THE QANTAS/EMIRATES DECISION

How the Competition Commission of Singapore Used the Net Economic Benefits Exclusion to Regulate the Air Passenger Market

The Competition Commission of Singapore ("CCS") did not properly assess the Net Economic Benefits ("NEB") created by the co-operation agreement between Qantas Airways Ltd and Emirates. In particular, the high market shares of the two companies should have excluded the NEB defence under the Competition Act (Cap 50B, 2006 Rev Ed), even more so as the remedies proposed by the parties are likely to increase their market share further. The CCS appears to have failed to follow the letter of the Competition Act and instead effectively regulated the airlines sector through the use of competition tools, undermining the enforcement of competition rules and restricting competition in the airlines sector. The more recent decision on the Qantas/Jetstar co-operation shows an improvement in the assessment of economic benefits. The CCS must continue to improve its competitive assessment, must restrict the use of the NEB defence and possibly adopt the more internationally accepted slot divestment remedy as a way of solving competition concerns in airline agreements, or it will hurt competition and consumers in Singapore.

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I. Introduction: CCS in the global context

1 In March 2013, the Competition Commission of Singapore ("CCS") conditionally approved the agreement between Qantas Airways Ltd ("Qantas") and Emirates ("Decision"),[1] two major international

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1 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013).

airlines.[2] While the divestment of airport slots has become the preferred tool of competition authorities around the world to alleviate the anti-competitive effects of agreements between airlines, CCS took an unprecedented and surprising step. On the identified routes where the new entity would have a market share of nearly 60% (Singapore–Melbourne and Singapore–Brisbane), the parties offered to maintain or increase the number of passengers in and out of Singapore as a condition to their co-operation agreement. Under the argument that the proposed undertakings would generate net economic benefits ("NEBs") for the Singapore economy, CCS granted its approval to the Qantas/Emirates co-operation. This article highlights the costs of accepting remedies under the NEB defence.

2 After this first introduction part, the second part of the article looks at the Decision in detail, taking the view that the competitive assessment by CCS is incomplete, that the assessment of the proposed remedies is not discussed in the Decision, and that the NEB defence was inappropriate to assess the proposed co-operation. CCS appears to have failed to follow the letter of the Competition Act[3] and effectively regulated the airlines sector through the use of competition tools, undermining the enforcement of competition rules and restricting competition in the airlines sector. In this second part, the author argues that by accepting that the parties increase the number of seats on the identified routes, CCS has generated anti-competitive effects beyond the original concerns identified in the proposed co-operation. The third part provides some analysis in relation to the past practice of CCS and the fourth part looks at decisions in the airline sector in the European Union ("EU"). The European Commission ("EC") has never considered the Art 101.3[4] exclusion (the EU equivalent of the NEB defence) nor the increased number of seats as a remedy to anti-competitive effects generated by airlines co-operation, for the reason that it does not attempt to regulate the airline sector but rather focuses on enforcement of competition rules. The fifth part details the positive elements coming out of the Decision. The article concludes that the Decision is not only a mistake from a competition enforcement point of view, it is essential that CCS rectifies its flawed approach to NEB and to agreements between airlines when it has a chance to do so, in the near future.

2 Airlines are prevented from merging in order to meet domestic ownership requirements, and instead often enter into extensive co-operation agreements. The agreement between Qantas and Emirates is comparable to a merger. However, the operation was assessed under the rules preventing anti-competitive agreements, rather than under the merger rules.

3 Cap 50B, 2006 Rev Ed.

4 Treaty on the Functioning of the European Union (Consolidated Version of the Treaty on European Union [2010] OJ C83/13).

II. The Qantas/Emirates conditional clearance

A. Jurisdiction

3 The Decision was taken under s 44 of the Competition Act. Pursuant to s 44, companies voluntarily notify their agreements to CCS and apply for a decision.[5] CCS examines the agreements to determine whether they violate s 34 of the Act, which prohibits agreements having the object or effect of restricting or distorting competition within Singapore.[6] It should be noted that s 44 of the Act follows in its wording and spirit the international standards in competition law, for instance, Art 101 of the Treaty on the Functioning of the European Union ("TFEU"),[7] and s 1 of the Sherman Act in the US.[8]

4 On 12 October 2012, Emirates and Qantas notified CCS of their planned co-operation. Under the Master Co-operation Agreement signed by the parties a month prior to their notification, Qantas and Emirates planned to co-ordinate across their passenger and freight global networks, on every aspect of the airlines' activities (planning, scheduling, operating, capacity, sales, marketing, pricing, connectivity airport facilities, *etc*). In effect, even though the agreement leaves the two corporate entities separate, they would nonetheless act as a single airline. In a previous decision, CCS noted that "for regulatory reasons, merger between airlines from different countries are not common", and that this type of highly integrated joint venture was at the end of the spectrum of the possible agreements between airlines.[9] Applying the same increased scrutiny, CCS considered that the highly integrated nature of the agreement made it likely to enter into the scope of s 34 of the Competition Act, which lists agreements that have the object or effect of limiting competition as those which "directly or indirectly fix purchase or selling prices or any other trading conditions".[10] This assessment, rather simply, follows the EC's practice, where agreements between airlines on similar aspects of air traffic have fallen within the

5 However, the Singapore competition regime is based on voluntary notifications of agreements and mergers, following a UK model as opposed to a European Union model of notification in which notification of agreements and mergers between companies is mandatory past a certain threshold. This does not, however, affect the present analysis.

6 Competition Act (Cap 50B, 2006 Rev Ed) s 44.

7 Treaty on the Functioning of the European Union (Consolidated Version of the Treaty on European Union [2010] OJ C83/13) Art 101.

8 Sherman Antitrust Act 15 USC (US) § 1 (1890).

9 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Japan Airlines International Co Ltd and American Airlines Inc of their Alliance Agreement and Joint Business Agreement* CCS 400/008/10 (4 July 2011) at para 9.

