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Saving Competition in Hong Kong's Aviation Market

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Hong Kong is a regional and international aviation hub and aviation is the lifeblood of the Hong Kong economy, providing connectivity for the flow of people and goods between the city and the rest of the world. Despite its significance to Hong Kong's economy, Hong Kong's aviation market has a number of ambiguities from a competition perspective. As one of the most regulated industries, aviation intersects with competition law, and their intersection requires a systematic approach. There are ex ante regulatory powers available to aviation regulators and ex post competition law powers in many areas of the aviation market. Without coordination between the Hong Kong Competition Commission (HKCC) and aviation agencies in Hong Kong, overlapping areas will be regulated haphazardly. Since Hong Kong's current aviation regulations do not consider competition review, the overlapping areas will be subject to the HKCC's ex post enforcement power. The current system creates confusion and uncertainty for airlines, who would assume that their business activities have been approved by aviation regulators. This article identifies competition law issues in Hong Kong's aviation market and makes recommendations on how to address them.

Keywords: Hong Kong, Aviation Market, Aviation Law, Competition Law, Hong Kong Competition Commission

1 INTRODUCTION

The importance of aviation to Hong Kong cannot be overstated. Aviation is the lifeblood of the Hong Kong economy, providing connectivity for the flow of people and goods between the city and the rest of the world. Since Hong Kong is a regional and international hub, there is strong local demand as well as a significant volume of connecting traffic at Hong Kong International Airport (HKIA). In 2018, HKIA handled 74.7 million passengers and 427,725 flight movements, making it the world eighth busiest airport in terms of the number of passengers.¹

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¹ Katia Hetter, *This Is the World's Busiest Airport*, CNN (17 Sept. 2019), <https://edition.cnn.com/travel/article/worlds-busiest-airports-2018/index.html> (accessed 15 Apr. 2021).

HKIA was ranked the world's busiest cargo airport for the tenth consecutive year in 2019.²

As a background, it is important to understand Hong Kong's high degree of autonomy in the realm of aviation. In 1982, the People Republic of China ('PRC') and the United Kingdom ('UK') entered negotiations over the sovereignty of Hong Kong. The negotiations, the major part of which was under a ninety-nine-year lease to the UK expiring in 1997, concluded with the signing of the Joint Declaration³ on 19 December 1984 in Beijing. The Joint Declaration also required the enactment of the Basic Law,⁴ which serves as Hong Kong's de facto constitution.⁵ Promulgated in 1990, the Basic Law affirms Hong Kong's status as a centre of aviation⁶ and provides Hong Kong Special Administrative Region ('HKSAR') with the autonomy to maintain its independent aircraft registry.⁷ Key provisions concerning local airlines and Air Services Agreements ('ASAs') include the following:

- The PRC Government shall, in consultation with the HKSAR Government, arrange for flights between Mainland China and HKSAR operated by airlines incorporated in HKSAR and with their principal place of business in Hong Kong.⁸
- The HKSAR Government shall, under specific authorization from the PRC Government, renew and amend ASAs previously in force or negotiate new ASAs for airlines incorporated in HKSAR with their principal place of business in Hong Kong.⁹
- The HKSAR Government shall be authorized to issue licenses to airlines incorporated in HKSAR with their principal place of business in Hong Kong.¹⁰

² *Freighter Movements Record Consistent Growth in May HKIA Ranked World's Busiest Cargo Airport for 10 Consecutive Years*, HKIA (13 June 2020), https://www.hongkongairport.com/en/media-centre/press-release/2020/pr_1452 (accessed 15 Apr. 2021).

³ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong, 19 Dec. 1984.

⁴ *Ibid.*, Art. 3(12).

⁵ Article 8 of *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* states that all laws previously in force in Hong Kong including statutes, case law, equity and other customary laws shall be maintained after Handover, so long as they do not contravene with the Basic Law.

⁶ *Ibid.*, Art. 128.

'The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation'.

⁷ *Ibid.*, Art. 129; Nationality marks thus changed from 'VR-Hxx' to 'B-xxx' (nationality mark for China) in 1997.

⁸ *Ibid.*, Art. 131.

⁹ *Ibid.*, Art. 133.

¹⁰ *Ibid.*, Art. 134.

- Airlines incorporated and having their principal place of business in Hong Kong prior to the establishment of HKSAR shall continue to operate.¹¹

In 2019, the PRC Government published ‘Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area’ which re-emphasized Hong Kong’s status as an international aviation hub.¹² In fact, mainland China plays a clear role in Hong Kong’s hub status. Many mainland Chinese travelers use HKIA as a transfer point for their journeys to Taiwan, Southeast Asia, Australia and the United States although the number of direct flights departing from mainland Chinese cities was fast increasing before the COVID-19 crisis.

The aviation market in Hong Kong has recently endured unprecedented challenges. The challenges began with the protests in the second half of 2019 and continued with the global COVID-19 pandemic in 2020. Passenger traffic at HKIA was especially hard-hit. By way of example, passenger volume saw a year-on-year decrease of 99.4% in May 2020.¹³ For the time being, the airline industry is in survival mode. Once the peak of COVID-19 has passed, however, aviation will play a vital role in repairing the economic and social damage that COVID-19 has caused. The recovery will occur at various times in different markets, and some markets might see a V-shaped recovery.¹⁴

While COVID-19 is definitely disruptive to the aviation sector, it makes room for regulators, policy makers and the sector itself to think about reforms and plan for the post-COVID era. Indeed, a competition study into Hong Kong’s aviation market is one area that is ripe for review. Despite its significance to Hong Kong’s economy, Hong Kong’s aviation market has a number of ambiguities from a competition perspective. To be clear, Hong Kong enacted its cross-sector competition law, the Competition Ordinance (Cap. 619), in June 2012, and the Hong Kong Competition Ordinance (HKCO) came into effect in December 2015. For the past five years, the Hong Kong Competition Commission (HKCC) has been proactive and effective in enforcing the HKCO as well as nurturing a competition culture in Hong Kong. However, there are still challenges for HKCC to deal with in the aviation market. Most notably, Hong Kong does not have a cross-sector merger regime, and the aviation market is governed by a complex regulatory structure.

¹¹ *Ibid.*, Art. 135.

¹² *Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area*, Constitutional and Mainland Affairs Bureau of Hong Kong 2 (18 Feb. 2019), https://www.bayarea.gov.hk/filemanager/en/share/pdf/Outline_Development_Plan.pdf (accessed 15 Apr. 2021).

¹³ *Ibid.*

¹⁴ Brian Pearce, *COVID-19 Updated Impact Assessment* (24 Mar. 2020) (presentation at, <https://www.iata.org/en/iata-repository/publications/economic-reports/third-impact-assessment/>) (accessed 15 Apr. 2021).

