IN THE COMPETITION APPEAL TRIBUNAL

Appeal Number : TRP 1-2014
TRP 2-2014

Before:

THE HONOURABLE JUSTICE HASNAH MOHAMMED HASHIM
President

TAN SRI DATO' SERI HAIDAR MOHAMED NOR

TAN SRI DATO' SRI DR. SULAIMAN MAHBOB

TAN SRI DATO' DR. LIN SEE YAN

DR. WAN LIZA MD AMIN @ FAHMY

BETWEEN

MALAYSIAN AIRLINE SYSTEM BERHAD ... First Appellant

AIRASIA BERHAD ... Second Appellant

AND

COMPETITION COMMISSION ... Respondent

Heard at Kuala Lumpur Court Complex on 23 - 26 March, 10 April, 21 - 22 May and 19 October 2015

APPEARANCES

Logan Sabapathy, Tharminder Singh, Carmelia Cheong for the First Appellant
(Messrs. Logan Sabapathy & Co.)

Tay Beng Chai, Leonard Yeoh, Wong Weng Yew, Nicole Leong,
Lynette Yee for the Second Appellant
(Messrs.Tay & Partners)

N. Navaratnam, Wong Wye Wah for the Respondent
(Messrs. Navaratnam Chambers)

DECISION

Introduction

[1] On 31.1.2014 the Competition Commission ('Commission') having conducted investigations issued and handed out its final decision ('the Final Decision') holding that Malaysian Airline System Berhad ('MAS') and AirAsia Berhad ('AirAsia') had infringed the prohibition under section 4(2)(b) read together with section 4(3) of the Competition Act 2010 ('Act) by entering into a Collaboration Agreement dated 9.8.2011 ('CA') the object of which is the sharing of market within the air transport sector in Malaysia. Pursuant to section 40(1)(c) of the Act the Commission imposed a financial penalty of RM10,000,000 on MAS and AirAsia respectively.

[2] Dissatisfied with the Commission's decision both MAS and AirAsia appealed against the Final Decision pursuant to section 51(1) of the Act to us. By consent of all the parties, both appeals were heard together.

[3] MAS is the Appellant in Appeal No. TRP 1-2014 (First Appellant) whereas AirAsia is the Appellant in Appeal No. TRP 2-2014 (Second Appellant). For the purpose of this decision MAS and AirAsia will be referred to as the Appellants unless otherwise stated.

The Parties

[4] MAS operates an airline business as a full-service carrier providing both domestic and international flight services since

1.10.1972. As at March 2013, Khazanah Nasional Berhad is the single largest shareholder holding 69.37%.

[5] Fly Firefly Sdn. Bhd. ('Firefly') which was formerly registered as MAS Sdn. Bhd. is a wholly-owned subsidiary of MAS. Firefly commenced its passenger flights services on 3.4.2007. Firefly's flight services which are based in two hubs, namely the Sultan Abdul Aziz Shah Airport in Subang and the Penang International Airport, provide various connections to various destinations within Malaysia, Southern Thailand, Singapore and Sumatra in Indonesia.

[6] AirAsia operates airline business as low-cost carrier not only in Malaysia but also throughout the ASEAN region since 1996. Tune Air Sdn. Bhd. is the largest shareholder of AirAsia. Tan Sri Dr. Anthony Francis Fernandes and Dato' Kamarudin bin Meranum are also the largest shareholders of Tune Air Sdn. Bhd. Both hold the positions as AirAsia's Group Chief Executive Officer and the Deputy Group Chief Executive Director respectively.

[7] AirAsia X Sdn. Bhd.'s ('AAX') majority shareholder is Aero Ventures Sdn. Bhd. with 139,292,800 shares amounting to approximately 62.18% as at 16.4.2013. Tan Sri Dr. Anthony Francis Fernandes and Dato' Kamarudin bin Meranun are also the directors and majority shareholders of Aero Ventures Sdn. Bhd.

[8] AAX is also a party to the CA. For the purpose of the decision of the Commission, AirAsia and AAX are treated as forming a single

economic unit as defined under section 2 of the Act. The Commission gives its reasons for so holding and cited ***Europemballage and Continental Can v Commission Case 6/72 [1973] ECR 215.*** We observed that the issue was not seriously challenged.

[9] The Respondent is the Commission established pursuant to the Competition Commission Act 2010.

The Legislative Framework

[10] Section 4(1) of the Act provides -

> *"A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services."*

[11] Section 4(2) of the Act further provides -

> *"Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to-*
>
> *(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;*
>
> *(b) share market or sources of supply;*
>
> *(c) limit or control-*
>
> *(i) production;*
>
> *(ii) market outlets or market access;*
>
> *(iii) technical or technological development; or*

(iv) investment; or

(d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services."

[12] Section 14(1) of the Act empowers the Commission to conduct any investigation as it thinks expedient where it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Act -

"The Commission may conduct any investigation as the Commission thinks expedient where the Commission has reason to suspect that any enterprise has infringed or is infringing any prohibition under this Act or any person has committed or is committing any offence under this Act."

[13] Section 15 of the Act provides -

"(1) The Commission may, upon a complaint by a person, conduct an investigation on any enterprise, agreement or conduct that has infringed or is infringing any prohibition under this Act or against any person who has committed or is committing any offence under this Act.

(2) The complaint shall specify the person against whom the complaint is made and details of the alleged infringement or offence under this Act."

[14] A person who is aggrieved or whose interest is affected by a decision of the Commission under sections 35, 39 or 40 of the Act may appeal to the Tribunal. Section 40 provides -

"(1) If the Commission determines that there is an infringement of a prohibition under Part II, it-

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

(b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) may impose a financial penalty; or

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

(2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.

(3) The Commission shall prepare and publish reasons for each decision it makes under this section.

(4) A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred."

[15] Section 58(2) of the Act provides -

"The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-

"(a) remit the matter to the Commission;

(b) impose or revoke, or vary the amount of, a financial penalty;

(c) give such direction, or take such other step as the Commission could itself have given or taken; or

(d) make any other decision which the Commission could itself have made."

The Inquiry and the Complaint

[16] By a letter dated 30.12.2011 MAS on its own and on behalf of AirAsia and AAX notified the Commission of its intention to apply for exemption of the CA. MAS had explained in that letter that the CA did not involve the airlines eliminating competition in respect of the provision of air passenger and air cargo transportation services in the relevant markets. Paragraph 1 of the letter states -

"As the Malaysian Competition Commission (MyCC) may already be aware, in August 2011 Malaysian Airlines System Berhad (MAS), AirAsia Berhad (AirAsia) and Air Asia X Sdn. Bhd (AAX), (collectively, the Airlines) entered

into a Collaboration Agreement for the purposes of exploring possibilities of collaboration in order to:

(a) be able to utilise each other's respective core competencies, thereby optimising efficiency and increasing the Airlines' individual competitiveness to the benefit of consumers; and

(b) become more able to compete effectively as Malaysian based airlines with global industry competitors (including to promote the centrality of Malaysia as a hub for tourism and aviation in the region).

The Airlines wish to notify MyCC that they intend to apply for an exemption of the Collaboration Arrangements under the Competition Act 2010 (Act) after the Act becomes operational on 1 January 2012.This notification is provided by MAS on behalf of the Airlines, with the consent of each Airline's respective senior management."

[17] The Commission vide a letter dated 3.1.2012 informed MAS that *"....it has perused the various reports published in the press and business magazines pertaining to the Comprehensive Collaboration Framework entered by MAS, AirAsia and AAX. However, these are merely reports and not substantiated by any relevant documents."* The Commission requested MAS to submit the relevant documents relating to the CA for its further review.

[18] MAS responded through a letter dated 10.1.2012 requesting for a meeting and clarification. A meeting was held on 30.1.2012 between the Commission and the representatives of MAS, AirAsia and AAX.

[19] Following the meeting of 30.1.2012 MAS wrote a letter to the Commission dated 23.2.2012 arising out of what was discussed. We quote the relevant part of the said letter -

> *"Referring to the meeting called for by the Malaysia Competition Commission (MyCC) on 30 January 2012 in which officers of the MyCC met with the internal counsel of the three Airlines, MH would like to submit the relevant information and data as requested by the MyCC.*
>
> *Kindly find the following data attached herewith:*
> - *Fuel and admin surcharges for the period 1 September 2011 to 31 January 2012;*
> - *Route revision for a similar period;*
> - *Flight frequency revision for the period 1 June 2011 to 31 January 2012.*
>
> *As the MyCC can see from the materials, the basis for the withdrawal of routes was economic in nature. The losses sustained on each route would not make the service sustainable and MH would be acting against the*

best interests of its shareholders if it continued to operate loss-making routes."

MAS reiterated its proposals to apply for joint exemption under the Comprehensive Collaboration Framework ('CCF'). The parties were also still exchanging information and documents.

