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## Korean Air/Asiana Merger – MAVCOM Approves Malaysia's First Competition-Related Merger<sup>1</sup>

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Since the dawn of the pandemic, companies have sought various methods to streamline their business operations to adapt to a sluggish economy. This includes undertaking mergers & acquisitions (M&A) with competitors or related companies to stay afloat during these turbulent times. However, this raises several issues such as monopolisation and reduction of competition in the market.

In this alert, we examine the decision of the Malaysian Aviation Commission (MAVCOM) in respect of the anticipated merger between two airline competitors carrying out scheduled air passenger services between Malaysia and South Korea. This alert will also look at the context of the prohibition under Section 54 of the Malaysian Aviation Commission Act 2015, which prohibits any merger that results in the substantial lessening of competition of the aviation industry.

This decision is the first competition-related merger case to be analysed by any competition authority or sector regulator in Malaysia<sup>2</sup>.

### Aviation Industry

Generally, the aviation industry in Malaysia is governed by Part VII of the Malaysian Aviation Commission Act 2015 (MACA). The MACA is ubiquitous in that it is currently the only legislation in Malaysia that specifically incorporates a merger control regime. Section 54 of the MACA prohibits mergers that result in, or are likely to result in, a significant reduction in competition in any aviation service sector.

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<sup>1</sup> <https://www.mavcom.my/en/2021/09/09/mavcom-greenlights-malaysias-first-competition-related-merger/>

<sup>2</sup> <https://www.thesundaily.my/business/mavcom-greenlights-korean-air-asiana-merger-NC8316609>

The MACA includes a voluntary merger notification and application system, which allows a merger party to notify MAVCOM of its merger or potential merger and apply for a decision by MAVCOM on whether the merger or potential merger in question infringes or will infringe the prohibition under Section 54 of the MACA.

## Korean Air Lines And Asiana Airlines Merger

On 17.11.2020, Korean Air Lines Co. Ltd. (Korean Air Lines) had entered into a Share Subscription Agreement (SSA) with Asiana Airlines Inc. (Asiana Airlines) pursuant to which Korean Air Lines agreed to subscribe and purchase new ordinary shares in Asiana Airlines for approximately 1.5 trillion won (estimated to be RM5.3 billion). This would result in Korean Air Lines holding 63.9% of the total share capital in Asiana Airlines.

In March 2021, Korean Air Lines and Asiana Airlines voluntarily notified MAVCOM of their anticipated merger and filed an application with MAVCOM to seek MAVCOM's determination on whether the anticipated merger would contravene Section 54 of the MACA.

Asiana Airlines stated that it had been in financial trouble for some time and cannot be rehabilitated without the anticipated merger. As such, the anticipated merger should qualify as a 'failing firm defence'<sup>3</sup> merger - which implies that a merger party would justify a merger by contending that their prospective withdrawal from the aviation industry would not substantially lessen the competition. Further, both airline companies argued that the anticipated merger should occur to rehabilitate and promote economic and industry development in South Korea.

In light of this, on 17.8.2021, MAVCOM issued the "Consultation on the Proposed Decision on the Voluntary Notification and Application of an Anticipated Merger between Korean Air Lines Co. Ltd. and Asiana Airlines Inc.", which outlined its proposed decision and invited relevant industry players and the general public to submit written

<sup>3</sup> Defined as "A firm that has been consistently earning negative profits and losing market share to such an extent that it is likely to go out of business."

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feedback. Thereafter, on 9.9.2021, MAVCOM announced that the merger had been approved and published its final decision.

### Summary Of MAVCOM's Decision

To assess whether the anticipated merger between the two airline companies would contravene Section 54 of the MACA, MAVCOM employed the Substantial Lessening of Competition Test (SLC Test).

MAVCOM concluded that following the merger, combined market share held by Korean Air Lines and Asiana Airlines in respect of the direct route between Seoul and Kota Kinabalu would not act as a barrier to entry and expansion of the market by other competitors as the Korean Air Lines and Asiana Airlines would not be able to increase the price of their airfares significantly due to the strict control by the South Korean Ministry of Land, Infrastructure and Transport. Further, passengers and customers are able to exercise countervailing buyer power due to the variety of airline choices available to the passenger/customer as a result of the increase of online travel agencies.

On the "failing firm defence," Asiana Airlines had provided sufficient evidence such as annual reports, financial statements and restructuring plans to be considered a 'failing firm'. Additionally, MAVCOM found that the merger would result in significant economic efficiencies and social benefits, such as improved safety, reduced training costs and efficiencies related to maintenance, repair and overhaul (MRO).

Hence, MAVCOM found that the proposed merger between Korean Air Lines and Asiana Airlines had passed the SLC Test and would not contravene Section 54 of the MACA.

### Conclusion

MAVCOM Executive Chairman, Datuk Seri Saripuddin Kasim stated that *"This merger decision highlights that Part VII: Competition of Act 771 is on par with the international standards for competition laws, as well as MAVCOM's capacity and capability to undertake the relevant competition*

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*analysis work for mergers to ensure the continued protection and development of the Malaysian aviation sector."*

The trend of airlines forming alliances, consolidating, and entering mergers is not uncommon, especially during a global recession. As travel bans and restrictions are slowly lifted around the globe, it will be interesting to observe the development of mergers and acquisitions between airline competitors and the responses of regulatory authorities, particularly by way of the voluntary notification and application system provided in the MACA.

Authored by Senior Associate, Annabel Kok Keng Yen and Pupil Cuthbert Ephraim Chan Pak Hang from the firm's Corporate & Real Estate Transactions practice.

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