

## Competition Law: Revisiting The Court of Appeal's Ruling In AirAsia And Malaysia Airlines Case

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Recently, the Court of Appeal ruled in favour of AirAsia Berhad (AirAsia) and Malaysia Airlines Berhad (MAB) by setting aside the RM10 million fine imposed by the Malaysia Competition Commission (MyCC) on each of the airline companies for breaching a market-sharing prohibition.

The Court of Appeal allowed the airline companies' appeals to reinstate the decision of the Competition Appeal Tribunal (CAT) in February 2016 which found that they were not guilty of infringing Section 4(2) of the Competition Act 2010 (CA). MyCC is currently in the process of applying for leave to appeal to the Federal Court.

### Background

AirAsia and MAB's matter started in 2014 when MyCC found that both airline companies had breached the prohibition against market-sharing under Section 4(2)(b) of the CA 2010 by entering into an agreement to share market in the air transport industry in Malaysia, following which MyCC imposed a fine of RM 10 million on each of the airline companies.

Dissatisfied with MyCC's decision, AirAsia and MAB appealed to the CAT on several grounds including:

- The collaboration agreement had no anti-competitive object.
- MyCC had misinterpreted the collaborative agreement and the improper retrospective application of the CA 2010.

After hearing both parties, the CAT held that based on the terms of the collaborative agreement, AirAsia and MAB did not infringe Section 4(2) of CA and as such, MyCC's decision was set aside. Dissatisfied with the CAT's decision, MyCC filed a judicial review application at the High Court.

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### The High Court's Decision

In December 2018, the High Court allowed MyCC's judicial review application and set aside the CAT's decision. The High Court ruled that the decision by the CAT was tainted with errors of law, irrationality and unreasonableness. The High Court added that MyCC had *locus standi* to file the judicial review as it was adversely affected by the decision of the CAT. The High Court opined that both AirAsia and MAB are competitors in the air transport industry. Hence, the collaboration between them would deter competition and substantially affect the pricing of the airlines business, which in turn would be unfair for the consumers.

The High Court further held that several clauses in the collaboration agreement, including the discussion and resolution made in AirAsia and MAB's board of directors' meetings regarding the collaboration, undoubtedly showed that the agreement had the object to share market between AirAsia and MAB. As such, Section 4(2)(b) is applicable since the collaboration agreement has '*the object or effect of significantly preventing, restricting, or distorting competition*' in air transport industry.

### The Court of Appeal's Decision

On 27 April 2021, the Court of Appeal allowed AirAsia and MAB's appeals and quashed the fines imposed by MyCC. The reasons for the decision include, amongst others, that the CAT is an appellate authority and consequently, MyCC is obliged to comply with its decision. The Court of Appeal agreed with the preliminary objection raised by AirAsia and MAB that MyCC had no locus standi to file the judicial review against the decision by the CAT. According to the Court of Appeal, MyCC is not allowed to challenge CAT's decision unless the CA 2010 specifically states that they may do so.

Further, it was held that MyCC was not a person 'adversely affected' by the CAT's decision under Order 53 rule 2 of the Rules of Court 2012, therefore it is not entitled to seek remedy via a judicial review application. Another point was also raised by the Court of Appeal is that the collaboration agreement between the airline companies was entered into

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on 9 August 2011, several months prior to the CA 2010 coming into force on 1 January 2012, and as such, it was perfectly lawful to discuss such agreement at the material time.

## Conclusion

It was recently reported that MyCC is currently investigating more than 3,000 companies for potential breach of Section 4 of the CA due to alleged bid-rigging activities involving various project cartels worth RM5.8 billion. Further, the MyCC also recently announced that it has managed to cripple a 'project tender cartel' believed to have monopolised a total of 354 tenders involving projects from several ministries and government agencies nationwide worth RM3.8 billion since 2014.

Following these recent developments, all businesses are reminded to comply with competition laws as there will be severe consequences for business enterprises and individuals, including directors, in the event of non-compliance and contravention of such law.

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