



Australian  
Competition &  
Consumer  
Commission

# Draft Determination and interim authorisation

lodged by

Etihad Airways PJSC and Air Serbia A.D.

in respect of

a Commercial Co-operation Agreement

Date: 15 February

Authorisation numbers: A91563 & A91564

Commissioners:

Sims  
Rickard  
Schaper  
Featherston

## Summary

The ACCC proposes to grant authorisation to Etihad and Air Serbia to coordinate their operations pursuant to a Co-operation Agreement.

The ACCC proposes to grant authorisation for 10 years.

The ACCC also grants interim authorisation to enable Etihad and Air Serbia to commence joint activities under the Co-operation Agreement.

### Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision.

## The applications for authorisation

1. On 7 December 2016 Etihad PSJC and Air Serbia A.D (the **Applicants**) lodged applications for authorisation<sup>1</sup> (A91563 and A91564) with the ACCC. The Applicants are seeking authorisation to enter into and give effect to a **Co-operation Agreement** and, inter alia, to engage in the following activities in relation to passenger travel and cargo services in accordance with the intent of the Partnership<sup>2</sup>:
  - Work together on a co-operative basis, including reaching agreements where desirable, in respect of:
    - route and schedule co-operation
    - pricing and fare product development
    - marketing, distribution, dealing and sales representation including consolidation of sales offices and joint travel agent and corporate account dealing, and
    - processes and working arrangements  
(together the **Pricing, Scheduling and Marketing Activities**).
  - Work together on a co-operative basis, including reaching agreements where desirable, in respect of:
    - freesale codesharing
    - reciprocal preferred fare pro-ration
    - staff travel, staff exchange and staff training programmes
    - reciprocal lounge access
    - product development including seamless product innovation
    - joint airport representation and handling including seamless full service transfer products at airports, and
    - joint procurement

<sup>1</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

<sup>2</sup> Supporting submission to Applications A91563 & A91564, pp.1-2.

(together the **Co-operative Activities**).

2. The Applicants only overlapping operations are services between Belgrade and Abu Dhabi, which in some cases will form a segment of a service to or from Australia.
3. The Applicants have also requested interim authorisation to enable them to engage in the activities described in the Co-operation Agreement before the ACCC makes a final decision about the applications for authorisation.

## The Applicants

### *Etihad Airways*<sup>3</sup>

4. Etihad Airways (Etihad) is a full service network carrier operating from a hub in Abu Dhabi, the capital of the United Arab Emirates. Etihad commenced commercial operations in November 2003. As at October 2016, Etihad had a fleet of 122 aircraft, and operated flights to 112 destinations in over 60 countries – including Australia.
5. As at November 2016, Etihad operated 39 services per week from destinations in Australia direct to Abu Dhabi as shown in the below table.

Destination	Services per week as at November 2016	Commenced services
Sydney	11	March 2007
Brisbane	7	September 2007
Melbourne	14	March 2009
Perth	7	July 2014

6. The ACCC has previously authorised commercial partnerships between Etihad and three other airlines, Virgin Blue Airlines (now Virgin Australia), Air Berlin and Alitalia.<sup>4</sup>
7. As at October 2016, Etihad has 51 codeshare arrangements and 197 interline agreements.<sup>5</sup>
8. Etihad's current codeshare agreements are with Aegean Airlines, Aerolineas Argentinas, Aer Lingus, Air Astana, airBaltic, Air Berlin, Air Canada, Air Europa, Air France, Air Malta, Air New Zealand, Air Serbia, Air Seychelles, Alitalia, All Nippon Airways, American Airlines, Asiana Airlines, Avianca Airways, Avianca Brazil, Bangkok Airways, Belavia, SN Brussels Airlines, China Eastern Airlines, Czech Airlines, Darwin Airline, Flybe, Garuda Indonesia, Gol Linhas Aereas Inteligentes, Hainan Airlines, Jet Airways, JetBlue Airways, Kenya Airways, KLM Royal Dutch Airlines, Korean Air Lines, kulula.com, Malaysia Airlines, Middle East Airlines, NAS

<sup>3</sup> The information in this section is from Supporting Submission to Applications A91563 & A91564 pp. 5-7 unless otherwise stated.

