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## Competition Law Takes Off in Singapore: An Analysis of Two Recent Decisions

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# Competition Law Takes Off in Singapore: An Analysis of Two Recent Decisions

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The first two decisions by the Competition Commission of Singapore, issued in the first quarter of 2007, represent important milestones in the implementation of competition law in Singapore since the enactment of the Competition Act 2004. Both cases involved cooperation agreements between airline operators who had sought negative clearance through the Commission's notification process. This article provides an overview of the legal and policy background behind the new competition regime and, in particular, explains how the new statutory provisions concerned with anticompetitive agreements were applied to the two notified agreements described above. An analysis of these two cases is also conducted to illustrate how the competition regulator has interpreted the relevant competition law principles in the course of its decision-making process.

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# I. Introduction

Competition law arrived in Singapore with the enactment of the Competition Act 2004 (hereinafter the "Competition Act" or the "Act"), followed shortly by the establishment of the Competition Commission of Singapore (CCS) on January 1, 2005.[1] Modeled after the Anglo-European competition law regime, the new laws comprise a classic trinity of statutory prohibitions against anticompetitive agreements (as described in Section 34 of the Act and hereinafter the "Section 34 prohibition"),[2] conduct which amounts to an abuse of a dominant position (as described in Section 47),[3] and mergers which result in a substantial lessening of competition within Singapore (as described in Section 54).[4] The prohibitions against multi-party and unilateral anticompetitive behavior came into force on January 1, 2006, while the merger regulation regime took effect on July 1, 2007.

Singapore's competition law framework was introduced, in part, to advance broader government initiatives that strengthen and liberalize the domestic economy, which has been driven by various government-linked enterprises for the past few decades and in the aftermath of the Asian financial crisis at the end of the last century. The other significant contributing factor behind the introduction of these new laws was the signing of a bilateral free trade agreement between Singapore and the United States in 2003, under which Singapore would introduce a general competition law that would "adopt or maintain measures to proscribe anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare."[5]

Just over a year after the Section 34 prohibition was brought into force, the CCS issued its first two negative clearance decisions in response to notifications from undertakings that had entered into airline alliance agreements.[6] This arti-

1 The Act was passed by the Singapore Parliament on October 19, 2004. *See* Act No. 46 of 2004, at ch. 50B (October 19, 2004) [hereinafter Competition Act 2004], *available at* http://statutes.agc.gov.sg.

2 *Id*. at § 34 [hereinafter Section 34 prohibition].

3 *Id*. at § 47 [hereinafter Section 47 prohibition].

4 *Id*. at § 54.

5 *See* U.S.-Singapore Free Trade Agreement, May 6, 2003, at art. 12.1 (July 31, 2003) (ratified by the United States Congress), *available at* http://www.fta.gov.sg and http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html. A more detailed overview of the legislative background to the Competition Act 2004 is set out in B. Ong, *The Competition Act 2004: A legislative landmark on Singapore's legal landscape*, SING. J.L.S. 172 (2006).

6 Section 44 of the Act provides a mechanism for parties to agreements that wish to have their agreements examined by the Competition Commission to apply to the CCS for a decision as to whether or not the Section 34 prohibition has been infringed and whether or not the agreement qualifies for any of the statutory exclusions or block exemptions. A decision from the CCS that an agreement does not infringe the Section 34 prohibition enjoys a limited immunity from future penalties under Section 46 of the Act.

cle introduces the legal and policy foundations that underpin Singapore's competition law framework and, against this backdrop, evaluates the first two decisions of the Competition Commission. Section II of this article sets out the regulatory policy that the CCS has declared it will adopt in its administration of the statutory prohibitions found within the Act. Section III sets out the key facts and findings of the CCS in the two decisions it has issued in relation to the Section 34 prohibition. Section IV of this article analyzes these decisions and comments on their implications on the state of the law, before making a few concluding observations in Section V.

## II. The Competition Commission of Singapore as a Regulatory Agency

The CCS was incorporated as a statutory body under the Act and established as an organ within Singapore's Ministry of Trade and Industry. The Commission comprises members with legal backgrounds, economists, and businessmen, and is headed by a chief executive appointed from within the civil service.[7] The functions and duties of the CCS are statutorily defined to encompass the following:

> "a) maintain and enhance efficient market conduct and promote overall productivity, innovation, and competitiveness of markets in Singapore;
> b) eliminate or control practices having adverse effect on competition in Singapore;
> c) promote and sustain competition in markets in Singapore;
> d) promote a strong competitive culture and environment throughout the economy in Singapore;
> e) act internationally as the national body representative of Singapore in respect of competition matters; and
> f) advise the Government or other public authority on national needs and policies in respect of competition matters generally."[8]

7 For further details regarding the organizational structure of the CCS and its principal office holders, *see* Competition Act 2004, *supra* note 1, at §§ 3-10.

8 *See id*. at § 6(1). It should be noted that these statutorily-defined functions are further qualified by § 6(2) of the Act, which goes on to state that in performing these functions and in discharging its duties under the Act, the CCS "shall have regard to (a) the differences in the nature of various markets in Singapore; (b) the economic, industrial and commercial needs of Singapore; and (c) maintaining the efficient functioning of the markets in Singapore."

As the national competition authority, the CCS is empowered to perform quasi-legislative, executive, and judicial functions in the administration of the competition law regime. It is responsible for drafting the regulations, guidelines, and other secondary legislation necessary to implement the provisions of the Act. It is authorized to carry out market investigations, acting on complaints from the public or on its own accord, and to make determinations as to whether or not any of the statutory prohibitions against anticompetitive behavior have been infringed.

These roles are shared between the two functional groups established within the CCS. The Policy and Economic Analysis Group, staffed primarily with officers with formal training in economics, is tasked with establishing the requisite policy framework and guidelines in implementing the Act, undertaking economic analysis, and conducting market studies, as well as investigating and evaluating the economic merits of competition cases. The Legal and Enforcement Group, comprised of legally-trained officers, is responsible for undertaking legal analyses, reviewing and preparing all the legal documentation needed in the course of the Commission's work, representing the Commission in appellate and all other legal matters, as well as educating the business community on the competition law regime and liaising with other sectoral regulators and international competition authorities.[9]

Where the CCS has decided that the conduct of an undertaking amounts to an infringement of the Act, its decisions are statutorily enforceable through a range of discretionary remedial powers, including directions requiring undertakings to modify or terminate their infringing agreements or conduct, to enter into legally enforceable agreements as may be specified by the Commission, or to pay a financial penalty of up to 10 percent of an undertaking's annual business turnover for each year of infringement, up to a maximum period of three years.[10] Appeals of the decisions made by the CCS may be made to the Competition Appeal Board and, thereafter, to the Singapore High Court and Court of Appeal in accordance with the provisions of the Act.[11] Individuals who suffer loss or damage as a result of anticompetitive conduct prohibited by the Act enjoy rights of private action only after the CCS has established that one of the statutory prohibitions has been infringed, and may seek judicial relief—such as injunctive relief and damages—from the courts only after all available avenues of appeal have been exhausted.[12]

9 Further details about the role and internal structure of the CCS and its output can be obtained from their website. *See* Competition Commission Singapore, *at*, http://www.ccs.gov.sg (last visited Sep. 6, 2007).

10 *See* Competition Act 2004, *supra* note 1, at § 69.

11 *See id.* at §§ 71-74.

12 *See id.* at § 86.

