also views that the OTAs would constrain and diminish the ability of the Parties to charge high prices as many OTAs automatically create alternative non-direct flight options by combining promotional offers from different carriers.
137. **Failing firm defence:** OZ has provided substantial evidence such as annual reports, financial statements, restructuring plans, and documents relating to potential investors. As such, the Commission concludes that OZ is facing significant financial challenges and should therefore be considered as a failing firm under Paragraph 4.4(c) of the MAVCOM's Guidelines on Substantive Assessment of Mergers.
138. **Economic efficiencies or social benefits:** the Commission finds there are significant economic efficiencies or social benefits arising directly from the merger<sup>25</sup> such as:
- (a) sharing operational best practices to maximize consumer benefits;
  - (b) improved safety and reduced training costs;
  - (c) efficiencies related to MRO; and
  - (d) other quantitative efficiencies.

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<sup>25</sup> These have been substantiated with evidence based on Parties' response to MAVCOM dated 14 June 2021.

## **THE COMMISSION'S DECISION**

139. Upon assessing the notification and by virtue of section 55 of Act 771, the Commission has concluded that the merger, if carried into effect, would not infringe the prohibition in section 54 of Act 771.

**APPENDIX I**  
**IATA AIRPORT AND AIRLINE CODES**

## APPENDIX I: IATA AIRPORT AND AIRLINE CODES

### AIRPORT CODES

Airport Code	Airport Name
<b>Airports in Malaysia</b>	
BKI	Kota Kinabalu International Airport
JHB	Senai International Airport
KUL	Kuala Lumpur International Airport
SZB	Sultan Abdul Aziz Shah Airport
<b>Airports in South Korea</b>	
ICN	Incheon International Airport
GMP	Gimpo International Airport
PUS	Gimhae International Airport

Source: AirportIS

## AIRLINE CODES

Airline Code	Airline Name
<b>Airlines involved in the Anticipated Merger</b>	
BX	Air Busan
KE	Korean Air Lines Co., Ltd.
LJ	Jin Air
OZ	Asiana Airlines, Inc.
RS	Air Seoul
<b>Other South Korean Airlines</b>	
4V	Fly Gangwon
7C	Jeju Air
RF	Aero K Airlines
TW	T'way Air
YP	Air Premia
ZE	Eastar Jet
<b>Malaysian Airlines</b>	
AK	AirAsia Berhad
D7	AirAsia X Berhad
FY	FlyFirefly Sdn. Bhd.
MH	Malaysia Airlines Berhad
OD	Malindo Airways Sdn. Bhd.
<b>Other Airlines</b>	
3K	Jetstar Airlines
JO	Jasmin Airways
KF	Air Belgium
PF	AirSial
TR	Tigerair
-	Aero Dili
-	AirGotland
-	HiSky
-	OWG

Source: AirportIS

**APPENDIX II**

**PASSENGER VOLUME BY AIRLINES, 2015-2020**

**APPENDIX II: PASSENGER VOLUME BY AIRLINES, 2015-2020**

Operating Airlines	2015	2016	2017	2018	2019	2020
<b><u>SEL-BKI</u></b>						
LJ: Jin Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
RS: Air Seoul	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
KE: Korean Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
BX: Air Busan	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
7C: Jeju Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
9C: Spring Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
D7: AirAsia X*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Z2: Philippines AirAsia*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
BI: Royal Brunei Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
CZ: China Southern Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>SEL-KUL</u></b>						
D7: AirAsia X	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
KE: Korean Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
VN: Vietnam Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Z2: Philippines AirAsia*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
SQ: Singapore Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
TG: Thai Airways*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>SEL-JHB</u></b>						
LJ: Jin Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
D7: AirAsia X*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>PUS-BKI</u></b>						
BX: Air Busan	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
D7: AirAsia X*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: AirportIS

