Competition Commission
SINGAPORE

Section 44 of the Competition Act (Cap. 50B)

Notice of Decision issued by the Commission

Notification by Qantas Airways and Orangestar Investment Holdings of their Co-Operation Agreement

5 March 2007

Case number: CCS 400/003/06

I. INTRODUCTION

1. This notice sets out the Commission's analysis and decision regarding the Co-Operation Agreement between Qantas Airways and its subsidiaries ("Qantas") and Orangestar Investment Holdings and its subsidiaries ("Orangestar"). The Commission's analysis and decision is based on the submissions and information provided by the Parties to the notification for decision, as well as by relevant third parties.

II. THE FACTS AND PARTIES' SUBMISSIONS

The Notification

2. Qantas and Orangestar (collectively referred to as "the Parties") entered into the Co-Operation Agreement (the 'Agreement") on 21 April 2006.

3. On 25 April 2006, the Parties notified the Agreement to the Commission under section 44 of the Competition Act (Cap. 50B) (the "Act"). The purpose of the notification was to seek a decision by the Commission on whether the Agreement infringes section 34 of the Act. The Parties argue that the Agreement is outside the purview of the section 34 prohibition because (i) they form a single economic entity, and (ii) the Agreement comes within the net economic benefit exclusion.

4. A summary of the notification was placed on the Commission's public register on 8 May 2006.

The Parties

i) Qantas

5. Qantas is Australia's largest domestic and international airline. Qantas' main business is the provision of passenger air services. In addition, the Qantas Group operates a diverse portfolio of airline-related businesses, such as engineering and maintenance, ground-handling, catering, freight and sale of worldwide and domestic holidays. The Qantas flying businesses are grouped under two major brands, namely, Qantas and Jetstar. Jetstar Airways Pty Ltd ("Jetstar Airways"), an Australian low-cost carrier, is a wholly-owned subsidiary of Qantas.

ii) Orangestar

6. Orangestar is the holding company for two value-based intra-Asia carriers – Jetstar Asia Airways Pty Ltd ("Jetstar Asia") and Valuair Ltd ("Valuair"), both of which are based in Singapore. Orangestar owns and operates both Jetstar Asia and Valuair. Its main business is the provision of passenger air services.

7. Jetstar Asia was incorporated in Singapore on 25 March 2004, with 49% of its shareholdings held by Jetstar Asia Holdings Pty Ltd ("JAH"), a wholly-owned subsidiary of Qantas. The remaining 51% was held by Singaporean interests, including Fullerton Management Pte Ltd ("Fullerton"), a wholly-owned subsidiary of Temasek Holdings Pte Ltd ("Temasek").

8. On 22 July 2005, Jetstar Asia was merged with Valuair, with both companies becoming wholly-owned subsidiaries of Orangestar. Qantas owned 44.5% (through JAH) of Orangestar's shareholdings, while Fullerton owned 30.9%. The remaining shares were owned by other smaller shareholders. After the subsequent equity call, Qantas' and Fullerton's shareholding are both still below 50%. The remaining equity is owned by Singaporean entities.

9. According to the Parties, Orangestar's present shareholding structure is designed to fulfil the requirement that Orangestar's subsidiaries (Jetstar Asia and Valuair) be substantially owned (more than 50 per cent) and effectively controlled (the majority of directors) by Singapore nationals. This requirement must be fulfilled for the two airlines to be designated as Singapore carriers and benefit from the air traffic rights granted under Singapore's Air Services Agreements with foreign countries.

Overview of the Agreement

10. According to the Parties, the Agreement reflects the close association and common interest between Qantas and Orangestar, and is intended to describe an arrangement which allows Qantas to effectively deal with Orangestar as if it were one of the Qantas Group's flying businesses. The Agreement, which is of indefinite duration (subject to certain rights of termination), provides for the co-ordination of the Parties' flying operations and activities in any way, including and without limitation, in the following areas:

   i) Network and scheduling decisions, including routing, frequencies, aircraft types, product specifications, aircraft configurations, connection requirements and range of times for any services;

   ii) Sales and marketing initiatives, including the offering of customer rebates, incentives and discounts;

   iii) Holiday products and joint promotions;

   iv) Pricing and inventory decisions, including agreeing fares and new fare products;

   v) Product distribution channels, including the offering of rebates, incentives and discounts;

   vi) Frequent flyer or other loyalty programmes;

vii) In-flight products or services;

viii) Information technology;

ix) Purchasing, including back-office functions and fleet acquisitions;

x) Associated service activities;

xi) Sharing of experience and learning, including the secondment of personnel.

11. In summary, the Parties submit that the Agreement involves co-operation between them in the markets for the provision of:
    i) Air passenger transport;
    ii) Air freight transport; and
    iii) Sale of air travel services

12. The Parties submit that close co-operation amongst Qantas' flying businesses is necessary if Qantas wishes to respond competitively to the challenges of the global aviation industry. The commencement of international long-haul operations in late-2006 by Jetstar Airways makes it necessary for Qantas to co-ordinate its flying businesses, including Jetstar Asia and Valuair, in order to deliver benefits to shareholders and consumers.

13. The Agreement is conditional upon authorization from the Australian Competition and Consumer Commission ("ACCC") or the Australian Competition Tribunal ("ACT"), and upon a determination by the Competition Commission of Singapore (CCS) that the Agreement does not infringe the Act.

14. On 13 September 2006, the ACCC unconditionally authorized the Agreement for a period of five years. The ACCC's authorization is based on its assessment that the Agreement is likely to result in a benefit to the Australian public, and that this benefit would outweigh the detriment to the public constituted by any lessening of competition that is likely to result from the Agreement in markets in Australia.

Why the Agreement may Restrict Competition

15. The Parties submit that through the co-ordination of all elements of their airline businesses under the Agreement, they will likely engage in the following prohibited conduct: i) fixing prices, ii) allocating markets, iii) joint purchasing, iv) joint selling and v) exchanging price and non-price information.

III. LEGISLATIVE FRAMEWORK

The Section 34 Prohibition

16. Section 34 prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

17. Section 34(2) of the Act states that

> "... agreements ... may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
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> (c) share markets or sources of supply ... "

18. An assessment on whether an agreement infringes the section 34 prohibition requires an analysis of the degree to which the parties to the agreement are actual or potential competitors, and the effect of the agreement on competition. An agreement will fall outside the scope of the section 34 prohibition if it does not have an *appreciable* adverse impact on competition.

Application of Section 34 Prohibition to Undertakings

19. The section 34 prohibition applies to "agreements between undertakings". Section 2 of the Act defines "undertaking" to mean "any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services."

20. The CCS Guideline on the Section 34 Prohibition 2005 (the "Guideline") states that an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary "has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence".

21. The Guideline highlights some factors that may be considered in assessing the single economic entity claim. These include the parent's shareholding in the subsidiary, whether the parent has control of the board of directors of the subsidiary, and whether the subsidiary complies with the directions of the parent in key areas like sales and marketing activities and investment matters. Ultimately, whether the entities form a single economic entity will depend on the facts of each case.

The Section 35 Exclusion

22. Section 35 of the Act read with paragraph 9 of the Third Schedule to the Act, provides that the section 34 prohibition shall not apply to:

> any agreement which contributes to –
> (a) improving production or distribution; or
> (b) promoting technical or economic progress,
> but which does not –
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

IV. THE COMMISSION'S ASSESSMENT

23. In assessing the Agreement, the Commission will first consider whether the Parties form a single economic entity. In the event that the Commission is of the view that the Parties do not form a single economic entity, it will then examine if the Agreement prevents, restricts or distorts competition in the relevant markets in Singapore. If the Agreement falls within the scope of the section 34 prohibition, the Commission will make a finding of infringement unless the Parties are able to demonstrate that the Agreement yields net economic benefit as described in paragraph 9 of the Third Schedule, and hence can be excluded under section 35 of the Act.