The **objectives** of this article are as follows: to understand the current competition law issues in the Hong Kong aviation sector; to analyse competition-related problems of the fast-changing aviation market, particularly in the context of COVID-19; to examine how regulatory frameworks can encourage and facilitate competition in the Hong Kong aviation sector; and to provide high level recommendations on competition considerations and the potential impact of adopting such recommendations. Section 2 examines the institutional framework of the aviation market in Hong Kong while exploring how competition issues in the aviation market are regulated around the world. Section 3 discusses competition law analysis of airline alliances in Hong Kong while noting that a high degree of alliance cooperation inevitably requires a careful analysis of competition law. Section 4 reviews the current slot guidelines at HKIA and identifies competition concerns. Section 5 explores Hong Kong's passenger protection regime to see whether there is any role for HKCC in the area of passenger protection. Section 6 discusses competition policy issues in the aviation market during and after the COVID-19 crisis to safeguard a level-playing field. Section 6 concludes with a summary of the main points and provides recommendations.

2 INSTITUTIONAL FRAMEWORK

Except for telecommunication and broadcasting, over which HKCC has concurrent jurisdiction with the Communications Authority (according to sections 159–161 of the HKCO), HKCC has exclusive jurisdiction on competition matters in Hong Kong. Thus, in principle, the HKCO should apply to the aviation market in the same way that it applies to any other industry. At the same time, HKCC faces a practical challenge in handling the aviation market due to its complex regulatory structure. In fact, this problem is not specific to Hong Kong but is rather one faced by all young competition jurisdictions.

There are four aviation-related government bodies in Hong Kong: namely, the Transport and Housing Bureau (THB), the Civil Aviation Department (CAD), the Airport Authority Hong Kong (AA), and the Air Transport Licensing Authority (ATLA).

THB is a government agency responsible for formulating policies on matters relating to Hong Kong's internal and external transportation, including air services, land transport, maritime transport and logistics. THB is also responsible for the negotiation and conclusion of air service agreements and other related arrangements between Hong Kong and foreign governments and for air services between Hong Kong and other parts of the PRC. THB is in charge of matters related to traffic rights, which include the allocation of traffic rights (i.e., determining which airlines can utilize traffic rights). In brief, traffic rights allow designated airlines of

the respective regions/countries concerned to provide air services between the two regions/countries.

Since traffic rights are exchanged in ASAs, it is natural for THB to deal with traffic rights both externally as well as internally. In fact, this arrangement of roles is the common practice worldwide. Interestingly, however, Australia's International Air Services Commission (IASC), which deals exclusively with traffic rights, takes competition consideration into account through consultations with or submissions from the Australian Competition and Consumer Commission (ACCC) when making its determinations. This is a practice rather than a statutory requirement. However, section 28 of the IASC Act provides IASC with broad discretion to do what is needed to make a decision.¹⁵

CAD is Hong Kong's civil aviation authority. Its primary regulatory role concerns aviation safety. It also provides air traffic control services to all aircraft operations within Hong Kong's flight information region. In connection with competition, CAD is responsible for granting airline alliances (discussed in section 3) and allocating airport slots (discussed in section 4).

AA is a statutory body that is wholly owned by the Hong Kong government. AA is responsible for providing, operating, developing, and maintaining an airport for civil aviation in Hong Kong. AA's main duty is to plan and construct HKIA; its statutory objective is to maintain Hong Kong's status as a centre of international and regional aviation.

ATLA is an independent statutory body established under the Air Transport (Licensing of Air Services) Regulations (Cap 448A). ATLA's role is to grant, revoke, and suspend airline licenses (or air operator certificates) to carry passengers, cargo, and mail by air for hire or reward on scheduled journeys. In essence, ATLA is responsible for entry into the airline market in Hong Kong. ATLA's most recent decision was the decision rejecting Jetstar Hong Kong's licence application to operate scheduled air services in 2015 on the basis of their finding that the principal place of business of the said airline was not in Hong Kong.¹⁶

There are broadly speaking four models for the responsible institution that governs competition matters in the aviation market: (1) full jurisdiction by the competition agency (e.g., Australia: ACCC), (2) full jurisdiction by the

¹⁵ *International Air Services Commission Act 1992 (cth) s. 28 (Commission to act informally etc.): In performing its functions, the Commission: (a) must act with as little formality as possible; and (b) must act as quickly as is appropriate given the requirements of this Part and the need properly to consider a matter before it; and (c) may decide a matter before it without holding a hearing; and (d) is not bound by the rules of evidence; and (e) may inform itself on anything relevant to a matter before it in any way it thinks fit; and (f) may receive information or submissions orally or by written statements; and (g) may, in respect of a matter before it, consult such persons as it thinks fit.*

¹⁶ See Jae Woon Lee & Michelle Dy, *A Commentary on Jetstar Hong Kong Airways Decision Before the Air Transport Licencing Authority*, 46 H.K. L.J. 175 (2016).

transportation/aviation authority over certain competition matters (e.g., the US: Department of Transportation), (3) concurrent jurisdiction by the competition agency and the transportation/aviation agency (e.g., the UK: Competition and Markets Authority and Civil Aviation Authority), and (4) full jurisdiction by the aviation sector economic regulator (e.g., Malaysia: Malaysian Aviation Commission (MAVCOM)).

The underlying principle of the first model is that all industries are subject to competition law unless special rules are explicitly applied. The first model assumes that there is no convincing explanation as to why aviation is so different that it should be regarded as exceptional. From a pure competition law perspective, this is the most logical approach. A good example of the first model is ACCC, which has exclusive jurisdiction on competition matters in the aviation market.¹⁷ But even ACCC may seek input from anyone it considers reasonable and appropriate, and Australia's aviation agency (the Department of Infrastructure, Transport, Regional Development, and Communications) would be an obvious choice in an aviation matter.¹⁸

The EU falls into the first model. Whilst the Directorate General for Competition in the European Commission is charged with the enforcement of EU competition rules, the Directorate General for Transport and Mobility is responsible for general transport policy and has no effect on competition rules.¹⁹ In short, there is no sector-specific competition rule for air transport, and antitrust immunity for airline alliances is governed by general competition law in the EU in accordance with Article 101(3) of the Treaty on the Functioning of the European Union (TFEU).²⁰

The European Commission had the sole authority to grant individual exemptions to agreements on the basis of the criteria in Article 101(3) of the TFEU.

¹⁷ See *Airline Competition in Australia*, ACCC 1 (Sep. 2020), <https://www.accc.gov.au/publications/report-airline-competition-in-australia/> (accessed 2 Dec. 2020). The ACCC notes at 1 that 'the ACCC's role is to assist in protecting competition in the sector for the benefit of all Australian airline travelers'.

¹⁸ *Competition and Consumer Act 2010* (cth) s. 90(6).

(6) Before making a determination in respect of an application for an authorization, the Commission may do any one or more of the following:

(a) give any persons who appear to the Commission to be interested a written notice inviting submissions in respect of the application within a specified period;

(b) give the applicant a written notice requesting the applicant to give the Commission, within a specified period, additional information relevant to making its determination in respect of the application;

(c) give a person a written notice requesting the person to give the Commission, within a specified period, particular information relevant to making its determination in respect of the application;

(d) consult with such persons as it considers reasonable and appropriate for the purposes of making its determination in respect of the application.

¹⁹ *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches*, the European Commission & the United States Department of Transportation (16 Nov. 2010), http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf (accessed 15 Apr. 2021).

²⁰ *Ibid.*, at 14–15.