[20] By a letter dated 19.3.2012 the Commission notified the Appellants that it has yet to be provided with copies of the CCF, CA or any other related documents. In the same letter the Commission also indicated that it had received numerous inquiries and complaints alleging that the collaboration among the airlines infringed the provisions of the Act.

[21] In the midst of the discussion with the Appellants the Commission received a letter of complaint dated 24.2.2012 from the Federation of Malaysian Consumers Association ('FOMCA') against AirAsia for possible anti-competitive practices in the areas of price fixing and market sharing. The complaints are as follows -

"*Cause for Concern*

Share swap between AirAsia X and MAS

- *Air Asia's major shareholder , Tune Air Sd. Bhd. now holds a 20.5% stake in MAS*
- *MAS major shareholder, Khazanah Nasional Bhd. holds a 10% stake in Air Asia*

Consequence after the Share Swap

1. *Termination of Firefly to Sabah and Sarawak*
    - *From 7 times daily*
    - *Elimination of a competitor*

Affecting travelers to Sabah/Sarawak.

2. *Cancellation of AirAsia flights to London, Paris, Mumbai and New Delhi*

Needs further investigation

3. *Comparative analysis on Prices since the Swap*
    - *Have relative prices been increasing since the SWAP*

4.Review of Airline Routes – Are the routes being shared between the 2 airline players to reduce competition and maximise profits

Increasing number of complaints against AirAsia……"

[22] Due to the seriousness of the allegations the Commission requested further information from FOMCA (Re: letter dated 19.3.2012). In response, FOMCA's Chief Executive Officer vide a letter dated 27.3.2012 informed the Commission that the complaint was based on public record,

"… I believe the link between the share swap and what appears to be a collusion on routes can only be

established through internal and thorough investigation of the behavior of the two parties after the swap."

The Investigation

[23] Upon receipt of the complaint from FOMCA, a written notice dated 4.4.2012 was issued to the Appellants notifying that the Commission will conduct inquiries and investigation to establish that the CA does not in any way harm competition in the market,

"As you would be most aware, the alliance between MAS/AirAsia/AirAsia X has raised concerns among consumers in Malaysia. As the authority entrusted to enforce the Competition Act 2010 (the Act), it is incumbent upon the Malaysian Competition Commission (MyCC) to conduct inquiries and investigate to establish that the collaboration does not in any way harm competition in the market."

[24] In the same letter the Commission informed the parties that it is still finalizing the details of the guidelines for application for exemption and that the absence of any guidelines does not prevent any application for exemption pursuant to section 6 of the Act so long as the criteria under section 5(a) to (d) of the Act is satisfied.

[25] After the issuance of the said letter the parties continued to submit information, data as well as having discussions until September 2013.

The Collaboration Agreement

[26] The main thrust of the investigation by the Commission is the CA between MAS, AirAsia and AAX. The objective of the CA is to explore the possibilities of collaboration between all three parties to achieve the following -

(a) to be able to utilise each other's respective core competencies, optimise efficiency and increase all parties' competitiveness to the benefit of consumers; and

(b) to become more able to compete effectively with other industry players. (Re: Clause 3.1 of CA)

[27] The CA was executed before the coming into force of the Act on 1.1.2012. On 2.5.2012, MAS, AirAsia and AAX entered into a Supplemental Agreement ('SA') to vary the terms of the CA so that the parties will not undertake any further assessment, review and implementation for or of any collaboration or other arrangement in respect of provision of network services and the matters as described in clause 6 of the CA (Re: Clause 5 of SA).

The Proposed Decision

[28] By a notice dated 6.9.2013 pursuant to section 36 of the Act the Commission informed MAS that it has completed investigation and proposed to make a decision to the effect that one of the prohibitions under Part II of the Act has been or is being infringed by the Appellants. The Proposed Decision was enclosed with the said notice -

"The Commission hereby gives written notice ('Notice') of the ("Proposed Decision") to MAS as set out in Enclosure 1. The reasons for the Commission's Proposed Decision are also set out in Enclosure 1 of this Notice."

A similar notice as above was also issued to AirAsia.

[29] In its Proposed Decision the Commission found that the Appellants have infringed section 4(2) of the CA by entering into an agreement that has its object the sharing of markets in the air transport services sector within Malaysia (Re: Para 1 Proposed Decision).The reasons as set out in the Commission's Proposed Decision are as summarized as follows -

i. the Commission finds that AirAsia and AAX are part of a single economic unit ultimately controlled by AirAsia;
ii. the CA is an agreement within the definition of the Act;
iii. the CA entered into by the Appellants has the object of preventing, restricting or distorting competition between the signatory parties by allocating market share between them;
iv. by executing the CA to share the market the Appellants have infringed section 4(2)(b) of the Act; and
v. the Commission proposed to impose a financial penalty of RM10,000,000 on MAS and AirAsia respectively.

[30] The Proposed Decision was served on the Appellants on 6.9.2013. The Appellants responded with their written representations to the Commission.

[31] On 15.1.2014, the Commission convened a session for the Appellants to make their oral representations before the Commission.

The Final Decision

[32] The Commission informed the Appellants of its Final Decision vide a letter dated 10.4.2014. The Commission concluded that there has been an infringement of section 4(2) (b) of the Act and imposed a financial penalty of RM10,000,000 on each of the Appellants.

[33] In paragraph 66 of its Final Decision the Commission took into consideration that there are airline alliances which are pro-competitive such as code sharing, revenue and cost sharing, routes and schedule plannings etc. However, the Commission viewed that such alliances would not involve any market sharing agreements or joint management control of competing companies. The CA is beyond such alliance agreements as there was a clause on market sharing which by its nature is anti-competitive. Paragraph 66 reads -

> *"The Commission has taken into consideration that there are alliances made between airlines which may be pro-competitive such as code sharing, revenue and cost sharing, coordination of capacities, route and schedule planning, coordination of marketing, advertising, sales and distribution*

networks, etc.....These alliances would not involve any market sharing agreements or joint management control of competing companies."

[34] In paragraph 65 of the Final Decision the Commission makes reference to its *Guidelines on Market Definition* in particular paragraphs 1.9 and 1.20 which states -

"The Commission is under no obligation to carry out any precise definition in respect of section 4(2) infringement."

[35] The Guidelines on Anti-Competitive Agreement states that there is no necessity for the Commission to prove the 'effect' of the CA once the object is proven as stated in paragraph 3.25 -

"It is important to note that section 4(2) of the Act treats certain kinds of horizontal agreements between enterprises as anti-competitive. In these situations, the agreements are deemed to "have the object of significantly, preventing, restricting or distorting competition in any markets for goods or services." This means for these horizontal agreements the MyCC will not need to examine any anti-competitive effect of the agreements...."

[36] The Commission further states in paragraph 67 of the Final Decision that the CA ".... *was beyond an alliance arrangement as there was a clause on market sharing which is by its nature anti-*

competitive." It went on to state that the CA proceeded to set up the Joint Collaboration Committee ('the JCC') which provides joint management and access to both parties' information and management to ensure that clause 5 is implemented.

[37] In paragraph 68 of the Final Decision, the Commission states that the clause on anti-trust compliance and/or clearance as set out in the CA does not provide any form of immunity for the parties and there was no evidence provided to indicate that the parties had conducted any assessment or compliance or the extent of the compliance or assessment. Paragraph 68 reads -

> *"Although the Collaboration Agreement contains a clause on antitrust compliance and/or clearance, it does not by itself provide any form of immunity for the parties. No evidence was provided to the Commission to indicate that the parties had conducted any assessment or compliance or the extent of the compliance or assessment."*

[38] The Commission went on further to state that pursuant to clauses 5.1 to 5.4 of the CA, the Appellants will only give focus to their market area and will not enter into areas specifically allocated to its competitor. The object is clearly to maximize commercial revenue by sharing the market in relation to the sectors and categories of aviation services. The Commission is of the view that the CA has the object of preventing, restricting or distorting competition by allocating markets between them.

[39] It is the view of the Commission in the Final Decision that the CA had also resulted in Firefly (wholly owned by MAS) withdrawing from the 4 routes and leaving AirAsia to be the sole low cost carrier. From the documents perused and examined the Commission concluded that it was clear that prior to the execution of the CA, Firefly was formed to compete directly with AirAsia in the domestic markets. Due to the fierce competition from Firefly, AirAsia domestic market dropped drastically.

[40] The Commission further emphasized that an intention to seek an exemption does not in any way warrant an automatic exemption being granted. The Commission was of the opinion that all the parties did not satisfy the requirements of section 5 of the Act and therefore exemption could not be granted.

[41] The Commission found that there has been an infringement by the Appellants of section 4(2)(b) of the Act and after giving the Appellants the opportunity to make both written and oral representations imposed a financial penalty of RM10,000,000 on each Appellant.