A. ASSESSMENT OF THE SINGLE ECONOMIC ENTITY ARGUMENT

Background to the Relationship between Qantas and Orangestar

24. Before analysing the single economic entity argument, it is necessary to first set out, by way of background, the relationship between Qantas and Orangestar. The relationship is largely captured in an agreement between Orangestar's shareholders ("the Orangestar Shareholders' Agreement"), dated 22 July 2005. The Orangestar Shareholders' Agreement states that four out of Orangestar's nine board members are to be appointed by Qantas, while three are to be appointed by Fullerton. The Orangestar Shareholders' Agreement requires that board resolutions for material decisions, such as major schedule variations, have to be passed by a stipulated percentage of the board members. In view of the fact that Qantas and Fullerton appoint four and three of the directors respectively, the stipulated percentage effectively means that both Qantas and Fullerton have blocking rights over material board decisions.

Parties' Submissions

25. The Parties rely on two grounds for supporting the single economic entity argument.

<u>*Unity of Interest*</u>

26. The Parties submit that they form a single economic entity because of "unity of interest". They rely on a line of authorities from the United States of America ("US"), which state that entities having unity of interest constitute a single enterprise that is incapable of conspiring in contravention of §1 of the Sherman Act[1]. The Parties contend that the rationale is that agreements between entities having unity of interest do not constitute a sudden joining of previously disparate interests, and so should not be prohibited by the competition laws.

[1] § 1 of the Sherman Act embodies the US prohibition against restrictive agreements.

Decisive Influence

27. The Parties also claim that Qantas forms a single economic entity with Orangestar by virtue of its "decisive influence" over Orangestar's activities. Specifically, the Parties contend that Qantas exerts decisive influence via its blocking rights over Orangestar's material board decisions. In the Agreement, the parties state that they want the option of co-operation in a way that would be possible if Orangestar was a related body corporate of the Qantas group under the Australian Trade Practices Act.

28. The parties have cited case law from the European Community (EC) and US in support of their case. To provide context, the case law review in this notice of decision includes other relevant case law beyond that referred to by the Parties. The Commission notes that competition law is a new area of law in Singapore. While some of the cases cited in this decision may be persuasive or useful in assisting the Commission in reaching its decision on the single economic entity argument, they are not binding. The value of any foreign competition case law will depend very much on the overall context and the extent to which the facts of these cases are applicable to the local context and the facts of the present application by the Parties.

Commission's Assessment

i) Applicability of the single economic entity doctrine

29. There are several contexts in which the single economic entity doctrine has been applied in the EC and the US. The following are examples:

 i) The single economic entity doctrine has been used to remove agreements from the purview of the prohibition against anti-competitive agreements. For example:
 - A parent and wholly-owned subsidiary may be deemed to form a single economic entity for the purpose of taking agreements between them out of the scope of the prohibition against anti-competitive agreements;[2]
 - Similarly, a principal and its agent may be deemed to form a single economic entity for the purpose of taking agreements between them out of the scope of the prohibition against anti-competitive agreements.[3]

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[2] *Viho Europe BV v. Commission* [1997] All ER (EC) 163, decided by the European Court of Justice on 24 October 1996.

[3] *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, decided by the European Court of Justice on 24 October 1995.

ii) The single economic entity doctrine has also been used to render one undertaking liable for another undertaking's anti-competitive actions. For example:

- A parent and its subsidiary may be deemed to form a single economic entity for the purpose of holding the parent liable for the subsidiary's Article 85 [4] (now Article 81) infringement[5];
- A parent company and its subsidiary may be deemed to form a single economic entity for the purpose of supporting a finding that the parent abused its dominance through the actions of its subsidiary;[6]
- The member companies of a trade association may be held to form a single economic entity with the association, such that each is liable for the association's price-fixing activities.[7]

iii) The single economic entity doctrine has also been invoked in the merger clearance context. For example, the members of the corporate group to which the merging parties belonged may be held to form a single economic entity, such that the activities of these members were taken into account when evaluating the potential impact of the merger on competition.[8]

30. The Commission reiterates what has been stated in its guidelines: that the determination of whether two entities form a single economic entity turns very much on the facts of the case. For example, in *Viho Europe BV v. Commission*[9], a case cited by the Parties, agreements between a parent and its wholly-owned subsidiaries were held to fall outside the prohibition against anti-competitive agreements because the sales and marketing activities of the subsidiaries were controlled by an area team appointed by the parent. In *J R Geigy v Commission*[10], the parent was held liable for its subsidiary's participation in a price-fixing concerted practice because the subsidiary was found to follow the parent's instructions as to what price to charge.

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[4] This is the provision within the European Community Treaty that prohibits anti-competitive agreements.
[5] *J R Geigy v Commission* [1972] ECR 787, decided by the European Court of Justice on 14 July 1972.
[6] *Istituto Chemioterapico SpA & Commercial Solvents Corp v. Commission* [1974] ECR 223, decided by the European Court of Justice on 6 March 1974.
[7] *Metsa-Serla Oyj & Ors v. Commission* [2000] ECR I-10065, decided by the European Court of Justice on 16 November 2000.
[8] *Grupo Vilar Mir/EnBW* OJ L 48, 18.2.2004, p 86, decided by the European Commission on 26 September 2001.
[9] Cited at footnote 2.
[10] Cited at footnote 5.

31. Two entities may form a single economic entity in one context, but may not necessarily form a single economic entity in another context. For example, the nature of the corporate relationship between two companies, when viewed against some facts of the case, may support the conclusion that both companies should be deemed as a single economic entity for the purpose of excluding agreements between them from the section 34 prohibition. However, a slightly different set of factual indicators may be required for those companies to be considered a single economic entity for the purpose of holding one of the companies liable for the other company's competition infringements. For example, in the latter scenario, a pertinent consideration would be whether the subsidiary had engaged in the competition infringements on the instructions of the parent.

32. In analysing the Parties' single economic entity arguments, the Commission will thus pay particular attention to whether the facts of the cases cited by the Parties support their arguments.

ii) Unity of Interest

33. The first argument which the Parties rely on to support their single economic entity claim rests on the "unity of interest" test, which has been applied by a line of US authorities beginning with the US Supreme Court case of *Copperweld Corp et. al. v. Independence Tube Corp.*[11] In that case, the US Supreme Court ruled that a parent was incapable of conspiring with its wholly-owned subsidiary in contravention of § 1 of the Sherman Act. The Court felt that both companies had complete unity of interest, with common objectives, so that any agreement between them did not constitute a sudden joining of previously-disparate economic resources.

Extending the Unity of Interest Argument Beyond the Majority Shareholdings Context

34. While the Supreme Court in *Copperweld* was careful to restrict its "unity of interest" analysis to the relationship between parent and wholly-owned subsidiary[12], US courts have extended the doctrine to instances where the parent company holds a majority shareholding falling short of 100%. For example, the US District Court (Georgia) case of *Novatel Communications*

[11] 467 US 752 (1984), decided by the US Supreme Court on 19 June 1984.
[12] The Supreme Court remarked : "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own."

v. Cellular Telephone Supply Inc,[13] ruled that a 51% stake was sufficient. There are also US authorities suggesting that minority shareholdings may not be sufficient to establish unity of interest. In *Sonitrol of Fresno, Inc. v. A T & T*,[14] AT&T held 32.6% in a company called CBI, and 23.9% in another company called SNET. It was found that CBI and SNET had practically adhered to all of AT&T policies and were closely intertwined with AT&T through various agreements, contracts and operating directives. Furthermore, AT&T's shareholding was sizeable enough to make it extremely difficult for dissident stockholders to join together to elect a board of directors that would have acted independently of AT&T's wishes (compare this with the present application where Fullerton shares significant blocking powers with Qantas). Despite these facts, the US District Court ruled that the companies concerned did not share the unity of purpose or common design required by *Copperweld*, such that agreements between them still fell within the scope of the § 1 Sherman Act prohibition. The US District Court endorsed the lower court's reasoning that

> ... the directors [of CBI and SNET] ... had the legal duty - a breach of which could lead to equitable or legal relief - to consider foremost the goals and interests of the corporation on whose board each sat and of all the stockholders of that corporation.