However, Regulation 1/2003 abolished the system for individual exemption, taking effect on 1 May 2004. Regulation 1/2003 replaced the old *ex ante* control of agreements by *ex post* control. Essentially, Regulation 1/2003 lets companies decide for themselves whether their agreements could restrict competition as defined by EU competition law and whether they could be exempted from the general prohibition based on their pro-competitive benefits. Thus, airlines have not been able to notify the EU Commission of agreements (i.e., alliances) for prior approval since 1 May 2004.²¹ Traditionally, air transport services in the EU were given exceptional treatment through multiple block exemptions.²² Block exemptions automatically bring certain categories of conduct within the terms of Article 101(3), eliminating the need for case-by-case analysis of the most prevalent commercial agreements. The European Commission is empowered to grant block exemptions in the air transport sector by Regulation 3975/87, which was replaced by Regulation 487/2009.²³ However, in 2006, the EU Commission brought an end to the series of block exemption regulations that have existed in the airline industry since 1988.²⁴

The US Department of Transportation (USDOT) is a classic example of the second model. Until 1988, USDOT had jurisdiction over airline mergers. Although the US Congress transferred that jurisdiction to the US Department of Justice (USDOJ) in 1988, USDOT retains the statutory authority to approve agreements relating to international airline alliances and to immunize them from US antitrust laws. USDOT is an exceptional case because it has sufficient resources to handle aviation-related competition matters, which is not the case for most transportation agencies in the world.

The UK represents the third model, the concurrent jurisdiction model. The relevant section for the UK Competition and Markets Authority's (UKCMA) relationship with other regulators is section 54 of the Competition Act 1998. Section 54 provides that, in regard to the regulated sectors, which include aviation, the same provisions are applied and enforced, concurrently with UKCMA, by the other regulators, including the UK Civil Aviation Authority (UKCAA). Specifically, UKCAA has concurrent powers with UKCMA to enforce

²¹ *Ibid.*, at 17.

²² *Ibid.*, at 16.

²³ Volodymyr Bilotkach & Kai Hüscherlath, *Antitrust Immunity for Airline Alliances*, 7 J. Comp. L. & Econ. 335, 368 (2011).

²⁴ Commission Regulation (EC) No 1459/2006 of 28 Sept. 2006 on the application of Art. 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports; *See also* Hubert Beuve-Méry & Michal Struk, *Commission Brings Air Transport in Line with Other Industries By Phasing Out the Block Exemptions that Have Existed in This Sector Since 1988*, (3) Comp. Pol'y Newsl. 45 (2007), http://ec.europa.eu/competition/publications/cpn/2007_3_45.pdf (accessed 15 Apr. 2021).

competition cases and to conduct market studies in relation to two areas of the aviation sector: airport operation services²⁵ and air traffic services.²⁶ Both UKCMA and UKCAA have published guidance on these areas.²⁷ In addition, the two authorities have a separate memorandum of understanding regarding concurrent jurisdiction.²⁸

Malaysia is the unique example of a country adopting the fourth model. MAVCOM is the aviation sector economic regulator and has absolute power over competition matters for the aviation services market. The MAVCOM model followed precedent in the Malaysian telecommunications sector. Before the Malaysia Competition Commission was established, the Malaysian Communications and Multimedia Commission had comprehensive jurisdiction over competition matters. Even after the Malaysian Competition Commission was established in 2011, three sector-specific regulators in telecommunications, energy, and aviation continue to exercise authority over competition matters.

In theory, Hong Kong falls into the first model since HKCC has full jurisdiction over competition matters in the aviation market. As noted, telecommunications and broadcasting are the only exceptions where concurrent jurisdiction applies in Hong Kong. However, **coordination** with aviation-related government bodies, and particularly with CAD, is absolutely necessary. There is technical and sector-specific information that HKCC must factor in when analysing competition cases. Moreover, there are strong linkages between competition law and other aviation economic regulations as further discussed in the following sections.

3 AIRLINE ALLIANCES

An airline alliance is a common business practice in the airline industry. The term ‘alliance’ is used very loosely and can refer to any kind of inter-airline cooperation.²⁹ There is a wide spectrum of airline alliances, and the starting

²⁵ Civil Aviation Act 2012 c. 2 (conferring concurrent competition powers from Apr. 2013).

²⁶ Transport Act 2000 c. 5 (conferring concurrent competition powers from Apr. 2001).

²⁷ See *Guidance on the Application of the CAA’s Competition Powers*, CAA 11 (May 2015), <https://publicapps.caa.co.uk/docs/33/CAP1235%20GuidanceontheApplicationoftheCAAsCompetitionPowers%20May2015.pdf>; CMA, *Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries*, UK Government 7 (Mar. 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892735/Guidance_on_concurrent_application_of_competition_law_to_regulated_industries.pdf (accessed 15 Apr. 2021).

²⁸ See CMA & CAA, *Memorandum of Understanding Between the Competition and Markets Authority and the Civil Aviation Authority – Concurrent Competition Powers*, UK Government (Feb. 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908961/CAA_MoU.pdf (accessed 15 Apr. 2021).

²⁹ Jae Woon Lee, *Regional Liberalization in International Air Transport: Towards Northeast Asian Open Skies* 191 (2016).

point is interlining. Since no single airline's network encompasses all possible 'point A to point B' combinations, many passengers are required to interline or change airlines during their journey.³⁰ In essence, interlining is the simple process of linking two separate flights on two different airlines for the convenience of the traveling customer. A real partnership begins with code-sharing. In a code-sharing relationship, there is one operating carrier and one or more marketing carriers. The operating carrier is the one that actually operates the aircraft, while the marketing carrier just assigns its airline code to the flight without actually operating the aircraft.

The literature confirms that airline alliances benefit the consumers and carriers concerned.³¹ The International Air Transport Association (IATA) summarized the benefits of the airline alliances as follows: (1) lower fares for interlining passengers; (2) lower fares resulting from economies of traffic density; (3) passengers can more easily combine fares in an itinerary; (4) airlines can offer passengers a much wider range of schedules; and (5) passengers benefit from more seamless service and similar products.³²

Generally, interlining and low-level alliances (e.g., sharing facilities) do not raise competition law concerns. However, some advanced forms of airline alliances may include agreements that restrict capacity or that are directly or indirectly related to prices. Furthermore, airlines have an incentive to launch highly integrated joint ventures in specific markets. While still operating as two independent legal entities, the airlines cooperate as closely as possible. Such a high degree of alliance cooperation inevitably requires a careful analysis of competition law. In fact, highly integrated airline alliances can be assessed like mergers, as the EU often does while applying the EU Merger Regulation for approval.

Multiple jurisdictions with advanced competition law systems set clear rules or practices for airline alliances. Although airline alliances are treated differently in these legal systems, the US, the EU, the UK, Australia, New Zealand, Japan, South Korea, and Singapore have established competition analysis on airline alliances and granted *ex ante* exemptions on several occasions.³³ The view in many jurisdictions with mature competition regimes is that, if the efficiencies that an airline alliance

³⁰ Bilotkach & Hüschele, *supra* n. 23, at 338.

