



Australian Government

International Air Services Commission

DECISION

Decision: [2013] IASC 221
Variation of: [2009] IASC 133
The Route: Thailand
The Applicant: Virgin Australia Airlines (SE Asia) Pty Ltd
(Virgin Australia) ABN 79 097 892 389
Public Register: IASC/APP/201323

The Commission's delegate varies Determination [2009] IASC 133 to add a condition allowing the capacity to be used by Virgin Australia to provide services jointly with Air Berlin.

1 The application

1.1 On 15 May 2013, Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia) applied for a variation to Determination [2009] IASC 133 (the Determination) which allocates 3.15 B747 equivalent services of capacity per week in each direction on the Thailand route under the Australia-Thailand air services arrangements.

1.2 The application proposes that Air Berlin will code share, as marketing carrier, on flights operated by Virgin Australia between Phuket and Perth.

1.3 The Commission published, on 15 May 2013, a notice, in accordance with section 22 of the Act, inviting submissions about the application. No submissions were received.

1.4 Virgin Australia advised the Commission on 2 July 2013 that it intends to commence its code share services with Air Berlin on the Thailand route from 1 August 2013.

1.5 All non-confidential material supplied by the applicant is available on the Commission's website, www.iasc.gov.au.

2 Air services arrangements

The Australia-Thailand air services arrangements signed on 4 July 2008 allow the designated airline(s) of Australia to enter into code-sharing arrangements, as the operating airline, with any airline(s) of a third country on any number of frequencies per week within its allocated entitlement.

3 Delegate's assessment

3.1 In accordance with section 27AB of the *International Air Services Commission Act 1992* (the Act) and regulation 3A of the International Air Services Commission Regulations 1992, the delegate of the Commission may consider the application for variation. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

3.2 Virgin Australia's application seeks to vary the Determination to include a condition of a kind referred to in paragraph 15(2)(e) of the Act. In view of this, the application is a transfer application as so defined in subsection 4(1) of the Act and will have to be assessed in accordance with section 25.

3.3 Subsection 25(1) provides that the Commission must make a decision varying the determination in a way that gives effect to the variation requested, subject to subsection 25(2). Subsection 25(2) states that the Commission must not make a decision varying the determination in a way that varies, or has the effect of varying an allocation of capacity if the Commission is satisfied that the allocation, as so varied, would not be of benefit to the public.

3.4 Under section 26 of the Act, in assessing the benefit to the public of a variation of an allocation of capacity, the Commission is required to apply the criteria set out in any policy statement issued by the Minister under section 11.

3.5 Pursuant to section 11 of the Act, the Minister issued Policy Statement No. 5 dated 19 May 2004 (the Policy Statement). The Policy Statement sets out the range of criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity. It also provides other guidance to the Commission in performing its functions.

3.6 Paragraph 6.3 of the Policy Statement provides that, subject to paragraph 6.4, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity, including to use the Australian capacity in a code share arrangement with a foreign carrier, and no submission is received about the application, only the criteria in paragraph 4 of the Policy Statement are applicable.

3.7 Under paragraph 4 of the Policy Statement, the use of entitlements by Australian carriers under a bilateral arrangement is of benefit to the public unless such carrier is not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

3.8 The Commission notes that Virgin Australia is an established international

carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposal. This means that there is public benefit arising from the use of the entitlements.

3.9 Paragraph 6.4 allows the Commission to apply the additional criteria in paragraph 5 of the Policy Statement in circumstances set out in paragraph 3.6. Under paragraph 3.6, where capacity that can be used for code share operations is available under air services arrangements, including where foreign airlines have rights to code share on services operated by Australian carriers, the Commission would generally be expected to authorise applications for use of capacity to code share. However, if the Commission has serious concerns that a code share application (or other joint service proposal) may not be of benefit to the public, it may subject the application to more detailed assessment using the additional criteria set out in paragraph 5 (whether the application is contested or not). Before doing so, the Commission will consult with the Australian Competition and Consumer Commission (the ACCC).

3.10 The Commission does not have serious concerns that the use of the capacity on the Thailand route in joint services with Air Berlin may not be of benefit to the public. The Commission notes that as per decision [2013] IASC 201, Etihad is permitted to codeshare on services operated by Virgin Australia on this route.

3.11 Air Berlin is the second largest airline in Germany and sixth largest in Europe. It is a publicly listed company, with Etihad as its largest shareholder having 29.21% of issued capital. Air Berlin is a full service airline operating out of four hubs: Dusseldorf, Berlin, Vienna and Palma de Mallorca and operates flights to 162 destinations in 40 countries, mostly in Europe. The airline, however, does not currently operate any flights into or out of Australia.¹

3.12 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions as it thinks fit. Paragraph 15(2)(e), however, requires the inclusion of a condition in a determination stating the extent to which the carrier may use that capacity in joint services with another carrier.

3.13 The delegate, on behalf of the Commission, will authorise the use of the capacity by Virgin Australia in joint services with Air Berlin. The delegate will vary the determination as requested by Virgin Australia.

3.14 Nothing in this decision, however, should be taken as indicating either approval or disapproval by the ACCC. This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

¹ Source: the Australian Competition and Consumer Commission (ACCC) 25 July 2012 Determination granting authorisation for Etihad and Air Berlin to give effect to a commercial alliance.

4 Decision [2013] IASC 221

4.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, varies Determination [2009] IASC 133, which allocates 3.15 B747 equivalent services of capacity per week in each direction on the Thailand route under the Australia-Thailand air services arrangements, by:

adding the following conditions to the Determination:

- “the capacity may be used by Virgin Australia to provide services jointly with Air Berlin in accordance with;
 - the code share agreement between Virgin Australia and Air Berlin dated 28 June 2013; or
 - any subsequent code share agreement between Virgin Australia and Air Berlin, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under the code share agreement with Air Berlin, Virgin Australia must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking. Nothing in this determination exempts Virgin Australia from complying with the Australian consumer law; and
- under the arrangements with Air Berlin, Virgin Australia may only price and market its services, or share or pool revenues/profits on the route jointly with Air Berlin as long as such practices are authorised by the ACCC under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal.

Dated: 8 July 2013



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners