Competition & Antitrust

CCCS Issues Guidance Note for Airline Alliance Agreements

Overview

Following a public consultation from 22 January 2018 to 12 February 2018, the Competition and Consumer Commission of Singapore ("**CCCS**") has issued its finalised Guidance Note for Airline Alliance Agreements ("**Guidance Note**") on 5 September 2018.

Airline alliances are common in the aviation sector as a means for airlines to lower costs and compete more effectively by expanding their network structures and exploiting economies of scale. Such airline alliances may involve different airlines cooperating on pricing, capacity and/or frequency of flights. Whilst these alliances can enhance operational efficiencies and generate consumer benefits, they may raise competition concerns under Section 34 of the Competition Act which prohibits agreements that restrict competition in Singapore. As such, airlines often choose to pre-emptively notify their agreements to the CCCS for guidance / decision on whether the agreement has infringed the Competition Act. The CCCS has therefore issued the Guidance Note to assist airlines in their self-assessment and provide guidance on procedural and substantive matters in relation to the notification of airline alliance agreements to the CCCS.

In this Guidance Note, CCCS has largely adopted the draft guidance note that was released for public consultation. This Update provides a summary of the Guidance Note and highlights the differences from the draft guidance note. Please click here for our previous client update on the draft guidance note.

Summary of Guidance Note

We note that the key changes to the Guidance Note directly address many of the observations / queries that we had raised about the earlier draft in our previous client update.

Importantly, the Guidance Note has taken on board our suggestion to provide an express "low market share" threshold (i.e. where the aggregate market shares of the parties to the agreement do not exceed 20% on any of the routes affected by the agreement) for which an airline alliance notification is generally not necessary. This numerical threshold goes beyond current practice and thus helps to distil transactions which need to be scrutinised more carefully; hence, more certainty and guidance to parties. On the flip side, it would appear that if the market share is above 20%, then devoid of clear Net Economic Benefit ("**NEB**"), notification will be necessary.

The CCCS has also taken into account our observation that passenger volumes should be considered in assessing the competition impact, and has made this clarification in the Guidance Note.

These are elaborated below.

Procedural Matters

Self-assessment

The Guidance Note provides screening factors for airlines to undertake a self-assessment to determine whether there are any anti-competitive concerns such that the CCCS should be notified of the alliance agreement. In doing so, airlines should consider factors such as whether the different airlines have overlapping routes, the market shares of the parties such that they could be said to be rivals and the passenger volumes to determine the impact of competitiveness.

As noted, the CCCS has clarified in the Guidance Note that where the aggregate market share of the airlines involved in an agreement do not exceed 20%, parties may consider not making a notification to the CCCS. However, this is only applicable to agreements that generate operational efficiencies and does not apply to hardcore cartel agreements that are detrimental to consumers without any corresponding efficiencies such as price-fixing agreements.

Parties are strongly encouraged to conduct a self-assessment. The CCCS has added in the Guidance Note that in the event of an investigation, parties may choose to submit their self-assessment to CCCS to support their case.

Streamlined process

Key amongst the procedural matters set out in this Guidance Note is the adoption of a streamlined process for assessments relating specifically to the aviation sector, so as to provide quicker decisions at minimum cost to airlines. Application for the streamlined process must be made in writing with supporting documents, together with the submission of the Form 1 and initial fee.

The streamlined process will encompass a two-phase approach. A Phase 1 review for simple cases is expected to be completed within 30 working days. More complicated cases will go into a Phase 2 review, which may take a further 120 working days. The maximum duration is therefore 150 working days. The airline alliance agreement may also be cleared with commitments to address anti-competitive issues between Phase 1 and Phase 2.

The CCCS has provided a list of factors it will consider in determining whether the streamlined process is appropriate to any given application, including whether irreparable harm would be occasioned if the agreement was assessed under the standard procedures, whether rejection of the request for urgent assessment would negate the possibility of any net economic benefits or efficiencies accruing to Singapore. The CCCS will also consider whether there is broad consensus of interested parties in favour of the agreement, including government agencies and/or consumer group representatives. The CCCS may consider submissions from airlines falling outside of the listed factors if they justify why the streamlined process may be appropriate.

State-of-play meetings

In the course of assessment, airlines may request for meetings for an indication as to when an outcome can be expected. In the Guidance Note, the CCCS further clarified that substantive matters may also be discussed at such meetings. These meetings may be used to facilitate the preparation of commitments to address the CCCS' concerns.

Substantive Matters

The Guidance Note also sets out the CCCS' approach on substantive matters to allow airlines to assess whether there is a need to notify the CCCS.

Market definition

The CCCS confirmed a long-standing practice that it will use a route-to-route approach to define the market and that each combination of a city of origin and city of destination can form a distinct market.

However, in assessing the NED effect of an agreement, the CCCS may adopt a wider network approach. Thus, the CCCS may consider origin-destination ("**OD**") routes that are under the alliance, but not where competition concerns are identified. The CCCS may also consider the impact on complementary OD routes that are substitutes for the OD routes affected by the agreement.

