



CASE STUDY 06

SEPTEMBER 2013

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**ABUSE OF DOMINANCE: M.P. MEHROTRA v. JET AIRWAYS (INDIA) LTD. & ORS.\***

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**Forum:**

Competition Commission of India (CCI)

**Section referred:****The Competition Act, 2002;<sup>1</sup>**

1. Section 2(b) - "agreement".
2. Section 2(h) - "enterprise"
3. Section 2(l) - "person"
4. Section 3 - "Anti-competitive agreements"
5. Section 4 - "Abuse of dominant position"

**Parties to the case:**

1. Informant: M.P Mehrotra
2. Opposite Parties (OPs)
  - a. OP1: Jet Airways (India) Limited.
  - b. OP2: Kingfisher Airlines Limited.
3. Investigator: Director General (DG), CCI.

**Facts of the Case:**

The present information has been filed by the informant on 26<sup>th</sup> July 2009 u/s 9 of the Competition Act 2002. It has been alleged by the informant that OP1 and OP2 hold 60 per cent of the total air passengers and the alliance entered into between the two, is an exclusive arrangement that may have an appreciable impact on competition. Their dominant position is undermining the ability of the others to operate on a level playing field. The Opposite parties hold a cartel and have violated section 3 of the Competition Act, 2002.

**Issues and Arguments advanced:****Issue 1: Whether there is an existing alliance between the Opposite Parties?**

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<sup>1</sup> Hereinafter referred as 'the Act'.

\* M.P. Mehrotra v. Jet Airways (India) Ltd. & Kingfisher Airlines Ltd.; Competition Commission of India, case no 04/2009, decided on 11/08/2011, available at <http://www.cci.gov.in/May2011/OrderOfCommission/JetAirDissenOrder180811.pdf>

The Opposite parties argue that there is no formal agreement between them but only a proposed cooperation between the airlines to rationalise/reduce costs and improve the state of services. There is no intention of functioning as a group. Also, a public announcement cannot be taken as a decision u/s 3 of The Act construed. Moreover, the parties argue that section 3 only applies to those agreements which continue to operate after 20.05.2009. OP2 states that with respect to the agreement, the Commission does not have jurisdiction to investigate into matters prior to 20.05.09 and section 3 and 4 do not retrospectively affect, thus, there should be no penal consequences of the same.

On the other hand, the DG in its findings concludes that the agreement entered into between OP1 and OP2 still subsists because there is no evidence to prove otherwise. Thus, the strategic alliance is still present.

**Issue 2: Whether the agreement reflects any commercial intent between the parties, resulting in a cartel?**

The parties argue that there is no cartel agreement but only an interline agreement for smooth flow of services, which is a fairly standard agreement. OP1 stated that it has Multilateral Interline Traffic Agreements (MITA) agreements with more than 140 International Air Transport Association (IATA) carriers and it is a general commercial practice in the aviation industry. Prices or any part of the market is not controlled by the OPs, therefore, there is no cartel like behaviour. The Interline Electronic Ticketing agreement (IET) is of a technical nature and does not involve any commercial benefits; moreover, OP1 has

IET agreements with more than 80 IATA carriers. It is stated that it is only a technical move to provide services and OP1 has similar agreements with Air India.

On the other hand, then findings of the DG indicate that there is a commercial intent behind the agreement, reflected from the statements given by both parties.

### **Issue 3: Whether there is abuse of dominant position by the Opposite Parties and indulgence in Price Parallelism?**

The Opposite parties argue that the agreement is not anti-competitive in nature but simply a matter of sensible and prudent management of resources. The parties are operating separately and independent of each other. The Parties also deny the allegation of price parallelism. OP1 argues that ATP Company is the lens through which it watches its competitors and then decided its own fares. The seat availability is managed through a computerized revenue management system.

The DG concludes that the Opposite parties have a major share of slots as well as control of slots in the peak period, well indicated by statistics and figures. There is an alliance to enter into a Joint Network Rationalization to limit production and supply and to allocate markets which is violating Section 3 of The Act, though; the DG does not state any violation of section 4 of The Act. It is also stated by the DG that there is a very high degree of price parallelism between the two parties and the prices they are charging are higher than the prices charged by Air India.

#### **Observations of the Commission:**

The changing stands of the parties, inconsistent submissions before forums, joint actions to reduce costs and improve efficiency, indicate a definite alliance and extent of operationalization. Also, the cooperation and coordination between the parties on the subject matter of alliance is sufficient for it to be

covered u/s 2(b) of the Act. Therefore, the announcement was a mere formality and alliance for profitability, aimed at individual interests of both parties, already existed.

1. The agreement is held void u/s 3(2) of the Act as it causes an appreciable adverse effect within India and thus attracts Sections 3 (1) and 3 (2) of the Act. It also creates entry barriers for new players. As for the Abuse of dominance, the OPs controlled nearly 59 per cent of the market. The activities of the two airlines lead to decrease in seats and increase in prices which is in contravention with section 4(b)(i) of the Act. The Commission concludes that the entire idea was to create a colossus so that the other operators in the industry would not be in opposition to match them.
2. There is very high degree of price parallelism in violation of section 3 of the Act. The conduct of the parties in increasing fuel surcharges and ticket prices appears to be actions in concert. Thus, the OPs are guilty of unfair conditions of service u/s 4(2)(a)(i).

#### **Analysis of the Order:**

Abuse of dominant position takes place when a position of strength is enjoyed by the enterprise, having substantial market power, over and above the competitors or other market players. It enables the enterprise to operate independently of market factors and affect the market position of the other competitors negatively. There are number of factors required to assess dominant position, such as, market share, economic size of the competitors, customer base, size and resources of the enterprise and others. The present case is a perfect example of the same, where due to the alliance of the two major airlines, the market position of other players was being hampered. The market share of the two airlines which is about 59 per cent is sufficient to denote their market size and the constituents of the agreement entered into is a clear indicator of a well nit approach towards commercial gain.

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