

The Civil Aviation Authority of Singapore (CAAS) Airport Competition Code, 2009

- Advisory guidelines on the provisions relating to anti-competitive agreements and abuse of dominance -

What this Code is about

- 1 The CAAS Act provides for the CAAS to issue a code of practice with respect to competition, abuse of a dominant position in the operation of airports and fair market conduct in the provision of airport services and facilities.
- 2 The CAAS has formulated the Airport Competition Code 2009 (“Code”), which all airport licensees will be required to comply with. The Code sets out the prohibitions against anti-competitive activities in the airport market i.e. any market in Singapore where an airport licensee is engaged in the provision of airport services and facilities¹.
- 3 The CAAS will enforce the prohibitions against anti-competitive activities under the Code, with the aim of promoting a healthy competitive airport market in Singapore. A healthy competitive market will spur airport licensees to be more efficient and innovative, as well as be more responsive to the needs of airport users. Airport users in turn will enjoy more choices, lower prices, and better products and services. The economy as a whole benefits from greater productivity gains and more efficient resource allocation in the airport market.
- 4 These advisory guidelines provide a summary of the key provisions of the Code. This guideline is intended to help airport licensees and interested parties understand the CAAS’ intent; however, these guidelines neither add to, nor alter the requirements specified in the Code.

Regulatory approach

- 5 In the implementation and enforcement of this Code, the CAAS will consider:
 - the state of competition in the airport market in Singapore;
 - the economic and commercial circumstances of the airport market in Singapore; and
 - how to best foster innovation and efficiency in the functioning of the airport market in Singapore.

The CAAS will consider each case on its merits, to see if it warrants an investigation.

- 6 The CAAS may from time to time amend the Code to ensure its continued relevance, taking into account changing market conditions. Where the CAAS amends the Code, a notice that an amendment has been made will be published.

¹ “Airport services and facilities” has the meaning assigned to it at section 2 of the CAAS Act 2009.

Prohibition against anti-competitive agreements

- 7 Clause 10 of the Code is the prohibition of anti-competitive agreements by any airport licensee. The CAAS will focus on agreements of an airport licensee that appreciably prevent, restrict or distort competition in an airport market. An agreement covers agreements entered into by an airport licensee, whether directly or indirectly, and decisions and concerted practices (which may include co-operation without any agreement or decision). These may be oral or written agreements and need not necessarily be legally binding (for example, unwritten 'gentlemen's agreements'). Any agreement made by an airport licensee outside Singapore is also covered by this Code if such agreement has, or will have, effect on an airport market in Singapore.
- 8 The Code provides examples of prohibited agreements that may prevent, restrict or distort competition within the airport market in Singapore, namely those which:
- a. directly or indirectly fix prices, or any other trading conditions, for the provision of airport services and facilities or any other goods or services in relation to such provision;
 - b. limit or control services, markets, technical development or investment in relation to airport services and facilities or any other goods or services in relation to such provision;
 - c. allocate or share markets or sources of supply for airport services and facilities or any other goods or services in relation to such provision; or
 - d. result in an agreement to boycott any other person in relation to the provision of airport services and facilities or for any other goods or services connected with such provision.
- 9 The list is not exhaustive and does not set a limit on the investigation and enforcement activities of the CAAS. An agreement that appreciably prevents, restricts or distorts competition in an airport market is likely to fall within the clause 10 prohibition although it is not covered in the list. An agreement will not be prohibited if it falls within the exclusion provision set out in clause 24. In the event of an investigation by the CAAS, it will be for an airport licensee claiming the benefit of any exclusion to prove that it satisfies the requirements.

The appreciable effect on competition test

- 10 The CAAS will be generally guided by the Competition Commission of Singapore ("CCS") *Guidelines on the Section 34 Prohibition* to consider whether an agreement appreciably prevents, restricts or distorts competition in an airport market, or not. The CAAS will take into account the facts and circumstances of the situation, including the nature, scope and content of such agreement in its consideration.

- 11 However, any agreement by an airport licensee containing any of the following hard core restrictions will always be regarded as having an appreciable adverse effect on the airport market:
- direct or indirect price-fixing
 - bid-rigging (collusive tendering)
 - sharing the market
 - limiting or controlling production or investment.