Airlines looking to rely on the NEB exclusion have the onus of providing relevant information to the CCCS to demonstrate the claimed benefits. Such information may include internal business reports, external market research, consultancy reports showing benefits arising from the alliance or statistics from comparable past alliances.

Assessment of metal-neutral alliances

The CCCS considers metal-neutral alliances to have the object of restricting competition given that they involve coordination between competitors on pricing, capacity, frequency and scheduling and/or sharing of revenue according to each airline's output.

However, the CCCS states that, given that such alliances may also generate operational efficiencies and benefits, it will assess their competitive effects under the NEB test and that it will use a sliding-scale approach to assess whether the benefits outweigh the harm brought about by the agreement. The onus is placed on the parties to demonstrate the benefits would outweigh the competition harm.

Conclusion

The Guidance Note is to be welcomed for providing clarity on the CCCS' approach on assessing alliances in the aviation industry and will allow airlines and their legal counsels to better conduct self-

assessment on whether there would be any infringement of competition laws. Airlines are strongly encouraged to conduct such self-assessment as they can be valuable in allowing the speedy execution of agreements where competitions concerns are remote. The CCCS has also stated that self-assessment may also be submitted in the event of an investigation.

With the issuance of the Guidance Note that clarifies the CCCS's position on the procedural and substantive matters, our view is that the CCCS is likely to take stricter punitive action against parties who choose not to notify their agreements to the CCCS where a self-assessment based on the criteria in the Guidance Note suggests that they should.

Where a notification is necessary, airlines should also consider applying for assessment under the streamlined process framework, which we note is similar to the current assessment process for merger notifications. However, applications under the process should be undertaken with proper guidance. The CCCS has made it clear that airlines must justify why their application should fall under the process and that airlines must provide complete, concise and relevant information promptly. Otherwise, the CCCS may not be able to provide its decision or outcome within the stipulated timeframe.

If you have any questions on the Guidance Note, please feel free to contact the relevant lawyers below.

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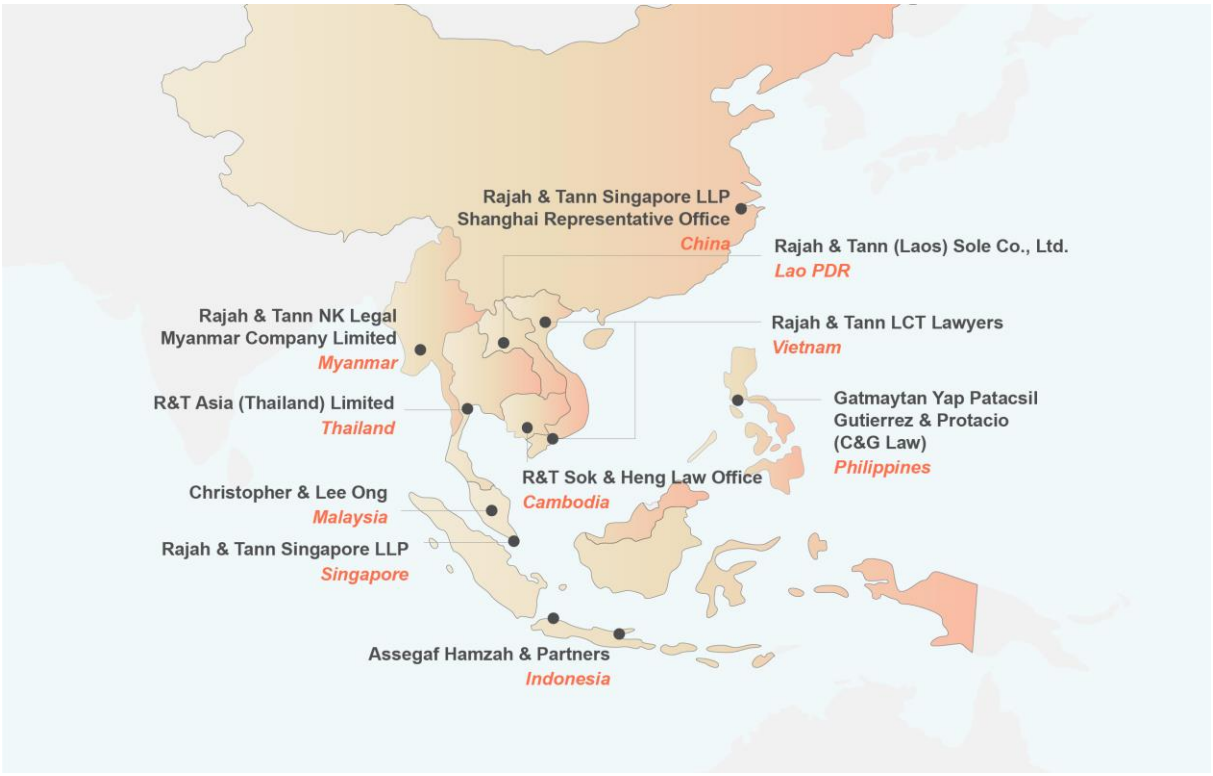

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