<sup>4</sup> See A91247 & A91248 Virgin Blue Airlines and Others (3 February 2011) and A91510 & A91511, Virgin Australia and Etihad Airways (4 December 2015), A91307 & A91308 Etihad and Air Berlin (25 July 2012), A91468 & A91469 Etihad and Alitalia (30 January 2015).

<sup>5</sup> <http://www.etihad.com/documents/pdfs/corporate%20profile/fast%20facts/oct-2016-en.pdf>

Air, Niki, Pakistan International Airlines, Philippine Airlines, Royal Air Maroc, SAS, Siberia Airlines, SNCF, South African Airways, SriLankan Airlines, TAP Portugal, Turkish Airlines, Vietnam Airlines and Virgin Australia.

#### *Air Serbia A.D*<sup>6</sup>

9. Air Serbia is based in Serbia and operates flights providing international air transport services for passenger and cargo from its home hub of Airport Nikola Tesla in Belgrade, Serbia to 36 destinations (44 in summer) in 28 countries in Europe, the Mediterranean, the Middle East and the United States.
10. Air Serbia operates a fleet of 11 Airbus A319/A320/A330 aircraft, 4 Boeing 737 aircraft and 6 ATR 72 turboprops as at November 2016.
11. In August 2013, Etihad Airways acquired a 49% share in Air Serbia with the Government of Serbia retaining 51%.
12. Air Serbia is a member of EAP Partners along with Etihad and 6 other carriers, being Air Berlin, Alitalia, Air Seychelles, Etihad Regional, Jet Airways and NIKI.
13. As at November 2016, Air Serbia has 18 code share agreements with Adria Airways, Aeroflot, Air Berlin, Air China, Air France, Alitalia, Bulgaria Air, Etihad Airways, Etihad Regional, KLM Royal Dutch Airlines, Aegean Airlines, LOT Polish, TAROM, Air Baltic, Air Europe, El Al Israeli Airline, Air Seychelles and NIKI.
14. Currently, Air Serbia does not operate any aircraft on a flight with an origin or destination in Australia. Therefore, services offered by Air Serbia between Australia and Serbia are never entirely operated by Air Serbia. Rather, Air Serbia offers flights to Australia marketed under its codeshare arrangement with Etihad.

## Consultation

15. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
16. The ACCC invited submissions from a range of potentially interested parties including suppliers, relevant industry associations, consumer groups, state and federal government and relevant regulatory bodies.<sup>7</sup>
17. The ACCC did not receive any submissions.

## Assessment

18. The ACCC's assessment of the Co-operation Agreement is carried out in accordance with the relevant net public benefit tests<sup>8</sup> contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**). In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the Co-

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<sup>6</sup> The following section is from Supporting Submission to Applications A91563 & A91564 pp. 7-8 unless otherwise stated.

<sup>7</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>8</sup> Subsections 90(5A), 90(5B), 90(6), 90(7), 90(8)

operation Agreement would outweigh the likely detriment to the public, including from any lessening of competition.

## **Relevant areas of competition**

19. For the purpose of assessing these applications, the ACCC considers the relevant areas of competition are:

- international air passenger transport services between Australia and Serbia, and
- international air cargo transport services between Australia and Serbia.

20. The ACCC notes that the most direct air transport services between Australia and Serbia are on routes transiting through hubs in either Asia or the Middle East. In turn, this means there are many routes, and combinations of route segments, between Australia and Serbia that can be chosen by consumers of air transport services.

21. The ACCC notes that the only city pair on which the Applicants overlap with direct flights is Abu Dhabi – Belgrade. In addition, the Applicants currently have a codeshare agreement covering routes between Australia and Serbia.

## **Future with and without**

22. To assist in its assessment of the Co-operation Agreement against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

23. The ACCC considers that without the Co-Operation Agreement :

- Etihad and Air Serbia would be likely to continue to operate their present networks of flights
- Air Serbia would continue its existing operations from Serbia and would be unlikely to commence standalone flights to Australia, and
- Etihad would continue to operate flights between Australia and Serbia (via Abu Dhabi).

24. As Etihad has acquired 49% of Air Serbia it is likely that, even in the absence of the Co-operation Agreement, Etihad will seek to align its operations more closely with Air Serbia including continuing its current codeshare arrangements with Air Serbia and integrating its codeshare and alliance arrangements with other airlines.