Transitional period

- 12 Should the CAAS determine that any agreement by an airport licensee made before 1 July 2009 and which remains in force, infringes the Code, the CAAS will not impose a financial penalty on the airport licensee for a 6-month transitional period from 1 July 2009 to 31 December 2009. The licensee may request for an extension of the transitional period for an agreement. The CAAS may consider such request on a case by case basis.

Prohibition against abuse of dominance

- 13 Clauses 11 and 12 define dominance and the duties of a dominant airport licensee respectively. An airport licensee will not be deemed dominant unless it has the ability to exercise significant market power in the airport market. Market power arises when an airport licensee does not face sufficiently strong competitive pressure. It can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. Market power can also be the ability and incentive to harm the process of competition in other ways, for instance, by weakening existing competition, raising entry barriers or slowing innovation.
- 14 As long as there is only one airport licensee in an airport market, this airport licensee will be deemed to be a dominant airport licensee. There is no prohibition on **being** in a dominant position. A breach of the duties of dominant airport licensee will however give rise to an abuse of dominance.
- 15 In assessing cases of alleged abuse, the CAAS may consider if the dominant airport licensee is able to objectively justify its conduct. Further, the dominant airport licensee will have to show that it has not taken more restrictive measures than are necessary to defend its legitimate commercial interest. The CAAS may also consider if the dominant airport licensee is able to demonstrate any benefits arising from its conduct and that the conduct is proportionate to the benefits claimed.

Exclusion

- 16 Clause 24 sets out the situations and circumstances under which the CAAS may allow any agreement or conduct of an airport licensee to be excluded from the prohibitions set out in the Code.

Enforcement

Investigation

- 17 The powers of the CAAS to investigate anti-competitive activities in the airport market are set out in clauses 15 and 16. The CAAS may also obtain information through informal enquiries, either before or during the course of an investigation.
- 18 When there are reasonable grounds for suspecting that the Code has been contravened, the CAAS can, by written notice, require any person to produce documents or information that it considers relate to any matter relevant to the investigation. The CAAS may also at any time after the expiry of the period specified in such notice, enter any premises to seize and take extracts of such document or information specified in the notice.

Complaints

- 19 Clause 17 outlines the procedure for any person to notify the CAAS of any infringement of clause 10 or 12 by an airport licensee. The CAAS will in general not consider anonymous complaints as there are practical difficulties in doing so when full information is not available and clarification cannot be sought from the complainant.
- 20 The CAAS may pursue the complaint (and may need to seek further information from the complainant) or the CAAS may consider that there are no grounds for action in respect of the complaint because the information provided in such complaint does not give the CAAS reasonable grounds for suspecting a possible infringement of the Code. The CAAS will consider each case on its merits to see if it warrants an investigation. If the CAAS decides that there is a contravention, appropriate enforcement action will be taken.
- 21 If the CAAS decides to pursue a complaint, it will usually seek further information from the airport licensee which is the subject of the complaint. If a complainant does not want to be identified to the airport licensee, it should make this clear at the earliest opportunity. However, for effective handling of complaints, it must be noted that it is sometimes necessary to reveal information which may identify the source of the complaint. When providing information or documents to the CAAS, complainants should:
 - clearly identify any confidential information;
 - provide this information in a separate annex clearly marked "confidential information", and
 - explain why this information should be treated as confidential.
- 22 The CAAS recognises the importance of complainants voluntarily supplying information and also recognises their interest in confidentiality. If the CAAS proposes to disclose any of the information in the confidential annexes, it will, to the extent that is practicable to do so, consult the person who provided the information.

- 23 The CAAS also recognises the importance of maintaining the confidentiality of commercially sensitive information and details of an individual's private affairs. The CAAS will be guided by the restrictions on disclosure of confidential information as set out in section 83 of the CAAS Act.

Offences

- 24 Clause 18 of the Code sets out the offences which may be committed where a person fails to co-operate with the CAAS in its investigation.

Legal privilege

- 25 Clause 19 clarifies that the requirement to disclose information or documents does not extend to such documents or materials which would be protected from disclosure on grounds of legal privilege.