The US District Court then concluded:

> ... while AT&T may have undoubtedly exercised de facto control over CBI and SNET, legal control of these corporations rested firmly in the hands of their board of directors. As long as these boards had the legal ability to determine the course of business activity for their corporation independently of AT&T, they were capable of conspiring with AT&T in violation of § 1 of the Sherman Act.

35. The Parties contend that unity of interest can still be established, even with minority shareholdings. Specifically, the Parties rely on the *US Supreme Court case of US v Citizens & Southern National Bank*.[15] In that case, a bank holding company, faced with various state restrictions against setting up bank branches in suburban areas, circumvented these restrictions by forming suburban banks in which it held only 5 percent of the stock (the maximum allowed by the state law). Ownership of much of the remaining stock was held by parties friendly to the bank holding company, with the bank holding company maintaining close oversight over the operation and

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[13] 1986-2 Trade Cas. (CCH) P67, 412, decided by the US District Court for the Northern District of Georgia on 23 December 1986.

[14] 1986-1 Trade Cas. (CCH) P67,080, decided by the US District Court for the District of Columbia on 30 April 1986.

[15] (1975) 422 US 86, decided by the US Supeme Court on 17 June 1975.

governance of the suburban banks. The suburban banks were also allowed to use the bank holding company's logogram and banking services. The US Supreme Court dismissed an action commenced by the US Department of Justice, which claimed that the relations between the bank holding company and the suburban banks violated § 1 of the Sherman Act.

36. The Commission is of the view that *Citizens & Southern National Bank* is not applicable here. Firstly, the facts are different. When the bank holding company established the suburban banks, the common expectation shared by all, including the regulators concerned, was that these banks would be acquired and converted into branches as soon as the law would permit. As such, much of the remaining shares in them were held by 'friendly parties' from the outset. In the present application, majority shareholdings within Orangestar are owned by Singaporean interests and not Qantas, and no indication has been offered that this status quo will change.

37. More importantly, the decision in *Citizens & Southern National Bank* was clearly not grounded on the single economic entity doctrine. While there is at least one US case which regards *Citizens & Southern National Bank* as involving "a single enterprise" [16], a plain reading of *Citizens & Southern National Bank* shows that the US Supreme Court actually based its reasoning on whether the relationship between the bank holding company and the suburban banks constituted an unreasonable restraint of trade[17], concluding that it was not[18]. This conclusion is very different from saying the parties formed a single economic entity such that any agreement between them fell outside the ambit of § 1 of the Sherman Act altogether. Indeed, if the single economic entity doctrine had been the basis of the US Supreme Court's decision in *Citizens & Southern National Bank*, which involved a 5% ownership stake, there would have been no reason for the US Supreme Court, in issuing its *Copperweld* decision 9 years later, to take such great pains to restrict its single economic entity reasoning only to cases involving wholly-owned subsidiaries. The dissenting judgment in the Supreme Court went so far as to quote *Citizens & Southern National Bank* as an authority supporting the proposition that "even commonly owned firms must compete against each other, if they hold themselves out as distinct entities" [19]. The Applicant's reliance on *Citizens & Southern National Bank* is therefore unfounded.

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[16] See the decision of the US Court of Appeals in *City of Mt Pleasant v Associated Electricity Cooperative Inc* 838 F.2d 268, at p 275.
[17] At p 116.
[18] At p 118.
[19] At footnote 7 to the dissenting judgment.

38. The Parties also rely on a decision by the US Court of Appeals for the 8th Circuit, *City of Mt Pleasant v Associated Electricity Cooperative Inc.*[20] This was another case where unity of interest was found to exist. The defendants were members of an electricity cooperative called Associated Electricity Cooperative ("Associated"). Associated owned all but a fraction of the co-operatives' electrical generating capacity and all of the larger power lines in the co-operatives' transmission grid. It also controlled all the production and distribution of electricity to six generation-and-transmission ("G&T") cooperatives, which were in turn responsible for transporting and selling on a wholesale basis, all the electricity to local retail-distribution cooperatives. While each co-operative was autonomous in that it set its own rates for power and managed its own profits and losses, each was linked to the organisation by long-term all-requirements supply contracts. Ownership ran upwards, *i.e.* each of the local distribution cooperatives owned a portion of the G&T cooperative that supplied it electricity, while the G&T cooperative shared ownership of Associated. The judgment states that although ownership ran upwards, "management of the cooperative's activities flows down the organizational chart" [21]. Specifically, the generation-and-transmission cooperatives were governed by Associated, whose board comprised representatives elected by them. (The organisational structure thus appears different from a parent-subsidiary relationship, where both ownership and control are held by the parent). The US Court of Appeals relied on *Copperweld* to rule that Associated's members could not conspire with one another because there was unity of interest between them. The court observed that while there had been occasions when representatives of Associated's members, sitting on Associated's board, had disputes about Associated's pricing policies, this was insufficient to refute the single economic entity conclusion:

> … Even though the cooperatives may quarrel among themselves on how to divide the spoils of their economic power, it cannot reasonably be said that they are independent sources of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent. The disagreements we have described are more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and independent.

[20] 838 F.2d 268, decided by the US Court of Appeals for the 8th Circuit on 29 January 1988.
[21] At p 271

39. The Parties rely on the quoted passage to argue that unity of interest can exist even if there are areas where the interests of Qantas and Orangestar diverge.

40. The Commission is of the view that *City of Mt Pleasant* is not applicable to the present application. That case centred on an organisation that was governed by a central association (*i.e.* Associated) that owned all but a fraction of the organisation's electrical-generating capacity, and which controlled all of the production and distribution of electricity for the organisation. The members of the organisation were commonly governed by the board of Associated. In the words of the US Court of Appeals, "management of the cooperative's activities flowed down the organization chart". It was in this context that the Court of Appeals remarked that disputes between the different representatives on Associated's board over pricing policies were akin to "disagreements … among the board members of a single enterprise". This is very different from the present situation, where Qantas and Orangestar are governed by their own boards. Both organisations are not centrally managed by the same body.

41. Furthermore, it was critical to the *City of Mt Pleasant* ruling that Associated's members were neither actual nor potential competitors and there was no pursuit of interests antithetical to that of the cooperative as a whole.[22] The same cannot be said of the instant case. The Commission notes that the ACCC had, in authorizing the Agreement, remarked that "Qantas and Orangestar are inter-related entities and as such, are not likely to compete to any great extent"[23]. However, the Parties go further than this and assert that there is "no prospect of competition" between them[24]. The Commission cannot agree with the Parties' claim. The Commission is of the view that it can be inferred from the rights conferred upon Qantas by clause 2.3 of the Orangestar Shareholders' Agreement that the interests of Qantas and Orangestar may diverge and that the potential for competition between Qantas and Orangestar exists.