## A. THE COMPETITION AUTHORITY'S REGULATORY POLICY

In the introduction to *The CCS Guidelines 2005*,[13] the CCS describes its role as the administrator of Singapore's competition law regime in the following manner:

> "The mission of the Competition Commission of Singapore (CCS) is to *promote healthy competitive markets that will benefit the Singapore economy*. Healthy competition is good for businesses and consumers alike. It promotes quality, diversity and innovation–characteristics which are highly valued in Singapore's open economy–and leads to economic growth which benefits out entire nation.
>
> The CCS' *approach is based on sound economic principles applied objectively and consistently*. It will investigate and enforce the Competition Act in a consistent and transparent manner while respecting confidentiality."[14] (Emphasis added)

These statements reflect an underlying utilitarian philosophy of competition law in Singapore—that it will be used as an instrument to enhance the competitiveness of the markets which comprise the domestic economy.

These statements reflect an underlying utilitarian philosophy of competition law in Singapore—that it will be used as an instrument to enhance the competitiveness of the markets which comprise the domestic economy—and that the CCS intends to employ an economics-based approach towards the interpretation and application of the statutory prohibitions in the Act. Competition law is not concerned with protecting the interests of individual businesses or competitors—its primary goal is to target those forms of private conduct that serve as impediments to an efficient and competitive market-based economy.

13 In 2005, the CSS published three sets of competition guidelines. The first set included Guidelines on the Major Provisions; Section 34 Prohibition; Section 47 Prohibition; and Market Definition. *See* Competition Commission of Singapore, CSS Guidelines (Jul. 29, 2005). The second and third sets included Guidelines on the Powers of Investigation; Enforcement; Notification for Guidance and Decision; Lenient Treatment for Undertakings Coming Forward with Information on Cartels; Transitional Arrangements; and The Appropriate Amount of Penalty. *See* CSS Guidelines (version dated Nov. 23, 2005). The Guidelines on Treatment of Intellectual Property Rights was published at the end of the year. *See* CSS Guidelines (version dated Dec. 20, 2005). Hereinafter individual CSS guidelines are referenced as they are described here. For the latest version of the guidelines, *see* Competition Commission of Singapore, The CCS Guidelines (2005), *at* http://www.ccs.gov.sg/Guidelines/index.html (last visited Oct. 4, 2007).

14 These self-declarations are consistent with the "Mission and Value Statement" of the CCS, as reflected on its website. *See* Competition Commission Singapore, Mission and Values Statement (Jan. 24, 2006), *at* http://www.ccs.gov.sg/AboutUs/Mission/index.html (last visited Sep. 7, 2007).

## 1. Regulatory Priorities and Interagency Cooperation

As a newly created competition regulator with a small head count, the CCS has clearly articulated is discretionary authority in relation to its administrative priorities: "The CCS will set its strategic priorities and consider each case on its merits, and in light of available resources, to see if it warrants an investigation."[15] The Competition Act 2004 envisages the CCS as a general competition authority with an expansive regulatory jurisdiction. Given its limited regulatory capacity and inexperience, it is not surprising that legislators consciously sought to limit the CCS' responsibilities by excluding activities in certain sectors of the economy from the scope of the Act. For example, agreements or conduct involving undertakings in industries already regulated by sectoral competition laws administered by another regulatory authority are excluded from the Sections 34 and 47 prohibitions.[16] In those industry sectors that have specialist industry regulators but no industry-specific competition code, the CCS has declared that it intends to cooperate with these other regulatory authorities on competition related matters:

> "On cross-sectoral competition cases, the CCS will work out with the relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator. The CCS will work closely with other regulators where necessary to prevent double jeopardy and minimise regulatory burden in dealing with the case."[17]

Such an approach ensures that the competition policy administered by the CCS complements, or at least does not undermine, the regulatory policies developed by other statutory bodies responsible for specific industry sectors.[18] In the two decisions discussed below, involving airline alliance agreements, it is very

15 *See* CCS Guidelines on the Major Provisions, *supra* note 13, at para. 3.6.

16 Other exclusions from the scope of the statutory prohibitions in the Competition Act 2004 can be found in the Third Schedule of the Act, including industry sectors without their own sectoral competition codes, but are subject to their own comprehensive regulatory regime. These include the postal services sector, the supply of piped potable water, wastewater management services, public bus and rail services, and cargo terminal operations.

17 *See* CCS Guidelines on the Major Provisions, *supra* note 13, at para. 3.7.

18 It remains to be seen how effectively the CCS' competition policy will gel with the established policy frameworks devised by industry regulators in other key sectors of the Singapore economy, such as the banking and financial services industry, the legal and medical professions, and the housing and property development industry.

clear that the views of the Civil Aviation Authority of Singapore were given serious consideration by the CCS before it issued a decision.

## 2. The Guidelines Issued by the CCS

One of the most practical and significant facets of the CCS' regulatory policy lies in the attitude it takes towards the guidelines it issued to clarify the scope of the general statutory provisions found within the Competition Act 2004. Most of the first year of the CCS' existence was spent drafting a set of eleven guidelines that cover the various substantive and procedural aspects of the new competition law.[19]

These guidelines serve as an important adjunct to the primary legislation because they reflect how the CCS intends to interpret and apply the provisions in the Act. This is particularly important where the key statutory prohibitions against anticompetitive conduct are concerned because of the broad and open-textured character of the statutory language that has been adopted in these legislative provisions. The underlying spirit of the CCS Guidelines has been summarized by the CCS in the following manner:

> "Rather than being prescriptive and detailed, the guidelines should outline the conceptual, analytical and procedural framework, within which the CCS will investigate and assess complaints and undertake enforcement. This is also in line with the approach of competition authorities elsewhere. The guidelines can only provide a general indication on how the CCS will administer and enforce the Act; the guidelines are not intended to be individual firm- or sector-specific rules. The application of the guidelines will depend on the facts of each case. The CCS will, however, apply its guidelines in a consistent and coherent manner."[20]

In addition, there is an important qualifying caveat made in the introductory sections of almost all of the guidelines published by the CCS:

19 *See supra* note 13.

20 Competition Commission of Singapore, Guidelines Policy Paper (Jul. 29, 2005), at para. 3c, *available at* http://www.ccs.gov.sg/Guidelines/Guidelines+Published+and+Policy+Paper.htm. The paper was released to accompany the first set of CSS Guidelines on the Section 34 and Section 47 Prohibitions (*see supra* note 13).

> "These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice."[21]

These statements reiterate the fact that the CCS Guidelines do not, strictly speaking, carry the same legal status as the corpus of secondary legislation—regulations and orders—promulgated under the Competition Act 2004. The regulations issued under the Act establish the formal procedural framework within which the CCS is required to operate, while the orders issued under the Act, by the Minister of Trade and Industry, provide detailed guidance on specific aspects of the competition law regime, such as the manner in which financial penalties will be calculated by the CCS or the scope of a block exemption.[22] While the CCS Guidelines may lack the degree of legislative formality or permanence associated with regulations or orders, they are nevertheless important legal instruments that reflect the CCS' regulatory policy and will certainly be relied on by the legal community to provide some degree of guidance to the ambit and application of the statutory prohibitions found within the Act.

Given that the first two decisions of the CCS concerned cases which involved the Section 34 prohibition, the next section of this article will outline the specific regulatory policy the CCS has developed around this particular statutory prohibition against multilateral anticompetitive behavior.

## B. THE SECTION 34 PROHIBITION

Section 34(1) of the Competition Act 2004 prohibits, subject to the statutory exclusions found in the Third Schedule of the Act, "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 are prohibited unless they are exempt" in accordance with the provisions of the Act. Section 34(3) goes on to declare that any provision of any agreement or any decision which falls within the scope of the Section 34 prohibition is automatically void on or after January 1, 2006.

21 *See, e.g.*, CCS Guidelines on the Section 34 Prohibition, *supra* note 13, at para. 1.4.

22 *See, e.g.*, the Competition (Financial Penalties) Order 2007 (S372/2007) and the Competition (Block Exemption for Liner Shipping Agreements) Order 2006 (S420/2006).

