

Section 58 of the Competition Act (Cap. 50B)

Grounds of Decision issued by the Competition Commission of Singapore

In relation to the merger notification application for decision pursuant to section 58 of the Competition Act of the acquisition by Cebu Air, Inc., of Southeast Asian Airlines (SEAir), Inc.

20 August 2014

Case number: CCS 400/005/14

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [X]

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I. Introduction

1. On 23 May 2014, Cebu Air, Inc. (“Cebu Pacific”) and Tiger Airways Holdings (“Tigerair Holdings”) (collectively “the Parties”) filed a joint notification pursuant to section 58 of the Competition Act, Chapter 50B (the “Act”), applying for a decision by the Competition Commission of Singapore (“CCS”) as to whether the acquisition by Cebu Pacific of 100% of the issued and outstanding shares of Southeast Asian Airlines (SEAir), Inc. (“SEAir”), from Roar Aviation II Pte. Ltd. (“Roar II”), a wholly-owned subsidiary of Tigerair Holdings, and the other shareholders of SEAir (the “Acquisition”), has infringed the section 54 prohibition of the Act (the “Merger Notification”). The Acquisition was completed on 20 March 2014.

2. As part of the Merger Notification, the Parties informed CCS that Cebu Pacific and Tiger Airways Singapore Pte. Ltd. (“Tigerair Singapore”) has entered into a Strategic Alliance Agreement (“the SAA”). The Parties submitted that the SAA is inter-conditional on the shares acquisition from ROAR II, and is an ancillary restraint directly related to and necessary to the implementation of the Acquisition.

3. CCS conducted a public consultation and also consulted with competitors of the Parties, aviation regulatory bodies, Changi Airport Group and travel industry players to seek their views on the likely impact that the transaction would have on competition in Singapore. CCS requested information from eight parties and received four responses.

4. At the end of the phase one review, based on its assessment of all the information provided to CCS, CCS has concluded that the Acquisition has not infringed section 54 of the Act and that the SAA and the Other Shareholders Non-Solicitation Restriction (as defined below) do not amount to ancillary restrictions to the Acquisition.

II. The Parties Involved in the Transaction

Cebu Pacific

5. Cebu Pacific is a low-cost carrier (“LCC”) commercial airline based in the Philippines that operates flights to 33 domestic destinations within the Philippines and 24 international destinations in Asia. The international routes involving Singapore which Cebu Pacific operates are:

- a. Cebu-Singapore;
- b. Clark-Singapore;
- c. Iloilo-Singapore; and
- d. Manila-Singapore.¹

6. Cebu Pacific is listed on the Philippines Stock Exchange, Inc. and has 10 special purpose entities that it controls which collectively make up the Cebu Pacific Group. Cebu

¹ Paragraphs 10.6 and 10.7 of Form M1.

Pacific is also involved in three joint ventures relating to aviation industry specific training and aircraft maintenance. As at 31 December 2013, CP Air Holdings, Inc., which is 100% owned by Cebu Pacific's ultimate parent company JG Summit Holdings, Inc., ("JGSHI"), owned 66.15% of Cebu Pacific. JSGHI also owns an addition 1.09% of Cebu Pacific.²

SEAir

7. SEAir is a commercial airline based in the Philippines that operates under the "Tigerair Philippines" LCC brand. Prior to the Acquisition, SEAir operated commercial flights to nine domestic destinations within the Philippines and four international destinations within Asia. The international routes that SEAir operated involving Singapore were:

- a. Clark-Singapore; and
- b. Kalibo (Boracay)-Singapore.

SEAir ceased operating the above mentioned routes involving Singapore on 9 March 2014.³ [X]⁴

8. SEAir is an incorporated company registered with the Philippine Securities and Exchange Commission.⁵ Prior to the Acquisition, 40% of SEAir was owned by Roar II. The other shareholders of SEAir were:

- a. Triple Star Group Holdings, Inc. – [X];
- b. Olma Inocentes – [X];
- c. Geraldine Olivares – [X]; and
- d. Thomas Lopez – [X]⁶,

collectively known as "the Other Shareholders".

9. The Other Shareholders own and operate Southeast Asian Airlines (SEAIR) International, Inc. ("SEAir-I"), a domestic leisure airline company that primarily operates turbo propeller aircraft for commercial flights, as well as chartered flights and a freight business. SEAir-I primarily caters to the air transport of passengers on "missionary routes" within the Philippines, which according to the Parties, refer to routes which are not currently served by other commercial airlines.

10. SEAir is now controlled by Cebu Pacific.⁷

Tigerair Holdings

² Paragraph 7.1 to 7.3 of Form M1.

³ Paragraph 10.8 and 10.9 of Form M1.

⁴ Paragraph 2.2, Response dated 24 July 2014 to CCS's request for further information dated 21 July 2014.

⁵ Annex 6 to Form M1.

⁶ Paragraph 7.5 of Form M1.

⁷ Paragraph 1.7 of Form M1.

11. Tigerair Holdings is listed on the Main Board of the Singapore Exchange Securities Trading Limited. Tigerair Holdings owns 100% of four subsidiaries companies including Roar II and Tigerair Singapore, and has an interest in three associate or joint venture operations in Australia, Indonesia and, prior to the Acquisition, the Philippines (“Tigerair Group”).

12. Companies within the Tigerair Group run LCC airlines that operate commercial flights to various domestic and international destinations throughout Asia and Australia.⁸

III. The Acquisition

13. According to the Parties’ submissions, the Acquisition by Cebu Pacific of 100% of the issued and outstanding shares of SEAir was through the following acquisitions:

- a. the acquisition from Roar II, a wholly-owned subsidiary of Tigerair Holdings, of its entire shareholding interest in SEAir, representing 40% of the issued and outstanding shares of SEAir (the “Roar II Share Acquisition”); and
- b. the acquisition from the Other Shareholders of all the shares in the issued share capital of SEAir held by the Other Shareholders, representing 60% of the issued and outstanding shares of SEAir (the “Other Shareholders’ Sale Shares”). Pursuant to the option deed entered into between Roar II and the Other Shareholders dated 4 June 2012,⁹ Roar II has nominated Cebu Pacific as its third-party nominee to acquire the Other Shareholders’ Sale Shares (the “Other Shareholders Share Acquisition”).

