

**Air Transport Licensing Authority (“ATLA”)  
Public Inquiry with regard to the application for licence by  
Jetstar Hong Kong Airways Limited**

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**Summary of ATLA decision**

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Background

Jetstar Hong Kong Airways Limited (“JHK”) submitted an application for licence to operate scheduled air services to the Air Transport Licensing Authority (“ATLA”) in June 2013. JHK’s application was objected to by Cathay Pacific Airways Limited, Hong Kong Dragon Airlines Limited, Hong Kong Airlines Limited and Hong Kong Express Airways Limited (“the Objectors”). Among the reasons for objection, the Objectors contend that JHK does not have its principal place of business (“PPB”) in Hong Kong and is therefore ineligible for the licence.

Legal requirements

2. In accordance with Article 134(2) of the Basic Law, the required licence to operate scheduled air services is to be granted to an airline incorporated and having the PPB in Hong Kong. ATLA, which is an independent statutory body established under the Air Transport (Licensing of Air Services) Regulations (Chapter 448A) (“the Regulations”), is responsible for considering application for licence to operate scheduled air services. In granting a licence to an applicant, ATLA has to be satisfied that the applicant complies with the relevant requirements of the Regulations, and is incorporated and has its PPB in Hong Kong.

Procedures leading to public inquiry

3. ATLA has processed JHK’s application pursuant to the relevant provisions of the Regulations and the ATLA Procedural Guide. To expedite processing of the case, ATLA held a procedural meeting with the parties in March 2014 to discuss and agree upon the procedures for dealing with objections and representations. As requested by JHK and the Objectors, ATLA decided in May 2014 to hold a hearing to determine the preliminary issues as agreed by JHK and the Objectors. A preliminary hearing was held by ATLA in September 2014 to consider the submissions made by JHK and the

Objections with regard to the agreed preliminary issues. Based on the ATLA's decision of the preliminary hearing issued in November 2014, JHK and the Objectors filed their written submissions for the public inquiry scheduled for January 2015 to determine as to whether JHK has its PPB in Hong Kong. In addition, as further discussed and agreed by the parties, JHK and the Objectors filed their closing submissions and made their oral closing in February 2015.

#### Applicable legal principles

4. The Basic Law does not set out any definition of the term "PPB". JHK or the Objectors did not draw to ATLA's attention to any discussion pertaining to this matter during the drafting of the Basic Law, either. ATLA has been referred to authorities from other jurisdictions on PPB in the course of the public inquiry.

#### Applicable test for checking compliance with PPB requirement

5. In the light of the relevant case law on PPB, ATLA has set out the applicable test in deciding whether an airline is able to satisfy the requirement that its PPB is in Hong Kong as highlighted below:

- (a) In determining whether the PPB of an applicant is in Hong Kong, the answer is not confined to where the day-to-day operations are conducted.
- (b) The day-to-day activities of the airline may be carried out in Hong Kong but to satisfy the PPB requirement, its activities must not be subject to the control of senior management, shareholders or related parties located elsewhere.
- (c) The airline has to have independent control and management in Hong Kong, free from directions or decisions made elsewhere.
- (d) The nerve centre has to be in Hong Kong. By nerve centre, ATLA looks at where and by whom the decisions regarding the key operations of an airline are made. Decisions are not those of the day-to-day operations only but also those which are relevant and crucial to the business of the airline.
- (e) The core business of an airline is the carriage of passengers and goods for reward and the decisions as to where the airline can fly (i.e. route and

networking) and how much it can charge for the services rendered (i.e. pricing) are two important factors, among others, under ATLA's consideration. Decisions pertaining to these matters have to be independently controlled and managed in Hong Kong.

- (f) The mode of operation of a passenger airline may take different forms which vary from a full service carrier ("FSC") in one case to a low cost carrier ("LCC") to the other. Even for the case of LCC, an airline may operate the air services under its own brand, a licensed brand or other contractual arrangement with varying degree of dependency and control which the airline and the contracting parties may be subjected to. In other words, whether an airline is operating under FSC or LCC is but a business decision and is irrelevant to the consideration of its compliance with PPB requirement. The root of the question goes to how the airline's business is independently controlled and managed in Hong Kong. The mode of operation as set out in the various documentations and the actual implementation of the same (which is not relevant in this application) may affect the weight by which certain factors have to be assessed.

6. The operation of an airline contains other important matters, features and characteristics that are vital to its business and upon which the test of independent control and management would have to be applied. The relevant factors that would be applicable generally to all companies include:

- (a) voting rights at the shareholders' meeting;
- (b) voting rights of the board of directors;
- (c) place of these meetings;
- (d) the powers of the senior management staff, e.g. Chairman of the Board or Chief Executive Officer ("CEO");
- (e) financial control;
- (f) insurance being taken out;
- (g) the site of the corporate authority, namely the location or domicile of the

shareholders and directors where decisions are made; and

- (h) whether the day-to-day operation is subject to decision or direction from elsewhere.

7. Moreover, in the context of an airline, there are other special features that are important to its business which are not covered above or considered in the relevant law cases. The locale where the following decisions on operation are made are highly relevant to the PPB of an airline:

- (a) the decision to purchase and dispose of its fleet of aircraft;
- (b) the flight network or route that are to be adopted by the airline;
- (c) the fares that are to be fixed in conducting its airline business;
- (d) the engagement, direction and termination of the senior management staff; and
- (e) whether the airline's business is restricted such that it does not have the ability to decide with whom or how it would operate.