THE GROUNDS OF APPEAL

[42] The grounds of appeal of the Appellants are summarized as follows -

(i) The CA had no anti-competitive object and the Commission misinterpreted the CA;

(ii) The CA was never implemented;

(iii) The Commission did not establish (and did not even attempt to establish) a causal link between the CA and route withdrawals;

(iv) (a) The improper retrospective application of the Act;

(b) The Commission should have conducted an effect analysis instead of object analysis;

(v) Procedural fairness; and

(vi) Disproportionate and discriminatory penalty assessment.

[43] At the start of the proceedings it was agreed that Mr. Logan, counsel for MAS will submit on grounds (i) to (iv) and Mr. Tay, the counsel for AirAsia submits on grounds (v) and (vi).The counsel for AirAsia is at liberty to supplement the submission of the counsel for MAS on the other grounds.

[44] We are of the view that the principal issue is centered on the interpretation of section 4(2)(b) of the Act in the context of the provisions of the CA and the conduct of the Appellants. Nevertheless, we shall deal with all the issues raised by the parties.

Ground No.1

The CA has no anti-competitive object and the Commission misinterpreted the CA

[45] The Tribunal is of the view that paragraph (b) of ground (iv) can be conveniently dealt with under this ground. The issue of ***the deeming provision*** is also discussed hereunder.

[46] It is contended by the Appellants that the Commission failed completely to take into account the relevant clauses in the CA such as Clauses 1.2(b), 3.1, 3.2 and 4. It is submitted that unless an agreement is an ostensible agreement, the agreement must be interpreted as a whole with effect given to all the clauses.

[47] The counsel for MAS argued that the Commission ought to have immediately proceeded in a manner consistent with its Guidelines on assessing 'the aims pursued by the agreement in light of the agreement's economic context' on the basis that the CA was clearly not a secret market-sharing cartel but instead a *bona fide* future joint venture of a conditional nature in the public domain to be considered under an effects analysis.

[48] The CA is no more than a conditional framework to explore potential areas of future cooperation between the parties subject to obtaining appropriate and desirable prior anti-trust clearance. The terms of the CA do not have an anti-competitive object as the implementation of the CA is expressly conditional upon compliance with competition law.

[49] The counsels for the Appellants further submitted that the Commission misdirected itself in interpreting the CA. Clause 5.6 of the CA expressly provides that MAS had intended to review Firefly's operations but MAS never agreed with AirAsia or *vice versa* to withdraw from any route including the 4 routes. As such, clause 5 is

subject to the necessary anti-trust condition precedents in clause 4 of the CA.

[50] It is the submission of the Appellants that it was never the intention of the Appellants to restrict each other from competing. The terms of the CA cannot be construed to the effect that the Appellants had agreed to share the market merely because MAS made an independent commercial decision to internally review its strategic business model to re-brand Firefly's services under the MAS brand and/or under Sapphire's brand.

[51] The Commission, however, submitted that the intention of the CA was the sharing of market for aviation services by creating a platform for the parties to collaborate and give effect to segment the airline passenger market. In its submission the counsel for the Commission argued that contrary to the assertions of the Appellants, the Commission did not just consider clause 5 of the CA but the CA as a whole. One of the stated objects of the CA was to establish a JCC under clause 9. Clause 9 reads as follows -

> *"9. Joint Collaboration Committee*
>
> *9.1 For the purposes of administering and overseeing such collaboration, the parties shall forthwith establish a committee constituted by persons representing each of them in order to enable the parties to plan, direct and manage jointly all issues and matters pertaining to this Agreement.*

9.2 The JCC and the implementation of all provisions of this Agreement, including in particular clauses 5, 6, 7 and 8, will be subject to all anti-trust Legal Requirements. Before the date of the JCC's first meeting and the implementation of any of the provisions of this Agreement involving collaboration, the parties shall develop anti-trust compliance protocols, including (without limitation) in relation to information sharing, and all JCC meetings, and any other interaction between the parties, shall be conducted in accordance with those protocols.

9.3 Subject to Legal Requirements, the JCC shall have delegated authority from the respective boards of Air Asia, MAS and AirAsia X to have oversight of all matters under this Agreement. Its primary responsibilities are:

(a) to kick start the collaboration process;

(b) to undertake an anti-trust review of all matters to be proposed for exploration or assessment hereunder, prior to their implementation;

(c) ensure maximum synergy capture through co-ordinated action by the relevant parties of all matters under the COBA concerning them;

(d) to closely monitor progress under the Agreement, and enforce implementation of the Agreement by the parties; and

(e) to resolve deadlocks in accordance with clause 10.

9.4 The JCC shall consist of six members initially, namely:

(a) the chief executive officer of AirAsia;

(b) the chief executive officer of AirAsia X;

(c) the chief executive officer of MAS;

(d) Dato' KamarudinMeranun;

(e) Datuk Mohamed Azman bin Yahya; and

(f) one other director of MAS.

9.5 However, in bilateral matters, only the representatives from the two affected parties shall participate in JCC proceedings and make decisions thereon, and the third party and its JCC nominees shall abstain from all deliberations and decision-making in this regard. In the event of a matter where all parties are affected, then all JCC members shall participate (in) JCC proceedings to deliberate and decide on the matter at hand. Where matters are bilateral in nature, any decision thereon must be the unanimous decision of both parties affected by such matters. Where matters affect all parties, likewise any decision thereon must be the unanimous decision of all parties. No person on the JCC, and none of the parties, shall have a second or casting vote on all of such matters.

9.6 The first meeting of the JCC shall be convened as soon as practicable after the date hereof, at which the parties shall kick-start all the processes required to implement this Agreement, and determine the procedures for the conduct of the JCC.

9.7 The JCC shall meet at a frequency of not less than once a quarter.

9.8 In the event that there is a dreadlock of any matter that requires the mutual agreement of two parties (in a bilateral matter) or of all parties (in a matter affecting all parties), such deadlock shall be first referred in writing to the JCC for resolution. The deadlock may be referred by any party.

9.9 If such deadlock is not resolved by the JCC within one month of its referral, then:

(a) for bilateral matter, it shall be referred to both the boards of the respective affected parties for resolution; and

(b) for a matter affecting all parties, it shall be referred to the boards of all the respective parties for resolution.

9.10 In the event that the deadlock is still not resolved by the boards pursuant to clause 9.9 within one month of

its referral, then either party may terminate this Agreement by three months written notice to the other."

[52] The Commission submitted that the JCC was involved in the sharing of information for the purposes of giving effect to the arrangements that were envisaged. Further this must also be viewed in the context of the share swap.

[53] The Commission further submitted that the Appellants merely contended that any actions taken under the CA would have been subject to anti-competition review but that does not take away from the fact that the CA itself was one that was designed to establish and promote collaboration between competitors.

[54] The Appellants intended to apply for an exemption under section 6 of the Act. It is the submission of the Commission that this means that the CA was, in their opinion, in violation of section 4 of the Act. Otherwise no exemption would have been necessary.

[55] The sharing of market took place when the parties evinced an intention to focus or refocus on specific areas of the passenger airline market. Clauses 8.2 and 8.5 of the CA were referred. Clause 8.2 of the CA provides as follows -

"*It is intended by each party that it will review and assess its existing revenue-generation model, and will revise the same where required and to the extent permitted by Legal*

Requirements, so as to optimise such model within the objectives of this Agreement."

[56] Clause 8.5 further stipulates -

"*The parties agree and undertake to use all commercially reasonable efforts to perform their obligations as set forth in this Agreement in a spirit of mutual co-operation and in recognition of the mutual benefit which the parties may derive from such combined and co-operative effort, to the extent permissible by Legal Requirements. Each party agrees that it shall ensure that its subsidiaries and affiliates performs all of its obligations hereunder; to the extent permitted by Legal Requirements."*

[57] The Commission pointed out that if there was no intention at all to collaborate and share market, there would not have been the need for clause 5 at all in the CA. The Commission further argued that it is indeed worth noting that by the execution of the SA on 2.5.2012 the parties to the CA removed clauses 5.2 to 5.4 as well as clause 6.1.

[58] In addition, the Commission submitted that clause 10 of the CA provided remedies for breach of the CA and contemplates that loss could be occasioned by the parties' failure to comply with its obligations. This would include failures to comply with the obligation to honour the intention expressed in clause 5. Clause 10 reads as follows -

" 10. BREACH

10.1 Each party acknowledges that in the event of any breach of this Agreement, or any of the Legal Requirements, by that party ('Defaulting Party'), the losses that may be suffered or incurred by the other party or parties (each a 'Non-Defaulting Party') may also arise from the fact that the Non-Defaulting Party had agreed to and complied with its obligations under this Agreement in the expectation that the Defaulting Party would in turn also comply with the Defaulting Party's obligations under this Agreement.