10 Competition Act (Cap 50B, 2006 Rev Ed) s 34(2)(*a*).

scope of Art 101 of the TFEU. The CCS assessment of the scope of s 34 focused on price fixing,[11] in accordance with the *CCS Guidelines on the Section 34 Prohibition* ("s 34 Guidelines").[12]

B. Limited competitive assessment

5 CCS took as a starting point, in accordance with its own case law and international practice, that the relevant geographic market should be defined as an Origin-Destination ("OD") city pair. This is consistent with the EC practice, cited here in example, and the EC assessment that passengers are travelling to a specific destination "and will not substitute another destination when faced with a small, non-transitory increase in price".[13] However, CCS did not take into account destinations which are geographically very close to the identified cities. In the case of Brisbane for instance, it would have been possible to mention the effects on low-cost airlines such as JetStar, Tiger, Scoot and Air Asia. Several of these airlines, while not serving the Brisbane–Singapore and Melbourne–Singapore routes, serve the Singapore–Gold Coast route, a mere hour away from Brisbane by car. However, this applies for tourist passengers only, while the economic benefits of an increase in the number of passengers generally focuses on business travellers only (as the increase in tourists flying from Brisbane for instance is neutralised by the number of Singaporeans flying out to Brisbane, who do not bring economic benefits to Singapore).

6 Here again and despite not taking into account the neighbouring cities, the similarities with the EC practice and the references to it are striking, and call for little comment. CCS referred to its own *Bus Cartel* case[14] to establish that it does not have to prove that an agreement is anti-competitive by effect and falls under the s 34 prohibition if the agreement has the object of restricting competition. Nonetheless, CCS proceeded to detail the market share of the parties on the relevant routes, noting that these exceeded by far the 20% market share threshold that shields agreements from enforcement

11 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 24.

12 *CCS Guidelines on the Section 34 Prohibition* (June 2007) at para 3.2.

13 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 31, citing the European Commission practice.

14 *Notice of Infringement Decision Issued by Competition Commission of Singapore, Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand* CCS 500/003/08 (3 November 2009) at para 70, cited in *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 44.

of s 34.[15] CCS provided market shares, sourced by Changi Airport and IATA Airport Intelligence Services, of nearly twice the level of those provided by the parties in their submission.[16] No reference is made to these discrepancies.

7 A difference appears at that point of the competitive assessment between the EC treatment of agreements between airlines and the CCS assessment. Connecting passengers, in the EC's view, benefit from airline alliances: through increased connectivity at the arrival hub, connecting passengers benefit from an increased choice of final destinations; in EC decisions, this element has proven useful for airlines to put forward the pro-competitive effect of their alliances or agreements, as routes were treated as complimentary goods.[17] In some other EC decisions on the contrary, the European regulator has underlined the potentially restricted access to connecting traffic, "namely through refusal to conclude interline or special pro-rate agreements".[18] In sum, the competitive assessment of airline agreements by the EC is made of two parts: the increment in market shares for city pairs, and the detailed analysis of connecting flights and their potential effects for connecting passengers.

8 In its Decision, however, CCS did not seem to take into account specific connecting flights and potential restrictions, but it did take the view that passengers could choose not to fly on one of the non-Australian based competitors to the parties (which leaves practically only Singapore Airlines) as these companies do not have the right to operate domestic flights in Australia. CCS indicated that this "aggravates the adverse effects on competition on these two routes", because Singapore Airlines cannot simply increase its capacity and its number of seats on these routes to lure in new passengers, in contrast to an Australian airline.[19] Singapore Airlines is bound to be the biggest loser in the proposed alliance: the increased connectivity of Emirates

15 *CCS Guidelines on the Section 34 Prohibition* (June 2007) at para 2.19. Interestingly, it is mentioned at para 2.19 that agreements that concern companies whose market shares do not meet the threshold will generally have no appreciable adverse effect on competition "[a]s Singapore is a small and open economy". This assumed link between the size and openness of the economy, and the market share threshold for anti-competitive agreements does not appear clearly at the moment.

16 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 40 and 47.

17 On the assessment of the merger of International Consolidated Airlines Group and British Midlands Ltd for connecting passengers, see European Commission, *Decision Case COMP/M.6447 – IAG/BMI* at paras 523–551.

18 European Commission, *Decision Case COMP/39.596 – BA/AA/IB* at para 49.

19 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 48.

passengers with Australian domestic flights will most likely shift passengers from Singapore Airlines to the Qantas/Emirates alliance, further limiting competition on the market. Qantas's extensive network in Australia will deliver a substantial advantage to the alliance, over Singapore Airlines which remains virtually the only competitor for the city pairs.

9 In this context Singapore Airlines can only attract new customers by lowering prices, a practice unlikely to constitute a winning corporate strategy in a market where margins are notoriously tight. In the light of the potentially pro-competitive effects of increased connectivity for connecting passengers, this lack of detailed analysis by CCS is detrimental to the assessment of the co-operation between Qantas and Emirates. CCS's reasoning is that because the agreement is anti-competitive by object (as it includes for instance pricing co-ordination between horizontal competitors, which is considered "hard-core" anti-competitive practice), it is not necessary to establish anti-competitive effects.[20] When looking at whether or not the proposed agreement could generate anti-competitive pro-competitive effects for connecting passengers, CCS's argument seems misguided: the Qantas/Emirates agreement has the same effects as a merger; it could be treated as such for the purpose of analysing competitive effects.

C. Increasing the number of passengers: The missing assessment of the proposed remedies

10 To alleviate the competition concerns, the parties proposed to maintain or, under some circumstances, to increase the number of seats on the routes where the parties overlapped.[21]

11 This approach triggers two questions, both relating to a different issue behind the Decision.

(1) How does increasing the number of passengers affect competition in the relevant markets?

12 The proposed co-operation would create a "number one" in the two identified markets where they overlap. The parties' combined market share would be 60.4% on the Singapore–Melbourne route and 58.5% on the Singapore–Brisbane route. Singapore Airlines, the

20 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 47.

21 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 106–114.

market's number two and only other player, will control the remaining 37.50% and 36.50% on the identified routes.

