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BRIEFING

THAILAND'S TRADE COMPETITION ACT
FOR AIRLINES

MARCH 2018

- THAILAND'S NEW TRADE COMPETITION ACT OR TCA (2017) HAS NOW BEEN IN FORCE FOR SIX MONTHS
- IF PROPERLY AND FULLY IMPLEMENTED, THE ACT COULD RESULT IN SIGNIFICANT CHANGES TO THE WAY IN WHICH ANTI-COMPETITIVE CONDUCT IS ADDRESSED AND PROSECUTED



On 5 October 2017, Thailand's new Trade Competition Act or TCA (2017) ("the TCA" or "the Act") came into force. As the Act has now been in force for six months, this briefing considers the impact it has had on airlines and the Thai aviation sector. It should be read in conjunction with our briefing "Thailand's Trade Competition Act, March 2018" on the provisions of the Act.

Until the introduction of the TCA, anti-competitive conduct in Thailand was primarily addressed by enforcement action in other jurisdictions and the need to comply with competition laws and regulations in these jurisdictions. The lack of effective enforcement of the predecessor to the Act meant that the Thai aviation sector developed largely insulated from enforcement action and compliance requirements.

If properly and fully implemented, the Act could result in significant changes to the way in which anti-competitive conduct is addressed and prosecuted, resulting in changes to the way in which airlines and the broader Thai aviation sector ensure compliance with its new requirements and regime. We consider these below:

“TG’S SHAREHOLDINGS AND MANAGEMENT ROLES IN THAI SMILE AND LCC NOK AIR MAY ALSO REQUIRE THE COMMISSION TO ADDRESS THE DEFINITION OF A MARKET INVOLVING FSCS, LCCS AND HYBRID CARRIERS SUCH AS THAI SMILE.”

Implications for airlines

The end of the blanket exemption for Thai Airways (“TG”) and its subsidiaries may be one of the most significant changes. A key issue is whether the Cabinet will give TG an exemption and, if so, the nature and duration of such an exemption and the extent to which it applies to purely commercial operations. If no exemption is granted, or, if only a narrow exemption is granted by the Cabinet, this is likely to result in more scrutiny of agreements and relationships with or involving TG. Please see briefing “Thailand’s Trade Competition Act, March 2018” for further details on the exemption issue.

There is no express ‘grandfathering’ provision in the Act and it is unclear if existing agreements and relationships are ‘grandfathered’, particularly where these were based on the repealed blanket exemption. Even if existing agreements and relationships are ‘grandfathered’, any new agreements and relationships and arguably changes to existing agreements and relationships would be subject to the jurisdiction of the Act and the Trade Competition Commission (TCC).

For Thailand’s many privately owned and/or listed airlines, the likely focus will be on compliance with the Act in code shares and other agreements, relationships and arrangements. Much will depend on the extent to which TG is granted an exemption and the extent of the exemption. Given the dominant position of TG in the domestic market, an exemption for TG is likely to have a significant impact on market practice and conduct. An exemption would also complicate enforcement of the Act against privately owned and/or listed airlines.

These airlines are likely to see the Act as a means to improve or defend market position and share in a competitive market, particularly once the domestic market reaches a level of maturity which translates in to lower rates of overall market growth. The Commission is likely to have to consider where low cost carriers (LCCs) and full service carriers (FSCs) are operating in a single or separate markets and whether affiliate airlines in the same franchise as a single business operator for the Thai market. TG’s shareholdings and management roles in Thai Smile and LCC Nok Air may also require the Commission to address the definition of a market involving FSCs, LCCs and hybrid carriers such as Thai Smile, which provide some of the services of an FSC and have elements of an LCC in their operations, distribution and pricing.

Foreign ownership restrictions, imposed generally by the Thai Foreign Business Act and specifically in the requirements to be a Thai operator, may moderate investment by foreign airlines and investors. The LCC franchise model may also make M&A activity less attractive. However, the provisions on anti-competitive conduct with foreign companies may allow competitors to challenge these franchise models, particularly where this allows an LCC franchise to have a dominant market position on a route, or at an airport.

This is likely to be a critical factor in relation to slots and routes.

“A CHALLENGE TO THE DECISION OF THE SLOT COMMITTEE COULD BE ONE OF THE FIRST AND MORE CRITICAL TESTS OF THE TCC AND THE ACT PARTICULARLY IN RELATION TO DOMINANT MARKET POSITION AND ABUSE OF MARKET POSITION AND WHETHER BANGKOK’S TWO AIRPORTS FORM A SINGLE MARKET.”

Airport Slots

Bangkok’s two airports (BKK and DMK) and Phuket airport are slot constrained Category III airports. The currently approved expansion plans are unlikely to meet demand for three or more years, resulting in continued and increasing demand for existing slots.