42. The Parties also cite the cases of *Jack Russell Terrier Network of Northern California & ors v. American Kennel Club & Ors* [25] (involving the relationship between a dog breeders' club and its affiliates) and *Williams v. I.B. Fischer Nevada*[26] (involving the relationship between a franchisor and its franchisees), where the relationships concerned were held to give rise to

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[22] At p 276.
[23] At ¶6.102 of the ACCC's determination.
[24] Form 1 Part 2, at ¶5.1.2(r).
[25] 407 F.32 1027 (2005), decided by the US Court of Appeals for the 9th Circuit on 17 May 2005.
[26] 999 F.2d 445, decided by the US Court of Appeals for the 9th Circuit on 21 July 1993.

unity of interest, such that the parties concerned were incapable of contravening § 1 of the Sherman Act. The Commission finds that those cases are not applicable to the present application. In the *Jack Russell* case, the Jack Russell Terrier Network of Northern California shared unity of interest with its affiliates, the latter being considered extensions of, and controlled by, the national club, thereby sharing a unity of interest in protecting their economic interest in the current and future value of the Jack Russell Terrier breed. Similarly the *Williams* case involved a franchise, where parties would inevitably have the common goal of promoting the franchise. In both instances, there was clearly no prospect of competition. No such similar relationship exists based on the facts of the instant case.

43. The present application does not require the Commission to decide whether shareholdings need to cross any particular threshold in order to establish the requisite unity of interest. The Commission also does not propose to rule on whether the extensions of the unity of interest reasoning to other relationships, such as those between cooperative members, between club and affiliate, or between franchisor and franchisee, are applicable to the Singapore context. The Commission is satisfied that based on the facts of this application, the cases cited by the Parties in the analysis above do not support their unity of interest argument.

Financial and Operational Support

44. To support their unity of interest argument, the Parties have emphasised the financial and operational support which they say has been extended by Qantas to Orangestar. Some of the claims which the Parties raise as evidence of operational support include the following:

i) After incorporation and prior to its merger with Valuair, Jetstar Asia was largely managed by Qantas secondees. Furthermore, most of the resources (in terms of staff, operational principles and intellectual property) used to set up Jetstar Asia was provided by Qantas.

ii) Qantas has assisted Jetstar Asia in various transactions, such as the execution of fuel hedges and the negotiation of insurance premiums.

iii) Jetstar Asia operated under the Qantas' 'Jetstar' brand so that, from a consumer perspective, Jetstar Asia has always been associated with Qantas from the beginning.

iv) Orangestar's current CEO, Ms Chong Phit Lian, will work closely with Jetstar's overall CEO in determining the strategic direction of Jetstar Asia and Valuair.

45. As evidence of Qantas' financial support to Orangestar, the Parties have cited Qantas' equity funding to Jetstar Asia and Orangestar.

46. Yet, the the Parties have forwarded to the Commission, a letter dated 5 July 2006, where the Parties state:

> ***Without the ability to discuss and agree prices and inventory*** in this way, the Applicants could not co-ordinate their networks nor set capacity, frequency and scheduling because ***the Applicants would have the incentive and ability to act to further their own interests at the expense of the joint operations***. This means that the Applicant would be unable to optimise the utilisation of aircraft across their combines networks" [Emphasis added].

47. If the inability to secure approval for the ability to coordinate prices and output means that the Parties are going to act in their own interests and at the expense of joint operations, their interests would appear not to be as closely aligned as they claim.

48. Qantas says that without the ability for the special co-operative relationship to continue in the manner set out in the Agreement, Qantas would have no commercial or economic incentive to continue to provide financial support and operational assistance to Orangestar. The Commission concludes from this that Qantas' financial stake as one of the major shareholders, and its status as the only industrial partner of Orangestar, are insufficient to give rise to the close unity of interest claimed by Qantas to exist.

49. The financial and operational support extended by Qantas to Orangestar appears to be conditional upon the Parties being allowed to coordinate prices and output. Qantas' argument is thus circular: the ability to coordinate prices and output should be sanctioned because there is unity of interest, by way of financial and operational support, between the Parties. However, the financial and operational support will cease if the Parties are unable to coordinate prices and output (*i.e.* without this ability, Qantas will not continue providing its support). This argument constitutes an attempt by the Parties to lift themselves up by the bootstraps, and cannot be a valid ground for sanctioning the Agreement. Otherwise, parties may enter into other forms of anti-competitive agreements and then claim that their activities should be excluded under the single economic entity doctrine on the ground that the agreements have created unity of interest amongst

themselves.

50. In this respect, the Commission notes that in *Citizens & Southern National Bank*, a case cited by the Parties themselves, the US Supreme Court sounded the following caution, which is highly apposite[27]:

> ... independently owned firms cannot escape competing merely by pretending to common ownership or control, for the pretense would simply perfect the cartel. We may also assume, though the question is a new one, that a business entity generally ***cannot justify restraining trade between itself and an independently owned entity merely on the ground that it helped launch that entity, by providing expert advice or seed capital.*** Otherwise the technique of sponsorship followed by restraint might displace internal growth as the normal and legitimate technique of business expansion, with unknowable consequences. [Emphasis added]

51. The Commission thus considers that the unity of interest which the Parties claim to exist between Qantas and Orangestar has not been substantiated.

iii) Decisive Influence

52. The other argument which the Parties rely on to support their single economic entity claim rests on Qantas' ability to control Orangestar, through its blocking rights over material Orangestar board decisions. The Parties claim that this gives Qantas decisive influence over Orangestar.

53. In considering the Parties' submissions, the Commission notes that authorities in the EC have, in focusing on the issue of control in the context of the single economic entity doctrine, remarked that a single economic entity will exist if, on the facts of the case, one undertaking does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by another, such that the first mentioned undertaking does not enjoy any real autonomy in determining its course of action on the market.[28]

54. In assessing the Parties' decisive influence claim, the Commission will seek to establish if such control exists.

Impact of Shareholdings on the Decisive Influence Analysis

55. In *Viho*, the single economic entity doctrine was applied to a restrictive agreement between a parent and its wholly-owned subsidiary. However,

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[27] At p 117.

[28] *J R Geigy v Commission*, at ¶44-45; *Viho Europe BV v. Commission*, at ¶16.

the doctrine has also been applied in cases involving majority shareholdings falling short of 100%. For example, in the *Commercial Solvents* case[29], the parent company owned 51% of its subsidiary, with a 50% representation on its decision-making board and committee, and held the right to appoint the subsidiary's Chairman, who held the casting vote. The European Court of Justice ruled that both companies were a single economic entity, on account of the parent's power of control over the subsidiary[30]. The court also found that the subsidiary had acted on the instructions of its parent. In the present application, Qantas's shareholding in Orangestar falls short of a majority. In addition, blocking rights over Orangestar's material management decisions do not belong to Qantas alone. The three Fullerton nominees on Orangestar's nine-member board are also in a position to block any resolution required for material decisions.

56. The Parties assert that "the ability of one undertaking to exercise a decisive influence over the policy of another is indicative of the existence of a single economic entity, regardless of the level of shareholding that undertaking may have"[31]. The Parties cite the case of *Minoan Lines SA v. Commission*[32] to argue that a single economic entity can exist even where no shareholdings are involved. The Commission is of the view that *Minoan Lines* is not applicable, as the single economic entity relationship in that case was based on a relationship of agency[33]. In line with rulings by the EC courts that a principal and its agent can form a single economic entity if the agents "do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking"[34], the European Court of First Instance found that the agent in that case did business in the market only in the name of, and on account of, its principal and took no financial risks. It is clear, as confirmed by Qantas, that Orangestar is not the agent of Qantas. A focus on risk is also different from the focus on control in the context of a decisive influence claim.

57. Quite apart from the issue of shareholdings, the Commission also notes that the parties themselves have said that:

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[29] Cited at footnote 6.
[30] At ¶41.
[31] Further information submitted by Parties dated 21 August 2006, at ¶27(d).
[32] [2003] ECR II-5515, decided by the European Court of First Instance on 11 December 2003.
[33] See the court's reasoning at ¶129.
[34] *Bundeskartellamt v Volkswagen AG* [1995] ECR I-347, at ¶19; *Cooperatieve vereniging 'Suiker Unie' UA & Ors v Commission of the European Communities* [1976] 1 CMLR 295, at ¶¶539-541.