14. The Acquisition was completed on 20 March 2014.

15. In addition, the Parties have submitted that inter-conditional on the Roar II Share Acquisition, Cebu Pacific and Tigerair Singapore, Tigerair Holdings’ wholly-owned subsidiary, have entered into a SAA on 7 January 2014 to:

- a. jointly operate common routes between Singapore and the Philippines, and other markets that may emerge as both Tigerair Holdings and Cebu Pacific expand their networks, on a metal-neutral basis;
- b. jointly sell and market common and non-common routes using codeshare or interline arrangements;
- c. cooperate in relation to sales and marketing, distribution, airport operations and ground handling, scheduling, pricing, service policies, innovation, procurement and other matters to improve the overall quality of service offered to passengers on their respective operations and to reduce cost; and

⁸ See: http://www.tigerair.com/sg/en/destination_map.php

⁹ An option was granted by the Other Shareholders to Roar II under this option deed, which when exercised would enable Roar II to propose a local independent third party (or local independent third parties) who shall be a Filipino citizen(s) or a Philippine national(s) acceptable to the Other Shareholders to purchase their shareholding interests in SEAir.

d. [X¹⁰X¹¹X]¹².

16. The Parties have clarified that [X]¹³

17. The overall consideration for the Acquisition is US\$15 million (approximately S\$19.03 million), comprising of US\$7 million (approximately S\$8.88 million) as the consideration for the Roar II Share Acquisition, and US\$8 million (approximately S\$10.15 million) as the consideration for the Other Shareholders Share Acquisition.

18. The Parties have submitted that from Cebu Pacific's perspective, the Acquisition is expected to result in a number of efficiencies, including the integration of Cebu Pacific's and SEAir's networks and the resulting increase in connectivity across Cebu Pacific's and SEAir's networks, and improvement in load factors, in particular of SEAir. Cebu Pacific has also submitted that the Acquisition will result in additional operational efficiencies and marketing efficiencies.¹⁴

19. With regard to Tigerair Holdings, the Parties have submitted that [X]¹⁵. Tigerair Holdings is of the view that [X]¹⁶. The Parties also submitted that the Acquisition, together with the SAA, would allow Tigerair Holdings to penetrate the Philippines market¹⁷.

20. Upon completion of the Acquisition, SEAir will continue to operate under the Tigerair brand for 12 months from 10 February 2014.¹⁸ Both Parties' websites will also be used as sales and distribution platform to market all routes operated by them and for the cross-booking of flights.¹⁹

21. Given that the Acquisition is an acquisition for sole control, CCS is of the view that the Acquisition constitutes a merger pursuant to section 54(2)(b) of the Competition Act.

IV. Competition Issues

22. The Parties have submitted that prior to the Acquisition, Cebu Pacific and SEAir overlapped on the Singapore – Clark route.

23. The Parties submitted that the Acquisition would not result in a SLC in view of several factors, including the following:

¹⁰ [X]

¹¹ [X]

¹² Paragraph 1.3 of Form M1.

¹³ Responses to question 22 of CCS's *Information Request* dated 4 June 2014.

¹⁴ Paragraph 12.1 of Form M1.

¹⁵ Paragraph 12.2 of Form M1.

¹⁶ [X]

¹⁷ Paragraph 12.5 of Form M1.

¹⁸ Paragraph 11.9.6 of Form M1.

¹⁹ SGXNET Announcement entitled "Tigerair Makes Progress In Its Recent Alliance With Cebu Pacific", dated 20 March 2014.

- a. The intense competition currently existing in the provision of international and domestic (i.e. within the Philippines) air passenger transport services, including potential competition on the Singapore – Clark route;
- b. The ability of customer to switch easily between the suppliers and the high price sensitivity of the customers in the Philippines air transport market; and
- c. The absence of significant barriers to entry in the Philippines air transport market, leading to ease and likelihood of potential competitors entering the Singapore – Clark route.

V. Relevant Market

24. Before considering the level of competition in a relevant market and the consequent effects of the Acquisition, CCS considered the relevant market(s) affected by the Acquisition.²⁰

The Parties' Submissions

Air Passengers Transport Services

25. The Parties submitted that the relevant market affected by the Acquisition is defined as the market for economy-class seats on full-service airlines ("FSAs") and all classes of seats for "Low Cost Carriers" ("LCCs") on the Cebu Pacific's and SEAir's overlapping route i.e. between Singapore and Clark.

26. To support its definition of the relevant market, the Parties quoted CCS and other competition authorities' past assessments on relevant market definitions in airline joint venture agreements. They submitted that the relevant market in this case should be based on the following considerations:

- i. The origin and destination pair ("O&D Pair") routes (CCS 400/002/12 *Qantas/Jetstar*) ("*CCS Qantas/Jetstar Decision*") involving Singapore (CCS 400/006/12 *Qantas/Emirates*)²¹ ("*CCS Qantas/Emirates Decision*"),
- ii. Exclusion of indirect flights (EC Case No. COMP/M.4439 – *Ryanair / Aer Lingus* and EC Case No COMP/M.5440 – *Lufthansa / Austrian Airlines*)²², and
- iii. Exclusion of market for first- and business-class passengers and inclusion of market for economy-class passengers (*CCS Qantas/Jetstar Decision*)²³.

27. In respect of paragraph 26(i) above, CCS had previously considered in the *CCS Qantas/Jetstar Decision* that

²⁰ Paragraph 1.6 of *CCS Guidelines on Market Definition*.

²¹ Paragraph 20.2 and 20.3 of Form M1.

²² Paragraph 20.6 of Form M1.

²³ Paragraph 20.9 of Form M1.