10.2 The parties agree that any party is entitled to seek interlocutory injunctive and/or other relief in the event of any breach by any party of the detailed agreements to be entered into pursuant hereto.

10.3 The parties further agree that damages alone may not be an adequate remedy, and the parties are entitled to the remedy of specific performance, in the event of any breach of the detailed agreements to be entered into pursuant hereto.

10.4 The foregoing is without prejudice to any remedy which party may be entitled to in law or equity."

[59] Clauses 11.1(b) and 12.2 of the CA envisaged the sharing of confidential information which would otherwise be secret amongst competitors and to the world at large.

[60] Clause 13.4 further provides that -

> *"13.4 The parties recognize and accept that it is impracticable to provide herein for every contingency that may arise in the course of the performance of the terms and conditions contained in this Agreement, and accordingly they declare it to be their mutual intention that they will deal with each other in good faith to achieve the principal objectives of this Agreement and if circumstances arise which have not been contemplated in this Agreement, the parties shall use their best endeavours to agree upon such action as may be necessary (including, without limitation, the execution of an agreement to amend or supplement this Agreement) to resolve such matter within such spirit, at all times in accordance with any applicable Legal Requirement."*

[61] Clause 14 stipulates that collaboration was envisaged to continue for five (5) years subject to an option to renew for a further five (5) years and that termination of the CA under Clause 15 would be without prejudice to any accrued rights or liabilities to the parties.

[62] The Commission argued that the CA has all the characteristics of a concluded and enforceable contract. The

Commission further argued that it also has all the characteristics of an attempt by the parties to achieve super dominance in the passenger airline industry in Malaysia.

The deeming provision

[63] The Commission submitted that section 4(2) of the Act is a deeming provision. Parliament has enacted that in the case of a horizontal agreement to share market, the existence of an agreement to share market is sufficient to satisfy the requirement that it has the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

[64] The Commission argued that where a statute provides that certain things shall be deemed, it matters not as to whether the provision covers a situation or not without the presence of the word deemed. A deeming provision has the effect of bringing in something which may otherwise be excluded or for that matter of dispensing with proof that a thing has occurred.

[65] Contrary to the assertion of the Appellants, the effect of the deeming provision in section 4(2) of the Act is to make it unnecessary to establish the 'effect' of the CA was to significantly prevent, restrict, or distorting competition in any market for goods or services.

[66] It is the Commission's view that there is no dispute that the CA is a horizontal agreement. Consequently, the question in these

appeals is simply whether the CA amounted to an agreement which has the object to share market or sources of supply.

[67] The Commission further argued that anti-competitive conduct is seen from the very execution of the CA. In his submission the counsel for the Commission argued that because of the deeming provision in the Act, there is no necessity for the Commission to prove that any active steps of an anti-competitive nature ever took place. Once the agreement is in place, there is no way to monitor or police what the parties to such an agreement actually do. It is submitted that what is anti-competitive is the act of two (2) competitors agreeing to collaborate in the way that they did by aligning their business models under clause 5 of the CA to accommodate specific sections of the market between themselves and to return to their original business models and thus collaborate to share market.

[68] The Commission had also submitted that the Final Decision is not a mere blind endorsement of the Proposed Decision. There are numerous differences between the Proposed Decision and the Final Decision.

[69] The Commission argued that the arguments raised by the Appellants have all been addressed and found to be unconvincing. There is no obligation on the Commission to refute all the arguments adduced during the written and oral submissions.

[70] The counsel for the Appellants on the other hand argued that in order to invoke the deeming provision the Commission must establish the essential elements, namely, (a) there is an agreement; (b) the agreement itself has the prohibited object; and (c) the prohibited object in question is to share market.

[71] The Appellants' counsels further submitted that the Commission disregarded the obvious conditional framework under the CA to explore possibilities and also the characterization of a full-service premium carrier ('FSC') and low-cost carrier ('LCC') as mere business model. It is argued by the Appellants that the CA must be interpreted as it stands and all the provisions under the CA cannot be disregarded.

The Tribunal's Analysis and Decision

[72] The Commission in its Final Decision found the Appellants had infringed the prohibition in section 4(2)(b) of the Act by executing the CA. The Commission viewed that the object of the said CA is the sharing of market within the air transport services sector in Malaysia-

> *"49. The Commission is satisfied that MAS and AirAsia by entering into the Collaboration Agreement to share market have infringed section 4(2)(b) of the Act. The Collaboration Agreement is clearly entered into by the parties to share market in relation to the aviation services."*

[73] The counsel for the Commission argued that it is so obvious based on the terms of the CA that the object is to share market. The

Recital itself described MAS as a full service carrier and AirAsia and AAX as a low cost airline and this statement is sufficient to establish the sharing of market between the signatories of the aforesaid CA. It is submitted by the Commission that the mere existence of the CA "*...in its purport and intent is sufficient to establish the deemed "objects" violation of section 4.*"

[74] The intention of the parties in signing the CA must be ascertained in order to determine "*the true rights and interests of the parties*". This was the view of Wylie CJ (Borneo) in ***Tan Tien Choy v. Kiaw Aik Hang Co Ltd [1965] 1 LNS 182; [1966] 1 MLJ 102, FC,*** at page 104:

> *"The court must take into account the real nature of this agreement to determine the true rights and interests of the parties."*

[75] It is a settled principle of construction that the intention of the parties can be ascertained from the words used by the parties. It is therefore the duty of this Tribunal to construe the words and expressions used by the parties in the CA and to give effect to them accordingly. Lord Diplock in ***Pioneer Shipping Ltd and others v. BTP Tioxide Ltd The Nema [1981] 2 All ER 1030, 1035***, aptly said that:

> *"The object sought to be achieved in construing any commercial contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they (or*

brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed.

Words and expressions certainly play an important part in construing the intention of the parties. The court will not be in error if it construes the intention of the parties by giving effect to the words and expressions employed by them.

In Re F.D. Sassoon. Inland Revenue Respondenters v. Raphael, Re R.E.D. Sassoon. Inland Revenue Respondenters v. Ezra [1934] All ER Rep 749, 770, Lord Wright rightly said:

> *It must be remembered at the outset that the duty of the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used.*
>
> *I will not re-write the intention of the parties by adding words or expressions which are not there. That would amount to rectification and not construction."*

[76] The case of ***Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 "(ICS)"*** sets out the principles in the construction of an agreement and the

consideration of the relevant principles. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:

> *"... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds[1971] 1 WLR 1381, 1384-1386 and Reardon Smith Line Ltd v. Yngvar Hansen-Tangen [1976] 1 WLR 989, is always sufficiently appreciated.*
>
> *The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:*
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd [1995] 1 WLR 1 508.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera SA v. Salen Rederierna AB [1985] AC 191, 201:

If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense."

[77] The principles of Lord Hoffmann were summarized in ***Berjaya Times Square Sdn. Bhd. v. M-Concept Sdn. Bhd. [2010] 1 CLJ 269*** .Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

".....it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract."

[78] The Commission's case is premised on section 4(2)(b) of the Act which provides that an agreement with the object to share market or sources of supply is deemed to have the object of significantly preventing, restricting or distorting competition. In order

to succeed under the aforesaid provision it is incumbent upon the Commission to establish that by the construction of the terms embodied in the CA the object is to share market. In the Final Decision the Commission states that once the object has been established, the deeming provision will inevitably apply.

[79] The CA was entered into between MAS, AirAsia and AAX on 9.8.2015. Clause 1.2 of the aforesaid CA states that the parties hoped to establish a framework for the parties to explore possibilities for mutual cooperation -

> *" The parties wish to establish a framework under which they will explore possibilities for mutual cooperation in accordance with the terms and conditions set forth in this Agreement."*

[80] Clause 3 of the CA stipulates that the parties wish to explore the possibilities of collaboration and to achieve the following -

> *"(a) to be able to utilise each other's respective core competencies, optimize efficiency and increase all parties' competitiveness to the benefit of consumers; and*
>
> *(b) to become more able to compete effectively with other industry players."*

[81] The Commission took cognizance that there are alliances made between airlines which may be pro-competitive such as code sharing, revenue and cost sharing, coordination of capacities, route

and schedule planning, coordination of marketing, etc. Such alliances would not involve any market sharing agreements or even joint management control of competing companies. The Commission, however, concluded that the said CA is more than a mere alliance agreement because of the existence of Clause 5 which in their view by nature anti-competitive -

> " *67. In the context of this case, it was beyond an alliance arrangement as there was a clause on market sharing which by its nature anti-competitive. Further to this, the Collaboration Agreement proceeded to set up a JCC which in effect provides joint management and access to both parties' information and management to ensure that clause 5 is implemented.*"

[82] Clause 5 of the CA describes the business model of the parties as follows -

> " *BUSINESS MODEL PRINCIPLES*
>
> *5.1 Subject to clauses 4 and 9, each party confirms that it intends to focus, or re-focus, as the case may be, on its respective core competencies in the business segment in which its original business model was or would have been optimized. This may be undertaken by itself, or through a subsidiary or affiliate. For the purposes hereof, an affiliate. For the purposes hereof, an affiliate of a party is a corporation the financial results of which, by virtue of a party's interest in that corporation's*

equity, that party is entitled to equity account its relevant share of that corporation's financial results.