> "the Orangestar Board is not accustomed to nor is it under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of Qantas."

In the Commission's view, this strongly indicates that the control required to establish a single economic entity relationship is absent.

Whether Joint Control Suffices

58. The Parties argue that an undertaking jointly controlled by multiple firms can form a single economic entity with only one of those firms. In support, the Parties cite the EC's merger decision in *Grupo Vilar Mir/EnBW.*[35] In that case, EnBW was an energy company seeking to acquire joint control of a Spanish electricity firm. The EC felt that the acquisition raised competition concerns, because EnBW was jointly controlled by another energy company, EDF, which was the largest exporter of electricity to Spain. In particular, EDF owned 34.5% of EnBW, while OEW (an association of German public districts) held another 34.5%[36]. The EC remarked that EnBW and EDF formed a single economic entity, and taking account of their links, EnBW's acquisition of joint control would create a dominant position in the Spanish electricity market. Commitments were thus required before the merger was sanctioned. The Parties argue that, just as EDF was able to form a single economic entity with EnBW despite sharing joint control of EnBW with another entity, Qantas can form a single economic entity with Orangestar despite sharing joint control of Orangestar with Fullerton.

59. However, the EC in *Grupo Villar* was conducting an assessment of the potential impact which the acquisition might have on competition in the Spanish electricity market, *e.g.* whether it would create or strengthen a joint dominant position. As the exercise involved an assessment of the future effects of the merger, the EC took account of the activities of all the members of the group to which EnBW belonged. It was against this backdrop that the EC viewed EnBW and EDF as a single economic entity.

60. The flaw in the Parties' arguments is evident when we consider those instances where competition authorities evaluate restrictive agreements between newly-formed joint ventures ("JVs") and their shareholders. For example, in *Thomson/Deutsche Aerospace AG*,[37] the EC was faced with a

[35] Cited at footnote 8.

[36] The facts relating to the shareholding structure within EnBW can be found in an earlier decision of *EDF/EnBW* COMP/M.1853.

[37] Case No IV/M.527, 02/12/1995, decided by the European Commission on 2 December 1994.

proposed joint venture that resulted in the creation of two JVs. Each JV would be jointly-owned by two shareholders in the proportion 50-50. The EC approved the creation of the two JVs and in doing so, acknowledged that each JV would form a "single entity" with each of its two shareholders[38]. The EC went on to consider certain supply agreements between each of the JVs with their shareholders. Specifically, the EC refused to sanction some of these supply agreements,[39] on the ground that they could not be considered as necessary to the creation of the JVs.[40] Clearly, this ruling meant that the supply agreements between each of the JVs and their shareholders were *not* excluded under the single economic entity doctrine. If they were excluded, the entire exercise by the EC of evaluating if these agreements should be sanctioned would be otiose. The *Thomson* case thus shows that there is a difference between viewing a JV and its shareholder as a single economic entity for the purpose of analysing the competitive effects of a merger/acquisition, and viewing them as a single economic entity for the purpose of excluding agreements between them from the scope of the section 34 prohibition.

61. A case that is more pertinent to the present application is *Gosme/Martell-DMP*,[41] which is another decision of the EC. That case involved a joint venture company called DMP, which was equally-owned by 2 other companies, Martell and Piper-Heidsieck. It was argued that Martell formed a single economic entity with DMP, such that agreements between the two companies did not contravene the prohibition against anti-competitive agreements. Despite Martell's 50% stake, the EC found the argument to be unfounded:

> 30. DMP and Martell are independent undertakings within the meaning of Article 85(1). At the relevant time, Martell was ***not in a position to control the commercial activity*** of DMP because:
> – the parent companies each held 50% of the capital of DMP and the voting rights,
> – half the supervisory board members represented Martell shareholders and half Piper-Heidsieck shareholders,
> – DMP also distributed brands not belonging to its parent companies,
> – Martell and Piper-Heidsieck products were invoiced to wholesalers on the same document,
> – DMP had its own sales force and it alone concluded the conditions of sale with the buying syndicates in France.

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[38] At ¶¶8 & 9.
[39] At ¶33.
[40] In clearing a merger, the regulator will also approve any accompanying anti-competitive agreements insofar as they are "directly related and necessary to the implementation of" the merger.
[41] OJ L 185, 11.7.1991, p 23, decided by the European Commission on 15 May 1991.

> Moreover, neither DMP nor Martell have contested the view that they constitute independent companies. In fact, quite the contrary as they wrote to the Commission to underline this independence. [Emphasis added]

62. Like Martell, Qantas' stakeholding does not exceed the 50% mark. While Martell controlled half the board of DMP, Qantas controls even less than that. In the same way that Martell had to share veto power with Piper-Heidsieck, Qantas has to share blocking rights over material board decisions with Fullerton.

63. The Commission is aware of the differences between the facts of the present application and the facts in *Gosme/Martell-DMP*. For example, both of DMP's stakeholders, as well as DMP itself, were in the same business. In the present application, only Qantas and Orangestar are in the airline business, while Fullerton is not. Qantas also provides operational expertise to Orangestar. Furthermore, Martell and DMP had written to the EC to underline their independence. Nevertheless, these differences are not material, as it is apparent from the list of factors cited by the EC that the crux of the decision lay in the fact that Martell did not have the requisite level of control over DMP to form a single economic entity with it. That control is similarly missing in the Qantas-Orangestar relationship.

64. The Parties further contend that joint control means that Orangestar can form a single economic entity with Qantas, and another single economic entity with Fullerton (*i.e.* two separate single economic entities). In support of its argument, the Parties rely on the *Metsa-Serla* case.[42] In that case, four member companies of a trade association were held jointly and severally liable for a financial penalty imposed on the association, with regard to the association's price-fixing activities with other entities. Each member was held to form an economic unit with the association. However, the Commission notes that *Metsa-Serla* involved separate agency relationships, *i.e.* the association had been an agent for each member company, acting as an auxiliary organ selling each member company's product on behalf, and under the instructions, of that company.[43] As such, the relationship between the association and each member company gave rise to a distinct single economic entity. That factual matrix is very different from the present case, where Orangestar does not purport to act as agent for either Qantas or Fullerton.

65. The Parties also rely on the Commission's Form 1 pro forma, used for the

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[42] Cited at footnote 7.
[43] At ¶55.

filing of notifications to obtain guidance or decisions from the Commission. Paragraph 1.8 of the Form 1 pro-forma asks an applicant to identify the groups to which each party to the notified agreement/conduct belongs. Paragraph 1.9 states that an undertaking jointly controlled by several other undertakings should be treated as being part of the group of each of these other undertakings. The Parties contend that paragraph 1.9 "clearly indicates that it is possible for an undertaking which is subjected to the joint control of two other undertakings to be part of two Single Economic Entities". The Commission is of the view that this argument is unfounded. In making a decision or giving guidance on notified agreements or conduct, the Commission needs to be apprised of the extent to which the notifying party is linked to other entities by common shareholders, in order to gain a fuller picture of the potential competitive effects of the agreement or conduct being notified. There is nothing in the Form 1 pro forma which suggests that corporations linked by common shareholders can enter into anti-competitive agreements, regardless of the level of control involved, under the guise of the single economic entity doctrine.

66. The Commission is thus of the view that the level of Qantas' control over Orangestar is insufficient to bring agreements between them under the single economic entity doctrine.

iv) Conclusion on the Single Economic Entity Argument

67. In summary, the Commission is of the view that the Parties do not form a single economic entity. The Commission is of the view that the Agreement is an agreement between undertakings, which means that it would be subject to the section 34 prohibition. The Commission would add that this does not preclude the possibility that there may be other situations where the actions of Qantas vis-à-vis Orangestar may support a finding that they do form a single economic entity in some other context, *e.g.* in relation to a particular conduct or specified agreement. As mentioned above, the determination of whether a single economic entity exists depends on the facts and context of each case.