\*Indirect Carriers

 Merger Parties

**APPENDIX III**

**PASSENGER MARKET SHARE BY AIRLINES, 2015-  
2020**

**APPENDIX III: PASSENGER MARKET SHARE BY AIRLINES, 2015-2020**

Operating Airlines	2015	2016	2017	2018	2019	2020
<b><u>SEL-BKI</u></b>						
LJ: Jin Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
RS: Air Seoul	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
KE: Korean Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
BX: Air Busan	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
7C: Jeju Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
9C: Spring Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
D7: AirAsia X*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Z2: Philippines AirAsia*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
BI: Royal Brunei Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
CZ: China Southern Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>SEL-KUL</u></b>						
D7: AirAsia X	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
KE: Korean Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
VN: Vietnam Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Z2: Philippines AirAsia*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
SQ: Singapore Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
TG: Thai Airways*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>SEL-JHB</u></b>						
LJ: Jin Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
D7: AirAsia X*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>PUS-BKI</u></b>						
BX: Air Busan	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
D7: AirAsia X*	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: AirportIS

\*Indirect Carriers

■ Merger Parties

**APPENDIX IV**  
**AVERAGE AIRFARE BY AIRLINES, 2015-2020**

**APPENDIX IV: AVERAGE AIRFARE BY AIRLINES, 2015-2020**

Operating Airlines	2015	2016	2017	2018	2019	2020
<b><u>SEL-BKI</u></b>						
<b><i>Economy Class</i></b>						
LJ: Jin Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
RS: Air Seoul	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
7C: Jeju Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
ZE: Eastar Jet	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><i>Business Class</i></b>						
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
7C: Jeju Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>SEL-KUL</u></b>						
<b><i>Economy Class</i></b>						
D7: AirAsia X	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
KE: Korean Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><i>Business Class</i></b>						
KE: Korean Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
MH: Malaysia Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>SEL-JHB</u></b>						
<b><i>Economy Class</i></b>						
LJ: Jin Air	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
<b><u>PUS-BKI</u></b>						
<b><i>Economy Class</i></b>						
BX: Air Busan	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
OZ: Asiana Airlines	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
ZE: Eastar Jet	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: AirportIS

\*Direct, one-way airfares (Prices in RM)

■ Merger Parties

**APPENDIX V**  
**MONETARY ESTIMATES FOR OTHER QUANTITATIVE**  
**EFFICIENCY GAINS**

**APPENDIX V: MONETARY ESTIMATES FOR OTHER QUANTITATIVE EFFICIENCY GAINS**

Description	Estimated efficiency gains	Explanation
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]
[✂]		[✂]
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]
[✂]	[✂]	[✂]

Source: Parties' response to MAVCOM dated 14 June 2021

**APPENDIX VI**

**INVESTORS' INTERNAL REVIEW AND  
CONFIRMATION OF INTENTION: SUMMARY OF KEY  
OVERLAPPING FEEDBACK**

**APPENDIX VI: INVESTORS' INTERNAL REVIEW AND CONFIRMATION OF INTENTION (SUMMARY OF KEY OVERLAPPING FEEDBACK)**

Key overlapping feedback	Details
[REDACTED]	(i) [REDACTED]. (ii) [REDACTED].
[REDACTED]	(i) [REDACTED].
[REDACTED]	(i) [REDACTED].
[REDACTED]	(i) [REDACTED].

Source: Parties' response to MAVCOM dated 29 April 2021

**APPENDIX VII**  
**DETAILED INVESTORS' INTERNAL REVIEW AND**  
**CONFIRMATION OF INTENTION**

**APPENDIX VII: DETAILED INVESTORS' INTERNAL REVIEW AND CONFIRMATION OF INTENTION**

Conglomerate	Internal review of each investor
[REDACTED]	(i) [REDACTED]. (ii) [REDACTED]. (iii) [REDACTED].
[REDACTED]	(i) [REDACTED]. (ii) [REDACTED]. (iii) [REDACTED]. (iv) [REDACTED].
[REDACTED]	(i) [REDACTED]. (ii) [REDACTED]. (iii) [REDACTED].
[REDACTED]	(i) [REDACTED]. (ii) [REDACTED]. (iii) [REDACTED]. (iv) [REDACTED].
[REDACTED]	(i) [REDACTED]. (ii) [REDACTED]. (iii) [REDACTED]. (iv) [REDACTED].

Source: Parties' response to MAVCOM dated 29 April 2021