## **Public benefit**

25. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>9</sup>

26. The ACCC considers that the public benefits of the Co-operation Agreement fall within the following broad categories:

- enhanced products and services
- operational and other efficiencies
- increased competition in international air passenger and cargo transport markets; and
- stimulation of tourism.

27. The ACCC's assessment of the likely public benefits from the Co-operation Agreement is as follows.

### **Enhanced products and services**

28. The ACCC recognises that, absent coordination, two airlines offering complementary services do not have an incentive to take into account the effect of their product and service decisions on demand for the other airline's products and services. The consequence can include less convenient connections for passengers, less attractive customer reward programs and/or lower levels of provision of ground services such as airport lounges and check-in services.

29. The ACCC considers that the Applicants are likely to have an incentive under the Co-operation Agreement to optimise their joint service offering and that this is likely to result in public benefits.

### **Operational and other efficiencies**

30. In its consideration of similar airline alliances the ACCC has previously accepted that improved operating efficiencies and/or avoidance of duplicated fixed costs through alliances are likely to result in a public benefit. However, the ACCC has generally not placed a significant weight on this as a public benefit absent strong evidence about how such savings will be achieved.

31. In this case, the Applicants submit that the Partnership will allow cost efficiencies through means including leveraging operational synergies including co-locating Air Serbia and Etihad Airways staff, improved load factors as a result of improved products and more effective marketing, undertaking joint marketing activities which will be more efficient through economies of scale and improved understanding of customer needs, utilising joint promotional material and undertaking joint fare filing in respect of Australia.<sup>10</sup>

32. In principle, the ACCC considers that the Co-operation Agreement is likely to facilitate some public benefits through the realisation of efficiencies associated with cooperation synergies, improved load factors and more efficient and effective marketing.

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<sup>9</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

<sup>10</sup> Supporting submission to Applications A91563 & A91564, p. 17.

33. The ACCC considers that efficiencies are a public benefit in and of themselves. However, the ACCC gives greater weight to the realisation of efficiencies where they are likely to be passed through to consumers in the form of lower fares or better services.
34. The ACCC considers that the likelihood of efficiencies achieved by the Co-operation Agreement being passed through to passengers will depend on competitive conditions year to year, but accepts there is likely to be some pass through of realised cost savings and efficiencies in the form of lower fares or better services.

### **Increased competition in international air passenger transport services and international air cargo markets**

35. The ACCC considers that airline alliances can stimulate competitive responses among rivals where the alliance enhances the alliance partners' products and results in lower fares (to the extent that cost savings and other efficiencies are passed through to customers).
36. The ACCC notes that the product and service offering under the Co-operation Agreement is greater than either airline could have offered alone. The Applicants are able to leverage this integrated network, through joint sales and marketing initiatives, to attract passengers who otherwise might not have flown with either Etihad or Air Serbia.
37. The ACCC considers that the enhanced product and service offering under the Co-operation Agreement - including single booking processes for complementary services, better scheduling, and improved customer distribution handling - is likely to trigger some degree of competitive response from competing airlines. To the extent that this occurs, it is likely to result in a public benefit.

### **Tourism benefits**

38. As the ACCC has noted in previous assessments of airline alliances, there is a wide range of factors that influence tourism demand and expenditure including general purchasing power in source countries; the relative cost of other destinations; the total cost of visiting Australia; and the perceived quality of Australia as a destination. Notwithstanding this, the ACCC has recognised the potential for airline alliances to increase tourism demand and expenditure.
39. In this case, the ACCC considers that the Co-operation Agreement has the potential to stimulate tourism in Australia through increased passenger traffic as a result of enhanced products and services and, potentially, lower fares to the extent that, on balance, the Co-operation Agreement promotes rather than lessens competition and the Applicants pass through cost savings and efficiency gains to customers.
40. The ACCC considers that the extent of the tourism benefits realised under the Co-operation Agreement will be highly (positively) correlated with the additional traffic to Australia stimulated by the Co-operation Agreement. In this respect, while the Applicants have not provided strong evidence that the Co-operation Agreement will materially increase traffic to Australia the ACCC accepts that, on balance, the Co-operation Agreement has the potential to generate some additional traffic. On this basis, the ACCC considers that the Co-operation Agreement has the potential to generate some, limited, tourism-related public benefits.