5.2 *In the case of MAS, it intends to focus on being a full-service premium carrier ("FSC").*

5.3 *In the case of AirAsia, it intends to focus on being a regional low-cost carrier ("LCC").*

5.4 *In the case of AirAsia X, it intends to focus on being a medium-to-long haul LCC.*

5.5 *For the purposes of the Agreement, the parties will mutually discuss and agree, within three months from the date of this Agreement, based on value proposition to the market, the appropriate definitions of FSC and LCC for the implementation of the matters under this Agreement.*

5.6 *MAS intends to review Fly Firefly Sdn. Bhd. operations, and MAS's short-haul FSC business may be undertaken by itself and/or through a new MAS subsidiary ("Sapphire") and MAS has the flexibility to re-designate capacity, assets and resources from Fly Firefly Sdn. Bhd. to form Sapphire."*

[83] The counsels for the Appellants argued that clause 5.6 of the CA was never intended to be a provision for the Appellants not to

compete with each other. It was inserted to make it clear that MAS had intended to pursue the Project Sapphire.

[84] A detailed analysis of the terms and conditions show the intention of the parties was to explore the possibilities of collaboration in order to be able to utilize each other's respective core competencies as well as to optimize efficiency and increasing all parties' competitiveness. We are of the considered view that the Commission in the Final Decision failed to take into consideration of all the terms and conditions of the CA.

[85] The Commission in the Final Decision had considered that the withdrawal of the East Malaysian routes as the only evidence of implementation. However, Clause 4 of the CA provides that that the agreement *"....does not give rise to any binding commitment as to any particular form of collaboration or give any effect to any form of collaboration until anti-trust analysis have been completed ...".* The CA was never in effect implemented.

[86] It is the submission of the Commission that as section 4(2)(b) of the Act is a deeming provision it does not matter whether the provision covers a situation or not. A deeming provision has the effect of bringing in something which may otherwise be excluded. It is unnecessary to establish that the 'effect' of the CA is to significantly prevent, restricts or distort competition in any market for goods or services.

[87] It is further submitted by the Commission that there is no necessity to prove that any active steps of an anti-competitive nature had taken place. The fact that the Appellant had agreed to collaborate in the manner they did by aligning the business models as envisaged under Clause 5 of the CA to accommodate specific sections of the market between them must thus be seen as an act to share market.

[88] On the issue of deeming provision, His Lordship Zulkefli Ahmad Makinudin, FCJ in the judgment of the Federal Court in the case of ***Ahmad Najib Aris v. PP [2009] 2 CLJ 800*** elucidated that a deeming provision -

> *".....is a legal fiction and is used to create an artificial construction of a word or phrase in a statute that would not otherwise prevail. As Viscount Dunedin said in CIT Bombay v. Bombay Corporation AIR [1930] PC 54 at page 56:-*
>
> > *135]Now when a person is "deemed to be" something the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were.*
>
> *In commenting on the words "deemed to be" The Law Lexicon (7th Reprint Ed) by Ramanatha Aiyar says at page 302:-*
>
> > *No doubt the phrase "deemed to be" is commonly used in statutes to extend the application of a*

provision of law to a class not otherwise amenable to it.

Its primary function is to bring in something which would otherwise be excluded (see Malaysia Building Society Bhd v. Lim Kheng Kim & Ors. [1988] 3 MLJ 175). In Ex parte Walton, In re Levy [1988] 17 Ch D 746, it was held that in interpreting a provision creating a legal fiction the court is to ascertain for what purpose the function is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect of the fiction. It would be proper and even necessary to assume all those facts on which alone the fiction can operate (see Shital Rai v. State of Bihar AIR [1991] Pat 110 (FB)). In so construing a fiction it is not to be extended beyond the purpose for which it is created (see In re Coal Economising Gas Company [1875] 1 Ch D 182) or beyond the language of the section by which it is created (see CIT Bombay City II v. Shakuntala AIR [1966] SC 719). The fiction in the realm of law has a defined role to play and it cannot be stretched to a point where it loses the very purpose for which it is invented and employed (see Bindra's Interpretation of Statutes, 9th edn, p 72). It is required by its very nature to be construed strictly and only for the purpose for which it was created; and its application cannot be extended (see FCT v. Comber [1986] 64 ALR 451). Thus it cannot

be pushed so far as to result in a most anomalous or absurd position (see Ashok Ambu Parmar v. Commr of Police, Badodara City AIR [1987] Guj 147)."

[89] The Commission did not give any reason or analysis for its decision concluding that the purported object of the CA is market sharing. Even if it is a deeming provision the onus is on the Commission to establish that the object of the CA is to share the market. It is observed that in the Final Decision the Commission did not or failed to identify the relevant market. Identification of relevant market is integral in any competition inquiry. The case of ***Europemballage and Continental Can Corporation v Commission Case 6/72 [1973] ECR 215*** explains the importance of the identification of relevant market.

"...The definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products."

[90] It is pertinent to note that the Malaysian competition law uses a deeming provision to establish cases of anti-competition while many other jurisdictions use market impact cases to do the same. A simplistic use of the deeming provision upon airlines business may not be proper. This is due to the widespread practices among airlines

to undertake alliances and code sharing as well as doing maintenance of aircrafts on behalf of others. This arises from the fact that such businesses are capital intensive and thus utmost level of efficiency is expected. It is therefore of no surprise that the Appellants undertake similar arrangements, as others do. In such a case the Commission should not just rely totally on the deeming provision but should establish as to whether there was object in the CA between the Appellants to share market.

[91] In conclusion, we are of the considered view that there must be proper assessment and evaluation by the Commission of the CA and any other documentary evidences submitted to it before it can invoke the deeming provision. The plain reading of the terms in the CA does not give rise to the CA having the object of significantly preventing, restricting or distorting competition in any market for goods or services. Under the circumstances, we are of the considered view that the Commission misinterpreted the CA to ascertain the mutual intentions of the parties and the legal obligations each assumed pursuant to the terms and conditions of the CA.

Ground No.2

The CA was never implemented

[92] The counsels for the Appellants argued that the CA was never implemented. In its Proposed Decision the Commission adduced route withdrawals as the only evidence of implementation. It is submitted that, the Commission had misconstrued the CA as it did

not take into account the relevant clauses thereof showing to the contrary that it was merely a framework agreement to explore potential areas of future cooperation subject to obtaining any appropriate anti-trust clearance.

[93] It is further argued by the Appellants that there was no evidential basis for the Commission to make little of the express clauses of the CA as though it was merely an ostensible agreement.

[94] The Appellants had received advice before entering into the CA and had always treated compliance with competition law as a top priority. Furthermore the Appellants did not implement any aspect of the potential areas that were to be explored under the CA.

[95] It is the submission of the counsel for the Appellants that the CA is a conditional agreement. Clause 4.1 of the CA stipulates as follows -

> *" Notwithstanding to the contrary, this Agreement does not give rise to any binding commitment as to any particular form of collaboration, or give any effect to any form of collaboration, until anti-trust analysis has been completed in respect of thereof,..."*

[96] The Appellants argued that it is sufficiently clear from the Final Decision that the ground for the finding of the infringement by the Commission was premised only on clause 5. Paragraph 8 of the Final Decision states as follows -

> *"Clause 5 of the CA expressly mentions that each airline will focus on their market area and thereby agree that they will not enter into the areas specifically allocated to their competitor. It is the Commission's finding that this clause sets out the intention of the parties or "object" of the parties' to share the market in relation to sectors and categories of aviation services."*

[97] In paragraph 62 of the Final Decision the Commission explained that -

> "*Clause 5 of the CA states that each of the parties shall focus on separate sectors in the airlines industry with MAS mandated to focus on being a FSC, AirAsia mandated to focus on being a LCC and in the case of Air Asia X, it was mandated to focus on being a medium-to-long haul LCC. Clause 9 was intended to be the supervisory clause to ensure that each of the parties comply with the business plan."*

[98] The Commission submitted that the Act makes the entering into an agreement that has the prohibited 'object' an infringement of the section. The CA was in fact implemented by virtue of the appointment of the JCC and the exchange of information that took

place under the CA. The Commission further argued that the agreement contained in the CA for the three (3) competitors to limit their activities to fixed passenger segments was clearly an infringement of the Act. The very existence of the CA in its purport and intent is sufficient to establish the 'objects' in violation of section 4 of the Act.