13 The parties argued that the proposed co-operation would generate efficiencies (see the detailed proposal of the parties and the assessment of CCS below). Instead of proposing undertakings to allay these concerns, the parties argued that the co-operation generates benefits that qualify under the Third Sched to the Competition Act, and that therefore the agreement is excluded from the Competition Act (see below).

14 The parties committed to maintaining the current weekly number of seats on the city pairs. This does not immediately affect competition on the market, although it could have anti-competitive effects in the future. Notwithstanding, this constitutes an attempt to regulate the air passenger market through competition enforcement.

15 If the parties reach a certain aggregated route profitability or a certain load factor for the city pair (both of which are confidential in the public version of the Decision), they commit to increase the number of seats on the city pairs (the increased percentage is confidential).

16 This aspect of the undertaking may well generate anti-competitive effects. By increasing the number of seats, the parties will increase their market share and possibly their market power (airport slots cannot be created when airports are running at or close to capacity).[22] If the threshold for the increase of the number of seats is reached, the undertaking proposed by the parties may harm consumers by increasing the parties' market share and market power, in which case they will be able to charge more for the same service, or reduce the quality of the service provided, without suffering from a significant loss of customers.

17 Furthermore, the undertaking provides for the number of seats which the parties commit to provide to keep increasing if their profitability or load factor on the routes continues to progress (as decided by CCS on a rolling 12 months' basis). As a consequence of their increase in market power, the parties' profitability and load factor is bound to increase, as barriers to entry are extremely high and the market is bound by the number of slots at the relevant airports. The mechanism put in place by the Decision (to increase the airlines' capacity when they reach a certain profitability or load factor) generates

22 Park Kyunghee, "Singapore to Double Changi Airport Capacity as Demand Increases" *Bloomberg* (9 January 2014) <http://www.bloomberg.com/news/2014-01-08/singapore-to-double-changi-airport-capacity-as-demand-increases.html> (accessed 7 March 2014).

another mechanism, by which the parties' market share will increase in a market which is limited in size.

18 CCS showed its concern for passengers' choices in terms of connectivity. However, as explained below, the assessment lacks any account of the loss of connectivity for passengers travelling with competing airlines, which will lose market shares and market power as a result of the Decision.

19 Therefore, competition in the markets is bound to decrease, because CCS used the tools of the Competition Act to regulate the market.

(2) What is the threshold for the NEB defence before the CCS?

20 The Decision sheds light on the NEB defence before the CCS. This section will detail how CCS failed to properly apply the NEB criteria, despite evidence that the agreement between the parties did not qualify for exclusion from s 34. By doing so, CCS undermined competition enforcement in Singapore and set a low threshold for the NEB exclusion. This section outlines the reasoning of CCS in the clearance given to Emirates and Qantas.

21 In the Decision, CCS rushed to analyse the case under the NEB doctrine.[23] CCS considered that the proposed undertakings generate NEBs which outweigh the anti-competitive effects of the proposed co-operation. However, it did not take into account that the increase in the number of seats increases anti-competitive effects, although it claimed to do so when announcing that "the greater the increase in market power that is likely to be brought about by the anti-competitive behaviour, the more significant the benefits have to be".[24]

22 The Competition Act[25] excludes from s 34 an agreement which contributes to:

(*a*) improving production or distribution; or

(*b*) promoting technical or economic progress,

but which does not –

23 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 46.

24 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 52.

25 Competition Act (Cap 50B, 2006 Rev Ed) Third Sched, para 9.

> (*c*) impose on the undertaking concerned restrictions which are not indispensable to the attainment of the objectives; or
>
> (*d*) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

23 In its explanation of the NEB exclusion, CCS looked at the first three conditions, but failed to analyse the agreement under the fourth condition (*d*) of the Third Sched.[26]

24 Under this fourth condition, the agreement should not have been found to be excluded from s 34, at it grants the parties the control of 60.4% and 58.5% of the relevant markets. This very high market share, above the red-flag level of international practice,[27] should have put an end to the NEB defence of the parties. The s 34 Guidelines provide that the fourth criteria requires CCS to look at competition prior to the agreement, and states that "in a market where competition is already relatively weak, this factor may be more important".[28] This is therefore particularly true in a market with very high barriers to entry, and one single competitor.

25 If the assessment by CCS is to be looked at under its own rules for market share, it may be that not only did CCS fail to follow the criteria laid out in the Competition Act and in the s 34 Guidelines, it failed to follow its own guidelines on the assessment of mergers.[29] CCS did not analyse the possible consequences of the high market shares of the parties, such as the fare increase and the facilitation of the collusion between the two remaining actors, now in a position of duopoly. Moreover, the voluntary undertaking by the parties to increase their capacity on the relevant routes means that their market share will increase above the already anti-competitive levels of 60.4% and 58.5%.

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26 For the Competition Commission of Singapore's explanation of the net economic benefits exclusion, see *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 51 and 54. For its assessment of the net economic benefits exclusion, see paras 26–38 below.

27 At the European Commission level: "Save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is a market share of 50%." See European Court of Justice, *Decision Case C-62/86 – AKZO Chemie BV v Commission of the European Communities* at p 5.

28 *CCS Guidelines on the Section 34 Prohibition* (June 2007) Annex C at para 10.12.

29 Under the CCS Merger Guidelines, a market share above 40% and a combined market share of 70% for the three largest firms are indicators of potential competition concerns. See *CCS Guidelines on the Substantive Assessment of Mergers* (June 2007) at paras 5.14–5.16.