At BKK, TG plays a key role on the Slot Allocation Committee. The IATA Worldwide Slot Guidelines stipulate that the organization allocating slots should be “functionally and financially independent of any single interested party and act in a neutral, transparent and non-discriminatory way”.

Provided neither TG nor the Airports of Thailand (“AoT”) are granted a blanket exemption, a challenge to the decision of the Slot Committee could be one of the first and more critical tests of the TCC and the Act, particularly in relation to dominant market position and abuse of market position and whether Bangkok’s two airports form a single market. Even if TG is exempt, a challenge may be brought by other carriers seeking the same slot. It is also conceivable that such a challenge could be based on the slots allocated to each of the three major airline alliances. If this is the case, the extent to which the Commission is prepared to consider and apply outcomes in other jurisdictions may be as significant as any ruling on such a challenge.

As DMK reopened in 2007, there were no historical slot allocation or entitlements and the rapidly expanding domestic and International LCC traffic at the airport has resulted in carriers competing for ever decreasing slots. Allocation of slots at DMK is also likely to present one of the first tests of the Act and the powers of the Commission. The extent to which the AoT is granted any exemption from the Act by the Cabinet may play a critical role.

Airports not owned by the AoT

If the Act is enforced against privately owned airports, this may result in greater transparency in allocation of slots and access generally. The extent to which the Act will provide greater access will depend, to a significant part, on the extent to which the AoT is subject to the provisions of the Act. Given the number of airports operated by the AoT and its share of domestic and international passenger and cargo traffic, an exemption for the AoT’s conduct may make it difficult for the Commission to effectively and accurately assess anti-competitive conduct by private airport operators. A lack of geographic competition between the AoT and privately-owned airports may also limit the impact on access, pricing of ground handling and other services and the nature and quality of the services provided by an airport operator.

“IF THE ACT IS ENFORCED AGAINST PRIVATELY OWNED AIRPORTS, THIS MAY RESULT IN GREATER TRANSPARENCY IN ALLOCATION OF SLOTS AND ACCESS GENERALLY.”

“A CRITICAL ISSUE IS WHETHER THE APPROACH OF THE COMMISSION WILL BE CONSISTENT WITH THE APPROACH IN OTHER JURISDICTIONS. IN PARTICULAR, THE COMMISSION MAY NEED TO DEFINE THE MARKET AND THE ROLE OF EXISTING CARRIERS.”

Routes

The dramatic rise of LCCs and their growing share of the domestic and international markets is already being felt on the allocation of routes and designation of carriers under bilateral air services agreements. It is probable that decisions on popular and/or lucrative routes, such as those between Thailand and China, Japan and South Korea, will be challenged by the unsuccessful airline(s). A critical issue is whether the approach of the Commission will be consistent with the approach in other jurisdictions. In particular, the Commission may need to define the market and the role of existing carriers. An issue of potential significance is where airline alliance partners have a monopoly on non-stop services between city pairs. The extent to which the Commission will consider code sharing and metal neutral agreements between alliance partners as creating a single player for the purposes of assessing dominant market position may be a significant issue with ramifications beyond Thailand. A further issue is whether the Commission will consider the market to be only direct flights or include indirect flights.

ACTION CHECKLIST

1. Ensure that local, regional and head office in-house legal, regulatory and competition teams are briefed on the changes;
2. Assess the requirements to ensure compliance with the provisions of the Act, particularly given the uncertainty over the application of the Act and its interpretation;
3. Closely monitor developments, particularly in relation to exemptions for key majority government owned companies in the aviation sector;
4. Consider the relationship between the Act and applicable competition laws and regulations in the jurisdiction of incorporation and registration of the airline;
5. Review existing agreements and relationships and assess whether advice is required as to whether these comply with the requirements of the Act;
6. Ensure that the impact of the Act is taken into account when changes to existing agreements or relationships are being considered; and
7. Ensure that the impact of the Act is taken into account when new agreements or relationships are being considered;

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



ALAN POLIVNICK
Partner
Bangkok

+66 2 665 7805
apolivnick@wfw.com



SUPANNIKA VIRAPHANDHU
Associate
Bangkok

+66 2 665 7838
sviraphandhu@wfw.com



KUNADHA GAJASENI
Associate
Bangkok

+66 2 665 7828
kgajaseeni@wfw.com



PAWEEN SENAKOCHAWONG
Associate
Bangkok

+66 2 665 7848
psenakochawong@wfw.com



KANYAPAT RATANAWILAS
Associate
Bangkok

+66 2 665 7846
kratanawilas@wfw.com

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