A list of examples of conduct which may have the object or effect of preventing, restricting, or distorting competition within Singapore is set out in Section 34(2)—these are agreements, decisions, or concerted practices which:

> "(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Where an agreement is made outside Singapore, or if it involves parties who are based outside of Singapore, the agreement is viewed by the CCS as subject to the statutory prohibition as long as the object or effect of the agreement is the prevention, restriction, or distortion of competition within Singapore.[23] The CCS has also taken the view that the Section 34 prohibition only applies to agreements which are separate undertakings, and does not apply to agreements where there is really only one undertaking involved, that is, an agreement between entities that form part of a single economic unit. As such, agreements between a parent company and its subsidiary are not "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."[24] The factors the CCS considers relevant to its assessment of whether or not a subsidiary is independent from its parent or if it forms part of the same economic unit, include the extent of the parent's shareholding in the subsidiary, whether or not the parent has control of the subsidiary's board

23 *See* CCS Guidelines on the Section 34 Prohibition, *supra* note 13, at para. 2.2.

24 *See id.* at para. 2.7. It is fairly clear that the single economic entity doctrine has been imported by the CCS from the European competition law regime, with the European Court of Justice articulating the doctrine as early as in the 1970's in Béguelin Import v. GL Import Export, 1971 E.C.R. 949 (E.C.J.) and reaffirming it, more recently, in Viho v. Commission, 1996 E.C.R. I-5457 (E.C.J.).

of directors, and whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters.[25]

### 1. The Appreciability Concept

In light of the potentially expansive scope of the Section 34 prohibition against agreements whose object or effect is prevention, restriction, or distortion of competition, it was necessary for the CCS to qualify the ambit of the statutory prohibition by introducing the concept of appreciability into the interpretation of Section 34. This reflects a deliberate policy decision to focus the regulatory agency's attention on addressing instances of multilateral anticompetitive behavior that are likely to have a significant negative impact on the competitive process. Paragraph 2.18 of the CCS Guidelines on the Section 34 Prohibition explains that:

THIS REFLECTS A DELIBERATE POLICY DECISION TO FOCUS THE REGULATORY AGENCY'S ATTENTION ON ADDRESSING INSTANCES OF MULTILATERAL ANTICOMPETITIVE BEHAVIOR THAT ARE LIKELY TO HAVE A SIGNIFICANT NEGATIVE IMPACT ON THE COMPETITIVE PROCESS.

> "Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is prohibited. The CCS does not adopt such a narrow approach and will assess an agreement in its economic context. An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition unless it is excluded or exempted."

The appreciability concept appears to have been derived from the de minimis doctrine developed by the European Courts,[26] with the CCS providing additional guidelines that significantly resemble the safe harbor market share thresholds found in the European Commission's *Notice on Agreements of Minor Importance*.[27] Paragraph 2.19 of the CCS Guidelines on the Section 34 Prohibition declares that:

25 *See* CCS Guidelines on the Section 34 Prohibition, *supra* note 13, at para. 2.8, where the CCS is careful to qualify itself by stating that "ultimately, whether or not the entities form a single economic unit will depend on the facts and circumstances of each case."

26 *See, e.g.*, the European Court of Justice's decision in Völk v. Vervaecke, 1969 E.C.R. 295 (E.C.J.), in which it has held that "an agreement falls outside the prohibition in Article [81(1)] where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question."

27 European Commission, Notice on Agreements of Minor Importance, 2001 O.J. (C 368) 13 [hereinafter European Commission Notice].

> "as Singapore is a small and open economy, an agreement will generally have no appreciable adverse effect on competition:
>
> - if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned);
> - if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned);[28]
> - in the case of an agreement between undertakings where each undertaking is a small or medium enterprise ("SME"). Agreements between SMEs are rarely capable of distorting competition appreciably within the section 34 prohibition.[29]
>
> Where it may be difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors, the 20% threshold will be applicable."[30]

In addition, the CCS goes on to declare in paragraph 2.20 that "an agreement involving price-fixing, bid-rigging, market-sharing or output limitations will always have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels mentioned [above], and even if the parties to such agreements are SMEs." This approach is consistent with the one taken in the European Commission Notice, which denies safe harbor protection for agreements that contain hard-core restrictions on competition.[31]

If the agreement in question does have an appreciable adverse effect on competition in Singapore, then the parties to that agreement will infringe the

28 In contrast, the European Commission Notice sets the market share threshold at 10 percent for agreements between competitors and at 15 percent for agreements between non-competitors. *Id.* at para. 7.

29 A similar provision can be found in the European Commission Notice. In Singapore, SMEs are defined as having fixed assets investment of less than US$15 million if they operate in the manufacturing sector and less than 200 workers if they operate in the services sector. *Id*. at para. 3.

30 In the European Commission Notice, a 10 percent market share threshold is applicable where there are difficulties in classifying the agreement. *Id*.

31 *See id.* at para. 11, which states that the Notice does not apply to horizontal agreements to fix prices, to limit output or sales, or to allocate markets or customers.

Section 34 prohibition unless they satisfy the criteria for any of the exclusions found within the Third Schedule of the Act.

## 2. The Net-Economic-Benefit Exclusion

The exclusion that was successfully invoked by the parties in the two cases discussed below is the net economic benefit exclusion, modeled closely after Article 81(3) of the EC Treaty:

> "Agreements with net economic benefit
>
> 9. 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."[32]

Annex C of the CCS Guidelines on the Section 34 Prohibition sets out the CCS' policy approach towards this exclusion and provides an analytical framework for assessing agreements when deciding if they meet the criteria listed above. The exclusion is viewed by the CCS in essentially three parts.

The first limb of the exclusion requires proof of efficiency gains that will arise from the agreement—parties must show that there are objective benefits created by the agreement and the economic importance of such efficiencies.[33] Many types of efficiencies are covered by the criterion that the agreement "contributes to improving production or distribution; or promoting technical or economic progress," and the CCS does not require parties seeking to rely on this exclusion to draw clear distinctions between the various categories because these categories overlap with each

32 *See* Competition Act 2004, Third Schedule, *supra* note 1, at para. 9.

33 *See* CCS Guidelines on the Section 34 Prohibition, *supra* note 13, at para. 10.3.

other considerably.[34] The CCS Guidelines explain the CCS' position on what parties to an agreement need to show in order to satisfy this first limb:

> "The efficiency claims must therefore be substantiated as follows:
>
> - The claimed efficiencies must be objective in nature;
> - There must normally be a direct causal link between the agreement and the claimed efficiencies;
> - The efficiencies must be of a significant value, enough to outweigh the anti-competitive effects of the agreement.
>
> In evaluating the third factor, the likelihood and magnitude of the claimed efficiencies will need to be verified. The undertakings will have to substantiate each efficiency claimed, by demonstrating how and when each efficiency will be achieved. Unsubstantiated claims cannot be accepted. Further, the greater the increase in market power that is likely to be brought about, the more significant benefits will have to be."[35]

The Guidelines suggest that concrete evidence of efficiency gains have to be established, perhaps even quantified in some way to the satisfaction of the CCS, before they can be taken into consideration for the purposes of applying this statutory exclusion. It also appears reasonably clear that the extent of these efficiencies generated by the agreement will have to be weighed against, and must ultimately offset, the anticompetitive object or effects of the agreement.

The second and third limbs of the exclusion require the satisfaction of two negative criteria—that the agreement "does not impose on the undertakings concerned restrictions which are not indispensable to the attainment" of the efficiencies identified in the first limb of the exclusion, and that it does not "afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question." These two limbs restrict the types of efficiency claims that will qualify under the exclusion—one looks at the extent to which the restraints on competition are necessary in order to attain potential efficiencies, while the other is concerned with the extent of the anti-competitive effects arising from the execution of the agreement.