(3) The NEB exclusion's explanation and the actual CCS assessment

26 The NEB exclusion follows the same principle as Art 101(3) of the TFEU. However, the enforcement of Art 101(3) at the EC level has shown two trends in the granting of exceptional clearances to agreements. Firstly, no agreement should be cleared if it consists of "hard-core" anti-competitive conduct, such as price-fixing agreements. As the Qantas/Emirates co-operation includes such hard-core conduct, it should therefore not have been granted clearance under the NEB defence. Secondly, granting of a clearance under Art 101(3) is the result of a balancing exercise, where the regulator clearly evaluates the benefits and the costs of the proposed agreement. Such a detailed assessment is missing in the Decision, in part because the "benefits" identified by CCS are outside the realm of competition and concern the position of Singapore as a regional hub. This section details the way this omission affects the validity of CCS's reasoning, and highlights why an EC approach to the NEB defence would have been preferable.

27 The Decision first features an explanation of the NEB exclusion, followed by CCS's assessment of the parties' submission following the undertakings. Several discrepancies between the explanation and the assessment undermine CCS's findings, although the explanation is already incomplete.

28 CCS's reasoning and methodology in assessing the agreement and the undertaking are discussed below.

29 CCS first rejected the parties' submissions that the agreement would generate the following benefits: promotion of Singapore as an aviation hub;[30] accelerated deployment of Emirates' capacity for Singapore services;[31] expedited expansion of the Jetstar Asia network and increased connectivity for passengers travelling to Singapore;[32] increase in tourism and employment;[33] generation of efficiencies which

30 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 59–63.

31 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 64–71.

32 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 72–75.

33 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 76–79.

will result in more competitive fares for consumers in Singapore;[34] enhanced customer experience and product innovation;[35] competitive response from rivals and long-term sustainability of Qantas;[36] increase in freight capacity between Singapore and Australia;[37] and increase in freight activities via Singapore.[38] Overall, CCS's assessment was that the agreement between the parties without the undertaking to maintain and/or increase capacity did not generate benefits which outweighed its anti-competitive effects.[39]

30 After this initial rejection and following a detailed explanation of the parties' submission (although heavily redacted, as explained above), CCS analysed the agreement and the proposed undertaking under the NEB test.

31 The NEB test was established in the s 34 Guidelines. The test was used in the Decision for the first time in CCS's history.

32 In the s 34 Guidelines, the first leg of the test (as to whether the agreement improves production or distribution or promotes technical or economic progress) is made up of three criteria:[40]

(a) the claimed efficiencies must be objective in nature;

(b) there must normally be a direct causal link between the agreement and the claimed efficiencies; and

(c) the efficiencies must be of a significant value, enough to outweigh the anti-competitive effects of the agreement.

34 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 80–85.

35 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 85–91.

36 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 92–94.

37 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 95–98.

38 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 99–104.

39 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 105.

40 *CCS Guidelines on the Section 34 Prohibition* (June 2007) Annex C at para 10.4.

33 Although the Decision refers to the above three criteria for the first part of the NEB test, it does so only in the explanation of the NEB exclusion, and not in the test itself.[41]

34 The second leg of the NEB defence test (as to whether the agreement imposes unnecessary restrictions and substantially eliminates competition) was seriously left aside by CCS: in the explanation of the NEB exclusion, there was simply no mention of the substantial restriction of competition, while the test itself failed to properly look at the anti-competitive effects of the agreement, and of the parties' proposed undertakings.

35 Here CCS clearly contradicted itself: in the explanation of the NEB it quoted the s 34 Guidelines which state that both the overall agreement between the parties and the anti-competitive effects "will not be regarded as indispensable if there are other economically practical and less restrictive means of achieving the efficiencies, or if the Parties are capable of achieving the efficiencies on their own".[42] According to these criteria, the NEB defence should have been rejected. In its original assessment of the parties' submission, CCS noted that "the increase in Qantas' dedicated capacity to Singapore by flying to, not through Singapore, can be achieved absent the Proposed Alliance".[43]

36 Instead of following the s 34 Guidelines, CCS proceeded to a three-part assessment of the proposed undertaking. It argued first that the agreement "leads to an improvement in production of air passenger services and freight capacity for the relevant market";[44] secondly, that the agreement is indispensable to these benefits;[45] and thirdly, that the agreement, in the light of the undertaking proposed by the parties, does not substantially eliminate competition.[46] The failure to assess the

41 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 51.

42 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 55.

43 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 61–63.

44 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 115.

45 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 116.

46 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 117–118.

elimination of competition, already outlined above, is crystallised in these two paragraphs of the Decision. CCS affirmed that the undertaking addresses the risk of unilateral effect "such as a reduction in seat capacities".[47] It considered that the agreement is "unlikely to substantially eliminate competition in the Relevant Market".[48] This claim, however, was not substantiated by any serious competitive assessment of the markets, with and without the agreement, and with and without the proposed undertakings, as it would have been in the international practice of competition authorities. Instead, CCS noted that the parties will "continue to face competition from other carriers such as Singapore Airlines and Ethiad", and that "Singapore Airlines continues to be a strong competitor in each of the Relevant Markets".[49] These claims are baseless: earlier in the same Decision, CCS's market assessment for the two city pairs makes clear that Ethiad does not serve the Singapore–Melbourne route, while it has a 3.30% market share on the Singapore–Brisbane route.[50] A correct analysis would have been instead that Singapore Airlines is *the only* competitor on the relevant markets, with nearly half the market share of the parties. Another sign that CCS rushed to clear the agreement without a proper competitive assessment is the effect of the increased number of seats, or the effect of the possibly reinforced dominating position of Qantas and Emirates against a necessarily decreasing Singapore Airlines. The possible loss of market power of Singapore Airlines, triggered by the increased connectivity of passengers choosing Qantas for Australian domestic destinations, would in the end hurt Singapore customers and passengers travelling though Singapore. This possible negative effect, and more widely the idea that anti-competitive effects may have short-term benefits but always end up hurting consumers, is absent from the Decision.

37 After an increase of seat capacity by the parties, Singapore Airlines' market share on the routes may be even lower. Moreover, as explained above, the CCS Merger Guidelines indicate that a combined market share in excess of 70% for the three largest firms is an indication

47 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 117.

48 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 117.

49 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 118.

50 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 47.

of competition concerns.[51] In the present case, the three largest firms have a combined market share of 98.7% and 99.3% of the relevant markets.