³¹ See e.g., Jan K. Brueckner, *International Airfares in the Age of Alliances: The Effects of Codesharing and Antitrust Immunity*, 85 Rev. Econ. & Statistics 105 (2003); Robert J. Calzaretta, Yair Eilat & Mark A. Israel, *Competitive Effects of International Airline Cooperation*, 13 J. Comp. L. & Econ. 501 (2017).

³² See Brian Pearce & Gary Doernhoefer, *The Economic Benefits Generated By Alliances and Joint Ventures*, IATA Economics Briefing, IATA (28 Nov. 2011).

³³ See e.g., EU: Case COMP/39.596 – British Airways/American Airlines/Iberia (Oneworld Alliance); US: American Airlines, Inc., British Airways PLC, Finnair OYJ, Iberia Líneas Aéreas de España, S.A., Royal Jordanian Airlines Joint Application, Final Order, Dkt. No. OST-2008–0252, Ord. 2010–7-8 (Dep't of Transp. 20 July 2010); United Kingdom: CMA, *CMA Acts to Protect Competition on UK-US Airline Routes*, Press Release (17 Sept. 2020), <https://www.gov.uk/government/news/cma-acts-to->

enhances and the benefits it provides consumers outweigh its anticompetitive effects, the government can grant it an exemption.³⁴

For instance, Singapore (which has many similarities with Hong Kong, such as small but remarkably open economies and international aviation hubs) has published ‘CCCS Guidance Note for Airline Alliance Agreements’. In the Guidance, the Competition & Consumer Commission of Singapore (CCCS) states:

Given the restrictions contained within such [airline joint venture] agreements that are akin to price-fixing and/or capacity control agreements, as a starting point, CCCS considers such “metal neutral” alliances to have the object of restricting competition. However, CCCS is cognisant that such metal neutral alliances may also generate operational efficiencies and benefits, unlike hardcore cartels that are formed for the sole purpose of restricting competition between competitors.³⁵

Hong Kong does not have competition rules specifically applying to airline alliances and has not provided guidance about them. When CAD handles airline alliances, no competition analysis is required during the process. In fact, CAD views airline alliances as commercial arrangements between airlines, and there is no requirement for the airlines to seek CAD’s approval before entering into such agreements.³⁶ CAD considers airline alliances as rights to be exercised under air services arrangements.³⁷ As long as airline alliances are allowed in the relevant ASAs, including their memoranda of understanding, signed between Hong Kong and its aviation partners, airlines can write to CAD to seek approval for operating the respective services.

protect-competition-on-uk-us-airline-routes; Australia: *Decision not to vary, infra* n. 38; New Zealand: *Air New Zealand, infra* n. 39; Korea: *Korean Air – Delta Joint Venture Approved* (in Korean), Press Release, Ministry of Land, Infrastructure and Transport (29 Mar. 2018), https://www.molit.go.kr/atmo/USR/N0201/m_36515/dtl.jsp?id=95080576 (accessed 22 Feb. 2021); Singapore: Application for Decision by Emirates and Qantas Airways Limited, CCS 400/006/12 (28 Mar. 2013); Japan: *Japan Airlines Welcomes the Approval by the Ministry of Land, Infrastructure, Transport and Tourism of Japan for Antitrust Immunity with American Airlines to Cooperate on Trans-Pacific Routes*, Press Release, Japan Airlines (22 Oct. 2010), <http://press.jal.co.jp/en/uploads/20101022%20-%20JAL%20receives%20Approval%20from%20MLIT%20for%20ATI%20Application%20with%20American%20American%20Airlines.pdf> (accessed 15 Apr. 2021).

³⁴ *Air New Zealand, infra* n. 39, at 3:

‘We consider the Alliance has provided, and will continue to provide, benefits to New Zealand. It provides greater international airline capacity (number of seats and flights) into New Zealand and improved connectivity for passengers travelling between New Zealand and key markets in Europe and Asia. There are risks that alliances can reduce competition in some markets. However, we consider that in this case these risks are outweighed by the public benefits described above’.

³⁵ *CCCS Guidance Note for Airline Alliance Agreement*, Competition and Consumer Commission of Singapore § 54 (2018), https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/ccs-guide-lines/airline-guidance-note-2018/airline-guidance-note_final.pdf?la=en&hash=9B2A502874F00ED6FD523E3F88FC95994F7CF227 (accessed 15 Apr. 2021).

³⁶ Email from Civil Aviation Department, *Request for Access to Information* (29 Sept. 2020).

³⁷ *Ibid.*

The lack of competition analysis by CAD in Hong Kong was highlighted when Australia's IASC and New Zealand's Ministry of Transport published their decisions, which both contain detailed competition analysis, on Cathay Pacific's airline alliances with Qantas³⁸ and Air New Zealand,³⁹ respectively. In both decisions, there was no competition review in Hong Kong although Hong Kong-registered Cathay Pacific was a party to the alliances.

Although no airline alliance case has been investigated by HKCC yet, it can be inferred from the two relevant cases how HKCC would generally approach airline alliances. In *Liner Shipping Agreements*,⁴⁰ while HKCC issued a Block Exemption Order for vessel sharing agreements (VSAs), which mainly deal with operational arrangements, it rejected an application covering voluntary discussion agreements (VDAs) on commercial matters. When applying this case to airline alliances, it is reasonable to conclude that exchanging data about supply and demand and discussing recommended rates are likely to be prohibited under the HKCO.

In the more relevant *Seaport Alliance* case,⁴¹ HKCC regarded Seaport Alliance in Hong Kong as having not only the characteristics of a joint production agreement but also common elements with mergers or 'merger-like' joint ventures that are likely to have anti-competitive effects in related markets. HKCC specifically mentioned that 'the Alliance also has certain elements in common with mergers or "merger like" joint ventures (for example alliances seen in the airline industry)' [emphasis added]. Thus, HKCC could conclude that a merger-like joint venture in the airline industry, a highly integrated airline alliance, would likely have anti-competitive effects, depending on the facts of the case.

The fact that Hong Kong does not have a cross-sector merger regime should not be mistaken to mean that any merger-like joint ventures are allowed in Hong Kong. Although some common competition concepts can apply to both airline alliances and airline mergers, such as market definition, assessment of competition effects, and economic efficiencies, merger-like joint ventures are not mergers *per se*. Depending on the facts of the case, merger-like joint ventures could be

³⁸ IASC, *Decision Not to Vary* [2015] IASC 115, IASC/APP/201902 (18 July 2019), https://www.iasc.gov.au/sites/default/files/2019iasc204_Hong_Kong_final.pdf (accessed 15 Apr. 2021).

³⁹ *Air New Zealand/Cathay Pacific Alliance Reauthorisation Ministry of Transport Analysis*, Ministry of Transport (Aug. 2019), <https://www.transport.govt.nz/assets/Uploads/Report/2019-Cathay-Air-NZ-alliance-full-report.pdf> (accessed 15 Apr. 2021).

⁴⁰ *Decision to Issue a Block Exemption Order in Respect of Vessel Sharing Agreements* CASE BE/0004, HKCC (8 Aug. 2017), https://www.compcomm.hk/en/enforcement/registers/block_exemption/files/Statement_of_Reasons_Non_confidential_version.pdf (accessed 15 Apr. 2021).

