

Fair Trade Commission Disposal Directions (Guidelines) for Handling Merger and Concerted Action Cases of Domestic Civil Air Transportation Enterprises

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1. The Guidelines are adopted by the Fair Trade Commission (hereinafter referred to "the Commission") to maintain trading order and consumers' interests, ensure free and fair competition, and effectively handle cases involving domestic civil air transportation enterprises' pre-merger notifications and filing for approval of concerted actions.
2. The term "domestic civil air transportation enterprise" as used in the Guidelines refers to an enterprise engaging in the transportation services by aircraft of passengers and cargo on regular routes in the territory in accordance with Civil Aviation Act.
3. The market definition for reviewing civil air transportation enterprises' pre-merger notifications and concerted action applications will be assessed in principle based on the "city pair" as the smallest market unit. However, the Commission will also take the following factors into account on a case-by-case basis:
 - (1) the transportation time, distance and flight frequency of different routes originating from areas adjacent to the point of departure;
 - (2) the transportation time, distance and frequency between air, rail, road, and surface water transportation;
 - (3) other factors relevant to the definition of domestic air transportation market.

Unless otherwise provided under the Guidelines, the relevant market definition for domestic civil air transportation enterprises is reviewed in accordance with the

Commission's "Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets ".

4. The market share of a domestic civil air transportation enterprise may be calculated by either of the following methods:

- (1) market demand basis: The number of passengers carried by, the volume of cargo traffic of, or the turnover of a specific domestic civil air transportation enterprise, expressed as a proportion of the total number of passengers carried by, the volume of cargo traffic of, or the total turnover of, all civil transportation enterprises in the relevant market.
- (2) market supply basis: The number of seats made available or the cargo capacity by a specific domestic civil air transportation enterprise, expressed as a proportion of the total number of seats made available or the cargo capacity by all civil transportation enterprises in the relevant market.

5. A pre-merger notification shall be submitted to the Commission prior to the merger between domestic civil air transportation enterprises or between a domestic and other non-domestic civil air transportation enterprise, if the circumstance described in Paragraph 1, Article 10 and either one of the subparagraphs set forth in Paragraph 1, Article 11 of the Fair Trade Law, is present, provided that the proposed merger does not trigger any of the exemptions as described in Article 12 of the Fair Trade Law.

Domestic civil air transportation enterprises' pre-merger notification cases shall be reviewed under "Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings" unless otherwise provided by the Guidelines.

6. Factors to be considered by the Commission when determining the impact of a pre-merger notification case filed by domestic civil air transportation enterprises on competition:

- (1) market structure: The number of market participants, market share in terms of the number of passengers and volume of cargo traffic, and degree of market concentration.
- (2) unilateral effects: The ability of the surviving enterprise, being freed from the constraints of market competition, to increase the price of its goods or the remuneration for its services at a specific route after the merger.
- (3) coordinated effects: Whether the reduced number of market participants makes it easier for the surviving enterprise to restrain the business

activities (such as cargo rate, number of flights, passenger capacity, etc.) with other competitors; or whether in the absence of restraining each other's business activities, mutual dependence between oligopolistic vendors effectively hampers market competition.

- (4) market entry: This include the likelihood and timeliness of market entry for potential competitors, and whether such entry can bring pressure on incumbents in the market. For example, the time required to obtain route certificates and permits, frequent flyer reward programs, and the implementation of corporate user discount mechanisms.
- (5) countervailing power: The ability of incumbents or potential trading counterparties to deter the surviving enterprise from increasing its price for goods or services.

The less the degree of overlapping between air routes operated by participating enterprises, the less significant the effect of the merger will be in restricting competition. Conversely, the greater the degree of overlapping between the routes operated by participating enterprises, the greater the restriction of competition that will result from the merger.

If after a merger there will remain at least three similarly-sized competitors in the relevant market, and there is reason to believe that the merger will not lead to significant anti-competition effects, then in principle it can be assumed that the merger will not restrain market competition to a significant degree.