34 Examples of improvements in production or distribution set out in paragraph 10.6 of the Guidelines include "lower costs from production or delivery runs," "changes in methods of production or distribution," "improvements in product quality," and "increases in the range of products produced." Examples of the promotion of technical or economic progress set out in paragraph 10.7 of the Guidelines include "efficiencies from economies of scale and specialization in research and development with the prospect of an enhanced flow or speed of innovation."

35 *See* CCS Guidelines on the Section 34 Prohibition, *supra* note 13, at para. 10.4.

The indispensability requirement in the second limb has been interpreted by the CCS to involve the application of a two-fold test—both the agreement itself, as well as the individual restrictions contained within it, must be "reasonably necessary to attain these efficiencies."[36] Parties seeking to rely on this exclusion must be prepared to justify the necessity of the agreement in general, as well as the specific restraints on competition resulting from it. The CCS Guidelines on the Section 34 Prohibition set out CCS' approach to this limb of the exclusion:

> "The first consideration is whether more efficiencies are produced with the agreement in place than in its absence. The agreement will not be regarded as indispensable if there are other economically practical and less restrictive means of achieving the efficiencies, or if the parties are capable of achieving the efficiencies on their own.
>
> Where the agreement is deemed necessary to achieve the efficiencies, the second consideration is whether more efficiencies are produced with the individual restriction(s) in place than in their absence. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that flow from the agreement, or make them much less likely to materialise. Restrictions relating to price-fixing, bid-rigging, market sharing and output limitation agreements are unlikely to be considered indispensable.
>
> The assessment of indispensability is made within the actual context in which the agreements operate and must in particular take account of the structure of the market, the economic risks related to the agreements, and the incentives facing the parties. The more uncertain the success of the products covered by the agreements, the more restrictions may be required to ensure that the efficiencies will materialise. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement."[37]

The third limb of the exclusion requires an assessment of the extent of the reduction in competition arising from the agreement. This entails a comparison of the degree of competition in the market, and the degree of market power possessed by the parties to the agreement prior to the agreement, as compared to the situation that is likely to arise after the agreement has been consummated.[38]

36 *See id.* at para. 10.8.

37 *See id.* at paras. 10.9, 10.10, and 10.11.

38 *See id.* at paras. 10.12 and 10.13. Paragraph 10.12 of the Guideline emphasis that the CCS is primarily concerned with evaluating the extent of the reduction in competition that an agreement may bring about, and that "in a market where competition is relatively weak, this factor may be more important."

# III. The First Two Decisions of the Competition Commission of Singapore

The CCS' first two published cases involve negative clearance decisions issued with respect to airline alliance agreements which had been notified to it in 2006. Both of these decisions, which were released in the first quarter of 2007, found that even though the Section 34 prohibition in the Competition Act 2004 had been contravened, the notified agreements nevertheless qualified for the net benefits exclusion in the Third Schedule.[39] The facts, findings, and reasoning used by the CCS in both cases are set out below.

## A. *QANTAS AIRWAYS/BRITISH AIRWAYS*[40]

In *Qantas Airways/British Airways*, the parties were airline companies that had entered into a joint venture agreement under which they would jointly operate certain scheduled flights into and out of Singapore for an indefinite duration. The comprehensive agreement provided for enhanced cooperation between the two companies in areas including scheduling, marketing, sales, cargo, pricing, holiday products, distribution and agency arrangements, frequent flyer programs, in-flight products, information technology, and purchasing and associated service activities. The purpose of the agreement was to enable both parties to overcome some of the difficulties each faced in operating their respective long-sector services along the so-called Kangaroo Route—the bundle of routes between Australia and Europe, with a midpoint stopover. Qantas, based in Australia, was at one end of the Kangaroo Route, while British Airways, based in the United Kingdom, was at the other end. Both airlines used Singapore as a mid-point stop for their flights to refuel and change crews. Qantas enjoyed higher passenger loads for flights along the segments of the Kangaroo Route between Australia and Singapore, compared to its flights between Singapore and Europe, while British Airways had the opposite problem. The agreement allowed them to combine and coordinate their respective passenger traffic and feed each other's flights out of Singapore, thereby using Singapore as a mini-hub for their operations along the Kangaroo Route.

An agreement of this nature violated the Section 34 prohibition of the Competition Act 2004 because the parties were competitors operating a number of similar flights into and out of Singapore. Under the agreement, the parties were jointly responsible for the costs of certain flights along the Kangaroo Route and jointly shared in the revenues earned from these flights, regardless of which

39 The decisions are currently only available from the CCS' online Public Register. Competition Commission of Singapore – Notification Decisions – Public Register, *at* http://www.ccs.gov.sg/PublicRegister/Notifications+Decisions+-+Public+Register.htm (last visited Oct. 4, 2007).

40 Qantas Airways/British Airways, Case No. CCS 400/002/06 (notified Apr. 24, 2006, decided Feb. 13, 2007) [hereinafter *Qantas/BA*].

carrier actually operated the service. The agreement involved fixing prices along all routes between Australia and Europe, Australia and Southeast Asia, and Europe and Southeast Asia, and also involved jointly managed capacity and yields along some of these routes. So if both airlines offered flights from Singapore to the same destination, or from the same point of origin to Singapore, and the passenger load from one flight could be absorbed into the other's service, the agreement enabled one of the airlines to eliminate its scheduled flight and divert its passengers to the other airline's service.

The CCS defined the relevant markets as the markets for scheduled air passenger transport, comprising various individual routes along the Kangaroo Route in which both parties operated.[41] These included the Singapore-London, Singapore-Frankfurt, Singapore-Sydney, and Singapore-Melbourne routes. The combined market shares of the parties in these markets averaged around 34 to 38 percent.[42] This exceeded the 20 percent market share threshold for assessing whether an agreement has an appreciable adverse effect on competition[43] and the CCS found that the agreement "may have the appreciable effect of preventing, restricting or distorting competition for the provision of scheduled air passenger transport" on these specified routes.[44]

However, the Section 34 prohibition was excluded from operating against this agreement because the CCS was prepared to find that the agreement satisfied the net economic benefit exception set out in paragraph 9 of the Third Schedule of the Competition Act 2004. The parties argued that their agreement yielded net economic benefits (and should therefore be excluded from the ambit of the Act) because, in the absence of the agreement, they would have relocated their airhub away from Singapore to another city in the region. There were difficulties in quantifying the efficiency gains because the agreement had been in place for more than a decade (the original agreement started back in 1995) and the counterfactual submitted by the parties was based on "what the Parties would most likely do, rather than what the Parties could potentially do, if the Agreement is

41 Reference was made to the market definitions adopted by the European Commission in other airline cases. *See* KLM/Alitalia, Case No. COMP/JV.19 (Aug. 11, 1999), at para. 52; Air France/Sabena, Case No. COMP/M.157 5 C.M.L.R. M1 (1994), at para, 25; and Lufthansa/SAS, 1996 O.J. (54) 28, 4 C.M.L.R. 845 (1996), at para. 31.

42 More detailed data relating to the relevant market shares submitted by the parties to the CCS can be found in *Qantas/BA*, *supra* note 40, at paras. 42-43.

43 The 20 percent indicative threshold is set out CCS Guidelines on the Section 34 Prohibition, *supra* note 13, at para. 2.19.

44 In relation to the markets for air freight services and the sale of air travel services, the CCS concluded that market shares of the parties to the agreement were found to be too low to result in an appreciable prevention, restriction or distortion of competition in these markets. *See Qantas/BA, supra* note 40, at paras. 88 and 92.

not excluded from the section 34 prohibition."[45] Under this counterfactual involving the withdrawal of air services from Singapore, in the absence of the agreement, the parties said they would reduce their flights to or from Singapore by between 44 and 68 percent or cease operating all of their flights in a particular sector of the Kangaroo Route.[46] With the cooperative agreement in place, however, the parties claimed that they would achieve significant productive efficiencies through cost reductions and service improvements arising from the coordination of their flights as well as efficiencies achieved through the development of joint facilities (such as sales teams, retail shops, customer service facilities, and airport lounges). Cost savings were achieved from the higher passenger load which they would enjoy on all their flights because of the passenger feed between the airlines, as well as from coordinating their flight services so that the different flights along the Kangaroo Route would be allocated to the party that was better placed to operate each particular service.