⁴¹ *Commitments Under Section 60 of the Competition Ordinance in Relation to the Hong Kong Seaport Alliance*, Press Release, HKCC (30 Oct. 2020), https://www.compcomm.hk/en/media/press/files/EN_PR_CC_accepts_commitments_from_HKSA_20201030.pdf (accessed 15 Apr. 2021).

anticompetitive agreements that are still subject to the First Conduct Rule of HKCO in Hong Kong.

Compared to the two cases above, the main difference with airline alliances is that a government agency, CAD, is directly involved in the approval process. Nevertheless, even if there is no competition analysis during the application process with CAD, HKCC can still enforce the HKCO on airline alliances. As noted, the aviation market is not exempted from the HKCO, and HKCC can exercise competition law powers if an airline alliance infringes the HKCO.

The current scheme creates uncertainty for airlines. Since advanced forms of airline alliances have become popular in the industry, both Hong Kong-licensed airlines and foreign airlines operating in Hong Kong may run the risk of contravening the HKCO. For Hong Kong, Japan and Korea's approach to reviewing airline alliances is worth considering. While the aviation agencies are responsible for granting airline alliances, they must consult with the competition agencies. The Japanese Aviation Act (Article 113) and the Korean Aviation Act (Article 121) require ex ante consultation with the Japanese Fair Trade Commission (JFTC) and the Korea Fair Trade Commission (KFTC), respectively.

However, such a legislative and formal arrangement is not the only solution. Informal, non-mandated cooperation between CAD and HKCC is a workable solution that could be implemented smoothly.⁴² When a given airline alliance is likely to cause substantial harm to competition, a remedy is required that can effectively maintain competition in the market. For instance, slot divestiture has been used as a remedy for highly integrated airline alliances around the world.⁴³ If there were a memorandum of understanding between CAD and HKCC regarding

⁴² For the discussion of informal cooperation between sector regulators and competition authorities, see Jon Stern, *Sectoral Regulation and Competition Policy: The U.K.'s Concurrency Arrangements – An Economic Perspective*, 11 J. Comp. L. & Econ. 881–916 (2015).

⁴³ See for the EU: Cases COMP/39.596 – British Airways/American Airlines/Iberia (Oneworld Alliance); COMP/AT.39964 – Air France/KLM, Alitalia, Delta (Sky Team Alliance); COMP/AT.39595 – United Airlines/Lufthansa/Air Canada (Star Alliance members United, Air Canada, and Lufthansa agreed to surrender slots to new entrants in New York and Frankfurt; See for the US: American Airlines, Inc., British Airways PLC, Finnair OYJ, Iberia Líneas Aéreas de España, S.A., Royal Jordanian Airlines Joint Application, Final Order, Dkt. No. OST-2008–0252, Ord. 2010–7–8 (Dep't of Transp. 20 July 2010) (For a period of ten years from the date of approval, applicants must transfer four slot pairs at London Heathrow to competitors: two for Heathrow-Boston services and two for services between Heathrow and any US city.); Delta Air Lines, Inc., Aerovías De Mexico, S. A. DE C.V Joint Application, Final Order, Dkt No. OST-2015-0070, Ord. 2016-12-13 (Dep't of Transp. 14 Dec. 2016) (Alliance to coordinate flights and fare prices between US and Mexico – required divestiture of slots at JFK and Mexico City's Benito Juárez International); See for the UK: *CMA Acts to Protect Competition on UK-US Airline Routes*, Press Release, CMA (17 Sept. 2020), <https://www.gov.uk/government/news/cma-acts-to-protect-competition-on-uk-us-airline-routes> (Revenue sharing joint venture (ongoing) American Airlines-British Airways. There was a notice of intention to accept binding commitments in relation to the Atlantic joint business agreement (including divestitures.) However, due to the pandemic, the CMA issued a decision not to accept commitments and to issue interim measures) (accessed 15 Apr. 2021).

competition analysis of airline alliances, HKCC would be able to review the alliance in advance and make recommendations if necessary. HKCC already has *ex post* jurisdiction of airline alliances in case they infringe the HKCO. However, *ex ante* assessment, coordinated with CAD, would be more effective and straightforward.

4 AIRPORT SLOTS

Until the COVID-19 pandemic, passenger demand at HKIA was rapidly reaching maximum capacity. In 2019, passenger throughput was 71.5 million, out of a design capacity of 74 million.⁴⁴ According to IATA's Worldwide Slot Guidelines (IATA WSG), HKIA is classified as a 'Level 3 Airport' wherein demand for airport infrastructure significantly exceeds the airport's capacity.⁴⁵ For Level three airports, IATA recommends that 'a coordinator is appointed to allocate slots to airlines and other aircraft operators using or planning to use the airport as a means of managing the declared capacity'.⁴⁶

A practical solution to airport congestion is to increase capacity. The Third Runway Project at HKIA, slated for completion in 2024, will increase capacity by 30 million annually.⁴⁷ Since it is estimated that passenger demand will not return to pre-2019 levels until 2024,⁴⁸ HKIA is not likely face a serious slot shortage for the next few years. That said, it is worth reviewing the existing slot rules to see if any necessary reforms can be implemented when demand returns and new slots are available to be distributed. However, a detailed economic analysis is beyond the scope of this research.

Since July 2008, CAD has assumed the role of the slot coordinator for HKIA. The Hong Kong Schedule Coordination Office (HKSCO)⁴⁹ at CAD handles the work of coordination. HKSCO allocates slots according to 'Schedule Coordination Guidelines for Hong Kong International Airport' (HK Slot

⁴⁴ *HKIA FactSheet*, Hong Kong International Airport (May 2020), https://www.hongkongairport.com/iwov-resources/file/the-airport/hkia-at-a-glance/facts-figures/HKIA_FactSheet_EN_200518A.PDF (accessed 15 Apr. 2021).

⁴⁵ *Worldwide Slot Guidelines (WSGs) Edition 10*, IATA 5.1 (1 Aug. 2019), <https://www.iata.org/contentassets/4ede2aabfcc14a55919e468054d714fe/wsg-edition-10-english-version.pdf> (accessed 15 Apr. 2021); See *List of Coordinated and Facilitated Airports*, IATA (updated 10 Nov. 2020), <https://www.iata.org/en/policy/slots/slotguidelines/> (accessed 15 Apr. 2021).

⁴⁶ *Ibid.*, WSGs 1.4.1.

⁴⁷ *Three Runway System: Project Overview*, HKIA (Nov. 2020), <https://www.threerunwaysystem.com/en/three-runway-system/project-overview/> (accessed 23 Feb. 2021).

⁴⁸ *Recovery Delayed as International Travel Remains Locked Down*, IATA (28 July 2020), <https://www.iata.org/en/pressroom/pr/2020-07-28-02/> (accessed 15 Apr. 2021).

⁴⁹ Hong Kong Schedule Coordination Office, *Home*, Civil Aviation Department (Mar. 2014), <https://www.hkgslot.gov.hk/Home.html> (accessed 15 Apr. 2021).