“...typically, the starting point for market definition relating to the provision of scheduled air passenger transport services is the O&D pair, usually a city-pair. Passengers generally want to travel to a specific destination and will not substitute another destination when faced with a small, non-transitory increase in price. Therefore, each combination of a point of origin and a point of destination can form a separate market.”

28. Further in the *CCS Qantas/Emirates Decision*, CCS had considered that

“Given that the section 34 Prohibition specifically concerns the prevention, restriction or distortion of competition in Singapore, CCS will focus on air passenger services involving Singapore OD city pairs...”²⁴

29. In respect of paragraph 26(iii) above, CCS had assessed that

“... there are fundamental differences between leisure and non-leisure passengers for air services along the overlapping routes. Typically, leisure passengers who are price-sensitive may be less concerned about travel time and fare flexibility relative to passengers who may travel by business class or first class. Specifically, CCS is of the view that the relevant markets for the purpose of assessing the Proposed Conduct should not include first or business class passengers of the FSAs given the substantial differences in air fares based on the O&D Pair routes submitted by the Applicants.”²⁵

30. The Parties then further noted that in the same decision, CCS had also concluded that economy-class services provided by a FSA would be in the same relevant product market as the air passenger services provided by an LCC.²⁶

31. Besides quoting CCS’s past assessments, the Parties also have submitted third party analysis and commentary on the airline industry to support their arguments of increasing convergence of economy-class FSA services and LCC services. For example, on 3 October 2013, the Centre for Aviation published an article describing the diminishing differences between economy-class FSA and LCC services in the Indian market.²⁷ It is noted that no third party analysis and commentary has been submitted specifically for the route between Singapore and Clark.

32. From the fares perspective, the Parties asserted that various economy-class FSAs compete with the Parties on routes such as between Singapore and Manila, and Singapore and Cebu.²⁸ However as there are no FSAs operating on the route between Singapore and Clark, the Parties were unable to provide fare comparisons to support its argument of price competition between LCCs and economy-class FSAs on that specific route. Instead, the

²⁴ Paragraph 45 of *CCS Qantas/Jetstar Decision*.

²⁵ Paragraph 46 of *CCS Qantas/Jetstar Decision*.

²⁶ Paragraph 47 of *CCS Qantas/Jetstar Decision*.

²⁷ “India’s airlines, LCC and FSC, must review their business models, maybe creating space for AirAsia”, Centre for Aviation, 3 October 2013

²⁸ Paragraph 7.2 of Response to CCS RFI dated 4 July 2014

Parties provided fare comparison charts for the Singapore – Manila and Singapore – Cebu routes.

33. The Parties further submitted that from a demand-side perspective, in the provision of international and domestic air passenger transport services, passengers would consider travelling from airports within a reasonable travelling time or travelling distance from their starting origin point or final destination point. This was discussed in EC Case No. COMP/M.4439 – *Ryanair / Aer Lingus*, where the Commission considered that 100km or one hour driving time was a conservative estimate of an airport’s typical minimum catchment area. However, due to the specifics of respective airport and other evidence, the catchment area may be wider in reality.

34. The Parties went on to suggest that with a distance of approximately 100km between Manila city centre and the Clark International Airport, and a travelling time varying between 1.5 hours and 2.5 hours depending on the mode of transport and traffic conditions, there may be some potential overlap between the catchment areas of Clark International Airport and Manila International Airport .

35. The Parties also submitted that [X], in particular as a possible alternative to operating services out of Manila, in view of the potential overlap, to a certain extent, between the catchment areas of Clark International Airport (i.e. DMIA) and Manila International Airport (i.e. NAIA).

Air Cargo Transport Services

36. Although the Parties provide air cargo transport services, they submitted that it is not a relevant market for this merger notification. The Parties indicated that these services are ancillary to their air passenger transport services (i.e. cargo is transported on the same aircraft operated for air passenger transport services) and are an insignificant part of the Parties’ business.

37. For Cebu Pacific, [X]. Further, [X] of its total air cargo volume in 2013 was carried within the Philippines whereas total air cargo volume in 2013 carried for the route between Singapore and Clark was [X]. Cebu Pacific asserted that given the insignificance of the business, it is not aware of and is not able to provide information on its market share vis-à-vis its competitors for air cargo transport service. However, the Parties was able to provide estimate for SEAir’s market share based on the Philippine Civil Aeronautics Board’s data that SEAir has [X] market share of the market for domestic (Philippines) air cargo services.²⁹

38. Based on publicly available information, the Parties understood that other competing service providers for air cargo transport services may also include:

- i. Cargo airlines with dedicated freighter planes;

²⁹ Para 11.4 of Form M1

- ii. Combination airlines (i.e. airlines with both dedicated freighter airplanes and belly space cargo capacity on passenger flights); and
- iii. Integrators, which offer not only airport to airport services but also handle cargo from the point of origin to the airport and from the airport to the final destination, including legal formalities such as customs clearance. Examples of integrators include DHL International GmbH (“DHL”), United Parcel Service Inc. (“UPS”), FedEx Corporation (“FedEx”) and TNT Express N.V. (“TNT”).

39. Such competing service providers would likely be able to provide the same air cargo transport services that Cebu Pacific and SEAir provide, both domestically within the Philippines, and internationally between Singapore and the Philippines, and may accordingly compete with Cebu Pacific and SEAir for the same business, and possibly for the same types of customers. The Parties have submitted that this is consistent with EC case law.³⁰

40. As submitted in paragraphs 38 and 39 above, competitors to Cebu Pacific and SEAir in this regard may include not only other passenger airlines that operate flights between Singapore and the Philippines and similarly provide air cargo transport services on an ancillary basis, but also cargo airlines with dedicated freighter planes, combination airlines (with both dedicated freighter airplanes and belly space cargo capacity on passenger flights), as well as integrators, such as DHL, UPS, FedEx and TNT.