The Tribunal's Analysis and Decision

[99] We have considered the CA in its entirety and is of the view that the CA is a conditional agreement as expressly provided in Clause 4 of the CA.

[100] In the case of ***Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3; [1960] 26 MLJ 47***, it is held that if a conditional agreement is not affirmed it would mean that no agreement exists between the parties. Clause 4.1 provides that the CA would not be enforceable unless and until anti-trust analysis has been completed. Any further step will only be executed after the anti-trust analysis is done and completed. Clause 4.1 reads -

> *"Notwithstanding anything to the contrary, this Agreement does not give rise to any binding commitments to any particular form of collaboration ,or give any effect to any form of collaboration, until anti – trust analysis has been competed in respect thereof..."*

[101] In the case of ***GlaxoSmithKline Services Unlimited v. Commission [2009] ECR 1-9291, [2010] 4 CMLR 50***, the Court of

Justice said that in order to decide whether an agreement is restricted by object -

> *"Regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part."*

[102] In its Final Decision the Commission at paragraph 8 stated that clause 5 of the CA expressly mentions that each airline will focus on their market -

> *"Clause 5 of the Collaboration Agreement expressly mentions that each airline will focus on their market area and thereby agree that they will not enter into the areas specifically allocated to their competitor. It is the Commission's finding that this clause sets out the intention of the parties or "object" of the parties to share the market in relation to sectors and categories of aviation services."*

[103] In paragraphs 9 and 37 of the Final Decision the Commission concluded that based on clause 5 of the CA that withdrawal of the Kuala Lumpur–Kuching, Kuala Lumpur–Kota Kinabalu, Kuala Lumpur–Sandakan and Kuala Lumpur–Sibu routes and AirAsia covering those routes show that the intention of the object is anti-competitive. Paragraph 9 reads as follows -

> *"9. Although the purported main purpose of the Collaboration Agreement was to optimise efficiency and to increase all parties' respective competitiveness, the*

agreement also resulted in an outcome whereby Firefly (a wholly owned subsidiary of MAS) withdrew from the Kuala Lumpur-Kuching, Kuala Lumpur-Kota Kinabalu, Kuala Lumpur-Sandakan and Kuala Lumpu-Sibu routes (Sabah and Sarawak routes) leaving AirAsia to be the sole low cost carrier. Although this has been denied by MAS, the Commission came to the conclusion that the withdrawal from these routes was in line with the stated objects of clause 5.6 of the Collaboration Agreement whereby MAS has stated that it intends to review Firefly's operations."

[104] Paragraph 37 reads -

"*The Commission considered this argument but is unable to agree as it is undisputed that these routes were cancelled after the parties had entered into the Collaboration Agreement. The Commission therefore is of the view that these routes were cancelled pursuant to clause 5 and clause 5 had in fact continued to remain in effect until 1st May 2012 which was five (5) months after the Act came into force.*"

[105] The counsel for the Commission had further submitted that the CA was for the purpose of sharing of market for aviation services by creating a platform for all three parties to collaborate and give effect to an intention to segment the airline passenger market. One

of the objects to share market is the setting up of the JCC as stipulated in clause 5 of the CA.

[106] In its Final Decision the Commission had taken into consideration the CA in its entirety in particular clause 5 and clause 9 which specifically provide for market sharing and the establishment of a joint management committee which is involved in decision-making process in two different enterprises. According to the Commission the setting up of the JCC is clearly anti-competitive. The terms expressed in the CA had the "object" of significantly preventing, restricting or distorting competition in the market which is an infringement under section 4(2) of the Act.

[107] It is the Commission's submission that the object of the CA was to share market. The withdrawal of the routes is not the act which triggered the operation of section 4(2) of the Act and its deeming effect. It was triggered by the fact that there exists an agreement to share market until 2.5.2012 when the parties executed the SA. The Commission contended that the mere entry of the Appellants into the CA is an infringement.

[108] The words "*Legal Requirements*" is defined under the said CA as -

> *"...all laws, decrees, statutes, ordinances, orders, administrative guidelines, rules, regulations, permits, licenses, authorizations, directions, circulars and/or requirements of all regulatory and/or governmental*

authorities which, now hereafter, may be applicable to a party, and "Legal Requirement" shall be construed accordingly."

[109] Clause 4.1 of the CA provides -

"Notwithstanding to the contrary , the Agreement does not give rise to any binding commitment as to nay particular form of collaboration ,or give effect to nay form of collaboration, until anti-trust analysis have been completed in respect thereof..."

[110] Clause 4.2 further provides -

"To the extent that there is any anti-trust, competition or other Legal requirement that is applicable to any matter or transaction under this Agreement, such that the matter or transaction cannot be proposed and/or undertaken unless certain Legal Requirements are complied with..."

[111] We are, therefore, of the considered view that based on the terms and conditions of the CA it is crystal clear that the CA is a conditional agreement and would only be enforceable if detailed anti-trust analysis is conducted and all the legal requirements are complied with.

[112] The Appellants contended that the Commission cannot at this stage remedy the defects by introducing and relying for the first time on clauses 6, 7, 8.2, 8.5, 10, 11.1(b), 12.2, 13.4 and 14 of the CA to

supplement and enhance the Final Decision. The Appellants further submitted that the Commission's finding or reasons cannot be supplemented or reformulated on appeal in the course of the proceedings before the Tribunal, nor inferred from the contents of documents not specifically relied in the Final Decision.

[113] It is further submitted by the Appellants that the Commission is barred from relying on clauses 6, 7, 8.2, 8.5, 10, 11.1(b), 12.2, 13.4 and 14 of the CA as they were not referred to in the Final Decision.

[114] The case of ***Archer Daniels Midland Co. v. Commission of the European Communities Case C-511/06*** as cited by the Appellants states as follows -

> *"Where the documents and items of evidence which are the source of the facts used as a basis for the classification as a leader of the cartel consist of testimonies of persons involved in the infringement procedure and therefore have a subjective aspect, the fact that those documents are annexed to the statement of objections, without those facts being expressly referred to in the wordings itself of the statement, does not enable the undertaking in question either to assess the credence which the Commission gives to each of the items of evidence set out in those documents or to contest them or, consequently usefully to exercise."*

[115] In our view the Commission had failed to show as to how clauses 6, 7, 8.2, 8.5, 10, 11.1(b), 12.2, 13.4 and 14 of the CA have restricted competition by object in pursuance to section 4(2)(b) of the Act.

Ground No.3

The Commission did not establish (and did not even attempt to establish) a causal link between the CA and the route withdrawals

[116] Some time in 2010 MAS considered a proposal from Firefly's management to launch distinct jet aircraft operations on certain routes. This proposal is known as the "Project Riesling" and would use a different type of aircraft and be based in a different hub. The jets would be based in Kuala Lumpur International Airport (KLIA) whereas the turboprop aircraft would be based in Subang.

[117] The Start-Up Firefly Jets Operations was approved in 2011 and initially covered 4 domestic routes to East Malaysia and would overlap with MAS' East-Malaysian Routes. MAS gradually stepped out of the routes, but both the Firefly Turboprop Operations and the Start-Up Firefly Jet Operations continued to operate.

[118] Due to losses amounting to RM24.36 million in October and December 2011 the Start-Up Firefly Jets Operations covering East-Malaysian Routes ceased. Following the termination of the said

Start-Up Operations MAS still continue operating the East-Malaysian Routes.

[119] It is submitted that the Commission, in its Final Decision failed to analyze and take into account the distinction between the established Firefly Turboprop Operations and the subsequent Start-Up Firefly Jets Operations when considering the withdrawal in 2011 by Firefly Jets Operations from the East-Malaysia. The cancellation of the East-Malaysian Routes was an independent commercial decision made due to the dire financial situation in 2011. Furthermore, the Firefly Jets Operations had incurred severe financial losses in 2011.

[120] It is also argued that the Commission failed to establish that the route withdrawals were caused by the Appellants' entering into the CA. The counsels for the Appellants submitted that the East-Malaysian Routes were originally covered by MAS which was then taken over by Start-Up Firefly Jets Operations which were also incurring severe financial losses in 2011. The East-Malaysian Routes were originally covered by MAS and then the Start-Up Firefly Jets Operations and thereafter reverted to MAS (all within a single economic unit). This means that there was never any ceding of the East-Malaysian Routes to AirAsia.

[121] The Commission submitted that there is no need to show a causal link between the withdrawal of the respective Kuching, Kota Kinabalu, Sandakan and Sibu routes and the CA. The Commission

further submitted that contrary to the contention of the Appellants, this was not the basis of the Commission's finding that the Appellants had infringed section 4 of the Act.