Guidelines)⁵⁰ and follows IATA WSG in large part, including its slot allocation principles. Indeed, IATA WSG is considered a set of standards for the management of airport slots at congested airports although it does not have any legal binding.

The most significant principle of IATA WSG is that slots are primarily allocated on the basis of historical rights. An airline may retain a series of slots so long as it used those slots at least 80% of the time in the previous season, that is, the ‘use it or lose it’ rule.⁵¹ If usage falls under 80%, the slot will be returned to a pool for re-allocation. According to section 8.3.3.3 of IATA WSG, 50% of the slot pool must be allocated to new entrant requests.⁵² HK Slot Guidelines states that ‘[r] egarding slot allocation principles, priority and criteria, HKSCO follows Part 2 of the IATA WSG and the guidelines in this document’, and section 8.3.3.3 is located in Part 2 of the IATA WSG. However, it is worth noting that this research did not track the actual data on cases in which slots have been allocated to new entrants. In theory, if very few slots were used less than 80% in a given season, there would have been limited availability to new entrants.

There is a slot transfer provision in the HK Slot Guidelines that allows slots to be transferred between parent and subsidiary airlines and subsidiaries of the same parent.⁵³ Slots can also be transferred from one route or type of service to another route or type of service operated by the same airline.⁵⁴ Comparatively, this provision is a more stringent set of rules and could be problematic from a competition perspective.

The IATA WSG does not explicitly mention transfers between a parent company and subsidiary. It simply states that ‘Slot transfers between airlines, whether or not for compensation or consideration, may only take place where they are not prohibited by the laws of the relevant country. Slots may only be transferred to another airline that is serving or planning to serve the same airport’.⁵⁵ Slot allocation at airports in the EU also provides that ‘slots may be freely exchanged between air carriers or transferred by an air carrier from one route, or type of service, to another, by mutual agreement or as a result of a total or partial takeover or unilaterally’.⁵⁶

⁵⁰ See *Hong Kong Schedule Coordination Guidelines for Hong Kong International Airport Issue 14.1*, Civil Aviation Department (Sep. 2018), <https://www.cad.gov.hk/reports/SC%20Guidelines%20for%20HKIA.pdf> (accessed 15 Apr. 2021).

⁵¹ WSGs, *supra* n. 45, 8.1.1.f, 8.6 & 4.1.

⁵² *Ibid.*, at 8.3.3.3.

⁵³ *Hong Kong Schedule Coordination Guidelines*, *supra* n. 50, 28(i) & 28(ii).

⁵⁴ *Ibid.*, 28 (iii).

⁵⁵ WSGs, *supra* n. 45, 8.12.1.

⁵⁶ Regulation (EEC) No 95/93 of 18 Jan. 1993 on common rules for the allocation of slots at Community airports, OJ L 14, 22 Jan. 1993, at 1–6; See *Completed Trades*, ACL, <https://www.acl-uk.org/completed-slot-trades/> (accessed 2 Dec. 2020) for a table that summarizes slots transferred between air carriers in the UK by way of an exchange of slots, whether or not for monetary compensation.

The HK Slot Guidelines' limited transfer between parent and subsidiary airlines and subsidiaries of the same parent would appear to provide an opportunity for a company with subsidiaries to create barriers to entry for potential competitor airlines. If such slots were instead returned to the pool and reallocated, that would provide an opportunity for the slots to be used by more efficient users.

It is worth drawing a comparison with slot rules and practices in Korea, another international aviation hub in the region. Previously, slot transfers between airlines were freely allowed, whether between a parent company and subsidiary or between two independent companies. However, a new provision related to slots was added to the Aviation Business Act in 2019, under which slot transfers must be approved in advance by the Korean Ministry of Land, Infrastructure and Transport. This change was due to malpractice between parent airlines and subsidiaries. During an inspection of government agencies in 2018, the National Assembly learned that Korean Air and Asiana Airlines transferred their prime slots for their subsidiaries' unpopular slots first and then gradually stopped operating the slots received from their subsidiaries. On the surface, this was a slot exchange, but in fact, Korean Air and Asiana Airlines transferred slots to assist their subsidiaries. Since this could potentially lead to unfair trade practices that violate the Korean Fair Trade Act, the Korean Ministry of Land, Infrastructure, and Transport (MOLIT) decided to tighten the slot transfer. Since the new rule was implemented, MOLIT has been cautious about slot transfers between parent airlines and subsidiaries and often disapproves such transfers **while freely allowing slot transfers between independent airlines.**

The HK Slot Guidelines contain rules for slot use and monitoring to ensure compliance with conditions, but the rules appear to prioritize on time performance and are indifferent to efficiency. Examples of **slot misuse** provided in Annex 4 Slot Compliance at HKIA do not include hoarding practices such as ghost flights, whereby a slot is used but few or no passengers are flown. This practice has been used to retain slot usage rights, which might not deliver the best outcomes for passengers.

There is an extensive literature evaluating the IATA WSG principles, with much criticism of the system's inability to allocate slots to the most efficient airlines and its tendency to entrench the market power of incumbent airlines.⁵⁷ Indeed, the current rules do not lead to the efficient use of slots because slots are granted at

⁵⁷ See e.g., *Advice for the Department of Transport on Competition Impacts of Airport Slot Allocation*, CMA (Dec. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888765/CMA_advice_on_DfT_on_competition_impacts_of_airport_slot_allocation.pdf (accessed 16 Jan. 2021); Jaap de Wit & Guillaume Burghouwt, *Slot Allocation and Use at Hub Airports, Perspectives for Secondary Trading*, 8 Eur. J. Transp. & Infrastructure Res. 147 (2008); Daniele Condorelli, *Efficient and Equitable Airport Slot Allocation*, 1 Rivista di Politica Economica 81 (2007); De Boe V, *Allocation of Slots to Airlines: What Role for Competition Law?*, 6 J. Network Indus. 293 (2005).

no cost to the incumbent airline subject to the ‘use it or lose it’ rule. Proposed reform of these issues has revolved around an auction mechanism for primary allocation or increasing slot mobility through a secondary market.

Although both market-based approaches have the potential to remedy the inefficiencies in primary allocation, there are risks, including the risk of being exploited by dominant airlines to consolidate market power. That said, it would be helpful to review the HK Slot Guidelines to see whether relying solely on an administrative approach to allocate slots produces inefficiencies and whether there is potential to use market mechanisms to increase competition in end user air services.

The most important point for review is whether the HK Slot Guidelines are designed to create or maintain an undertaking with a substantial degree of market power at HKIA. When assessing market power in *Lufthansa/Air Berlin*, the European Commission focused entirely on the ‘dominant slot holding position’ test rather than the traditional ‘point of origin/point of destination’ or city-pair (O&D) approach.⁵⁸ The ‘dominant slot holding position’ test focuses entirely on the mere holding (as opposed to use) of slots. Slot holdings can convey market power if a carrier holds the vast majority of slots at an important, congested airport, especially if substitutes are not available.⁵⁹ HKIA is one of the few airports in the world that meet those conditions.