7. Factors to be considered by the Commission when determining the effects of a pre-merger notification case filed by domestic civil air transportation enterprises on economic efficiency:

- (1) reduction of operation costs: Whether the merger conducive to creating economies of scale and scope, thereby reducing operating costs.
- (2) rationalization of route network: Whether the merger conducive to readjustment of the air route network, so as to provide services more efficiently.
- (3) efficient use of resources: Whether the merger conducive to efficient use of assets or resources, such as aircraft fleets, maintenance, service counters, and takeoff and landing time slots.
- (4) convenience of service: Whether the merger conducive to providing air transportation services with a greater frequency of scheduled departures and a broader network coverage area.

- (5) promotion of competition: Whether the merger conducive to creating competitors of similar scale, thus promoting competition in the relevant markets.
- (6) failing enterprises: Other than by merging with another enterprise, would an enterprise participating in the merger be unable to continue operation and have to withdraw from the market, or could it combine with another enterprise with less likelihood of restriction of competition.

Justifications on grounds of efficiency presented by the participating enterprises must be directly related to the merger that is the subject of the filing, and must be achievable only by the merger. If economic efficiency grounds put forward do not stem from the merger, or could be achieved in other ways that do not have the effect of restricting competition, then they cannot be accepted as justifications.

8. If, when reviewing domestic civil air transportation enterprises' pre-merger notification, the Commission decides the potential competition restrictions are insignificant, or although the potential competition restrictions are significant while there is sufficient efficiency to justify the cause, it may regard the overall economic benefits of merger cases are greater than disadvantages from the competition restrictions thereof incurred. The Commission may also take the opinions of the civil aviation authority into account to assess the overall economic benefits and disadvantages from the competition restrictions thereof incurred.

9. If the practices of domestic civil air transportation enterprises fall under Article 14 of the Fair Trade Law and meets one of the provisos as set forth under Paragraph 1, Article 15 of the Fair Trade Law, it is necessary to obtain a prior approval from the Commission for such concerted action. If the domestic civil air transportation enterprises engage in the implementation of joint operations on domestic routes, such as code-sharing, unconditional endorsement and transfer of ticket vouchers, joint promotion and other joint activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services, such enterprises shall abide by Regulation Governing the Approval of Alliance of Civil Air Transportation Enterprises to which is promulgated by the Ministry of Communications together with the Commission.

10. When reviewing the concerted action of domestic civil air transportation enterprises to which the Commission considers to have the non-appreciable effects on competition and if the type of concerted action meets any of the qualifying conditions set out in the provisos of Article 15 Paragraph 1 the Fair Trade Law, the Commission may apply the following review criteria to assess whether the concerted action is beneficial to the overall economy and public interest

- (1) the state of competition among different modes of transportation in relevant markets;
- (2) conduciveness to consumer choice among relatively reasonable ticket prices and high-quality service;
- (3) the degree of influence on service provision or ticket prices on other air routes;
- (4) the possibility that the elimination of cross-subsidies between domestic and international air routes will lead to unfair treatment of passengers on other routes;
- (5) other benefits to the overall economy and the public interest.

11. The common behaviors of domestic civil air transportation enterprises, such as the sharing of aircraft ground handling, security, passenger transfer, VIP room service, fueling, in-flight meal, and baggage transportation and other which is not related to fares, flight frequency, and traffic volume integration, are not regarded as the concerted action as described in Article 14 of the Fair Trade Law.

12. The common actions which are in conformity with the Civil Aviation Act and insofar not in conflict with the legislative intent of the Fair Trade Law, shall be preferentially govern by the Civil Aviation Act.

13. If a domestic civil air transportation enterprise adopts any one of the following conducts resulting in an impact on the market function with respect to supply and demand of services, may be in violation of Article 15 of the Fair Trade Law:

- (1) the act of jointly deciding oil surcharges or other costs by any means, even if such costs are not the final freight rates;
- (2) the agreed number of aircraft seats, the amount of clearing accounts provided for the same route, and the joint allocation of revenues;
- (3) other agreements on restricting tariffs, flights, passengers and other activities.