

The Civil Aviation Authority of Singapore (CAAS) Airport Competition Code, 2009

- Advisory guidelines on the merger provisions -

What the merger provisions of the Airport Competition Code is about

- 1 The merger provisions of the Airport Competition Code 2009 (“Code”) issued pursuant to section 44 of the Civil Aviation Authority of Singapore Act (the “Act”) will apply to mergers involving an airport licensee that may have an effect on any airport market. Clause 13 of the Code prohibits mergers involving an airport licensee, or any undertaking over which an airport licensee can exercise effective control, and other undertakings that may be expected to result in a substantial lessening of competition (“SLC”) in any airport market.
- 2 The CAAS will enforce the prohibition against mergers that substantially lessen competition in any airport market under the Code, with the aim of promoting a healthy competitive airport market in Singapore. A healthy competitive market will spur airport licensees to be more efficient and innovative, as well as be more responsive to the needs of airport users. Airport users in turn will enjoy more choices, lower prices, and better products and services. The economy as a whole benefits from greater productivity gains and more efficient resource allocation in the airport market.
- 3 These advisory guidelines provide a summary of the key provisions of the Code. These guidelines are intended to help airport licensees and interested parties understand the CAAS’ intent; however, these guidelines neither add to, nor alter the requirements specified in the Code.

Regulatory approach

- 4 In the implementation and enforcement of this Code, the CAAS will consider:
 - the state of competition in the airport market in Singapore;
 - the economic and commercial circumstances of the airport market in Singapore; and
 - how to best foster innovation and efficiency in the functioning of the airport market in Singapore.
- 5 The CAAS may from time to time amend the Code to ensure its continued relevance, taking into account changing market conditions. Where the CAAS amends the Code, a notice that an amendment has been made will be published.

Mergers covered by the Code

- 6 Any merger where the airport licensee is the object of the merger will be covered under Part V of the Act and is subject to the prior approval of the CAAS. Any such merger which requires the prior approval of the CAAS will be excluded from the

Competition Act, Chapter 50B of Singapore (the “Competition Act”), pursuant to paragraph 1(a) of the Fourth Schedule of the Competition Act.

- 7 Mergers between an airport licensee and other undertakings that may have an effect on any airport market are covered under this Code. Under the Code, an airport licensee is required to ensure that undertakings which are under the effective control of the airport licensee do not enter into mergers with other undertakings which may substantially lessen competition in any airport market. Mergers covered under clause 13 of the Code will be excluded from the Competition Act, pursuant to paragraph 1(c) of the Fourth Schedule of the Competition Act. In a situation where one or more of the merger parties may be under the effective control of the airport licensee, the CAAS will work with the Competition Commission of Singapore (“CCS”) to determine if the merger should be excluded from the Competition Act on the basis of effective control by the airport licensee by one or more of the parties.
- 8 An airport licensee will be required to seek the prior approval of the CAAS before it carries on any substantial trading or financial activities that are non-airport business-related, pursuant to section 42(1) of the Act. Notwithstanding that the CAAS has given its approval for such activities, the airport licensee will be subject to any other written law, or code or practice issued under any written law, relating to competition which gives another regulatory authority jurisdiction in the matter.
- 9 For mergers which may have cross-sectoral impact beyond the airport market, the CAAS will work with the CCS and any relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator.

Prohibition against mergers that may substantially lessen competition in any airport market

- 10 Clause 13.1 of the Code prohibits mergers between an airport licensee and other undertakings that may be expected to result in a substantial lessening of competition in any airport market.
- 11 Specifically, clause 13.3(b) of the Code provides that a merger occurs if an airport licensee acquires direct or indirect effective control of the whole or part of one or more other undertakings.
- 12 The creation of a joint venture by an airport licensee and one or more other undertakings to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger and subject to Clause 13 of the Code. The CAAS considers that such joint ventures are likely to affect competition in an affected airport market in similar ways as a merger and its effect on competition should similarly be reviewed under the Code. Accordingly, such joint ventures are required to be notified to the CAAS for approval given the competition considerations specific to such joint ventures. For the avoidance of doubt, cooperative joint ventures are not required to be notified to the CAAS for approval. The CAAS will be generally guided by the *CCS Guidelines on the Substantive Assessment of Mergers* in assessing whether a joint venture may constitute a merger and is subject to the Code.