5 PASSENGER PROTECTION

Passenger protection was rooted in the rise of a broader consumer protection regime. Although competition policy and consumer policy are considered separate areas, both ultimately aim to protect the consumer. Worldwide, there are different institutional architectures in place to allocate responsibility for consumer protection and competition law and policy. Many jurisdictions fuse the two functions under the responsibility of a single agency.⁶⁰ This arrangement has its advantages, such as coordinated enforcement efforts and combination of regulatory expertise.⁶¹

⁵⁸ See CASE COMP/M.8633 – Lufthansa/Certain Air Berlin Assets; See also Laura M. Bolz, *Lufthansa/Certain Air Berlin Assets: The European Commission’s New ‘Dominant Slot Holding Position’ Test for Assessing Market Power*, XLII Annals Air & Space L. 317 (2017).

⁵⁹ *Ibid.*, at 328.

⁶⁰ See for a list of Competition and Consumer Protection Agencies around the world, *Competition and Consumer Protection Authorities Worldwide*, Federal Trade Commission, <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide> (accessed 2 Dec. 2020).

⁶¹ Max Huffman, *Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection*, 6 Eur. Comp. J. 7, 22 (2010).

Some jurisdictions have also recognized the need to have an agency designated specifically for passenger protection, such as the Civil Aviation Authority in the UK,⁶² the MAVCOM in Malaysia,⁶³ and the Department of Transport in the US.⁶⁴ USDOT has issued consumer protection regulations to prevent ‘unfair or deceptive practices or ... unfair methods of competition in air transportation’.⁶⁵

In Hong Kong, a plurality of government agencies may be involved in a particular passenger case. The government has in the past clarified how passenger complaints are addressed by each department. The Consumer Council (CC) is a statutory body that can help passengers and airlines discuss and resolve disagreements through mediation, which is not legally binding.⁶⁶ It also conducts studies and publishes research for consumers and the government. However, CC does not have any enforcement powers.

When a complaint is lodged about safety standards or flight operations, CAD will follow up with the airlines. If THB or CAD receive complaints regarding ticketing, they will either refer to the airline concerned and urge it to follow up appropriately or advise the customer to follow up with the CC for assistance, depending on the circumstances.⁶⁷ Also relevant is the Trade Descriptions Ordinance (TDO), which criminalizes ‘false trade descriptions’,⁶⁸ ‘misleading omissions’,⁶⁹ and ‘wrongly accepting payment’.⁷⁰ The Customs & Excise Department (C&ED) is responsible for enforcing the TDO.

A written reply by the Secretary for Commerce and Economic Development to the Legislative Council on 21 June 2017, reported that THB, CAD, C&ED, and CC had received the following number of complaints about airline passengers being unable to board scheduled flights (Table 1).⁷¹

⁶² *Consumer Protection Law*, CAA, <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/Consumer-protection-law/> (accessed 12 Dec. 2020).

⁶³ Malaysian Aviation Commission Act 2015.

⁶⁴ Jol Silversmith & Barbara M. Marrin, *U.S. Airline Passenger Consumer Protection – Recent Developments*, Lexology (28 July 2020), <https://www.lexology.com/library/detail.aspx?g=7f4f70b4-fdfe-415a-b118-1f02aadf5d50> (accessed 15 Apr. 2021).

⁶⁵ 49 USC §41712.

⁶⁶ *2012 LCQ15: Oversale of Air Tickets By Airlines*, Press Release, Government of the HKSAR (22 Feb. 2012), <https://www.info.gov.hk/gia/general/201202/22/P201202220206.htm>; *2011 LCQ14: Complaints Against Airlines*, Press Release, Government of the HKSAR (17 May 2011), <https://www.info.gov.hk/gia/general/201105/18/P201105180125.htm> (accessed 15 Apr. 2021).

⁶⁷ *LCQ11: Incidents of Airlines Failing to Provide Seats for Ticket-Holding Passengers to Board Flights*, Press Release, Government of the HKSAR (21 June 2017), <https://www.info.gov.hk/gia/general/201706/21/P2017062100381.htm> (accessed 15 Apr. 2021).

⁶⁸ Cap 362 s. 7.

⁶⁹ Cap 362 s. 13E.

⁷⁰ Cap 362 s. 13I.

⁷¹ *LCQ11 Incidents of Airlines Failing to Provide Seats for Ticket-Holding Passengers to Board Flights*, *supra* n. 67.

Table 1 Number of Complaints About Airline Passengers Being Unable to Board Scheduled Flights in Hong Kong

	<i>Transport Housing Bureau</i>	<i>Civil Aviation Department</i>	<i>Customs and Excise Department</i>	<i>Consumer Council</i>
11				
2014	0	3	20	309
2015	0	7	34	218
2016	1	13	10	222
2017 (Jan – May)	0	12	7	113

From a passenger's perspective, it is not always clear which laws have been infringed, what recourse is available, or which government agency is responsible. In the future, it would be preferable to establish a single channel through inter-government agency coordination.

More importantly, it is necessary to set up a **mechanism** for government agencies to coordinate passenger protection issues. In some cases, HKCC is better positioned to conduct economic analysis on passenger protection issues. For instance, when there were passenger complaints about excessive pricing on domestic routes in Malaysia, it was MAVCOM that conducted economic analysis.⁷² HKCC has the functions, inter alia, of advising the government on competition matters and conducting market studies into matters affecting competition in markets in Hong Kong.⁷³ This function should be flexibly applied in connection with passenger protection issues.

6 COMPETITION POLICY ISSUES IN THE POST-COVID-19 ERA

The COVID-19 crisis is reshaping the aviation market. Airlines have been calling on their governments to bail them out at an enormous cost since the beginning of the crisis. As a capital- and labour-intensive industry, aviation continues to incur high costs despite the devastating market conditions. Although many States are taking drastic measures, a considerable number of airlines are going to be consolidated or disappear altogether. In fact, the Asian aviation market was ripe for

⁷² *Technical Paper: Airfares For Domestic Flights During Peak Seasons*, MAVCOM (Aug. 2018), <https://www.mavcom.my/wp-content/uploads/2018/08/180813-Technical-paper-Airfares-for-Domestic-Flights-During-Peak-Seasons-August-2018.pdf> (accessed 2 Dec. 2020).

⁷³ Cap 619 s. 130 (d) & (e).

consolidation even before the COVID-19 crisis, and the pandemic will accelerate that process even further.⁷⁴

The birth of new airlines and the disappearance of weaker airlines through bankruptcies or mergers can be regarded as an acceptable outcome of fierce competition. However, the unique characteristics of the aviation market should also be factored in. Foreign ownership and control restrictions imposed by almost all countries will limit opportunities for cross-border consolidations in the airline industry. Unlike most industries, foreign investors in airlines can only acquire a minority stake of up to 49% of the company's equity. Control restrictions are even trickier than ownership restrictions as they are qualitative in nature.

Due to the ownership and control rules, many governments have traditionally either provided state aid to collapsing airlines or used political pressure to induce local companies to take them over.⁷⁵ During the COVID-19 slump, some governments have been **encouraging consolidations** that would create larger domestic airlines more capable of competing in international markets (e.g., the deal between Korean Air and Asiana Airlines in Korea). There are expected to be more consolidations in the post-COVID-19 era. One of COVID-19's lessons for the airline industry is that small countries without strong domestic markets face severe difficulties in maintaining more than two mega airlines.