41. Given the low market shares of Cebu Pacific and SEAir with respect to air cargo transported by the respective Parties on the route between Singapore and Clark, and the low overall shares of SEAir in the provision of cargo services on all routes (domestic and international), the Parties considered that the increase in market shares, in the market for air cargo transport services between Singapore and the Philippines, arising from the Acquisition is likely to be similarly low (given SEAir’s low overall shares of [X]) as provided in paragraph 37 above), and accordingly negligible. Accordingly, the Applicants submitted that any impact of the Acquisition on competition for air cargo transport services is likewise negligible.

CCS’s Assessment

Air passenger transport services

42. In defining the relevant market relating to the provision of scheduled air passenger transport services, CCS’s typical starting point is to consider the O&D Pair routes, usually city pairs. Passengers generally want to travel to a specific destination and will not substitute another destination when faced with small, non-transitory increase in price. For the purpose of this merger notification, CCS will similarly adopt this approach as the starting point in defining the relevant market concerned. In particular, CCS will consider each O&D Pair route provided by the Parties as potentially forming a separate market. Further, as stated in

³⁰ See, for example, EC Case No COMP/M.5440 – *Lufthansa / Austrian Airlines*, EC Case No COMP/M.6447 – *IAG / BMI*, and EC Case No COMP/M.6828 – *Delta Air Lines / Virgin Group / Virgin Atlantic Limited*.

paragraph 5.5 of *CCS Guidelines on the Substantive Assessment of Mergers*, “market definition focuses attention on the areas of overlap in the merger parties’ activities”. As such, CCS will focus its assessment on the overlapping route, which in this case, is the route between Singapore and Clark.

43. Given that the Singapore-Clark route is on average 3.5 hours (which is short haul in nature), CCS will exclude indirect flights between Singapore and Clark from the relevant market. This is consistent with EC’s approach in EC Case No. COMP/M.4439 – *Ryanair / Aer Lingus* and EC Case No COMP/M.5440 – *Lufthansa / Austrian Airlines* where indirect flights are generally assessed not to be a competitive constraint or alternative to direct short haul flights.

44. In considering the Parties’ submission that economy-class seats on FSAs and seats on LCCs are in the same market for the purpose of this merger notification, CCS notes that, based on the Parties’ submission, only LCCs are operating on the Singapore-Clark route. Further, the Parties had not submitted any information specific to this route for CCS’s assessment. As such, CCS is of the view that it is not necessary to assess whether the economy-class seats on FSAs and the seats on LCCs are in the same market for the purpose of assessing this merger notification, but instead will limit its assessment to all classes of seats provided by the LCCs.

45. In relation to the Parties’ submission that Singapore-Clark and Singapore-Manila could be in the same market, CCS has received information to the contrary. According to information provided by a travel agency, based on the distance and travel distance between the two airports in Clark and Manila, the travel agency was of the view that the possibility for a traveller to switch from one airport to the other, over a 10% increase in airfare, is relatively low. Its view was supported by the data it provided which showed that although it had sold almost 500 air tickets for the Singapore-Clark route in the financial year of 2013, it did not sell any air ticket on the Singapore-Manila route. Without further information to suggest otherwise, CCS is of the view that there is insufficient evidence for it to conclude that Singapore – Clark and Singapore – Manila routes are in the same market.

Air Cargo Transport Services

46. For the purpose of the assessment of this merger notification, CCS will not include air cargo transport services due to the ancillary and insignificant nature of the services in relation to Cebu Pacific’s and SEAir’s businesses and their low market shares.

VI. Competition on the Singapore – Clark route pre- and post-Acquisition

47. In assessing a merger, CCS will evaluate the prospects for competition with and without the merger.³¹ CCS notes that in the present case, the merger has already been completed. CCS will therefore assess whether there is a substantial lessening of competition (“SLC”) on the Singapore – Clark route taking into consideration the extent of competition pre-Acquisition and the extent of competition post-Acquisition.

³¹ Paragraph 4.6 of *CCS Guidelines on the Substantive Assessment of Mergers*

VII. Market Structure

Market Share

48. The Parties provided the below estimated cumulative yearly passenger and capacity shares on a bi-directional, marketing carrier basis for Cebu Pacific and SEAir for the period of December 2010 to November 2013, and May 2014:

Carrier	Share (December 2010 to November 2011)		Share (December 2011 to November 2012)		Share (December 2012 to November 2013)		Share (May 2014)	
	By no. of passengers	By no. of seats	By no. of passengers	By no. of seats	By no. of passengers	By no. of seats	By no. of passengers	By no. of seats
Singapore-Clark								
Cebu Pacific	[40 – 50]%	[40 – 50]%	[40 – 50]%	[40 – 50]%	[30 – 40]%	[30 – 40]%	[70 – 80]%	[60 – 70]%
SEAir	[40 – 50]%	[50 – 60]%	[50 – 60]%	[50 – 60]%	[30 – 40]%	[30 – 40]%	[0 – 10]%	[0 – 10]%
Philippines’ AirAsia	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[20 – 30]%	[20 – 30]%	[0 – 10]%	[0 – 10]%
Tigerair Singapore ³²	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[20 – 30]%	[30 – 40]%
PAL Express	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%
Others ³³	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%	[0 – 10]%
Total market size	[<]	[<]	[<]	[<]	[<]	[<]	[<]	[<]
Combined shares of Cebu	[90 – 100]%	[90 – 100]%	[90 – 100]%	[90 – 100]%	[60 – 70]%	[60 – 70]%	[60 – 70]%	[60 – 70]%

³² Tigerair Singapore ceased its operations on the Singapore-Clark route on 6 December 2010 and has recommenced its operations on this route from 9 March 2014 [<].

³³ “Others” includes airlines that may be allocated passenger shares as the marketing carriers for codeshare flights, or that may operate non-direct flights on this O&D Pair route.