Other economic benefits arising from the agreement identified by the parties in their submissions to the CCS included the lower airfares offered by the parties (as a result of their cost savings), improved flight schedules which minimized connection times, the addition of extra flights on high-demand routes and on routes which may not have enough demand to support a service, and economic benefits to the Singapore economy from increased tourism and tourism-related employment as a result of the parties using Singapore as an air-hub.

While the CCS accepted, on balance, that the agreement satisfied the net economic benefit exception, it expressed some reservations about the credibility of the counterfactual put forward by the parties that they would shift their hub out of Singapore to another city in the region. This was because, despite requests by the CCS, the parties did not submit any documentary evidence from their respective boards of directors to indicate that they would act this way in the absence of the agreement.[47] The counterfactual also failed to account for the feasibility of shifting their air-hub to a rival airport in light of the capacity limitations of alternative locations arising from the various Air Services Agreements between Australia and the other jurisdictions, the availability of suitable timeslots for flights to and from these countries, passenger travel patterns, and other commercial arrangements.

In deciding if the agreement contributed to "improving production or distribution" or "promoting technical or economic progress" (the key substantive

45 *See id.*, at para. 45.

46 *See id.* at para. 48.

47 In the Commission's opinion: "since the arguments put forward by the Parties on how the Agreement will satisfy the net economic benefit criteria hinge critically on the counterfactual, the Commission will tend to view the arguments with some reservations in the absence of such supporting documentation." *See id.* at para. 69.

requirements of the exception in paragraph 9 of the Third Schedule), the CCS explained that, "[f]or this criterion of the net economic benefit test to be met, it is necessary for any objective benefits resulting from the Agreement to outweigh and compensate for any detriments to competition."[48]

In assessing the various economic benefits identified by the parties as arising from the agreement, the CCS acknowledged that it would improve Singapore's connectivity as an airline hub, but observed that most of these benefits would accrue to passengers from either end of the Kangaroo Route (Europe or Australia) rather than passengers from Singapore. The parties' claims that the agreement resulted in tourism benefits to Singapore was not supported by the CCS because it was probably only one of the many factors that contributed to Singapore's tourism industry. Other significant factors that influenced tourism demand included the relative costs of other destinations and the perceived attractiveness of Singapore as a tourist destination. On the other hand, the CCS agreed with the parties that the agreement would improve the quality of the air passenger transport markets in Singapore "through better scheduling, more flight connections and efficiencies through joint activities such as purchasing and marketing."[49]

Turning to the next limb of the net economic benefit exception, the CCS was satisfied that the agreement did not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives."[50] The parties argued that the benefits of the agreement could not be achieved as effectively through less comprehensive code-sharing[51] and interlining agreements.[52] Feedback from third-party airlines indicated that cooperative agreements such as the one submitted by the parties to the CCS for clearance "are likely to be found in varying degrees amongst members of all airline alliances."[53] Without quantifying how the alleged benefits of the agreement exceeded the benefits that could be reaped under these alternative (and less restrictive) arrangements, the CCS concluded that the economic benefits it identified were "dependent on the full integration of the two Parties' networks and services,

48 *See id*. at para. 70.

49 *See id*. at para. 74.

50 *See id*. at para. 78.

51 A code-share agreement is one where one airline, the marketing carrier, is able to sell seats on a flight operated by another airline carrier using the marketing carrier's designator code. This allows the marketing carrier to increase the number of flights it has to offer to its customers and extend its number of destinations through a virtual network of carriers without having to operate additional flights.

52 An interlining agreement is a transaction between carriers where passengers, baggage, and freight are transferred from one carrier to another using only one ticket or check-in procedure from departure point to destination. It does not require fully integrated cooperation between the parties who form such alliances.

53 *See Qantas/BA*, *supra* note 40, at para. 78.

including joint revenue sharing, scheduling and fare setting, and that the restrictions in the Agreement are necessary to attain those benefits."[54]

Finally, the CCS was satisfied that the agreement did not "afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question."[55] This was because there were "numerous carriers flying between Singapore and major Australian cities, with the exception of Darwin" and Singapore Airlines enjoyed "substantial market shares on all these routes." The Singapore-Darwin route was also serviced by Tiger Airways (a subsidiary of Singapore Airlines) which had recently entered the market in late 2005 and had "since captured a significant market share and was likely to continue to be a strong competitor to the Parties."[56] The CCS took the view that the presence of significant market players on all the routes served by the parties to and from Singapore was likely to continue to impose competitive pressure on the parties. For example, the figures provided by the parties indicated that Singapore Airlines had 57 to 59 percent of the Singapore-Sydney market and 50 to 51 percent of the Singapore-London market, while the parties had combined market shares of 34 to 36 percent of the Singapore-Sydney market and 35 to 38 percent of the Singapore-London market.

The CCS decision also referred to the views of the Civil Aviation Authority of Singapore and the Singapore Ministry of Transport which stated that, "in line with the international trend towards air services liberalization," they were "supportive of allowing airlines to enter into cooperative marketing arrangements" and had "no objection in-principle to the Agreement."[57]

### B. *QANTAS AIRWAYS/ORANGESTAR INVESTMENT HOLDINGS*[58]

In *Qantas Airways/Orangestar Investment Holdings*, the parties to the cooperative agreement were related companies in the airline industry. Qantas operated its airline business out of Australia, while Orangestar was the holding company for two value-based, intra-Asia carriers (Jetstar Asia and Valuair) based in Singapore. Orangestar was a subsidiary company of Qantas, which held 44.5 percent of the former's shareholdings through a wholly-owned intermediary company. The remainder of Orangestar's equity was held by Singaporean entities. The notified agreement provided for the coordination of the parties' airline opera-

54 *See id*.

55 *See id.* at para. 79.

56 *See id.* at para. 79.

57 *See id*. at para. 82.

58 Qantas Airways/Orangestar Investment Holdings, Case No. CCS 400/003/06 (notified Apr. 25, 2006, decided Mar. 5, 2007) [hereinafter *Qantas/Orangestar*].

tions and activities for an indefinite duration. The scope of the comprehensive agreement extended to the parties' network and scheduling decisions, sales and marketing initiatives, holiday products and joint promotions, pricing and inventory decisions, rebate and incentive programs for their product distribution channels, frequent flyer and loyalty programs, support services, and personnel sharing and training arrangements. The parties claimed that the close cooperation among Qantas and its related airlines envisaged under the agreement was necessary "if Qantas wishes to respond competitively to the challenges of the global aviation industry."[59] The agreement between the parties was conditional on authorization from both the Australian Competition and Consumer Commission (ACCC) (which unconditionally authorized the agreement for a period of five years as of September 13, 2006) and a determination from the CCS that the agreement did not infringe the Competition Act 2004.[60]

The parties submitted that their agreement did not fall within the scope of the Section 34 prohibition against anticompetitive agreements because the statutory provision was directed at agreements between undertakings and, since this was an agreement between a parent and a subsidiary company, the parties ought to be treated as a single economic entity.[61] In assessing the single economic entity argument, the CCS noted that Orangestar's shareholders' agreement gave Qantas the power to appoint four out of the nine members of the board of directors, while three directors were appointed by another shareholder. The shareholders' agreement required material decisions of the board to be passed by a stipulated percentage of the board members, resulting in both Qantas and this other shareholder wielding blocking rights over material board decisions. After evaluating the arguments submitted by the parties, which included case authorities and legal principles drawn from U.S. antitrust and European competition law jurisprudence, the CCS concluded that that the parties did not form a single economic undertaking.