- 13 Clause 13.2 sets out a requirement for an airport licensee to ensure that undertakings which are under the effective control of the airport licensee do not enter into mergers with other undertakings which may substantially lessen competition in any airport market. The CAAS considers that mergers which are entered into by undertakings under the effective control of the airport licensee may potentially have the same effect of a substantial lessening of competition in an airport market as mergers which are entered into by the airport licensee. An airport licensee is obliged to ensure that as part of its compliance with the Code, clause 13 of the Code is not inadvertently contravened by a merger involving an undertaking under the effective control of the airport licensee.

Effective control

- 14 Effective control is defined under the Code to refer to the capability to exercise decisive influence with regard to the activities of an undertaking either by reason of rights, contracts or other means, or any combination of rights, contracts or other means.
- 15 The CAAS considers that effective control may be acquired on a legal or on a de facto basis. In some instances, effective control may arise in situations where the formal holder of a controlling interest differs from the party having the real power to exercise the rights conferred by that interest. Effective control may also arise through agreements which allow the airport licensee to affect the key strategic behaviour of another undertaking, for example, financial arrangements, long term supply agreements or consultancy agreements, or veto rights acquired by the airport licensee. The CAAS will take into account all relevant factors that provide strong evidence of effective control.
- 16 The CAAS will be generally guided by the *CCS Guidelines on the Substantive Assessment of Mergers* in determining where effective control may arise. Where relevant, the CAAS will consult with the CCS before making a decision on whether the airport licensee has effective control in a merger situation.

The substantial lessening of competition test

- 17 The CAAS will be generally guided by the *CCS Guidelines on the Substantive Assessment of Mergers* in its consideration of whether a merger may be expected to result in a substantial lessening of competition in any airport market.
- 18 The CAAS will be concerned where a merger involving the airport licensee substantially lessens the process of rivalry between entities to win a customer's business in any airport market. In examining whether a substantial lessening of competition may occur, the CAAS will evaluate the prospects for competition in the future with and without the merger, in considering likely and imminent changes in the nature, pace and structure of competition in affected airport markets.
- 19 For example, competition concerns may arise in mergers between the airport licensee and other undertakings which operate at different levels of the production or supply chain of an airport market. Such vertical mergers may reduce the competitive constraints faced by the merged entity by foreclosing a substantial

part of the upstream or downstream airport market to competitors¹ or by increasing the likelihood of post-merger collusion in the upstream or downstream airport market. The CAAS will be concerned where competitors lack a reasonable alternative to the vertically-integrated firm. In such a situation, competitors may either be deprived of access altogether or might be allowed to obtain the service or the facility only at unfavourable prices, thereby lessening competition in the airport market.

- 20 As long as there is one airport licensee, the airport licensee is deemed to have market power at any level of the production or supply chain in an airport market that the airport licensee operates in.

Countervailing factors

- 21 The CAAS will consider if there are any countervailing factors which will mitigate the lessening of competition arising from the merger. Such countervailing factors include buyer power, barriers to entry, and changes to the merged entity's ability and incentives to foreclose competition from any airport market arising from the merger.

Market Definition

- 22 The Code is focused on an assessment of the competitive impact of mergers involving airport licensees on the relevant airport market. However, where relevant, the CAAS will have regard to the *CCS Guidelines on Market Definition* in identifying the competitive constraints under which the merged entity will operate.

Potential for substantial lessening of competition of the airport market

- 23 In making its decision, the CAAS may have regard to considerations pursuant to section 7(2)(c) of the Act and clause 2(g) of this Code to foster the development and expansion of Singapore as an aviation hub. Such considerations include the impact of the merger on the competitiveness of Singapore as an aviation hub.

Remedies

- 24 The CAAS may grant a conditional approval to a merger involving the airport licensee, on the basis of structural and/or behavioural remedies to be undertaken by the airport licensee to address the potential substantial lessening of competition in an airport market which may arise from the merger. The remedies will be imposed as directions by the CAAS which are subject to representations and appeal by the airport licensee in accordance with clauses 21 and 23 of the Code.
- 25 Structural remedies may involve the sale of the business which led to the competition concern. Behavioural remedies may involve directions on the merged entity to allow effective and fair competition in the relevant downstream markets on the basis of objective and non-discriminatory criteria.

¹ For example, this may arise from the merged entity's refusal to supply, enhanced barriers to entry, facilitation of price discrimination and increase in rivals' costs.

Exclusion

- 26 In assessing whether a merger may substantially lessen competition, the CAAS will have regard to net economic efficiencies in an airport market which are sufficient to outweigh the detriments to competition in the airport market caused by the merger.
- 27 Agreements, or conduct which are directly related and necessary to the implementation of a merger approved by the CAAS are excluded from clauses 10 and 12 of the Code. The CAAS will be generally guided by the *CCS Guidelines on the Substantive Assessment of Mergers* in determining whether an agreement or conduct is directly related and necessary to the implementation of a merger.