Carrier	Share (December 2010 to November 2011)		Share (December 2011 to November 2012)		Share (December 2012 to November 2013)		Share (May 2014)	
	By no. of passengers	By no. of seats	By no. of passengers	By no. of seats	By no. of passengers	By no. of seats	By no. of passengers	By no. of seats
Pacific and SEAir								

49. The Parties submitted that Philippines' AirAsia has temporarily suspended operations out of Clark, as part of its realignment, and consolidation of its operations, with AirAsia Zest, pursuant to the strategic alliance between Philippines' AirAsia and Zest Airways³⁴. As a result of the suspension of Philippines' AirAsia's operations out of Clark, Philippines' AirAsia has also ceased operations on the route between Singapore and Clark in August 2013.

50. The Parties also submitted that Tigerair Singapore ceased its operations on the Singapore-Clark route on 6 December 2010 and has recommenced its operations on this route on 9 March 2014, [§<]. Separately, based on limited data provided by CAG, as at 1 June 2014, the capacity share of Cebu Pacific and Tigerair Singapore on the Singapore – Clark route is as follow:

	Weekly 1-way seat capacity	Market share
Cebu Pacific	1,092	46.4%
Tigerair Singapore	1,260	53.6%
Total	2,352	100.0%

51. Based on the yearly market share figures provided by Parties above, CCS observed that the market share of the merged party ranged from [60 – 70]% to over [90 – 100]% on the Singapore-Clark route. CCS notes that in 2014, prior to 9 March 2014, SEAir and Cebu Pacific were the only two competitors on the Singapore – Clark route after PAL Express and Philippines' AirAsia ceased operations on February 2013 and August 2013 respectively. CCS further notes that [§<]³⁵. While SEAir was acquired by Cebu Pacific, two competitors currently remain on the Singapore – Clark route post-Acquisition, namely Cebu Pacific and Tigerair Singapore with their relative market shares comparable to that between Cebu Pacific and SEAir before the Acquisition.

³⁴ Philippine Daily Inquirer article entitled "Philippines' AirAsia re-aligns operations in Clark Airport", dated 14 September 2013, <http://business.inquirer.net/142887/philippines-airasia-re-aligns-operations-in-clark-airport>.

³⁵ Paragraph 9, Response dated 13 August pursuant to CCS's request for information dated 11 August 2014

VIII. Barriers to Entry

Parties' submission

52. The Parties submitted that generally, the barriers to entry on the Singapore – Clark route are low.

53. Where the potential entrant to the Singapore – Clark route is an existing airline, no capital expenditure would be required for the airline to enter the route as such airlines would have the existing necessary aircraft that may be deployed to operate the route between Singapore and Clark. Further, potential entrants may also choose to lease aircrafts from other airlines or leasing companies.

54. The Parties also submitted that generally, the provision of air passenger transport services may be subject to regulation by the relevant aviation or airport authorities in each jurisdiction. However, the Parties are of the view that the regulation of the aviation industry in this case does not pose a significant barrier to entry on the Singapore – Clark route. This is because the aviation industry in Singapore is largely liberalised and [3<]. There are also [3<], and the amount of time taken potential entrants to obtain approval for the slots is reasonably short.

55. With respect to air traffic rights between Singapore and Philippines, Singapore and the Philippines are signatories to the ASEAN MAFLPAS.³⁶ Recent bilateral negotiations between the Singapore and the Philippines governments on air traffic rights formalised the liberalisation of all secondary international airports in the Philippines, allowing for unlimited air traffic rights between Singapore and all secondary international airports in the Philippines outside of Manila. In this regard, with respect to the Singapore – Clark route, air traffic rights between Singapore and the Philippines would not constitute a barrier to entry.

56. Potential entrants may need to obtain relevant contracts from suppliers for the provision of ground handling and aircraft maintenance services at the relevant airports, but the Parties have submitted that such contracts are not difficult to obtain, including at the Clark International Airport, and the Parties do not consider such requirements to be a barrier to entry.

57. The Parties have also provided examples of instances of market entry and exit for the Singapore – Clark route in the past five years, which include:

- (i) PAL Express commencing operations on this route in May 2012, and ceasing operations on this route in February 2013;
- (ii) Philippines' Airasia commencing operations on this route in December 2012, and ceasing operations on this route in August 2013; and
- (iii) Tigerair Singapore ceasing operations on this route on 6 December 2010 and recommencing operations on the route from 9 March 2014.

³⁶ "ASEAN MAFLPAS" stands for "ASEAN Multilateral Agreement on Full Liberalisation of Passenger Air Services".

IX. Competition Assessment

(a) Non-Coordinated Effects

58. Non-coordinated effects may arise where, as a result of an acquisition, the merged entity finds it profitable to raise prices (or reduce output or quality) because of the loss of competition between the merged entities. Other firms in the market may also find it profitable to raise their prices because the higher prices of the merged entity's services will cause some customers to switch to services provided by rivals, thereby increasing demand for the rival's services.³⁷

Parties' submission

59. The Parties submitted that for the overlapping Singapore – Clark route, non-coordinated effects will not arise as a result of the Acquisition in view of the following reasons.³⁸

Intense nature of competition and myriad of competitors

60. The Parties submitted that they face intense competition from a myriad of competitors that currently exist in the provision of international and domestic (i.e. within the Philippines) air passenger transport services, including potential competitors on the overlapping route between Singapore and Clark. The Parties submitted that they generally compete with other LCC carriers in the region which operate a similar LCC business model, offer the same perceived value proposition and have the same target market, as well as FSAs in the region, in particular FSAs that price their fares on par with LCCs.³⁹

Ability of customers to switch suppliers

61. The Parties submitted that customers have the ability to switch easily between suppliers as there are no switching costs involved when a passenger decides to switch between carriers. The Parties also highlighted the high price-sensitivity of customers in the air passenger transport services industry in the Philippines which is characterised by the high price elasticity and near-identical products offered by LCC and economy class of FSAs.⁴⁰

Easy and likelihood of entry of potential competitors

62. The Parties submitted that there is an absence of significant barriers to entry in the provision of international and domestic (i.e. within the Philippines) air passenger transport services generally, leading to a likelihood of entry of potential competitors on the overlapping route between Singapore and Clark.⁴¹

³⁷ Paragraph 6.3 of *CCS Guidelines on the Substantive Assessment of Mergers*.