Interim directions

- 26 Clause 20 provides for the CAAS to give interim directions where it considers appropriate under certain circumstances when it has not completed its investigations. Interim directions may be given when the CAAS has reasonable grounds to suspect that the Code has been contravened and considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.
- 27 When the investigation is completed and the CAAS has decided that a contravention has taken place, it may replace the interim direction with a final direction. Otherwise, an interim direction has effect until the CAAS has discontinued or completed its investigation into the matter or until the CAAS considers there is no longer any necessity to act as a matter of urgency to prevent any serious, irreparable damage to a particular person or category of persons or for the protection of public interest.

Decisions and directions

- 28 Clause 21 sets out the enforcement actions after the CAAS has completed its investigation. Where the CAAS proposes to make a decision or direction that the Code has been contravened by an airport licensee, it will send the airport licensee a notification of its proposed decision or direction. The airport licensee receiving such notification will have the right to make written representations relating to the proposed decision or direction.
- 29 The CAAS will review such representations from the airport licensee, and inform the licensee of its final decision. The CAAS may give a direction to the airport licensee to bring the contravention to an end and for the licensee to take such action to remedy, mitigate or eliminate any adverse effect on the airport market.

Penalties

- 30 The CAAS may impose a financial penalty for a contravention of the Code, provided that the contravention had been committed intentionally or negligently. The amount of penalty imposed may be up to \$1 million.
- 31 When setting the amount of any penalty, the CAAS will take into account the factors set out as follows:
- the seriousness of the contravention;
 - the duration of the contravention;
 - other relevant factors (such as deterrent value); and
 - any further aggravating or mitigating factors.

Guidance on agreements and conduct

- 32 Clause 22 sets out how an airport licensee may notify the CAAS of its agreement or conduct and seek guidance from the CAAS on whether there has been an infringement of the Code.
- 33 There is no requirement for an airport licensee to notify agreements and conduct to the CAAS. It is for the airport licensee to ensure that its agreements and conduct comply with the Code. However, the airport licensee may notify its agreements or conduct, together with all relevant and material information concerning such agreements or conduct, to the CAAS for guidance if the licensee has concerns as to whether such agreements or conduct are contravening the Code. Notification provides the airport licensee with immunity from financial penalties for infringements of the Code occurring between the point of notification to such date as may be specified by the CAAS following its guidance.
- 34 Notification cannot be made in respect of prospective agreements (i.e. agreements where the airport licensee has yet to enter into the agreement) or prospective conduct. A fee of up to \$10,000 may be charged as deemed necessary by the CAAS. The CAAS has the discretion not to give guidance.
- 35 On an application for guidance as to whether there has been a contravention of the Code, the CAAS may give an indication that there has been or likely to be an contravention; and if not, whether it is because of the effect of an exclusion.
- 36 The CAAS will not reopen a case once favourable guidance has been given unless:
- it has reasonable grounds for believing that there has been a material change of circumstance since the guidance was given;
 - it has reasonable grounds for suspecting that materially incomplete, misleading or false information had been given; or
 - a complaint is received from a third party.

Appeals

- 37 Clause 23 provides for an airport licensee aggrieved by any direction or decision of the CAAS to appeal to the Minister in accordance with the CAAS (Appeals to Minister) Rules 2009.

Co-operation between the CAAS and other regulatory authorities on competition matters

- 38 As provided for under paragraph 5 of the Third Schedule of the Competition Act, agreements and / or conduct of an airport licensee in an airport market will not be subject to the Competition Act. The issuance of this Code will give the CAAS jurisdiction on such agreements and / or conduct.
- 39 The CCS will have jurisdiction over any competition matters arising in any market that is not an airport market.
- 40 On cross-sectoral competition cases, the CAAS will work with the CCS and any relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator. Wherever possible, the aim is to prevent double jeopardy and minimise regulatory burden in dealing with the case.

Further information

- 41 These advisory guidelines do not purport to be a full or binding statement of law. This document is intended to be a guide to the Code. In the event that any of the parts of these guidelines is inconsistent or incompatible with the provisions the Code, the provisions of the Code shall prevail.

Dated 1 February 2010