59 *See id.* at para. 12.

60 It was observed that "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." *See id*. at para. 14.

61 Paragraph 2.7 of the CCS Guidelines on the Section 34 Prohibition explains that the prohibition "does not apply to agreements where there is only one undertaking, that is between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary ... 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." Paragraph 2.8 identifies some of the relevant factors which have to be taken into consideration when assessing if a subsidiary forms part of the same economic unit as its parent. These factors include the size of the parent's shareholding in the subsidiary, the extent of the parent's control over the board of directors of the subsidiary and whether the subsidiary "complies with the directions of the parent on sales and marketing activities and investment matters."

In arguing that they should be considered a single economic entity, the parties relied on the unity of interest test developed by the U.S. Supreme Court in *Copperweld*[62] (in which the Court held that a parent company was incapable of conspiring with its wholly-owned subsidiary in contravention of Section 1 of the Sherman Act[63]), as well as the decisive-influence test used by the European Court of Justice in its decisions concerning Articles 81 and 82 of the EC Treaty.[64] Cases from both jurisdictions in which these tests were applied were considered by the CCS, which, ultimately, took the view that neither test could be applied to support the proposition that the parties ought to be viewed as a single economic entity.

The parties' argument that there was a unity of interest between them was rejected because Qantas, the parent company, held only a minority share (44.5 percent) in Orangestar,[65] with the "majority shareholdings within Orangestar . . . owned by Singaporean interests and not Qantas."[66] The CCS did not accept the parties' claim that there was "no prospect of competition between them" because Orangestar's Shareholders' Agreement contemplated "that the interests of Qantas and Orangestar may diverge and the potential for competition between Qantas and Orangestar exists."[67] A conscious decision was also made by the CCS not to state what shareholding thresholds had to be crossed in order to establish the requisite unity of interest. Neither was the CCS prepared to rule on whether the extensions to the unity of interest reasoning developed by the U.S. courts in cases involving other commercial relationships were applicable to the Singapore

62 In *Copperweld,* the U.S. Supreme Court held that a wholly-owned subsidiary had complete unity of interest with its parent company, such that any agreement between them did not constitute a joining of previously-disparate economic resources. Copperweld Corp v. Independence Tube Corp., 467 U.S. 752 (1984) [hereinafter *Copperweld*].

63 U.S. Sherman Act, 15 U.S.C. at § 1 (2000 and supp. IV 2005).

64 Viho Europe BV v. Commission, 1997 E.C.R. 163 (E.C.J.).

65 Even though the U.S. Supreme Court in *Copperweld* had been careful to limit its application of the "unity of interest" analysis to relationships between parent companies and their wholly-owned subsidiaries (see *Copperweld*, *supra* note 62, at p. 767), subsequent decisions by the U.S. courts have extended the doctrine to cases involving majority-owned subsidiary companies (such in as Novatel Communications v. Cellular Telephone Supply Inc, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. Dec. 23, 1986). The parties could not provide any clear precedents from the U.S. courts to support their contention that a parent company with less than a majority shareholding in a subsidiary company could invoke this doctrine. The cases cited by the parties (U.S. v. Citizens & Southern National Bank, 422 U.S. 86 (1975); City of Mt. Pleasant v. Associated Electricity Cooperative Inc, 838 F.2d 268 (8th Cir. 1988); Jack Russell Terrier Network of Northern California v. American Kennel Club, 407 F.3d 1027 (9th Cir. 2005); Williams v. I.B. Fisher Nevada, 999 F.2d 445 (9th Cir. 1993)) to support their arguments that such an extension could be made were easy distinguished by the CCS on their respective factual matrices.

66 *See Qantas/Orangestar*, *supra* note 58, at para. 36.

67 *See id.* at para. 41.

context.[68] Furthermore, the mere fact that Qantas had extended significant financial and operational support to Orangestar was not enough to support their unity of interest argument.[69] The CCS observed that the "financial and operational support extended by Qantas to Orangestar appears to be conditional upon the Parties being allowed to coordinate prices and output" through the cooperation agreement between them.[70] In other words, without this agreement, there would no longer be any incentive for Qantas to provide such financial or operational support to Orangestar. Any unity of interest between the parties arose only because of the cooperative agreement contemplated between them. The interests of the parties would not necessarily have been aligned in the absence of the cooperative agreement.[71]

Qantas' other argument for why the two companies should be considered a single economic entity rested on its assertion that it wielded decisive influence over Orangestar. This decisive influence allegedly arose from Qantas' ability to control Orangestar through its blocking rights over material Orangestar decisions. The CCS considered the line of European cases in which one undertaking was treated as part of a single economic entity with another undertaking in which the former exercised sufficient control over the latter, such that the latter did not enjoy any real autonomy in determining its course of action on the market.[72] Noting that the European cases provided no clear precedent that the requisite

68 *See id.* at para. 43. These relationships include arrangements between members of a cooperative (*City of Mt. Pleasant*), between club and affiliate (*Jack Russell Terrier Network of Northern California*), and between franchisor and franchisee (*Williams*). For cases in parentheses, *see supra* note 65.

69 *See Qantas/Orangestar*, *supra* note 58, at paras. 44-45. Examples of such support given by the parties included the human resources deployed from Qantas to assist in setting up Jetstar Asia, one of Orangestar's airlines, prior to its merger with Valuair, assistance from Qantas in various commercial transactions such as the execution of fuel hedges and negotiating insurance premiums, overall strategic planning between Qantas and Orangestar's airlines, and Qantas' equity funding to Jetstar Asia and Orangestar.

70 The circularity of Qantas' arguments were criticized by the CCS as:

> 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.

*See id*. at para. 49.

71 In their correspondence with the CCS, the parties contradicted their "unity of interest" arguments by stating that "without the ability to discuss and agree prices and inventory," under their co-operative agreement, they "would have the incentive and ability to act to further their own interests at the expense of the joint operations," thereby preventing themselves from optimising the utilisation of their aircraft across their combined networks. *See id*. at para. 46.

72 These cases included Viho Europe BV v. Commission, 1997 E.C.R. 163 (E.C.J.), Istituto Chemioterapico SpA & Commercial Solvents Corp v. Commission, 1974 E.C.R. 223 (E.C.J.), and J R Geigy v. Commission, 1972 E.C.R. 787 (E.C.J.).

degree of control or decisive influence could be established in a situation where the parent company had less than a majority shareholding in the subsidiary, the CCS took the view that Qantas' control over Orangestar was insufficient for them to establish themselves as a single economic undertaking.

The CCS also rejected the parties' alternative arguments that, even if Qantas lacked complete control over Orangestar, it had joint control over the subsidiary together with the other Singaporean shareholders, which was enough for the parent and subsidiary companies to be considered a single economic entity. The parties had relied on a merger decision of the European Commission involving the acquisition of joint control over an undertaking and a finding that a position of dominance would arise because the entities involved were linked and viewed by the regulator as a single economic entity.[73] The CCS pointed out that even if a joint venture was treated as a single entity with each of its shareholders, any separate anticompetitive agreements between the parties to the joint venture still had to be evaluated independently by the competition regulator and were not automatically excluded under the single economic entity doctrine. In rejecting the parties' attempt at directly importing the single economic entity concept from the merger context into the process for evaluating agreements under the Section 34 prohibition the CCS emphasized 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."[74]

Any joint control which Qantas had over Orangestar—control that it had to share with Orangestar's other shareholders—was insufficient to give Qantas the requisite degree of control that would allow it to invoke the single economic entity doctrine on the facts of this case. Drawing an analogy with another European Commission decision involving an agreement between a joint venture company and one of its parents, the CCS could not accept that there was adequate control in this case because:

1. Qantas' share of stock did not exceed the 50 percent mark;
2. Qantas could only name less than half of the board of directors at Orangestar; and
3. Qantas had to share blocking rights over material decisions with another shareholder in Orangestar.