38 By failing to correctly apply the NEB test to the proposed agreement and by applying instead a very low threshold for the NEB defence, CCS has created a dangerous precedent which may undermine competition in other markets.

(4) Is the assessment of the NEB different in the Jetstar Decision and in the Singapore Airlines/Air New Zealand Decision?

39 In the Qantas/Jetstar Decision,[52] which came around six months after the Qantas/Emirates Decision, the parties demonstrated that the proposed co-operation between the airlines would generate benefits that outweigh competition concerns, without accepting or imposing any remedy.

40 CCS identified competition concerns on 11 routes. The Qantas/Jetstar Decision shows a considerable progress in the assessment of the NEBs. The test is outlined clearly, including the fourth element of the Third Sched which is missing in the Qantas/Emirates Decision.[53] While in the Qantas/Emirates Decision CCS analysed the submissions of the parties one by one and only ran the test in a later phase,[54] the parties' submissions in the Qantas/Jetstar Decision were made to follow the NEB test as suggested by the Third Sched to the Competition Act.[55] The parties first demonstrated that the proposed co-operation would contribute to improving production or distribution, or technical or economic progress, and then brought elements to establish that these benefits would not create unnecessary restrictions to attain these objectives, and would not afford the parties the possibility to eliminate competition on a substantial part of the relevant market. This last bit is

51 Under the CCS Merger Guidelines, a market share above 40% and a combined market share of 70% for the three largest firms are indicators of potential competition concerns. See *CCS Guidelines on the Substantive Assessment of Mergers* (June 2007) at paras 5.14–5.16.

52 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Qantas Airways and Jetstar Airways* CCS 400/002/12 (5 September 2013).

53 For the Competition Commission of Singapore's explanation of the net economic benefits exclusion, see *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at paras 51 and 54. For its assessment of the net economic benefits exclusion, see paras 26–38 above.

54 See para 29 above.

55 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Qantas Airways and Jetstar Airways* CCS 400/002/12 (5 September 2013) at paras 70–96.

essential to an assessment of the parties' submission: it shows that CCS followed the letter and the spirit of the Competition Act. In the Qantas/Jetstar Decision, CCS went as far as running the NEB test separately for the different "limbs" of the proposed co-operation, which resulted in a competitive assessment which is comprehensive, relevant and detailed. All these elements were missing in the Qantas/Emirates Decision.[56]

41 On 17 April 2014, CCS cleared the proposed alliance between Singapore Airlines and Air New Zealand, without conditions.[57] Although the complete text of the decision has not been published yet, the press release notes that the alliance "could raise competition concerns but that these would be offset by net economic benefits to Singapore".[58] In the continuity of the Qantas/Jetstar Decision, it is possible to assume that the NEB test has been applied as provided by the Third Sched to the Competition Act.

(5) A look back at previous mergers: Assessment of NEBs

42 On 18 March 2014, CCS published on its website the summary of a consultancy report ("Report") assessing the NEBs produced by two airline alliances cleared by CCS.[59] The consultants analysed the effects of the Japan Airlines/American Airlines Joint Venture and the All Nippon Airways/Continental Joint Venture. The Report focuses on two types of quantifiable benefits: fare reduction and increase in the number of seats. This cost benefits analysis constitutes a useful demonstration in favour of the argument that CCS should be more cautious in clearing agreements between airlines on the basis of NEBs. However, the Report itself notes that comparisons are difficult as the assessed alliances both concern Japan–US transpacific routes.

43 In short, the Report finds that the number of passengers was up 14% and 5% respectively for the two alliances, a result way below

56 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Qantas Airways and Jetstar Airways* CCS 400/002/12 (5 September 2013) at paras 101–134.

57 Media Release (Competition Commission of Singapore), "CCS Clears the Proposed Strategic Alliance between Singapore Airlines Limited and Air New Zealand Limited" (17 April 2014).

58 Media Release (Competition Commission of Singapore), "CCS Clears the Proposed Strategic Alliance between Singapore Airlines Limited and Air New Zealand Limited" (17 April 2014) at para 2.

59 Competition Commission of Singapore, "Summary Report on Net Economic Benefit of Joint Ventures, Market Study on the Airline Industry" (11 February 2014).

the 52–88% increase in passengers found in the literature.[60] Individual fares did not change as a result of the joint ventures, except for some business tickets on one of the alliances. Despite these clearly disappointing results, the authors of the report note in conclusion that "both [alliances] appear to have delivered net benefits – although it is too early to be sure of the precise long-term magnitude". This statement illustrates the limits of an assessment conducted at the request of CCS, as opposed to a truly independent analysis. That the full report has not been published also shows that CCS may not be at ease with its record in clearing airline agreements.

44 Furthermore, two elements of the Report confirm the doubts raised about the CCS assessment of the Qantas/Emirates agreement. First, the authors note that "[n]et benefits from additional tourist passengers are less certain given the significant numbers of Singaporean tourists flying out of the country".[61] This questions CCS's approach in the Decision, where an increase in passenger numbers (without distinction between economy and business class travellers) was considered an NEB. Secondly, one can wonder what the objective of accepting commitments from the parties to an agreement to increase the number of passengers is if this result is expected as a result of the proposed alliance.

45 Overall and despite its cautious wording, an analysis of the content of the Report shows that CCS must find a better way to ensure that proposed alliances deliver actual NEBs. As stated below, this can be done by focusing on the competitive effects of the agreements, and by divesting airport slots to competitors where the routes are concentrated in the hands of a few actors.

(6) Summary: CCS's errors

46 To summarise, CCS failed to: (a) identify competition concerns in the relevant markets and the possible consequences, such as fare increase and possible co-ordinated effects between the newly created duopoly; (b) follow the test provided in the Competition Act for the NEB defence, which does not apply to agreements which substantially eliminate competition; (c) identify how the proposed undertakings would lead to further anti-competitive effects in the future, through the increase in the parties' market share; (d) provide a full competitive

60 Competition Commission of Singapore, "Summary Report on Net Economic Benefit of Joint Ventures, Market Study on the Airline Industry" (11 February 2014) at p 6.