[122] The Commission further submitted that the finding of infringement was that the object of the CA was to share market and that it is not disputed that the withdrawal of routes took place in October and December of 2011. The withdrawal of routes is not the act which triggered the operation of section 4(2) of the Act and its deeming effect. Section 4(2) of the Act was triggered by the fact that an agreement to share market continued to be in existence after the Act came into force right up until 2.5.2012.

The Tribunal's Analysis and Decision

[123] The withdrawal or the cancellation of the East Malaysian routes by MAS was because of its financial situation in 2011. The Firefly Jets Operation incurred severe financial losses in 2011. There was never any ceding of the East Malaysian routes to AirAsia.

[124] We agree with the submission of the Appellants that the Commission failed to establish the causal link that the decision to withdraw from the East-Malaysian Routes was the result of any alleged anti-competitive agreement contrary to section 4 of the Act.

[125] The withdrawals of the routes were not part of the collaboration between the parties to the CA. Clause 5.6 of the CA gives MAS the right to review the Firefly operations and MAS's short-

haul FSC business *"...may be undertaken by itself and/or through a new MAS subsidiary ('Sapphire'), and MAS has the flexibility to re-designate capacity, assets and resources from Firefly to form Sapphire."* Accordingly we are of the considered view that the withdrawals of the routes were made by MAS outside the scope of the CA. Therefore in our view the Commission failed to establish that there is a causal link between the CA and the route withdrawals.

Ground No. 4

The improper retrospective application of the Act

[126] The Commission has no jurisdiction to consider the 'object' of any conduct that occurred before the Act came into force on 1.1.2012. In its Final Decision the Commission nevertheless purported to find an 'object infringement' for conduct prior to 2012 without properly undertaking an evidential assessment whether such conduct (particularly the irrevocable independent decision to terminate in 2011 the failed Start-Up Firefly Jets Operations) had ongoing effects after the Act had come into force.

[127] As the Commission is not permitted to conduct an 'object' analysis without engaging in retrospective application of the Act, it must instead conduct an 'effects' analysis. It is clear from the Final Decision (Re: paragraph 37) that a proper assessment of the effects of the route withdrawals is key to any possible finding of infringement:

> *"The Commission therefore is of the view that these routes were cancelled pursuant to clause 5 and clause 5 had in fact*

continued to remain in effect until 1st May 2012 which was five (5) months after the Act came into force." (emphasis added)

[128] The Commission failed to assess the continued effect of the route withdrawals and did not define any relevant market or markets within which the effects of the alleged infringement would be assessed. The Commission did not conduct any section 5 'effect' analysis covering, among others, actual and potential competition that would have existed between the relevant parties in the absence of the CA.

[129] The Commission has no jurisdiction to consider the 'object' of any conduct that occurred before the Act came into force on 1.1.2012. In its Final Decision, the Commission held that there is an 'object infringement' for conduct prior to 2012 without properly undertaking an evidential assessment as to whether such conduct had ongoing effects after the Act had come into force.

[130] The Appellants further argued that the Commission did not properly or at all, conduct any section 5 analysis and failed to respond to Appellants' representations on the application of section 5. A proper effects analysis would have enabled the Commission to conduct a section 5 analysis.

[131] The Commission however submitted that there is no basis for the suggestion that the Act was applied retrospectively.

The Tribunal's Analysis and Decision

[132] We agree with the submission of the Appellants that the Act cannot be applied retrospectively. However, it is clear from the decision of the Commission that the Act was not applied retrospectively. What the Commission did was to consider the facts that led to the execution of the CA before the Act came into force but continued to be in force when the Act came into effect. For ease of reference we quote hereunder the Commission's words as stated in its Final Decision at paragraphs 36, 37, 38 and 39 -

> *"36. In their written as well as in their oral representations in response to the Commission's Proposed Decision, MAS and AirAsia argued that the abovementioned routes, cancellations and the execution of the Collaboration Agreement occurred before the Act came into force. MAS further argued that the Commission applied the Act unconstitutionally as it cannot apply the Act retroactively to conduct that occurred before 1st January 2012.*
>
> *37. The Commission considered this argument but is unable to agree as it is undisputed that the routes were cancelled after the parties entered into the Collaboration Agreement. The Commission therefore is of the view that the routes were cancelled pursuant to clause 5 and clause 5 had in fact continued to remain in effect until May 2012 which was five (5) months after the Act came into force.*

38. The position espoused by the Commission is consistent with judgment in ***Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading [2002] CAT 1*** *above which is reproduced hereunder:*

> *"..In our view it is relevant to take facts arising before [the date of commencement of the UK legislation] into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on and after that date.*

39. Thus, the Commission is entitled to take into account the existing conduct that was done by the parties which led to the sharing of markets which had continued after the Act came into force."

[133] In the appeals before us the Appellants had submitted that the Commission misconstrued the ***Napp's*** decision because in ***Napp,*** the Tribunal had conducted a detailed analysis of the relevant market as at the date of the purported infringement on 1.3.2000.

[134] The Appellants further argued that the Commission erred in law in retrospectively applying the Act to MAS's decision to withdraw Firefly's operations form the four (4) routes prior to the coming into force of the Act. MAS withdrew Firefly from the routes on 30.10.2011 and 4.12.2011, which was before the Act came into force.

[135] In its Final Decision the Commission referred to its Guidelines on Anti-Competitive Agreements relating to prohibition under section 4(2)(b) Act, in particular paragraph 3.25 which reads -

> *"It is important to note that section 4(2)(b) of the Act treats certain kinds of horizontal agreements between enterprises as anti-competitive. In this situations, the agreements are deemed to "have significantly, preventing, restricting or distorting competition in any market for goods or services". This means for these horizontal agreements, the MyCC will not need to examine any anti-competitive effect of such agreements."*

[136] In our view Clause 1.2 of the CA does not in any manner or form stipulates that the object is to share market. It just describes the parties to the said CA and the intention to establish framework for mutual cooperation in clear and simple words -

> *" (a) MAS operates an airline business as a full-service carrier, while Air Asia and Air Asia X operate airline businesses as low cost carrier.*
>
> *(b) The parties wish to establish a framework under which they will explore possibilities for mutual consideration for mutual cooperation in accordance with the terms and conditions set forth in the Agreement."*

[137] It is the contention of the Commission that there is no necessity for the Commission to prove the subjective intention of the

parties but to instead look at the facts prior to the execution of the CA. The Commission stated in its Final Decision -

> *"56. From the documents gathered by the Commission throughout the investigation, it was clear that prior to the Collaboration Agreement being implemented, MAS's subsidiary, Firefly, was formed to compete directly with Air Asia in the domestic market."*

[138] It is further explained in the Final Decision that AirAsia's domestic market share dropped drastically because of fierce competition from Firefly. The Commission viewed that the CA was entered by the parties to maximize their commercial revenue by sharing market. The restriction is so obvious that the parties to the CA had agreed not to compete with each other or through their subsidiaries eliminating any possibility of competition between the parties.

[139] The Appellants submitted that they had in fact openly engaged with the Commission prior to the Act coming into force. This is evidenced from the correspondences and meetings between the Appellants and the Commission. By a letter dated 30.12.2011 MAS had notified the Commission of the intention of the CA which is to explore possibilities of collaboration in order to utilize each other's respective core competencies which would result in optimizing efficiency. In the same letter MAS expressed its intention to apply for exemption. The Commission had by a letter dated 3.1.2012 requested MAS to submit the relevant documents related to the CA.

In the same letter the Commission stated that it had perused various reports published in the press and business magazines pertaining to the comprehensive collaboration framework. However, the Commission is of the opinion that these were merely reports unsubstantiated by any relevant documents.

[140] The Appellants in a letter dated 30.12.2011 (by MAS) and 10.1.2012 (by AirAsia) expressed their desire to *"...work cooperatively with MyCC to alleviate any concerns the MyCC may have relating to the Collaboration Agreement".* This was followed by a number of discussions and meetings between the Appellants and the Commission. MAS explained to the Commission that the basis of the withdrawal of the routes was economic in nature as the losses sustained on each route would not make the service sustainable and to continue would be against the interest of its shareholders (Re: letter dated 23.2.2012).

[141] In March 2012 the Commission in a letter issued pursuant to section 18 of the Act to the Appellants notified that they have yet to be given a copy of the CA and requested for the submission of all relevant documents. (Re: the Commission's letter dated 19.3.2012). A copy of the CA was subsequently given to the Commission vide a letter dated 29.3.2012. Following the aforesaid letter the Commission commenced investigation and conducted inquiries sometime in April 2012 (Re: the Commission's letter dated 4.4.2012).