73 The single economic entity doctrine was invoked in the European merger clearance context in Grupo Vilar Mir/EnBw, 2004 O.J. (L 48) where members of the corporate group to which the merging parties belonged were taken to form a single economic entity for the purposes of determining the impact of the merger on competition.

74 *See Qantas/Orangestar*, *supra* note 58, at para. 60, which also discusses the European Commission's joint-venture decision *in* Thomson/Deutsche Aerospace AG, Case No. IV/M.527 (1994).

As such, given the CCS' view that neither the American nor the European competition law principles relied on by the parties could support the position that Qantas and Orangestar formed a single economic entity, the cooperative agreement between the parties was an agreement between undertakings and therefore subject to the Section 34 prohibition.

In seeking a decision from the CCS regarding the legality of their agreement, the parties recognized that the degree of coordination envisaged under the agreement would require them to engage in acts of price-fixing, market allocation, joint purchasing, joint selling, and exchanging price and non-price information between themselves. Given the nature and purpose of the agreement, Qantas and Orangestar wanted to be able to allocate flight services to and from Singapore between themselves to avoid competing directly with each other on the same or overlapping routes. In its decision, the CCS focused its assessment on the effects that the agreement was likely to have on the leisure passenger services market on the Singapore–Australia and Singapore–Asia routes where both airlines had the rights to operate.[75] The CCS observed that, "with regard to the current state of competition," the only overlapping route served by both parties was between Singapore and Denpasar (Bali, Indonesia) and their combined market share was only 16 percent, as opposed to Singapore Airlines, which enjoyed 73 percent of the market share on that route.[76]

This led the CCS to conclude that the agreement was unlikely to adversely affect any actual competition between the parties. However, when they considered the loss of potential competition between the parties, given the increasing popularity of Asian destinations and the possibility of competition that may exist in the absence of the agreement (if, for example, Qantas were to utilize its fifth freedom rights to operate on certain routes between Singapore and other Asian countries), the CCS took the view 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."[77] While the CCS could only reach a tentative conclusion on the potential adverse effects of the agreement on competition, it was nevertheless prepared to evaluate the parties' arguments that the

75 *See id.* at para. 93. The CCS also considered the potential effects of the agreement on the markets for air freight transport and the sale of air travel services but, because of the small market shares involved, reached the conclusion that there would not be an appreciable adverse impact on competition in these markets.

76 *See id.* at para. 96.

77 *See id*. at para. 98.

agreement produced net economic benefits that would outweigh the agreement's anticompetitive effects.[78]

The parties pointed to a long list of benefits that they claimed would flow from the cooperation between them under the agreement. These included the addition of new routes and more frequent flights, a boost to Singapore's tourism industry from the increase in the number of travelers, the sharing of expertise between Qantas and Orangestar's airlines, improvements in Singapore's air connectivity as a low-cost regional airline hub, and cost savings for the parties' airlines through greater economies of scale at various operational levels. In concluding that the agreement would yield objective economic benefits in spite of its anticompetitive character, the CCS did not give equal weight to all these alleged benefits. The claimed benefit of new routes and increased flight frequencies was met with some reservation because they would "only become apparent when the demand for these services actualise."[79] The CCS also took the view that any benefits to tourism could not be attributed entirely to the agreement between the parties because of the "wide range of factors which influence tourism demand in Singapore," and was not convinced that Qantas' sharing of its expertise with its subsidiary would not materialize without the agreement, given that it was already providing significant operational and management support to Orangestar.[80]

On the other hand, the CCS agreed that there would be net economic benefits from the agreement because of the improvements in Singapore's air connectivity, which was "likely to in turn increase employment and demand for services related to the aviation industry in Singapore," and because the agreement would "bring about a number of improvements and cost savings in the Parties' operations."[81] The CCS explained that:

> "Specifically, the Agreement will bring benefits such as the improvement of connection across their networks, better scheduling, wider scope for inventory control and higher utilisation though higher load factor. Cost savings

78 It was observed that "the Commission . . . 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." *See id.* at para. 99.

79 *See id.* at para. 100.

80 *See id.* at paras. 102-103.

81 *See id.* at paras. 101 and 104.

> are likely to arise from economies of scale and sharing of facilities and staff. These will in turn benefit consumers in Singapore."[82]

Furthermore, in reaching its conclusion that the cooperative agreement should qualify for the net economic benefit exception to the Section 34 prohibition, the CCS accepted that the agreement did not impose restrictions that are not indispensable to the attainment of these economic benefits. While the CCS recognized that interline and codeshare agreements could have been used by the parties to yield benefits similar to those offered by the cooperative agreement, the parties alleged that such agreements would not have enabled them to coordinate their scheduling for better connection times, plan their frequencies to maximize route performance, or control their inventory or schedules. The CCS took the view that:

> "[T]o 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."[83]

This assessment of the cooperative agreement between the parties was premised on the CCS' recognition 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"—with this commercial context in mind, the CCS was prepared to accept that the agreement was, "in its entirety, indispensable to attaining the benefits claimed and that it [was] not necessary for each of the restrictions in the Agreement to be assessed individually."[84]

Finally, the CCS was satisfied that the net economic benefit exception to the Section 34 prohibition was applicable in this case because it was not likely to

82 *See id.* at para. 104.

83 *See id.* at para. 107.

84 *See id.* at para. 108.

lead to the elimination of competition in a substantial part of the market. Two key factors were identified by the CCS to support its analysis. First, that there were low barriers to entry on the Singapore-Australia routes and Singapore-Asia routes (with the imminent implementation of an open skies framework within the ASEAN region). Secondly, "in view of the competitive presence of other airlines," the CCS considered that the agreement "was not likely to lead to the elimination of competition in a substantial part of the Singapore-Australia and Singapore-Asia markets."[85] No market share figures were given in the CCS decision to support these conclusions.

While the CCS concluded that the Qantas/Orangestar agreement brought about net economic benefits to Singapore, and was therefore excluded from the Section 34 prohibition, it nevertheless expressed a few specific reservations regarding the finality or accuracy of its decision:

> "The Commission recognises 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 actualised in the way which the Parties anticipate. . . . 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."[86]

## IV. Analyzing the Airline Alliance Agreement Cases

Given the structural complexities of the airline industry and its strategic importance to the country's aspirations of serving as a regional and international air hub, these were not easy first cases for the CCS to decide. A number of the issues arising from the application of the Section 34 prohibition and the net economic benefits exclusion turned on findings of fact by the CCS rather than issues of law or legal reasoning. There were, however, a few significant aspects of both decisions that are worth highlighting.

85 *See id.* at para. 112.

86 *See id*. at para. 132.