³⁸ Paragraph 34.18 of Form M1.

³⁹ Paragraph 34.1 of Form M1.

⁴⁰ Paragraphs 34.15 and 34.17 of Form M1.

⁴¹ Paragraph 34.18 of Form M1.

63. In particular, Clark International Airport is not slot-coordinated, and [X], and would not constitute a barrier to entry to this route.⁴²

64. With respect to air traffic rights, the Parties submitted that recent bilateral negotiations between the Singapore and Philippines governments on air traffic rights allow for unlimited air traffic rights between Singapore and all secondary international airports in the Philippines outside Manila. As such, air traffic rights between Singapore and the Philippines would not constitute a barrier to entry to this route, and any Singapore or Philippines carrier would be able to potentially enter this route, with the opening of a base or hub, if required.⁴³

65. The Parties also submitted that contracts from suppliers for provision of ground handling and aircraft maintenance services at the relevant airports are not difficult to obtain, including at Clark International Airport, and the Parties do not consider such requirements to constitute a barrier to entry.⁴⁴

66. The Parties submitted that carriers that are not currently operating on the route between Singapore and Clark, could do so relatively quickly and easily on a material scale, include Philippines' AirAsia, AirAsia Zest, Jetstar Asia, PAL Express, and Philippines Airlines.⁴⁵

CCS's Assessment

67. CCS considers that post-merger, the number of competitors remains at two given the re-entry of Tigerair Singapore as a result of the Parties' commercial arrangements. The evidence suggests that Cebu Pacific has been subjected to similar competitive pressure from Tigerair Singapore which has a level of market share comparable to SEAir prior the Acquisition (i.e., [20 – 30]% as compared to [30 – 40]%). In fact, CCS notes that Tigerair Singapore currently has higher seat capacity than Cebu Pacific (despite its low market share) on this route, and therefore has the ability to compete aggressively to improve its passenger load factor.

68. On the basis that Tigerair Singapore and Cebu Pacific are expected to compete on the Singapore – Clark route, CCS is of the view that non-coordinated effects on the said route is unlikely to arise due to the Acquisition.

(b) Coordinated Effects

69. A merger may also lessen competition substantially by increasing the possibility that, post-merger, firms in the same market may coordinate their behaviour to raise prices, or reduce quality or output. Given certain market conditions, and without any express agreement, tacit collusion may arise merely from an understanding that it will be in the firms'

⁴² Paragraph 34.8 of Form M1.

⁴³ Paragraph 34.10 of Form M1.

⁴⁴ Paragraph 34.13 of Form M1.

⁴⁵ Paragraph 34.14 of Form M1.

mutual interests to coordinate their decisions. Coordinated effects may also arise where a merger reduces competitive constraints in a market, thus increasing the probability that competitors will collude or strengthen a tendency to do so.⁴⁶

Parties' submission

70. The Parties submitted that coordinated effects will not arise as a result of the Acquisition for the following reasons.

71. First, there are numerous competitors in the provision of international and domestic (i.e. within the Philippines) air passenger transport services, and the ease of switching by, and the high price-sensitivity of, customers in the air passenger transport services industry in the Philippines creates strong commercial incentives for carriers to continue pricing competitively, creating instability and reducing sustainability of coordinated behaviour.⁴⁷

72. Second, there is an absence of significant barriers to entry in the provision of international and domestic (i.e. within the Philippines) air passenger transport services generally, and accordingly high potential for increased competition, which similarly creates disruptive effects and reduces sustainability of any coordinated behaviour.⁴⁸

CCS's Assessment

73. Similarly, CCS considers that risk of coordinated effects likely to be low given that the evidence suggests that Tigerair Singapore has exerted competitive pressure on Cebu Pacific as discussed in paragraph 67. CCS is therefore of the view that the Acquisition does not raise competition concerns as a result of coordinated effects.

X. Efficiencies

Parties submissions

74. The Parties have submitted that from Cebu Pacific's perspective, through the Acquisition, the O&D Pair routes which can be offered by SEAir will be expanded, given the larger existing Philippines network of Cebu Pacific relative to SEAir's existing network. This would allow for a wider range of connecting options on domestic routes (i.e. within the Philippines) and international sectors operated by Cebu Pacific.

75. Cebu Pacific expected that the passenger numbers of SEAir would increase with the expanded network and the increase in connectivity. Cebu Pacific illustrated this point by explaining that approximately [X] of Cebu Pacific's passengers in 2013 were connecting passengers. Assuming that these passengers generated connecting passenger traffic for SEAir, SEAir's passenger's number would have increased by [X] in 2013.

76. The Parties also submitted that with the full integration of SEAir's network onto Cebu Pacific's network post Acquisition, there could additionally be an increase in SEAir's

⁴⁶ Paragraph 6.7 of *CCS Guidelines on the Substantive Assessment of Mergers*

⁴⁷ Paragraph 35.1.1 of Form M1.

⁴⁸ Paragraph 35.1.2 of Form M1.

passenger numbers because of SEAir's integration into the larger and more established distribution network of Cebu Pacific's partners and agents. Cebu Pacific estimated that the shared distribution network could increase SEAir's load factors by [X]. Cebu Pacific projected the increase in SEAir's load factor by applying Cebu Pacific's actual load factors on each route to Cebu Pacific's of the total capacity of SEAir.

77. Generally, the Parties have submitted that the Acquisition is expected to allow the merged entity to derive operational and cost savings from coordinating maintenance, ground handling and other processes. No details were provided in relation to how the abovementioned cost savings will be achieved.

CCS's Assessment

78. CCS is of the view that the Parties had neither sufficiently demonstrated that their methodology is appropriate nor adequately supported their projection of the estimated increase in passenger numbers and load factor arising from the Acquisition, if any. CCS is therefore unable to accept the claimed efficiencies. CCS is also unable to comment on the claimed operations and cost savings as the Parties did not provide any details.