B. ASSESSMENT OF THE NET ECONOMIC BENEFIT ARGUMENT

68. In assessing the competitive impact of the Agreement, the Commission will, for each of the three relevant markets mentioned in paragraph 11, first assess whether the Agreement falls within the scope of the section 34 prohibition. If it does, the Commission will next assess the Parties' submission on net economic benefit ("NEB") to ascertain whether the Agreement can be excluded under section 35 of the Act.

Part A – Air Passenger Transport

i) Parties' Submission

Market Definition

69. The Parties propose to define possible relevant markets affected by the Agreement as:

i) The leisure (or non-time sensitive) air passenger transport markets for travel between:
- Singapore and Australia, including all potential indirect routes; and
- Singapore and Europe, including all potential indirect routes.

ii) The business (or time-sensitive) air passenger transport markets for travel between:
- Singapore and each port in Australia to which the Parties provide services, including Sydney, Melbourne, Brisbane, Perth, Adelaide and Darwin; and
- Singapore and each port in Europe to which the Parties provide services, currently London and Frankfurt.

iii) The air passenger transport market for travel between Singapore and other destinations within Asia.

70. The Parties submit that, regardless of how the relevant market for air passenger transport is defined, the Agreement will not have an adverse effect on competition in any market in Singapore.

Appreciable Prevention, Restriction or Distortion of Competition

71. The Parties submit that through the co-ordination under the Agreement, they will likely engage in the following prohibited conduct: i) fixing prices, ii) allocating markets, iii) joint purchasing, iv) joint selling, and v) exchanging price and non-price information.

72. However, the Parties claim that the Agreement does not have an appreciable anti-competitive object or effect in Singapore since the Parties' networks are of a complementary nature (currently, the Parties are actual competitors on only one route: the Singapore-Denpasar route[44]). Nor are they potential competitors, given the close economic relationship between Qantas and Orangestar.

73. The Parties further argue that the presence of competitively-priced airlines like Orangestar would increase the pressure on other airlines serving Singapore to be competitive. In particular, operating together in a market where there is a dominant carrier (i.e. Singapore Airlines in Singapore) would permit a more viable competitive response, for example, the creation of a mini-hub.

Net Economic Benefit

(a) Contributes to improving production or distribution, or promoting technical or economic progress

74. The Parties claim that numerous benefits will flow through co-operation between them. These include:

New routes and greater frequencies

75. The ability to blend the air rights and fleet options of Qantas, Jetstar and Orangestar could result in the creation of new routes, including multi-destination itineraries that neither party could offer on its own, and the maintenance or increase of frequencies on routes with lower demand. For example, the Parties have identified potential routes that they can either operate in Asia by utilising existing Australian air traffic rights or increase

[44] The Parties have informed the Commission that Australian Airlines has ceased operating passenger flights under the 'Australian Airlines' brand from 1 July 2006. However, Australian Airlines will continue to operate flights on behalf of Qantas under a wet-lease arrangement. Australian Airlines therefore currently operates the Singapore-Denpasar flights on behalf of Qantas under the 'Qantas' brand. Whether it is Qantas or Australian Airlines that is operating on the route does not change the outcome of the analysis, as Australian Airlines is a wholly-owned subsidiary of Qantas.

the frequency of their existing services. Consumers would enjoy more direct and indirect flights and benefit from better connecting times, more competitive prices and the availability of multi-destination journeys that minimize 'backtracking'[45].

76. The Parties claimed that these could materialize because of the increase in demand for services brought about by co-operation. However, they could not provide more information to the Commission to substantiate their claims, as these benefits will materialise only when demand for the services has become clearer, following the launch of Jetstar's international long-haul flights[46].

Increasing Singapore's competitiveness as a hub

77. The Parties submit that Orangestar's links with Jetstar and Qantas could encourage long-haul leisure travellers from Australia, Europe and all over the world to use Singapore as a low-cost hub in multi-destination itineraries en route to reaching other destinations, providing a new source of international feed through Singapore.

78. The Parties argue that the Agreement could encourage a greater flow of traffic via Singapore, and enable them to build connections from Australia to other countries via Singapore.

Increased job opportunities, tourism and other benefits for Singapore

79. The Parties claim that Orangestar could further stimulate inbound traffic to Singapore through the low fares and expanded network arising from the Agreement. The increase in the number of travellers visiting Singapore could boost tourism and spending, bringing immediate tangible benefits for the hotel, tourism, transportation, retail, medical and other service industries. Indirect benefits, by way of increased employment and revenue by providers of supporting services to the aviation industry in Singapore such as fleet engineering, will also flow from the growth of Orangestar and the increased passenger numbers.

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[45] For example, with co-operation, a Singapore consumer could travel from Singapore to Manila on Jetstar Asia, Manila to Brisbane on Qantas, and Brisbane to Singapore on Qantas.

[46] The Commission notes that Jetstar International services have been launched on the Singapore-Darwin-Cairns route, as well as the Melbourne-Bangkok, Sydney-Phuket and Sydney-Brisbane-Osaka routes, amongst others. No further information has been received from the Parties on how this would impact the notification.

Sharing of expertise

80. The Agreement could provide Orangestar with access to Qantas' experience in running and growing a substantial airline business, and allow it to enjoy association with a strong international brand like Qantas. To this end, Qantas has already provided significant operating and management contributions vital to Orangestar. Future areas in which expertise could be shared include revenue management, treasury services, aircraft procurement and cross-utilization of crew.

Cost savings

81. The Parties submit that the cost savings arising from co-operation can take place at several levels, including economies of scale, reservation systems, training, the sharing of call centres, and cross utilization of air and cabin crew. Coordination will allow the most efficient and lowest cost producer to be matched to the specific cost and features of a route, avoiding unnecessary duplication and costs of overlapping routes.

82. The Parties state that because of the feed that Qantas can bring to Orangestar, savings will be realized as a result of the increase in traffic throughout the network, better planning of schedules, and a higher load factor.

(b) Does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives

83. The Parties submit that the key benefits of the Agreement cannot be achieved via an interline agreement or codeshare arrangement that does not involve price-fixing and capacity co-ordination. Alternative arrangements cannot achieve a level of benefits close to that of the Agreement because co-ordination in price and capacity is critical to maximizing route performance.

84. In addition, the Parties point out that the Co-operation Agreement involves the Parties co-ordinating their flying operations and activities in any way that would be possible if Orangestar and Qantas were "Related Bodies Corporate" within the definition of the term under the Australian Trade Practices Act 1974. This will enable Qantas to engage in strategic decision-making for each of its flying businesses, including price and schedule co-ordination, the exchange of information and the sharing of expertise. The ability to co-operate and co-ordinate the Jetstar and Orangestar flying businesses (as set out in the Co-operation Agreement) is therefore designed

to reduce cost, improve profitability, while at the same time increasing the range of services available to consumers. The Parties further argue that it is therefore neither possible nor practicable to prohibit co-operation and co-ordination between the Parties in particular areas and still achieve the same level of efficiencies, benefits and cost savings.

(c) Does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question

85. The Parties say that Orangestar only has a 5% market share[47] of routes between Singapore and Asia, while Qantas' market share across all of these routes is less than 1%. There is no overlapping service on any route within the air passenger transport market, except for the Singapore-Denpasar route, on which Qantas (operated by Australian Airlines, a Qantas subsidiary) has a market share of 10% and Valuair has a market share of 6%[48].

86. The Parties submit that any route to Australia that could be serviced by Jetstar Asia or Valuair has low barriers to entry. Singapore Airlines, Tiger Airways, SilkAir and Virgin Blue have the unrestricted right to operate to any port in Australia which Jetstar Asia or Valuair could service. In addition, a number of sixth freedom carriers such as Emirates have liberal rights to do so. As such, there can only be increased competition.