61 Competition Commission of Singapore, "Summary Report on Net Economic Benefit of Joint Ventures, Market Study on the Airline Industry" (11 February 2014) at p 3.

assessment of the relevant markets; (e) study the possibility of alternative undertakings such as the divestment of airport slots to maintain competition in the market;[62] and (f) explain how the proposed agreement could lead to a reduction in seat capacity. All these failures and omissions stem from CCS's intervention in the market for air passenger service, where it should have focused on maintaining competition in the relevant markets. CCS should focus on assessing competition and enforcing competition rules, and not clear anti-competitive agreements with the view of regulating markets for which it is not competent or statutorily embodied to do. When taking into account possible NEBs, CCS must stick to the tests provided by the Legislature and by the guidelines (which imply that the NEB defence should not apply to agreements which create serious competition concerns), and it must engage in a comprehensive competition assessment. Only once CCS takes into account the full extent of the possible anti-competitive effects of the proposed agreement can it legitimately decide to clear the agreement under the possible outweighing positive economic outcomes. Defending Singapore's position as a regional hub is an obvious policy concern for CCS. A safe way of developing a practice that takes that policy into account without endangering the sustainability of the relevant markets would be to adjust its assessment and the remedies it obtains from airlines, by following internationally accepted practices of divesting slots and gates.

III. Regulatory background: The curious case of Singapore?

47 CCS is a fairly young competition authority, albeit an ambitious one. Singapore has become in recent years a regional hub. It hosts and influences the institutions of the Association of Southeast Asian Nations, which has set up a 2015 target for the implementation of competition laws in all the countries of the region.[63]

48 At the national (Singapore) and regional (Southeast Asia) levels, conditional clearances are relatively rare. Now in its sixth year of activity, CCS issued with the Qantas/Emirates Decision its first conditional decision. Previously, CCS had on two occasions taken the view that remedies accepted by other competition authorities were sufficient to alleviate competition concerns in Singapore: in the Thomson/Reuters merger case;[64] and in the Manitowoc/Enodis

62 See paras 56–58 below.

63 Association of Southeast Asian Nations, *ASEAN Economic Community Blueprint* (January 2008) at p 18 <www.asean.org/archive/5187-10.pdf> (accessed 1 May 2013).

64 *Notification for Decision: Merger between the Thomson Corp and Reuters Group plc* CCS 400/007/07 (23 May 2008).

anticipated merger decision.[65] If this seems to indicate at first that CCS is not ready to intervene in the economic activity of the city-state, this needs to be nuanced: compared with the total number of cases, the Qantas/Emirates Decision puts the intervention rate of CCS at 5.5%, a figure comparable with other competition authorities. In merger control, having accepted remedies in two out of 34 cases, CCS again has a 5.8% intervention rate.[66]

49 The Qantas/Emirates Decision should not be overlooked as a single and isolated accident in the tranquil consolidating world of airlines in Asia. Rather, it is an attempt by CCS to regulate the transport of passengers by air, in a small city-state with hardly more than five million inhabitants, which is heavily reliant on air traffic. However, by not adhering to the principles of a competitive economy, CCS takes the risk of favouring and encouraging business practices which in the long run endanger the economy as a whole, something that should be taken into account when evaluating NEBs. A financial, trading and shipping hub with global ambitions, it depends on the availability of passenger seats for its activities, both as a financial centre and as the politico-administrative centre of Southeast Asia. In addition, Singapore acts as a major transfer hub in the region, a role that CCS has emphasised in previous decisions relating to the international air traffic of passengers.[67]

50 Two of the three first decisions of CCS, after its launch in 2007, were related to the airlines sector, as a possible sign of the relevance of the market for the new regulator. In its early days, CCS cleared the agreements between Qantas and British Airways,[68] and between Qantas and Orangestar.[69]

65 Under Singapore law, companies can file for merger clearance prior to concluding their merger, in accordance with s 57(7) of the Competition Act (Cap 50B, 2006 Rev Ed). *Notification for Decision: Anticipated Merger between The Manitowoc Co, Inc and Enodis plc* CCS/400/002/08 (29 September 2008).

66 See, for instance, Justin Menzes & Emmanuel Frot, "Les remèdes en France et en Europe: une analyse statistique sur la période 2000–2010" ("Remedies in France and in Europe: A Statistical Analysis on the 2000–2010 Period") (2012) 3 *Concurrences* 5. Menezes and Frot find a 7% intervention rate at the European Commission and at the French Competition Authority.

67 "Singapore is also a popular transfer hub for international travellers and shippers. Foreign airlines operating in and out of Singapore use Singapore as a hub for services to the region and beyond." *Notification for Decision by Japan Airlines International Co Ltd and American Airlines Inc of their Alliance Agreement and Joint Business Agreement* CCS 400/008/10 (4 July 2011) at para 5.

68 *Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement* CCS 400/002/06 (13 February 2007).

69 *Notification by Qantas Airways and Orangestar Investment Holdings of their Co-operation Agreement* CCS 400/003/006 (5 March 2007).

51 After a few years without any activity in the sector (and without much activity at all by CCS, following the economic crisis), CCS reviewed three airline cases in the years 2011–2012. In three unconditional clearance decisions, CCS authorised agreements between Japan Airlines and American Airlines,[70] between All Nippon Airlines, Continental and United,[71] and between Singapore Airlines and Virgin Australia.[72] Finally, this year, the level of regulatory activity in the sector was maintained, with three cases in total: CCS cleared the joint venture between Singapore Airlines and Scandinavian Airlines,[73] accepted remedies on the Qantas/Emirates agreement,[74] while the agreement between Qantas and Jetstar was cleared under the NEB defence.[75]

52 At the time of the Decision, out of the then 18 total "s 44" decisions of CCS since its inception, eight concerned the market for passenger transport, an astonishing 44% of cases.