## Public detriment

41. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>11</sup>

42. The ACCC notes that Air Serbia does not directly operate flights on any routes into or out of Australia. Based on the available information, the ACCC considers that it is unlikely Air Serbia would be likely to commence operating services to Australia over the timeframe for which authorisation is sought (ten years).

43. In terms of indirect flights to Australia, the Applicants currently only operate overlapping services on one route, Abu Dhabi – Belgrade, which in some cases will form a segment of a service to or from Australia. The ACCC notes that there are many options available to travellers between Australia and Serbia, including services with a comparable travel time to that offered by the Applicants by Emirates and Qatar Airways.

44. While Air Serbia does not directly operate flights on routes to or from Australia, it does market services between Serbia and Australia pursuant to its codeshare agreements with Etihad. Absent the Co-operation Agreement, Air Serbia may be more likely to consider other options for providing flights between Europe and Australia such as through existing and potentially new codeshare agreements with other airlines. Therefore, there is potentially some loss of competitive rivalry for air passenger transport services on some routes between Australia and Europe as a result of the Co-operation Agreement. However, given that Air Serbia does not have a significant presence on these routes – and the competitive discipline imposed by other international airlines on these routes – the ACCC considers that any reduction in competition resulting from the Co-operation Agreement is likely to be very limited.

45. On this basis, the ACCC considers that the Co-operation Agreement is likely to result in little public detriment.

## Balance of public benefit and detriment

46. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Co-operation Agreement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

47. The ACCC considers that the Co-operation Agreement would, or would be likely to, result in public benefits, primarily in the form of:

- enhanced products and services
- operational and other efficiencies; and
- increased competition in international air passenger and cargo transport markets.

48. The ACCC considers that the Co-operation Agreement is likely to result in little public detriment.

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<sup>11</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.



49. Therefore, for the reasons outlined in this draft determination the ACCC is satisfied that the Co-operation Agreement is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result. Accordingly, the ACCC proposes to grant authorisation.

## **Length of authorisation**

50. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>12</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

51. In this instance, the ACCC proposes to grant authorisation for 10 years.

## **Draft determination**

### **The applications**

52. Application A91563 was made using Form A, and A91564 using Form B of Schedule 1 of the Competition and Consumer Regulations 2010. The applications were made under subsection 88(1) and (1A) of the CCA.

53. Authorisation is sought by Etihad and Air Serbia to coordinate their operations pursuant to a Co-operation Agreement.

54. Authorisation is sought as the Co-operation Agreement may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.

55. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### **The net public benefit test**

56. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstance the Co-operation Agreement for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by an lessening of competition arising from the Co-operation Agreement.

57. The ACCC is satisfied, pursuant to section 90(8), that the Co-operation Agreement for which authorisation is sought is likely to result in such a benefit to the public that the Co-operation Agreement should be allowed to take place.

### **Conduct which the ACCC proposes to authorise**

58. The ACCC proposes to grant authorisation A91563 and A91564 to Etihad and Air Serbia for the conduct described at paragraph 1.

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<sup>12</sup> Subsection 91(1).

59. The ACCC proposes to grant authorisation for ten years.

60. This draft determination is made on 15 February 2017.

## **Next steps**

61. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.

## **Interim authorisation**

62. At the time of lodging the application, the Applicants requested interim authorisation to give effect to the Co-operation Agreement while the ACCC considers the substantive applications.

63. The Applicants requested interim authorisation on the basis that:<sup>13</sup>

- the Co-operation Agreement has no adverse effect on competition, and
- interim authorisation is likely to allow many of the benefits of the Co-operation Agreement to be realised earlier than would otherwise be the case.

64. When considering any request for interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim authorisation is not granted, possible benefit and detriment to the public, the urgency of the matter and whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.

65. The ACCC considers that it is appropriate to grant interim authorisation at this time as:

- the likelihood that the conduct will result in significant anti-competitive detriment is low, given the lack of current or likely future overlap between the Applicants' operations to and from Australia in the absence of the Co-operation Agreement
- it would be relatively easy for the market to return to its pre-authorisation state should substantive authorisation ultimately be denied by the ACCC; and
- interim authorisation will allow benefits to begin to be realised by the Co-operation Agreement.

66. Accordingly, the ACCC grants interim authorisation under subsection 91(2) of the CCA. Interim authorisation is granted to give effect to the Co-operation Agreement.

67. Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

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<sup>13</sup> Supporting submission to Applications A91563 & A91564, p. 13.