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For immediate release

Competition Commission concludes investigation into proposed Joint Business Agreement between two major airlines

The Competition Commission (“Commission”) has decided to close the investigation into a proposed joint business agreement between two airlines, namely Cathay Pacific Airways Limited (“CX”) and Malaysia Airlines Berhad (“MH”) (collectively referred to as the “Parties”), after the Parties notified the Commission they had decided not to proceed with the proposed agreement.

The Parties had previously proposed to enter into a metal-neutral joint business agreement in respect of all scheduled air passenger services between Hong Kong and Malaysia operated by CX and MH (“Proposed JBA”).¹ A metal-neutral partnership or joint venture² essentially involves revenue and costs sharing between the airlines on a given route regardless of which airline is operating the actual flight, and is distinguishable from a codeshare agreement³.

The Proposed JBA came to light when in May 2022, the Parties jointly made an application to the Malaysian Aviation Commission (“MAVCOM”) for an individual exemption⁴ for the Proposed JBA, and which was reported. Shortly thereafter, the Commission approached the Parties for information in relation to the Proposed JBA. Upon consideration of the information voluntarily provided by the Parties, the Commission had reasonable cause to suspect that the Proposed JBA may potentially contravene the First Conduct Rule of the Competition Ordinance (“Ordinance”) and therefore initiated an investigation to assess whether the Proposed JBA may harm competition in Hong Kong. Throughout the course of the investigation, the Parties have fully cooperated with the Commission. The Commission also acknowledges and thanks the Civil Aviation Department, the Airport Authority and other market participants who have provided assistance to the Commission.

¹ The routes covered by the Proposed JBA include two direct services, namely Hong Kong-Kuala Lumpur and Hong Kong-Penang; and fourteen indirect services between Hong Kong and Malaysian destinations with transfer at Kuala Lumpur.

² Under the Proposed JBA, the cooperation between the Parties was intended to include (i) revenue sharing; (ii) network planning and schedule coordination; (iii) pricing coordination; (iv) inventory management coordination; (v) distribution systems coordination; (vi) joint sales and marketing; (vii) service and product cooperation; and (viii) frequent flyer agreement.

³ A codeshare agreement involves a marketing arrangement where an airline places its designator code on a flight operated by another airline, and then sells tickets for that flight. This is a simpler form of cooperation which does not usually involve sharing of revenue and costs.

⁴ Under the Malaysian regime, airlines may make an application to MAVCOM seeking an individual exemption from competition law under section 51 of the Malaysian Aviation Commission Act 2015 (“MAC Act”), which is broadly similar to an application for decision under section 9 and/or section 24 of the Competition Ordinance in Hong Kong. MAVCOM will grant an exemption where, in the opinion of MAVCOM, the proposed agreement meets the exemption criteria set out in section 50 of the MAC Act, which is broadly similar to the efficiency exclusion in section 1 of Schedule 1 of the Competition Ordinance in Hong Kong.

In late July 2023, the Parties notified both the Commission and MAVCOM that they will no longer proceed with the Proposed JBA.

The Commission's preliminary assessment during the investigation indicated that the markets for air passenger services between Hong Kong and Malaysia are highly concentrated, with the Parties having significant market shares and being each other's closest competitor. Implementing the Proposed JBA would likely eliminate all competition between the Parties as they would effectively operate as a single entity on the routes in question. There also appears to be barriers to market entry and expansion, and the competitive constraints exerted by existing competing airlines on the Parties may be insufficient.

Therefore, should the Proposed JBA be entered into, notwithstanding that it may generate some efficiencies and benefits, the Commission is more concerned that the Proposed JBA would likely reduce the incentives for the Parties to offer lower prices and/or to improve the quality of services, which would affect passengers travelling between Hong Kong and Malaysia. As the Parties confirmed that they will no longer proceed with the Proposed JBA, the Commission has decided to close the investigation.

Mr. Rasul Butt, Chief Executive Officer of the Commission, said, "Under the Ordinance, undertakings may choose to apply to the Commission for a decision as to whether or not an agreement (such as the Proposed JBA in this case) or conduct is excluded or exempt from the Conduct Rules. Undertakings are also entitled to conduct a self-assessment of the legality of their agreement or conduct.

Nonetheless, an undertaking's decision to conduct self-assessment does not preclude the Commission from initiating an investigation. The Commission will initiate an investigation into any agreement or conduct if there is reasonable cause to suspect that a contravention of a competition rule has taken place, is taking place or is about to take place.

With the COVID-19 pandemic finally behind us and the travel industry making a strong rebound, people in Hong Kong are travelling again both for business and leisure, and the routes between Hong Kong and Malaysia happen to be among the most popular choices. The Commission is mindful of information from public sources that the costs of travel have increased considerably post-pandemic and will be vigilant in identifying and tackling situations where anticompetitive conduct or lack of competition may be a contributing factor."