53 In the EU, airline cases have been examined by the EC either under merger control rules, or under Art 101 of the TFEU, which prohibit agreements between undertakings if these have the effect or object of limiting competition in the EU. The EC has assessed numerous agreements and mergers and alliances between airlines, with increased activity in recent years as the industry began an era of consolidation. Whether under the merger control rules or under Art 101, the EC has consistently responded to airlines who were attempting to form monopolies on specific routes by imposing similar remedies, mainly the divestment of airport slots, thus allowing competitors to enter the market.[76]

54 In the US, the law suit recently filed by the Department of Justice ("DoJ") to block the US Airways/American Airlines merger indicates that the era of consolidation might be reaching a peak for

70 *Notification for Decision by Japan Airlines International Co Ltd and American Airlines Inc of their Alliance Agreement and Joint Business Agreement* CCS 400/008/10 (4 July 2011).

71 *Application for Decision by United Airlines Inc, Continental Airlines Inc and All Nippon Airlines Co* CCS 400/001/11 (4 July 2011).

72 *Application for Decision by Singapore Airlines Ltd and Virgin Australia Airlines Pty Ltd* CCS 400/005/11 (17 April 2012).

73 *Application for Decision by Singapore Airlines Ltd and Scandinavian Airlines System* CCS 400/001/12 (7 November 2012).

74 *Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013).

75 See paras 39–40 above.

76 Under the European Commission practice, which the Competition Commission of Singapore has followed in each of its airline decisions, a market is consistently defined as a route between two cities, such as London–New York or Frankfurt–Boston. This follows the assessment that passengers are unlikely to change their destination following an increase in ticket fare.

airlines. The DoJ indicated in its filing that, despite the remedies conditioning the merger clearances in previous cases, fares on routes where competition was substantially reduced have increased, hurting consumers across the US. The DoJ's assessment of the US Airways/American Airlines merger seems to indicate that the US regulator regrets that it cleared the previous mergers. In effect, this shifts the battleground for airlines attempting to join forces, from a regulatory to a judicial one.

55 This is not to say that CCS is not entitled at all to take into account the economic situation of Singapore when assessing a competitive situation, or even the overall goals of the Singapore authorities, for instance in maintaining Singapore's position as a regional hub. However, it is fundamental for the rule of law and for legal certainty in relation to future decisions that CCS follows the tests provided by the Legislature and by the guidelines. The art and science of competition assessment provides enough of a margin of appreciation to a competition authority which is seeking to take a business-friendly view of a proposed agreement. A simple example shows that CCS went too far in clearing the agreement under the NEB exclusion and created a dangerous precedent. CCS could have taken into account the effect of low-cost carriers flying to nearby cities. Scoot flies from Singapore to the Gold Coast, which is about an hour away from Brisbane. To include this in the market definition, or in the assessment of the parties' market shares, may have allowed CCS to clear the agreement without moving away from the Act, for the benefit of the rule of law and of legal certainty.

IV. Remedies in the airlines sector in the EU and the US

56 The airline industry has been consolidating extensively over the past decade. Nearly ten years of continuing mergers have transformed the landscape of passenger transport, bringing the number of major players down to a handful. Firms such as Panamerican, ATA Airlines or Northwest Airlines that once defined the global air travel industry simply disappeared, while many others filed for bankruptcy, sometimes before merging.

57 Competition authorities around the world have stepped in to provide a regulatory framework for the consolidation of the airlines sector. Several signs indicate that the consolidation of the market might have reached a peak: the increased rate of intervention of competition authorities in the market for air transport of passengers, the difficulties

of some deals to obtain merger clearance (Olympic Air/Aegean Airlines[77] and Ryanair/Aer Lingus[78]) and the recent move by the DoJ to block the US Airways/AMR mega merger indicate that the era of synergies may have reached a peak. The DoJ withdrew its opposition to the merger when the parties committed to divest slots and gates, another indication that experienced competition enforcers perceive slot divestment as a possible remedy, even to the most anti-competitive agreement between dominant airlines. In Asia, the consolidation of airlines is gathering pace, and competition authorities across the continent are now in charge of clearing major deals, which has not been without some bumps.

58 Typically, the EC imposes on merging airlines, or airlines entering into agreement, to release airport slots when the proposed deals would severely limit competition on some routes. Other solutions retained in the EU include "access to network-type remedies", which can consist of access to seats for competitors on the parties' flights, agreements to improve access to the parties' connecting traffic, and opening access to the parties' frequent flyer programmes.

V. The Qantas/Emirates Decision's positive outcomes

59 In this section, the above argument that the CCS Decision is riddled with mistakes will be balanced by providing several reasons to hope for the future of competition enforcement in Singapore.

A. Maintaining of a service as a classic EC remedy

60 The proposed undertakings themselves, to maintain (or increase) the level of seats on a given route, could under some conditions counter anti-competitive effects. CCS' analysis towards this end is unfortunately incomplete in that it does not explain how a decrease in the number of seats (obviously feared by CCS) could result from the co-operation, let alone how this qualifies as a negative effect. Additional detail, research and explanation about this would have helped to build a compelling argument for the NEB exclusion. However, parties in remedy decisions around the globe have in the past successfully offered to maintain services and products, as a way of

77 The two Greek airlines were only authorised to merge in 2013, under the "failing firm" defence. The two firms' plan for merger was rejected a year before by the European Commission, despite the airlines' offer to divest airport slots. See European Commission, *Decision Case COMP/M.6796 – AEGEAN/Olympic II* (9 October 2013).

78 In February 2013, the merger between the two main Irish airlines was prohibited by the European Commission. See European Commission, *Decision Case COMP/M.6663 – Ryanair/AER Lingus III* (27 February 2013).

alleviating competition concerns.[79] Up to the discussion of the proposed undertakings, CCS had demonstrated its ability to undertake an EU-style assessment.