87. The Parties further submit that, even if they operate as separate businesses with no ability to co-operate, their close economic relationship means there is no prospect of direct competition between them.

ii) Third Party Views

88. Tiger Airways ("Tiger") have claimed that the Agreement raises significant competition concerns because the Parties are actual and potential competitors on a number of routes to and from Singapore. Specifically, Tiger was concerned that the Agreement may eliminate potential competition between the Parties on the Singapore-Darwin route.

[47] The Parties have used capacity share as a proxy for market share.

[48] Figures in this paragraph, which are provided by the Parties, are comparable to data from the Civil Aviation Authority of Singapore.

89. Tiger has questioned the economic benefits claimed by the Parties, noting that since the creation of Orangestar through the Jetstar Asia-Valuair merger, Orangestar has withdrawn from six routes and reduced its fleet size by 40%. The combined frequencies of Orangestar flights on key routes such as Singapore-Hong Kong and Singapore-Bangkok had been reduced, resulting in a reduction in employment.

90. In addition, Tiger also argued that the experience of low-cost airlines like Ryanair and Southwest Airlines indicates that low-cost airlines do not require partnerships with traditional airlines to be sustainable. Tiger noted that even without the Agreement, Qantas would share its expertise with Orangestar since it was a substantial Orangestar shareholder.

iii) Commission's Assessment

Market Definition

91. The Commission agrees with the Parties that the leisure and the business air passenger transport markets for travel on Singapore-Australia and Singapore-Europe routes are possible relevant markets, given that these two types of passengers are likely to have different needs during these long-haul flights. Business passengers are generally less sensitive than leisure passengers to price, but more sensitive to other factors such as flexibility, connectivity, convenience and comfort, particularly on long-haul flights.

92. However, for short-haul travel on Singapore-Asia routes, factors such as comfort and ticket flexibility for business passengers may not be as important as on long-haul routes. The Commission is therefore of the view that the distinction between leisure and business passengers may not be that apparent and it may not be necessary to make such a distinction.

93. Any overlap of routes between Orangestar and Qantas is likely to occur in the leisure passengers segment of the market, as Orangestar operates on a value-based model. As such, the Commission will focus its assessment on the effects that the Agreement is likely to have on the leisure passenger services market, in particular, on Singapore-Australia and Singapore-Asia routes where Qantas and Orangestar both have air rights to operate.

Appreciable Prevention, Restriction or Distortion of Competition

94. The Commission notes the Parties' admission that through the co-ordination of all elements of their airline businesses under the Agreement, the Parties will likely engage in the following prohibited conduct:

    i) Fixing prices;
    ii) Allocating markets;
    iv) Joint purchasing;
    v) Joint selling; and
    vi) Exchanging price and non-price information.

95. With regard to the current state of competition, the Commission observes that the only overlapping route which both Parties currently operate is between Singapore and Denpasar, through the operation of services by Australian Airlines, a fully-owned subsidiary of Qantas, and Valuair.

96. The Commission further notes that although Valuair and Australian Airlines account for two of the four airlines operating on the Singapore-Denpasar route[49], their combined market share[50] is only 16%. Although this combined market share is the second highest, any market power which they may have is likely to be constrained by Singapore Airlines, which, according to the Parties, has 73% of the market share on the route. The Commission therefore considers that the Agreement is unlikely to adversely affect competition to an appreciable extent[51].

97. With regard to the loss of potential competition between the Parties, the Commission notes that, given that destinations in Asia are becoming increasingly popular, there is a possibility that competition may exist in the absence of the Agreement. Although the extent to which Qantas can utilize its fifth freedom rights beyond Singapore are limited by Australia's ASAs with these third countries, the Commission notes that it is still possible for Qantas and Orangestar to operate on overlapping routes within Asia. For instance, the Parties have claimed that Qantas can utilize its fifth freedom rights to operate on certain routes between Singapore and other Asian countries. In addition, through the Agreement, the Parties can also increase the frequencies of their flights on certain existing routes between Singapore and other Asian countries.

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[49] The other two airlines operating on the route are Singapore Airlines and Transaero Airlines.

[50] The Parties have used capacity share as a proxy for market share.

[51] Figures in this paragraph, which are provided by the Parties, are comparable to data from the Civil Aviation Authority of Singapore.

98. In view of this, the Commission considers that the Agreement may reduce potential competition between the Parties, but the extent of the loss in competition is indeterminable at this point in time.

99. The Commission therefore does not rule out the possibility that the Agreement may have an appreciable adverse effect on competition in the future. It will next proceed to assess if the economic benefit arising from the Agreement is likely to outweigh its anti-competitive effects.

Net Economic Benefit

(a) Contributes to improving production or distribution, or promoting technical or economic progress

100. With regard to the claimed benefit of new routes and increased frequencies, the Commission recognizes that this is possible through the ability of the Parties to blend their existing air rights and fleet options. However, as the size of these benefits will only become apparent when the demand for these services actualise, the Commission views this claimed benefit with some reservation.

101. The Commission agrees with the Parties that the Agreement would improve Singapore's air connectivity. This is likely to in turn increase employment and demand for services related to the aviation industry in Singapore.

102. In relation to the improved tourism brought about by the Agreement which the Parties have claimed, the Commission is of the view that the Agreement may be one of many factors contributing to Singapore's tourism industry. This is because there is a wide range of factors which influence tourism demand to Singapore, such as the relative costs of other destinations and the perceived attractiveness of Singapore as a tourist destination and business hub.

103. As for the Parties' claim that the Agreement allows Orangestar access to Qantas' experience and expertise, the Commission is of the view that Qantas is already providing significant operating and management support to Orangestar. As such, it is not clear to the Commission why the other areas of expertise which Qantas claimed could be shared would not materialise without the Agreement.

104. The Commission considers that the co-operation afforded by the Agreement will bring about a number of improvements and cost savings in the Parties' operations. Specifically, the Agreement will bring benefits such as the improvement of connection across their networks, better scheduling, wider scope for inventory control and higher utilization through higher load factor. Cost savings are likely to arise from economies of scale and sharing of facilities and staff. These will in turn benefit consumers in Singapore.

105. On balance, the Commission is generally satisfied that the Agreement would contribute to improvements of production and distribution in the air passenger transport market, and promote technical and economic progress in Singapore.

(b) Does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives

106. The Commission recognizes that interline and codeshare agreements are able to yield some benefits similar to those offered by the Agreement. However, to the extent that the benefits of the Agreement will extend beyond those achievable through interline and codeshare agreements, further cooperation between the Parties would be required. For instance, the Parties have claimed that codesharing and bilateral interlining agreements would not allow them to coordinate their scheduling for better connection times and plan their frequencies together to maximize route performance. Other limitations would include the inability to control the inventory or schedules of the operating carrier's flights, which would result in the Parties having to bear the risk of the operating carrier limiting seat availability or changing flight times, amongst other things.

107. The Commission is therefore of the view that, to the extent that the benefits of the Agreement will extend beyond those which may be achieved through pure interlining and bilateral agreements, further co-operation akin to that embodied in the Agreement must be required. The benefits outlined by the Parties are dependent on the close co-ordination of the Parties' networks and services and the restrictions in the Agreement are necessary to attain those benefits. Such benefits are not likely to be achieved via less restrictive forms of co-operation.

108. In making its assessment, the Commission took into account the context in which the Agreement would actually operate. The Commission considers that the purpose of the Agreement is to provide the Parties with the flexibility to co-ordinate their behaviour in any way possible, in line with the business model that they have adopted, viz. for Orangestar to operate as part of Qantas' flying businesses. To this end, the Commission considers the Agreement, in its entirety, indispensable to attaining the benefits claimed, and that it is not necessary for each of the restrictions in the Agreement to be assessed individually.