These changing dynamics should be considered when assessing competition in the aviation market. Aviation has always been a highly regulated industry, but governments will be more interventionist at the entry/exit level. Given the decreasing number of airlines, more significant competition will occur between mega carriers or alliances of mega carriers in the international market.

For Hong Kong, Singapore's experience with the aviation market might be relevant as governments tend to be more interested in the experience of countries with similar characteristics. The Competition & Consumer Commission of Singapore (CCCS) has taken a very generous approach to granting airline alliance activities that offer a net economic benefit. The benefits recognized in CCCS's previous decisions have included the fact that a joint venture airline alliance will improve tourism or strengthen Singapore's position and competitiveness as an air hub.

The origin of this generous approach appears in section 6 (1)(a) of the Competition Act of Singapore, which states that CCCS should aim to 'maintain and enhance efficient market conduct and *promote overall productivity, innovation and*

⁷⁴ Jae Woon Lee, *Chapter 18 Concluding Remarks and Smart Regulation in the Post COVID-19 Era*, in *Aviation Law and Policy in Asia* 347 (Jae Woon Lee ed., Brill 2020).

⁷⁵ *Capacity: Hanging in the balance*, FlightGlobal (16 Feb. 2010), <https://www.flightglobal.com/capacity-hanging-in-the-balance/92015.article> (accessed 22 Feb. 2021).

competitiveness of markets in Singapore' (emphasis added).⁷⁶ By focusing on the overall benefits, the provision suggests that Singapore's competition law framework is designed to benefit Singapore's economic competitiveness as a whole.⁷⁷ The HKCO does not contain a similar provision, and this article does not suggest that Hong Kong should follow the Singaporean model. However, during the COVID-19 recovery stage, Singapore's approach provides food for thought in interpreting 'overall economic efficiency' in the HKCO.

Another COVID-19 impact in the aviation market is state ownership of national airlines. Many governments have developed bailout plans to save their national airlines by becoming shareholders with stakes of varying sizes, including the Hong Kong Government's first-ever investment in Cathay Pacific. Clearly, the HKCO does not provide rules for competitive neutrality. OECD defines competitive neutrality as 'a legal and regulatory environment in which all enterprises, public or private, face the same set of rules, and government ownership or involvement does not confer unjustified advantages on any entity'.⁷⁸ Since competitive neutrality could potentially have implications on competition in the aviation market including distorting competition in the market, it is recommended that HKCC come up with guidelines on competitive neutrality.

7 CONCLUSION AND RECOMMENDATIONS

Although the aviation market was hit hard (if not the hardest of all industries) by the COVID-19 crisis, it will rebound at some point, and fair competition will need to be guaranteed in the market. Even before the COVID-19 crisis, there were several concerns about competition in Hong Kong's aviation market. This article makes the following recommendations in regard to those concerns.

There needs to be inter-agency cooperation between HKCC and Hong Kong's aviation regulators. Aviation is a 'massive industry, highly regulated, structurally borderless, and treated by governments not as an ordinary part of international trade but as singular and exceptional'.⁷⁹ Aviation, by its nature, requires technical and sector-specific regulations. At the same time, the aviation market is not excluded from the HKCO, nor does it receive any

⁷⁶ See Burton Ong, *Competition Law in Singapore: The First Decade*, in *Research Handbook on Asian Competition Law* 151 (Steven Van Uytsel, Shuya Hayashi & John O. Haley eds 2020).

⁷⁷ *Ibid.*, at 154.

⁷⁸ OECD, *Policy Roundtables – State Owned Enterprises and the Principle of Competitive Neutrality* 11 (2009), DAF/COMP(2009)37, <http://www.oecd.org/daf/competition/46734249.pdf> (accessed 2 Dec. 2020).

⁷⁹ Brian F. Havel & Gabriel S. Sanchez, *The Principles and Practices of International Aviation Law* 5 (Cambridge University Press 2014).

exceptions. In order to deal with the overlap between competition law and aviation regulations, there needs to be cooperation between HKCC and aviation regulators.

HKCC and aviation regulators, particularly CAD, should conclude an informal, non-mandated MoU. Formal concurrency arrangements, which would require legislative reforms, are not the only way to inter-agency cooperation. Informal and non-mandated cooperation between HKCC and aviation regulators can work effectively. In particular, HKCC and CAD should cooperate on the issues of airline alliances to promote competition in Hong Kong's aviation market. A good model for this is the 'Memorandum of Understanding between the Competition Commission and the Securities and Futures Commission'.⁸⁰ The two agencies signed the MoU in April 2020 to enhance cooperation and the exchange of information on competition issues relating to the securities and futures industry. HKCC said the MOU represents 'a significant milestone in its endeavours to adopt a joined-up approach in promoting competition and combating anti-competitive practices with relevant sector regulators in Hong Kong'.⁸¹ An MOU with aviation regulators should be next.

CAD and HKCC should review 'Schedule Coordination Guidelines for Hong Kong International Airport' together to identify competition concerns and possible remedies. The interaction between slot allocation and competition considerations is an important one. Although slot allocation is not a major issue at the moment due to the impact of COVID-19, CAD and HKCC need to review the guidelines to better understand competition concerns in slot allocation in Hong Kong.

A study should be carried out about how to coordinate passenger protection issues in Hong Kong. From the outset, Hong Kong's approach to the passenger protections has seemed fragmented. There needs to be a study on how to coordinate passenger protection issues among government agencies, including HKCC.

HKCC should provide guidance on competitive neutrality. One of COVID-19's impacts is increased state ownership of flag carriers. To give some examples, Cathay Pacific, Alitalia, Lufthansa, TAP Air Portugal, El Al Israel Airlines, Air Baltic, Kenya Airlines, Korean Air, and Singapore Airlines have all either come under state ownership for the first time or seen governments increase

⁸⁰ HKCC & SFC, *Memorandum of Understanding Between the Securities and Futures Commission and the Competition Commission*, HKCC (16 Apr. 2020), https://www.compcomm.hk/en/media/press/files/ENG_CC_SFC_MOU.pdf (accessed 15 Apr. 2021).

⁸¹ *Memorandum of Understanding Between the Competition Commission and the Securities and Futures Commission*, HKCC, https://www.compcomm.hk/en/about/inter_agency/memorandum_sfc.html (accessed 15 Apr. 2021).

their stake in response to the COVID-19 crisis, though the percentage of ownership varies. For Hong Kong in particular, this has been the biggest corporate bailout in two decades for the traditionally laissez-faire city government. In this context, HKCC needs to provide guidance on competitive neutrality. That guidance will not only advise the government on the key principles of competitive neutrality but also help the state-owned company maintain discipline.

To conclude, this article calls on the regulators and stakeholders of the Hong Kong aviation ecosystem to implement the actions detailed herein. Although the COVID-19 crisis had a drastic impact on the aviation market, that crisis should be used as an opportunity to design a better future for aviation in Hong Kong. Hong Kong's aviation market should remain dynamic and provide a structure for fair competition. (end)