XI. Ancillary Restrictions

79. Paragraph 10 of the Third Schedule to the Act states that “[t]he section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct that is directly related and necessary to the implementation of a merger” (“the Ancillary Restriction Exclusion”). In order to benefit from the Ancillary Restriction Exclusion, a restriction must not only be directly related, but also necessary to the implementation of the merger.⁴⁹ In determining the necessity of the restriction, considerations such as whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger will be taken into account.⁵⁰

80. The Parties have submitted that the following constitutes ancillary restrictions to the Acquisition:

- (i) Clause 11.1 of the ROAR II SPA, which provides that: [X]⁵¹ [X]⁵² [X]⁵³, [X] (“the Roar II Non-Solicitation Restriction”);
- (ii) The Non-Competition Deeds (“the Other Shareholders Non-Competition Deeds”), enclosed as **Annex A**, executed by each seller in the Other Shareholders SPA. [X]
- (iii) Clause 8(d) of the Other Shareholders SPA which provides that: [X]⁵⁴[X]⁵⁵[X] (“the Other Shareholders Non-Solicitation Restriction”); and

⁴⁹ Paragraph 10.9 of *CCS Guidelines on the Substantive Assessment of Mergers*.

⁵⁰ Paragraph 10.13 of *CCS Guidelines on the Substantive Assessment of Mergers*.

⁵¹ [X]

⁵² [X]

⁵³ [X]

(iv) The SAA.

81. The Parties have therefore argued that the Roar II Non-Solicitation Restriction, the Other Shareholders Non-Compete Restriction and the SAA are all directly related to the Acquisition, but ancillary to the subject of the Acquisition. The Parties submitted that:

- (i) The ROAR II Non-Solicitation Restriction, the Other Shareholders Non-Compete Restriction and the Other Shareholders Non-Solicitation Restriction are necessary for the implementation of the Acquisition in order to allow Cebu Pacific to benefit fully from the goodwill that is acquired as part of the Acquisition; and
- (ii) The SAA, which is connected to and inter-conditional on the Acquisition, is necessary for the implementation of the Acquisition, as [REDACTED].

82. Accordingly, the Parties submitted that the SAA, the ROAR II Non-Solicitation Restriction, the Other Shareholders Non-Compete Restriction and the Other Shareholders Non-Solicitation Restriction should fall within the Ancillary Restriction Exclusion.

Roar II Non-Solicitation Restriction

Parties' submissions

83. The Parties submitted that the Roar II Non-Solicitation Restriction is not overly restrictive, and does not go beyond that which is necessary to allow Cebu Pacific to benefit fully from the goodwill that is acquired as part of the Acquisition.⁵⁶ In particular, they have submitted that:

- (a) The scope of the Roar II Non-Solicitation Restriction is limited to [REDACTED]; and
- (b) The duration of the Roar II Non-Solicitation Restriction is limited to [REDACTED]⁵⁷

84. The Parties submitted that the scope and duration of the Roar II Non-Solicitation Restriction is required to protect the value of the business and assets, i.e. SEAir, acquired by Cebu Pacific, in view of the market structure and the nature of the business involved.⁵⁸

CCS's Assessment

85. CCS has considered the Roar II Non-Solicitation Restriction in the context of the Acquisition, and is satisfied that it is directly related and necessary to the implementation of the Acquisition. The duration of [REDACTED] and the scope of the Roar II Non-Solicitation

⁵⁴ [REDACTED].

⁵⁵ [REDACTED]

⁵⁶ Paragraph 43.15 of Form M1.

⁵⁷ Paragraph 43.16 of Form M1.

⁵⁸ Paragraph 43.18 of Form M1.

Restriction are reasonable for the Acquisition. Accordingly, it falls within the Ancillary Restriction Exclusion.

Other Shareholders Non-Solicitation Restriction

Parties' submissions

86. The Parties submitted that, similar to the Roar II Non-Solicitation Restriction, the Other Shareholders Non-Solicitation Restriction is not overly restrictive, and does not go beyond that which is necessary to allow Cebu Pacific to benefit fully from the goodwill that is acquired as part of the Acquisition.⁵⁹ In particular, the scope of the Other Shareholders Non-Solicitation Restriction is limited to [X].⁶⁰

87. However, the Parties have also highlighted that the duration of the Other Shareholders Non-Solicitation Restriction is [X].⁶¹

88. The Parties again submitted that the scope and duration of the Other Shareholders Non-Solicitation Restriction are required to protect the value of the business and assets, i.e. SEAir, acquired by Cebu Pacific, in view of the market structure and the nature of the business involved.⁶²

CCS's Assessment

89. CCS is of the view that the proposed restriction period under the Other Shareholders Non-Solicitation Restriction is excessive and therefore do not qualify as an ancillary restriction. As highlighted in CCS's earlier decision on the *Proposed Acquisition by Asia Renal Care (SEA) Pte Ltd of Orthe Pte Ltd*⁶³, the European Commission's *Notice on Restrictions directly related and necessary to Concentrations* (the "EC Notice")⁶⁴ noted that:

"Non-competition clauses are justified for periods of up to three years, when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years.

...

Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses."

90. In the absence of substantive submissions by the Parties to demonstrate the need for Other Shareholders Non-Solicitation Restriction to extend beyond [X], CCS does not see the requirement for the Other Shareholders Non-Solicitation Restriction to be applicable to the

⁵⁹ Paragraph 43.15 of Form M1.

⁶⁰ Paragraph 43.17 of Form M1.

⁶¹ Paragraph 43.17 of Form M1.

⁶² Paragraph 43.18 of Form M1.

⁶³ CCS 400/008/12, 26 December 2012.

⁶⁴ Paragraph 20 of the EC Notice (2005/C 56/03).

sellers⁶⁵ for [X]. Typically, CCS would consider a restriction that is no longer than three years to be more likely to be considered as ancillary to an acquisition.