First, in determining whether or not these airline alliance agreements violated the Section 34 prohibition, the CCS went through the motions of defining the relevant markets and analyzing market shares to reach their conclusions that both agreements would have an appreciable adverse effect on competition in Singapore—a loss of actual competition in *Qantas Airways/British Airways* and a loss of potential competition in *Qantas Airways/Orangestar Investment Holdings*. While the market definition process demonstrates the CCS' commitment to sound economic analysis, it is curious why this was even necessary in these two cases given that there were hard-core restrictions on competition found within these notified agreements. Both cases involved agreements containing price-fixing, output-limiting, and market-sharing arrangements that one would expect to automatically infringe the Section 34 prohibition—especially in light of the policy statements found in paragraph 2.20 of the CCS Guidelines on the Section 34 Prohibition.[87]

Second, the CCS' decision in *Qantas Airways/Orangestar Investment Holdings* demonstrates its willingness to consider competition law cases from both the United States and Europe in its analysis of the single economic entity doctrine that the parties raised as an argument for the non-applicability of the Section 34 prohibition. In rejecting the parties' proposition that they should be treated as single economic entity for the purposes of the statutory prohibition, the CCS very competently distinguished the numerous authorities cited by the parties in support of their assertions. In addition, the CCS' analysis of the single economic entity principle was fairly sophisticated insofar as it was sensitive to the conceptual differences between how the European case law has been applied in the context of anticompetitive agreements which infringe Article 81 of the EC Treaty and in the context of merger regulation.[88]

Third, the CCS' application of the net economic benefits exclusion in these cases is noteworthy for a number of reasons. On the one hand, the CCS was not willing to accept every example asserted by the parties as an economic benefit as efficiency gains which "contribute[d] to improving production or distribution; or promoting technical or economic progress."[89] Economic benefits that were speculative or that were not directly attributable to the operation of the agreement cannot be relied on for the purposes of invoking this statutory exclusion. On the other hand, where it was clear that there would be some economic efficiencies created by the agreement—such as cost savings arising from economies of scale—the CCS appears not to have been concerned with quantifying these eco-

87 *See* CCS Guidelines on the Section 34 Prohibition, *supra* note 13.

88 *See supra* notes 73-74.

89 *See supra* note 32.

nomic efficiencies in any specific detail. Neither is it apparent from these decisions that the CCS attempted to carefully weigh these efficiency gains against the anticompetitive effects of the agreements in question.

Furthermore, it remains unclear from the CCS' decision in *Qantas Airways/Orangestar* whether or not the economic benefits relied on by the parties to justify the invocation of this exclusion have to be transmitted directly to customers or the public at large in Singapore. Even though the CCS accepted that the agreement would reap economic benefits in the form of better airline network connectivity, better scheduling, a wider scope for inventory control, higher load factors, and cost savings from economies of scale and the sharing of airline facilities and staff, it does not follow that these efficiency gains enjoyed by the parties will necessarily "benefit consumers in Singapore" given that the primary beneficiaries of the agreement are the airlines themselves.[90] Moreover, even if consumers stand to benefit indirectly from these airline alliance agreements, are they consumers in Singapore? In *Qantas Airways/British Airways*, the consumers who stand to gain the most from the agreement are not Singapore residents. Those who are most likely to benefit from the better connectivity between the airlines are foreign visitors traveling from either end of the Kangaroo Route, that is, passengers on the flights operating by the parties to the agreement.[91] Similarly, in *Qantas Airways/Orangestar Investment Holdings*, the air passengers who stand to gain the most from the coordination between the airlines are those traveling to and from Australia, where Qantas is based, and are using Singapore as a transit point for their flights to regional destinations.

IT REMAINS UNCLEAR FROM THE CCS' DECISION IN QANTAS AIRWAYS/ORANGESTAR WHETHER OR NOT THE ECONOMIC BENEFITS RELIED ON BY THE PARTIES TO JUSTIFY THE INVOCATION OF THIS EXCLUSION HAVE TO BE TRANSMITTED DIRECTLY TO CUSTOMERS OR THE PUBLIC AT LARGE IN SINGAPORE.

The way in which the indispensability limb of the net economic benefits exclusion was applied by the CCS in these two decisions also raises a number of important issues. In *Qantas Airways/Orangestar Investment Holdings*, both the parties and the CCS acknowledged that alternative agreements with less restrictive provisions—interline and code-share agreements—would have been able to yield similar benefits to those offered by the notified agreement. What was asserted by the parties to, and ultimately accepted by, the CCS was that "to the extent that the benefits of the (notified) Agreement [would] extend beyond those achievable through interline and codeshare agreements, further cooperation

90 *See Qantas/Orangestar*, *supra* note 58.

91 However, it is not too difficult to make an argument that these airline customers, even if they only transit through Singapore, are "customers in Singapore."

would be required"[92] and that "such benefits [were] not likely to be achieved via less restrictive forms of co-operation."[93] The CCS made no attempt to quantify the value of these extra benefits that were alleged to have been only attainable through the notified agreement. A similarly unsatisfactory approach was taken in *Qantas Airways/British Airways* when the CCS addressed the same indispensability issue.[94]

What is not clear from the CCS' decisions is why the parties had not been made to explore intermediate options between traditional interline, code-share agreements and the notified agreement which contained price-fixing and output-limitation provisions. Why couldn't the parties have entered into a less restrictive arrangement without these hard core restrictions, given that they already had strong incentives to cooperate for their mutual benefit? It would not have been unreasonable to expect the parties to have continued to closely coordinate their flight schedules and passenger loads even in the absence of these price-fixing or output-limiting provisions. In *Qantas Airways/British Airways*, the parties had a successful and longstanding partnership of more than ten years that made commercial sense because of their respective geographical advantages. In *Qantas Airways/Orangestar Investment Holdings*, the parties involved were closely related entities whose interests were already aligned to a significant extent, even if it was not enough for them to be treated as a single economic entity, such that it would still have made economic sense for them to continue working together even in the absence of these hard-core restrictions.

Furthermore, in reaching its conclusion in the *Qantas/Orangestar* case that the notified agreement was indispensable to attaining these economic benefits, the CCS decided that it was "not necessary for each of the restrictions in the Agreement to be assessed individually" because of the commercial context in which the notified agreement would operate.[95] This lack of scrutiny was surprising given the hard-core character of some of the restrictions in the agreement, and is somewhat inconsistent with the policy statements found in paragraphs 10.10 and 10.11 of the CCS Guidelines on the Section 34 Prohibition, which provide that "restrictions relating to price-fixing, bid-rigging, market sharing and output limitation agreements are unlikely to be considered indispensable" and

92 It was argued that these alternative agreements "would not allow them to coordinate their scheduling for better connection times and plan their frequencies for better connection times and plan their frequencies together to maximize route performance," and that they would be "unable to control the inventory or schedules of [each others' flights], which would result in Parties having to bear the risk of the operating carrier limiting seat availability of changing flight times, amongst other things." *See Qantas/Orangestar*, *supra* note 58, at para. 106.

93 *See id.* at para. 107.

94 *See id.* at paras. 77-78.

95 *See id.* at para. 108.

that "restrictions may . . . be indispensable in order to align the incentives of the parties."[96] In these two cases, there would already have been preexisting incentives for the parties to cooperate with each other, so it is arguable that not all of the restrictions on competition would have been indispensable for them to further align their incentives to such a degree that would have enabled them to extract the efficiency gains arising from their notified agreements.

## V. Conclusion

These airline alliance agreement cases are particularly challenging because of the highly specialized nature of the industry, the international character of some of the relevant issues, and their strategic importance to the national economy. A competition regulator's job is made more difficult by the fact that other players in this industry are unlikely to be too overtly critical of such arrangements in order to avoid attracting unwanted attention to similar arrangements they may have, or wish to have, with each other. These cases also illustrate the importance of a conceptually coherent understanding of the relevant economic benefits that parties to an anticompetitive agreement have to establish before they are entitled to invoke the statutory exclusion. Not all economic benefits to the economy of Singapore are economic benefits that the competition regulator should take into account when determining the legality of an agreement—an issue that featured prominently in these cases.

With these two decisions under its belt, a number of investigations under way, and its first infringement decisions currently in the pipeline, the Competition Commission of Singapore looks set to play a major role in the implementation of the new competition law in the near future. Its first two decisions involving negative clearances for the two airline alliance agreements serve as important milestones in the development of competition law in Singapore, providing the competition lawyers with an interesting glimpse into the future of things to come. The decisions rendered by the CCS in *Qantas Airways/British Airways* and *Qantas Airways/Orangestar Investment Holdings* are highly commendable first efforts from a new regulatory agency and it is hoped that its future decisions will demonstrate increasing analytical rigor and clarity.

96 *See* CCS Guidelines on the Section 34 Prohibition, *supra* notes 13, 36, and 38.