(c) Does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question

109. As the Parties currently operate complementary routes, with the exception of the Singapore-Denpasar route, for which the Commission has earlier determined that there are no strong competition concerns, the Commission is of the view that the Agreement is not likely to lead to the elimination of competition in a substantial part of the market.

110. The Commission notes that barriers to entry on Singapore-Australia routes are low for Singapore-registered and Australian-registered carriers. As a result, it is unlikely that potential competition in a substantial part of this market will be eliminated.

111. With respect to Singapore-Asia routes, the Commission notes that the imminent implementation of the open skies framework within ASEAN could increase potential competition.

112. The Commission therefore considers that the Agreement is not likely to lead to the elimination of competition in a substantial part of the Singapore-Australia and Singapore-Asia markets, in view of the competitive presence of other airlines.

Third Party Views

113. The Commission notes that, with the exception of Tiger, it has not received any adverse comments from third parties. Tiger's objections with regard to the restriction of actual and potential competition have been addressed in the Commission's earlier analysis in paragraphs 96 and 109-112. One airline commented that the arrangements under the Agreement are likely to be found in varying degrees amongst members of all airline alliances. The airline expressed the view that "absent an entirely free market, with no

limits on airline ownership or market access, facilitation of cooperation on product offerings amongst alliance partners, which does not result in the complete elimination of competition on the relevant routes, is a net economic benefit."

114. The Singapore-Darwin route is served by only Qantas and Tiger. Both are significant players. It is not apparent to the Commission whether Orangestar will enter this market in the absence of the Agreement.

115. The Commission has verified that Orangestar has not been downsizing its fleet. Any reduction in the routes of its subsidiaries could have been due to the rationalization that has been undertaken following the merger between Valuair and Jetstar Asia, and hence may not be a good proxy for the anti-competitive effects that would arise from the Agreement.

116. CAAS has written to the Commission to state that, in line with the international trend towards air services liberalization, MOT/CAAS is supportive of allowing airlines to enter into co-operative marketing arrangements and have no objection in-principle to the Agreement.

117. In summary, the Commission is of the view that there are net economic benefits based on the Parties' submissions. As such, the Agreement is excluded from the Act in respect of the air passenger transport market.

Part B - Air Freight Transport

i) Parties' Submission

Market Definition

118. The Parties propose to define a possible relevant market affected by the Agreement as the market for the provision of air freight services:

i) Between South-east Asia and Australia;
ii) Between South-east Asia and Europe; and
iii) Within Asia.

119. The Parties submit that regardless of how the relevant market for air freight services is defined, the Agreement will not have an adverse effect on competition in any market in Singapore.

Appreciable Prevention, Restriction or Distortion of Competition

120. The Parties further submit that Qantas carries freight between Singapore and Australia, and Singapore and Europe, while Orangestar carries freight between Singapore and other Asian destinations. As such, the Parties note that they do not operate on any overlapping routes that comprise part of any of the three air freight markets, except for the Singapore-Denpasar route.

ii) Commission's Assessment

Market Definition

121. Based on its understanding of the general movement of air freight between Singapore and major cities in Australia and Europe, the Commission does not agree with the Parties that the relevant markets are between (i) Australia and South-east Asia; and (ii) Europe and South-east Asia.

122. Instead, the Commission considers the relevant markets for the provision of air freight services to be between (i) Singapore and Australia (including all major cities); (ii) Singapore and Europe (e.g. London and Frankfurt); and Singapore and Asia. Similarly, the Commission has focused on the Singapore-Australia and Singapore-Asia routes, given that any potential overlaps in services between the Parties are likely to involve services on these routes.

Appreciable Prevention, Restriction or Distortion of Competition

123. Based on the information provided by the Parties, the Commission notes that the Parties have a relatively small share of the relevant air freight transport markets[52]. Although the Parties both provide air freight transport services on the overlapping Singapore-Denpasar route, they account for a small share of the tonnage carried on the route. Furthermore, given that Orangestar operates a value-based model and does not operate air freighter services (*i.e.* freight-only aircraft), it is unlikely to pose strong competition to Qantas which operates air freighter services. The Commission is therefore of the view that the Agreement does not have an appreciable adverse impact on competition in the provision of air freight transport in the relevant markets for Singapore-Australia, and Singapore-Asia routes. To this end, the Commission is of the view that no further analysis of the relevant market is needed.

[52] The Parties submit that Qantas carries a low percentage of the tonnage between Singapore and Australia, Singapore and the UK, and between Singapore and Germany. The Parties submitted that given the

Part C - Sale of Air Travel Services

i) Parties' Submission

Market Definition

124. The Parties propose to define the market for the sale of air travel services in Singapore to be a possible relevant market affected by the Agreement. The Parties submit that regardless of how the relevant market for the sale of air travel services is defined, the Agreement will not have an impact on any market in Singapore.

Appreciable Prevention, Restriction or Distortion of Competition

125. The Parties are unable to provide information with regard to their market share for the sale of air travel services in Singapore. However, they note that, given the number of carriers that provide services to and from Singapore, and the multitude of destinations to which passengers from Singapore may travel, the Parties' share of this market is likely to be very small.

ii) Commission's Assessment

Market Definition

126. The Commission finds the Parties' submission of the sale of air travel services in Singapore as a relevant market to be acceptable. The Commission observes that sale of air travel services in Singapore could be conducted through the internet or travel agents, in addition to the sales offices of the respective airlines.

Appreciable Prevention, Restriction or Distortion of Competition

127. The Commission notes the Parties' submission that, given the number of carriers that provide services to and from Singapore, and the multitude of destinations to which passengers from Singapore may travel, the Parties' share of this market is likely to be very small.

relatively low capacity share that Orangestar has on routes within Asia, it is likely that the Parties will have a relatively low combined market share within the intra-Asian freight market.

128. Furthermore, the Commission is of the view that, considering the competitive constraints imposed by the large number of players in the sale of air travel services (e.g. travel agents and airlines' ticketing offices), the proliferation of alternative ticketing avenues such as internet ticketing, and low barriers to entry into the market, the Parties are unlikely to have an appreciable effect on the market. To this end, the Commission is of the view that no further analysis of the relevant market is needed.

V. COMMISSION'S DECISION ON THE PARTIES' NOTIFICATION

129. The Commission is of the view that the Parties do not form a single economic entity. Although the Agreement between the Parties falls within the ambit of the section 34 prohibition of the Act, the Commission is of the view that the Agreement brings about net economic benefit to Singapore. The Agreement is therefore excluded from the Act.

130. Section 46 of the Act provides that, if the Commission has determined an application under section 44 by making a decision that the agreement has not infringed the section 34 prohibition, the Commission shall take no further action with respect to the notified agreement unless:

a. It has reasonable grounds for believing that there has been a material change of circumstance since it gave its decision; or
b. It has reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.

131. The Commission recognizes that the global aviation market is volatile and dynamic. The Commission also notes that the Agreement has yet to be fully implemented and the effects that the Agreement may have on competition in Singapore may not be actualized in the way which the Parties anticipate. To this end, the Commission may, amongst others, consider the following as a material change of circumstance:

i) Reduction in the number of competing carriers in the current overlapping routes for the passenger air transport market which the Parties may serve;
ii) Relevant international treaties entered into by the respective Governments;
iii) Changes in the operations of the Parties which have a significant impact on the Singapore market; and
iv) Any significant change in the shareholdings of Orangestar.

132. The Commission recognises that its detriment analysis is heavily influenced by its assessment that there is likely to be potential competition on the possible overlapping routes on which the Parties may operate. If this assessment is not borne out, the Commission may also initiate a review of the decision based on a material change of circumstances.

Ong Beng Lee
Chief Executive
Competition Commission of Singapore