Other Shareholders Non-Compete Restriction

Parties' submissions

91. The Parties submitted that the Other Shareholders Non-Compete Restriction⁶⁶ is not overly restrictive, and does not go beyond that which is necessary to allow Cebu Pacific to benefit fully from the goodwill that is acquired as part of the Acquisition.⁶⁷

92. According to the Parties, the scope of the Other Shareholders Non-Compete Restriction is limited to, with respect to Clause 2.1(a) of the Other Shareholders Non-Competition Deed, [X]⁶⁸ [X], which relates to the business that is being acquired by Cebu Pacific through the Acquisition, namely SEAir's activities in the provision of international and domestic (i.e. within the Philippines) air passenger transport services.⁶⁹ However, the Parties have noted that as this clause relates to [X]⁷⁰

93. The Parties have additionally stated that the scope of Clause 2.1(a) of the Other Shareholders Non-Competition Deed is limited by the [X]

(a) [X]

(b) [X]⁷¹

94. The Parties also submitted that with respect to Clauses 2.1(b) and 2.2 of the Other Shareholders Non-Competition Deed, the scope of the restriction on [X]⁷² [X], is limited to [X] which relates to the business of SEAir that is being acquired by Cebu Pacific through the Acquisition.⁷³

95. The Parties submitted that the duration of the Other Shareholders Non-Compete Restriction is limited to [X]⁷⁴

96. The Parties submitted that the scope and duration of the Other Shareholders Non-Compete Restriction are required to protect the value of the business and assets, i.e. SEAir, acquired by Cebu Pacific, in view of the market structure and the nature of the business involved, in particular the absence of significant barriers to entry in the provision of

⁶⁵ [X]

⁶⁶ As defined in paragraph 43.4 of Form M1.

⁶⁷ Paragraph 43.20 of Form M1.

⁶⁸ "Beneficiaries" means, collectively, Cebu Pacific and SEAir.

⁶⁹ Paragraph 43.21 of Form M1.

⁷⁰ Paragraph 43.22 of Form M1.

⁷¹ Paragraph 43.21 of Form M1.

⁷² [X]

⁷³ Paragraph 43.23 of Form M1.

⁷⁴ Paragraph 43.24 of Form M1.

international and domestic (i.e. within the Philippines) air passenger transport services generally and including [REDACTED], the ease and likelihood of entry of potential competitors, the ability of customers to easily switch between suppliers, and the high price-sensitivity of customers in the air passenger transport services industry in the Philippines.⁷⁵

CCS's Assessment

97. CCS has considered the Other Shareholders Non-Compete Restriction in the context of the Acquisition, and is satisfied that it is directly related and necessary to the implementation of the Acquisition. Accordingly, it falls within the exclusion under paragraph 10 of the Third Schedule.

The SAA

Parties' submissions

98. In summary, the Parties submitted that the SAA is directed related and necessary to the implementation of the Acquisition for the following reasons:

(a) It was a condition to the Roar II Share Acquisition that the SAA Parties entered into the SAA, and that [REDACTED]⁷⁶

(b) [REDACTED];⁷⁷

(c) [REDACTED]⁷⁸ [REDACTED]⁷⁹; and

(d) From Cebu Pacific's perspective, [REDACTED]⁸⁰ [REDACTED]⁸¹

CCS's Assessment

99. As mentioned above, paragraph 10.10 of the *CCS Guidelines on the Substantive Assessment of Mergers* states, "[in] order to be directly related, the restriction must be connected with the merger, but ancillary or subordinate to its main object". The *CCS Guidelines on the Substantive Assessment of Mergers* add that a "restriction is not automatically deemed directly related to a merger simply because it is agreed at the same

⁷⁵ Paragraph 43.25 of Form M1.

⁷⁶ Paragraph 43.29 of Form M1.

⁷⁷ Paragraph 17.2 of the Parties' Responses to CCS's Information Request dated 4 June 2014.

⁷⁸ Paragraph 43.31 of Form M1.

⁷⁹ Paragraph 17.6 of the Parties' Responses to CCS's Information Request dated 4 June 2014.

⁸⁰ Paragraph 17.8 of the Parties' Responses to CCS's Information Request dated 4 June 2014.

⁸¹ [REDACTED]

time as the merger or is expressed to be so related. If there is little or no connection with the merger, such a restriction will not be ancillary”.⁸²

100. CCS has determined that the SAA is not directly related or necessary to the implementation of Acquisition, given the scope of cooperation and coordination between the Parties under the SAA. The SAA has a broad scope that includes the joint operation and sale and marketing of all common routes between Singapore and the Philippines, and the joint sale and marketing of other markets which goes beyond SEAir’s or Cebu Pacific’s operations. The scope of cooperation and coordination between the Parties under the SAA is thus wider in terms of number of routes and markets covered, as compared to those under the Acquisition, and cannot be said to be ancillary or subordinate to the main object of the Acquisition, which is the acquisition of shares of SEAir.

101. CCS is also of the view that the level of coordination afforded by the SAA is disproportionately excessive to the terms and scope of the Acquisition. The SAA allows [X] and the geographical field of application of the SAA is much broader than the routes serviced by Cebu Pacific and SEAir, covering other existing [X] routes serviced by Tigerair Singapore.

102. CCS also notes that the Parties did not make submissions to demonstrate that, in entering into the SAA, they have chosen the alternative that is the least restrictive of competition.

103. In view of the above, the SAA does not constitute an ancillary restriction that falls within the exclusion in paragraph 10 of the Third Schedule of the Act.

XII. Conclusion

104. For the reasons above and based on all the information provided to CCS, CCS assesses that the Acquisition does not infringe section 54 of the Act and that the SAA and the Other Shareholders Non-Solicitation Restriction does not constitute an ancillary restriction to the Acquisition and therefore does not fall under the Ancillary Restriction Exclusion.



Toh Han Li
Chief Executive
Competition Commission of Singapore

⁸² Paragraph 10.12 of the *CCS Guidelines on the Substantive Assessment of Mergers*.