[142] We find that in its Final Decision the Commission did not specify the relevant documents which they considered and analysed to conclude that the CA has the object of restricting or distorting competition as stated in paragraphs 56 and 57 of the Final Decision. It is also not stated in the Final Decision as to whether the Commission had considered the meetings as well as discussions between the parties before and after the Act came into force. The Commission only listed the documents it referred to during its investigation and concluded -

> *"56. From the documents gathered by the Commission throughout the investigation, it was clear that prior to the Collaboration Agreement being implemented, MAS's subsidiary Firefly, was formed to compete directly with AirAsia in the domestic market."*

[143] Henceforth, applying the principles in the ***Napp's case*** we are of the considered view that the Commission is at liberty to consider events and circumstances as stated above that took place prior to the coming into force of the Act. It is also noted that the Guidelines relied upon and referred to by the Commission in the Final Decision was only issued after the coming into force of the Act.

Ground No. 5

Procedural fairness

[144] The Commission failed to properly consider and have regard to the Appellants' written and oral representations made to the Commission. In fact there are very few amendments made to the

Proposed Decision in producing the Final Decision despite extensive representations made by the Appellants. The Commission failed to acknowledge Appellants' representations in relation to the dire financial and economic conditions that led to the route cancellations.

[145] The Commission made statements reported to the media indicating that the Appellants would be unlikely to be let off without a fine, even before the Commission had received the Appellants' representations in response to the Proposed Decision.

[146] In considering the representations advanced by the Appellants under the framework of sections 36 and 37 of the Act, the Commission specifically failed to properly consider its jurisdiction as follows -

(a) the Commission had not provided access to the Appellants of all of the documents that represented the Commission's 'File';

(b) the framework of the said sections of the Act was not an evidential hearing for the Appellants to prove its innocence but merely to comment by way of representation on the reasoning (including its adequacy) and whether such reasoning had met minimum administrative law standards in light of those representations; and

(c) The Commission ought not to make any subsequent material changes (including additional grounds of reasoning) in its Final Decision without first affording the Appellants an opportunity to comment. The Commission should not have introduced new arguments about the JCC in the Final Decision where these were not made in the Proposed Decision and the Commission did not give the Appellants the opportunity to respond to this new material before the Final Decision was made.

[147] It is also submitted that the Commission ought not to have made selective conclusions on the JCC without equally considering and analyzing the fact that there was in place competition compliance protocols for the JCC meetings.

[148] On the issue of procedural fairness the counsel for the Commission submitted that the access to the Commission's File has in any event been given to AirAsia and the documents AirAsia wanted to look at can be found in the MAS's Appeal Record. It is submitted that these documents are largely irrelevant or consisting only of administrative documents such as e-mails and letters between the parties. The Commission further argued that the contents were also known to the parties.

[149] The Commission submitted that the documents in MAS's Record of Appeal Volume 2 at pages 44 and 49 (ie the letter from the Commission to MAS dated 3.8.2012 entitled 'Collaboration among MAS, AirAsia and AAX' and a letter dated 29.3.2013 entitled 'Request for further information' respectively) relevant to the performance of the Commission's power and functions in relation to the investigation on the CCF entered into by MAS, AirAsia and AAX are new documents which were not produced by the Appellants in representations made before the Commission.

[150] The counsel for the Commission submitted that this issue has been dealt with in paragraph 75 and 76 of the Final Decision. Paragraph 75 states -

> *"Section 5 could have also been invoked as a valid defence for an infringement under section 4(2) of the Act. MAS and AirAsia stated that the Collaboration Agreement's net economic benefit outweighs the anti-competitive effects. This defence would be available to any party in respect of any infringement of the Act. However, the burden to satisfy section 5 shifts to both MAS and AirAsia. Any party relying on section 5 would have to satisfy ALL the requirements of the section and the Commission is of the view that the parties did not satisfy the requirements of section 5 of the Act. This burden was not discharged by the parties."*

[151] In paragraph 76 of the Final Decision it states -

> *"The parties also argued that the Commission had only provided limited access to documents to the parties. The Commission has made available all the documents except those classified to be internal and confidential. Moreover, MAS itself had requested that some of the documents gathered in the course of the Commission's investigation be classified as confidential and not to be revealed to any third party including AirAsia."*

[152] The Commission raised information sharing as a separate anti-competitive conduct for the first time during its submission before this Tribunal -

> *"There was clause 9 that shows us you are sharing information."*
> *(Transcript of hearing on 10.4.2015 at paragraph 230); and*

> *"MAS intends to review Firefly operations and MAS's short haul FSC business may be undertaken by itself and/or through a new MAS subsidiary. So, business plans are again being disclosed and MAS has the flexibility. It is telling AirAsia my agreement with you is I continue to have the flexibility. Now, again, that's sharing of information and confirming agreement that is taken place between two competitors."*
> *(Transcript of hearing on 10.4.2015 at paragraph 302)*

[153] In the Final Decision there was never any allegation of purported sharing of information. The Appellants argued that the Commission's contention is therefore seriously flawed.

[154] The counsel for AirAsia further argued that the Commission's counsel had referred to the anti-trust protocol which was addressed by the Appellants during the representations but was not addressed or mentioned in both the Proposed and Final Decisions. The solicitors appointed for AirAsia, Messrs. Bain & Co had always maintained the confidentiality of the information. The information were only made privy to Messrs. Bain & Co and never to MAS and *vice versa*. Furthermore, there was no direct exchange of any information, documentary or oral between the Appellants.

[155] The Appellants further argued that the information on sharing of business plan i.e. the introduction of Sapphire was contained in Clause 5.6 of the CA and publicly disclosed by way of an announcement made on 9.8.2011, the same day of the execution of the CA. The Commission failed to show and explain as to how the sharing of this information which was promptly released to the public domain has any restrictive effect on competition.

[156] The Appellants submitted that apart from making baseless accusations, the Commission was unable to show, explain or substantiate as to how the information given by AirAsia to Messrs Bain & Co.:

(i) contravened section 4(2)(b) of the Act; and

(ii) is of such strategic and confidential nature that led to the purported concerted practice between the Appellants which has the object of market sharing.

Tribunal's Analysis and Decision

[157] It is our view that as far as procedural fairness is concerned, it must be shown that the procedural unfairness goes to the root or substance of the whole matter. The Federal Court in ***Darma Suria Risman v. Menteri Dalam Negeri, Malaysia & 3 Ors [2010] 1 CLJ 300*** held that if state action affects fundamental rights, the court will not only look into the procedural fairness but also substantive fairness. There must exist a minimum standard of fairness, both substantive and procedural. (See ***R v. Secretary of State for the Home Department, Ex Parte Peirson [1998] AC 539, 591E***).

[158] In any case, whatever issues that were raised before the Commission by the Appellants but allegedly not considered by the Commission can be raised before the Tribunal. In other words, the Appellants are not estopped from raising the issues before us as the appeals are heard by way of a re-hearing. In any event, the issues as raised by the Appellants were not objected to by the Commission. The issue of procedural fairness is therefore a non-issue.

[159] On the issue of the documents as raised by the Appellants, we agree with the reasons given by the Commission as stated in paragraph 76 of its Final Decision as referred in paragraph 151 of this decision.

The Share Swap

[160] In its Final Decision the Commission stated that the CA had involved Khazanah Nasional Berhad ('Khazanah') and Tune Air Sdn. Bhd. ('Tune Air') entering into a share swap agreement that there would be a cross-holding of shares resulting in Tune Air obtaining 20.5% stake in MAS and Khazanah obtaining 10% stake in AirAsia.

[161] The provisions of the CA and the SA are silent on the stated share swap and none of them makes any reference to or regulates the share swap between the parties.

Conclusion

[162] We have considered the written submissions by the Appellants and the Commission as well as the authorities tendered in support of their respective submissions and we are of the unanimous view that based on the terms of the CA there is no infringement of section 4(2) of the Act. For the reasons set out above, the appeals are hereby unanimously allowed. In the circumstances there is no necessity for us to consider the arguments as regards the financial penalties imposed by the Commission on the Appellants. Accordingly the Final Decision of the Commission dated 31.3.2014 is set aside. The financial penalties, if paid, are to be refunded. On the issue of

costs, as was agreed by the counsels of the parties that there is no provision in the Act for order of costs to be made, we therefore make no order as to costs.

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(JUSTICE HASNAH MOHAMMED HASHIM)
President/Chairman

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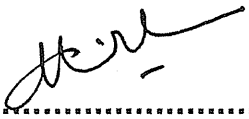
(TAN SRI DATO' SERI HAIDAR MOHAMED NOR)



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(TAN SRI DATO' SRI DR. SULAIMAN MAHBOB)

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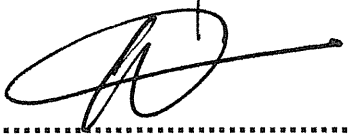
(TAN SRI DATO' DR. LIN SEE YAN)



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(DR. WAN LIZA MD AMIN @ FAHMY)

Dated: 18 February 2016