8. If the arrangement of the setting up and operation of a Hong Kong airline is such that its autonomy to continue the business is not protected in the eventuality of the termination of a licence agreement or other service contracts, it indicates that it is not exercising independent control and management of its own airline business.

9. Furthermore, there should be no prohibition in its operation such that it would not be precluded from competing fairly in the open market with other airlines, including that of any shareholder.

#### ATLA's views on JHK's PPB

10. Having considered all relevant information including the submissions and evidence JHK and the objectors presented at the public inquiry, the views of ATLA are:

- (a) JHK cannot make its decision independently from that of the two foreign shareholders in accordance with the provisions of the Shareholders' Agreement;
- (b) JHK's business is mandated to be linked with the Jetstar Group by reason of the definition of 'business' under the Shareholders' Agreement and the requirement to enter into a business service agreement ("BSA") with the Jetstar Group as Licensor;
- (c) Ultimately all network decisions are to be made by JHK subject to the decisions of the Flying Committee which comprises two representatives from China Eastern Airlines ("CEA") Group, one from Jetstar Group and one from JHK. The two foreign shareholders, CEA Group and Jetstar Group, will have a majority over JHK in relation to decisions that would have to be made by the Flying Committee;
- (d) There are references to Strategically Sensitive Routes and Restricted Routes under the Shareholders' Agreement whereby JHK cannot operate such routes. Also, routes flying to and from the mainland China are not dealt with or decided by JHK but the Flying Committee. The existence of these categories and its prohibitions or limitations under the Shareholder's Agreement indicates that JHK cannot decide for itself whether or not to pursue routes which may otherwise be profitable operation for its business;
- (e) Request for changing Flying Parameters by JHK, if unresolved by the Flying Committee, will be referred to the day-to-day managers (CEO or equivalent) of CEA, the Jetstar Group and JHK for resolution and ultimate decision;
- (f) The Flying Committee does not only have the purpose of ensuring profitable operation of JHK, but also with that of the airlines of the other two shareholders because it reviews and decides matters on the network planning arrangement to ensure profitable operation of JHK in conjunction with the operation of CEA members and Jetstar Group members;
- (g) As to network decisions, JHK is only there to provide advice and guidance but all network decisions will be discussed and validated through JET (which is the Licensor's executive arm comprised of the Jetstar Group CEO, his or her direct reports and the CEOs (or their delegates) of such members of the

Licensed Group as determined by the Licensor from time to time) prior to final approvals;

- (h) The Chairman of JHK Board may be nominated by Shun Tak but the appointment and approval of the Chairman requires Board Extraordinary Approval which requires a vote from one Director nominated by CEA and one Director nominated by Jetstar Group. In other words, the appointment and removal of the Chairman would necessitate approval of the two foreign shareholders' directors. The right of Shun Tak to nominate the Chairman is therefore heavily qualified;
- (i) The quorum of the Executive Committee ("Excom") of JHK is three members comprising one from Shun Tak, one from CEA and one from Jetstar Group. This has restricted Shun Tak's effective control over the decision of the Excom, not to mention those matters described in the Excom Authority Matrix that require unanimous consent of all Excom members present at the meeting. This shows that Shun Tak's control over the decision of the Excom is subject to the agreement of members from CEA and Jetstar Group;
- (j) Shareholders will make decisions by Shareholder Approval (meaning a resolution passed by an affirmative vote of more than 80% of the votes cast by the Shareholders present and entitled to vote). In other words, no Shareholder Approval could be reached unless it is with the support of the two foreign shareholders;
- (k) The appointment or removal of the JHK CEO (and of the Chairman as explained above) requires Board Extraordinary Approval. The fact that under the Shareholders Agreement, Jetstar Group has the right to nominate JHK CEO for appointment and JHK CEO has a dual reporting line to both Jetstar Group and JHK Board has cast doubt on whether JHK CEO can act independently and only in the interests of JHK;
- (l) The Shareholders Agreement obliges JHK to closely align its business with the business of the Jetstar Network Group, and to continue to do so in the future to ensure that the profitability and coordination of Jetstar branded airlines is achieved as underlined in the BSA;
- (m) The BSA is not a mere licence of intellectual property relating to software

and branding. In operating as a licensed Jetstar branded airline, JHK is to surrender the right to determine its own network, fare structures and other flight-related matters to the Jetstar Group under the BSA;

- (n) JHK is using the brandname of the Jetstar Group and there is no other provision under the Shareholder's Agreement for it to change its business model. The consent and willingness of the Jetstar Group to continue its services as well as licensing under the BSA become vital to the business of JHK;
- (o) For dispute resolution under the BSA, it will be dealt with through JET (as mentioned in (g) above). The Jetstar Group CEO must have regard to the benefit of all members of the Licensed Group;
- (p) Under the BSA, the pricing mechanism is actually determined by the Licensor who is empowered to set the level of all fees and surcharges, the related fees and charges etc.;
- (q) Under the BSA, JHK has no freedom to operate and obtain licence from any other airlines to operate LCC; and
- (r) Even there is no dispute that the day-to-day management of JHK would be conducted in Hong Kong and managed by the JHK CEO in Hong Kong, as the cases unequivocally indicate, that is not sufficient to establish and meet any PPB criteria.

### Conclusion

11. In the light of the above, ATLA decides that JHK does not have its PPB in Hong Kong and hence refuses JHK's application for licence.

12. For details of the applicable legal principles, the evidence considered and the conclusion of ATLA in this case, please refer to the full written decision. Should there be any discrepancies between this summary and the full written decision, the full written decision shall prevail.

ATLA Secretariat  
25 June 2015