B. The increase in seat capacity is not automatic and has to be sanctioned by CCS

61 While the increase in the parties' seat capacity would have serious negative effects on the competition in the relevant markets, this increase is not automatic. It is only actionable if the parties' aggregated route profitability or aggregate load factor on the selected routes reaches a certain level, for any 12-month period on a rolling basis.[80]

62 In addition, the increase in the minimum seat capacity can only happen at CCS's request.[81]

63 Finally, an independent auditor was appointed under the Decision, so as to ensure control, not only of compliance with the undertakings, but also of the necessity to activate the increase clause.[82] This corresponds to the international practice of competition authorities, who appoint in nearly every case with remedies a monitoring trustee (the EC) or a corporate monitor (the US Department of Justice and the Federal Trade Commission). The systematic appointment of trustees in recent years has been hailed as one of the reasons for the success of competition law enforcement in the EU and the US.[83] In this context, it has been noted that "in small economies, behavioral remedies may be less difficult to monitor, due to an increased market transparency, than would be the case in a larger territory".[84] Despite the repeated criticism of behavioural remedies and

79 For commitment to pursue the general policy of the development of new models and to maintain the full economic and competitive value of a brand, see, for instance, European Commission, *Decision Case COMP/2621 – Seb/Moulinex* at paras 437–439.

80 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 108.

81 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 108.

82 *Notice of Decision Issued by Competition Commission of Singapore, Application for Decision by Emirates and Qantas Airways Ltd* CCS 400/006/12 (28 March 2013) at para 113.

83 Thomas Hoehn & Jonas S Brusckner, "Monitoring Compliance with Merger Remedies – the Role of the Monitoring Trustee" *Competition Law International* (September 2010) at pp 73–80.

84 Swiss Competition Commission and Israel Competition Commission, "Competition Law in Small Economies" *Special Project for the 8th ICN Annual Conference* (December 2009) at p 35.

the difficulty of monitoring them in particular, it appears to be less problematic in smaller economies.

64 Through the activation of the increase mechanism and the appointment of the independent auditor, CCS keeps a certain control on the enforcement of the case and on later consequences for the competition in the relevant markets. It is hoped that CCS will undertake a complete competition assessment of the markets before ordering the parties to increase their capacity (and market share) on the selected routes.

C. Clarification of the NEB threshold

65 Although CCS set the threshold for the NEB exclusion at a very low level, the clarification of the actual threshold is still to be taken as good news. The wording of the Third Sched to the Competition Act and of the s 34 Guidelines outlined a complete test for CCS to follow (some of which was used in the Decision) but left CCS with ample manoeuvring in the actual running of the test. CCS not only established its practice, but some observers will doubtlessly perceive the low NEB threshold as a sign of CCS's independence.

66 In the Qantas/Jetstar Decision, the threshold is set out in more detail, providing helpful guidance for companies wishing to use the NEB defence in the future. CCS needs to confirm this, possibly in the context of remedies.

D. The Qantas/Emirates Decision is consistent with CCS's approach

67 The Decision, although the first to allow an agreement to proceed under the NEB defence, is consistent with CCS's policy to promote NEBs. In an article dated April 2013, Yena Lim, then Chief Executive of CCS, affirmed that it "consciously seek[s] to balance regulatory and business compliance costs against the benefits from effective competition".[85] Its primary focus said the CCS representative, "is on conduct or acts which have an appreciable adverse effect on competition in Singapore, without any compensating net economic benefit".[86] This approach, clearly open to exclusion of behaviour and practices which may generate NEBs, contrasts with the stricter EC approach.

85 Yena Lim, "CCS" *The Asia-Pacific Antitrust Review* (Global Competition Review, April 2013) at p 9.

86 Yena Lim, "CCS" *The Asia-Pacific Antitrust Review* (Global Competition Review, April 2013) at p 9.

E. CCS, still a young competition authority, delivers a detailed decision

68 The final point to raise about the Decision is that, although as noted above it is seriously flawed, it remains of a high standard. CCS grounded the essential element of jurisdiction into its own practice,[87] followed the international practice in many respects including the appointment of a trustee, structured the response to the parties' submission in a very clear way and reached a final decision on the merger after an analysis of the facts and an application of the law to these facts.

VI. Conclusion: Future of competition enforcement in Singapore

69 By placing the threshold for exclusion at a very low level, the Decision sets a dangerous precedent for the NEB exclusion under the Competition Act. In focusing on the role of Singapore as a transportation hub, CCS may have gone off track and attempted to act as a regulator rather than the guardian of competition. It is not in itself an unsuitable role for CCS to take into account regulatory and policy objectives in its assessments; however, this integration of policy goals should not result in CCS missing to enforce the competition rules.[88] The current CCS practice indicates a clear tendency to carve out Singapore as a separate jurisdiction which does not follow internationally accepted practice in terms of airline remedies. However, the existing legislation and guidelines in Singapore provide enough tools to simultaneously enforce competition rules and follow policy objectives. In the context of CCS claiming to lack interventionist ambitions, this is harmful to consumers and, in the end, to Singapore and Singaporeans.

70 Other airline mergers are on their way and will be assessed by CCS in the near future. Singapore aims at taking the lead in Southeast Asia's competition law enforcement, and is demonstrating that it has the potential to do so by delivering a detailed decision. However, more than the form, CCS will probably have to adopt the core of the international practice of competition law. This may require considering slot release on the relevant routes as a way to ensure both a moderate interventionism, and competition in the air passenger market. The Qantas/Jetstar Decision shows a clear ability to undertake a detailed, comprehensive and relevant test of the benefits brought by an agreement. This needs to

87 See para 6 above.

88 Cheng previously noted that competition and policy objectives can contradict each other, at the detriment of competition awareness which "retreats in the face of competing policy objectives": Thomas Cheng, "Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law" (2012) 12(2) Chi J Int'l L 433 at 487.

be developed further so as to avoid a repetition of CCS's failure in the Qantas/Emirates Decision.

71 Whether CCS decides to start following international practice in airline agreements, or whether it develops its own practice of easily accepting economic benefits under policy objectives, it must do so by following the rules provided by the Legislature, and not attempt to rewrite competition rules by failing to assess competitive effects.