Notification procedures

- 28 Airport licensees are required under the Code to notify the CAAS and to obtain the CAAS' written approval prior to entering into any mergers which may have an effect on any airport market.
- 29 Airport licensees are required to complete the Form in **Annex 1** for notifications to the CAAS of their anticipated mergers.
- 30 Airport licensees may consult with the CAAS for guidance on whether clause 13 of the Code is likely to be contravened prior to proceeding further with an anticipated merger and before making a notification to the CAAS for approval of the merger. Any guidance provided by the CAAS in respect of the anticipated merger will be based on information provided by the airport licensee. Such guidance will be non-binding and will not constitute a decision by the CAAS under the Code.

Timeframe for CAAS review

- 31 Clause 14.4 sets out the timeframe for the CAAS review of notifications for the approval of mergers. The CAAS will endeavour to complete its review of the notification within 30 working days following the receipt of a complete notification. Where the CAAS determines that the notification raises novel or complex issues, the CAAS may extend the review period by up to 90 working days.

Public consultation

- 32 The CAAS may conduct public consultations in respect of notifications received to provide interested parties with an opportunity to comment on the merger, or request for comments from individuals or entities where appropriate.
- 33 In conducting a public consultation, the CAAS will specify the timeframe and the process for the public consultation in the consultation document, and the safeguarding of confidential information provided to the CAAS pursuant to section 83 of the CAAS Act.

Issue of a favourable decision

- 34 The CAAS will not take any further action against a merger once it has issued a favourable decision that the notified merger will not, if carried into effect,

contravene clause 13 of the Code, unless it has reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.

Issue of an unfavourable decision

- 35 Where the CAAS intends to make an unfavourable decision that the notified merger will, if carried into effect, contravene clause 13 of the Code, the CAAS shall notify the airport licensee of its proposed decision. Clause 21 sets out the procedures for an airport licensee to make representations in respect of a decision or a direction on the basis that clause 13 may be contravened by the airport licensee.

Enforcement

- 36 The CAAS will have the same enforcement powers in relation to mergers as applicable to anti-competitive activities in the airport market. When the CAAS has reasonable grounds for suspecting that the Code has been contravened, the CAAS may, by written notice, require any person to produce documents or information relating to any matter which the CAAS considers relevant to the investigation. The CAAS may also at any time after the expiry of the period specified in such notice, enter premises to seize and take extracts of such document or information specified in the notice.

Complaints

- 37 The procedures for submitting complaints to the CAAS are as set out in clause 17. A complaint may be submitted in respect of a merger before or after completion of the merger.

Offences

- 38 Clause 18 sets out the offences which may be committed where a person fails to cooperate with the CAAS in its investigation.

Interim directions

- 39 Clause 20 sets out the interim directions which the CAAS may impose where it considers appropriate under certain circumstances when it has not completed its investigations. The CAAS will in determining the interim directions to be imposed, consider the appropriateness of the interim direction for the purpose of preventing serious, irreparable damage to a particular person or category of persons, or to protect the public interest.
- 40 Before issuing an interim direction, the CAAS will give the airport licensee written notice of the CAAS' intention to make the interim direction and to provide the opportunity for the airport licensee to make representations within a specified period no less than 30 working days.

Decisions and directions

- 41 Following an investigation, the CAAS may make a decision that clause 13 has or may be contravened by an airport licensee and to issue such direction as it deems necessary to remedy the adverse effect of the merger on the airport market. In such instances, the CAAS shall notify the airport licensee of its proposed decision. Clause 21 sets out the procedures for an airport licensee to make representations in respect of a decision or a direction on the basis that clause 13 has been or may be contravened by the airport licensee.

Penalties

- 42 The CAAS may impose a financial penalty in respect of a contravention of Clause 13 of the Code, subject to a maximum of S\$1,000,000.

Appeal

- 43 Clause 23 provide for an airport licensee aggrieved by any direction or decision of the CAAS to appeal to the Minister in accordance with the CAAS (Appeals to Minister) Rules 2009.

Further information

- 44 These advisory guidelines do not purport to be a full or binding statement of law. This document is intended to be a guide to the Code. In the event that any of the parts of these guidelines is inconsistent or incompatible with the provisions the Code, the provisions of the Code shall prevail.

Dated 1 February 2010