

CASE OF JET AIRWAYS (INDIA) LIMITED AND ETIHAD AIRWAYS PJSC* (Combination Regulation)

Forum:

Competition Commission of India (CCI)

Legislative Provisions Referred:

Competition Commission of India Regulations, 2011

1. Regulation 14 – Procedure in regard to the transaction of business relating to combination.¹
2. Regulation 16 – Intimation of any change.²

Parties to the Combination:

1. Jet Airways (India) Ltd. (Jet)
2. Etihad Airways PJSC (Etihad)

Facts of the Case:

The Government of India (GoI) liberalised its FDI Policy and set a 49% cap for foreign investments in Civil Aviation Sector in India. In 2013, Etihad, a company incorporated in the United Arab Emirates (UAE), a national airline of UAE, proposed to acquire 24% in Jet, a listed company incorporated in India. Etihad is wholly owned by the Government of Abu Dhabi and is primarily engaged in the business of international air passenger transportation services, commercial holiday services and cargo services. It is also stated to hold 29.21 percent equity in Air Berlin; 40 percent equity in Air Seychelles; 10 percent equity in Virgin Australia and 2.9 percent equity in Aer Lingus. Jet on the similar lines, is primarily engaged in the business of providing low cost and full service scheduled air passenger transport services to/from India along with cargo,

* Notice u/s 6(2) of the Competition Act, 2002, given by Etihad Airways PJSC and Jet Airways (India) Limited. Combination Registration No. C-2013/05/122. Decided on: 12.11.2013. Available on:

www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-05-122%20Order%20121113.pdf

¹ Hereinafter referred as Regulation 14.

² Hereinafter referred as Regulation 16.

maintenance, repair & overhaul services and ground handling services.

The proposal got approved by the Security Exchange Board of India (SEBI), the Foreign Investment Promotion Board (FIPB) and Cabinet Committee of Economic Affairs (CCEA).

Thereafter the Investment Agreement, Shareholders Agreement and a Commercial Co-operation Agreement between Jet and Etihad were submitted to CCI for its approval. This has been considered as a landmark case in the aviation sector, as CCI examined the details of the impact caused by the deal on air passenger services and consequently on competition in India.

Issue Raised and Observation thereupon

CCI while evaluating the proposed combination had to consider only one main issue whether or not such transaction between Jet and Etihad has an Appreciable Adverse Effect on Competition (AAEC) in India.³ Thus the observation is as follows:

Issue 1: Whether the proposed combination will have AAEC in India?

CCI while examining this issue first considered the 'relevant market' in the instant case, then whether such proposed combination will have AAEC on the relevant market.

Relevant Market

A relevant market in this case was concluded to be the market of international passenger air

³ According to procedure laid down under the Competition Act, 2002, the Commission has to first ascertain whether there would be any *appreciable adverse effect on competition in India* through a particular combination, its only if they conclude in positive that investigation by Director General is initiated.

transport based on the point of origin or point of destination (O&D). Thus, each such O&D constituted a different route, and hence each different route, constituted a different relevant market. To ascertain relevant market following points were considered:

1. Direct and Indirect flights between O&D being substitutable.
2. Indirect flights by competitor between O&D being substitutable.
3. Different classes of passengers, and inflight services rendered to different classes, being substitutable.
4. Time and price sensitive passengers (Business/Holidays).
5. Etihad being not operating in domestic (Indian) aviation sector and India's open skies policy in respect of international air cargo transportation.

Thus, CCI concluded that the relevant market in the instant case would be pertaining to:

1. O&D from or ending in 9 cities in India to/from UAE.
2. O&D from or ending in India to/from international destinations on the overlapping routes of the parties to the combination.

Appreciable Adverse Effect on Competition

Now that the relevant market was defined, CCI ventured into ascertaining, whether or not there would be any AAEC pertaining to such routes. CCI stressed upon the relevancy of trans-boundary competition, as routes were international, while ascertaining AAEC through this proposed combination. It was observed that there were 38 routes to/from India to other destinations where Etihad and Jet fly and there was at least one competitor on each of such route. Except 7 destinations, where Jet and Etihad had a combined share of more than 50 percent, rest all destinations had less combined share. Also of these 7 destinations, on 3 routes, the share of one was more than 50 percent and of the other less than 5 percent. Thus, post transaction change in the market share was observed, not to marginally alter the competition dynamics.

However, CCI observed that when considering the network effects, the assessment must go beyond the O&D pairs and consider potential network

effects of the proposed combination. It was noted that the complementarity of routes of Jet and Etihad makes the network effects stronger. Hubs, increased access to gates, slots and other infrastructure interfaces that link markets. Competition was observed to be increasing among systems rather than on point to point O&D pairs. Therefore, high market shares of Jet (India) and Etihad (Abu Dhabi), in their respective hubs, do not imply lack of competition.

Abu Dhabi as the exclusive hub

As per the clauses of CCA, it was required that Jet will use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, North and South America and the UAE and that there would be certain O&D where Jet cannot code share with other airlines. It was mooted that such restriction over code share can lead to market foreclosure and thereby inciting abuse of dominance on such routes in the absence of other strong competitors. But as all such routes had credible competition from eminent aviation players, which would constraint the market power of Jet-Etihad, competition concern from the concentration of market share was eliminated.

Decision as per Majority Ruling:

CCI observed that airlines alliance results in improving and expanding services and thereby inducing competition in that sector. It also postulated that the proposed combination may pave way for other similar combinations by other stakeholders and thereby rising competition in the sector. CCI also considered the importance of the proposed equity infusion, as Jet has been facing certain financial crisis, therefore such combination would allow Jet to continue to compete effectively in the relevant market in India and internationally. Therefore in the light of the abovementioned reasoning and observations, CCI concluded that the proposed combination is not likely to have AAEC in India and therefore the combination was approved with a caution that the approval is based on the information/details as provided by the parties and in case of any modifications later on, fresh approval should be sought. Also, it was incumbent upon the parties to ensure that this ex-ante approval does not lead to ex-post violation of the provision of the Act.

Decision as per Minority Ruling:

The minority ruling in the case, holding that there would be AAEC in the international air passenger transportation market, was based upon the observation that:

1. Incorporation of frequent flyer participation (FFP) policy will tie down the consumers and thereby are likely to create entry/expansion barriers, making it difficult for competitors/new entrants to shift the parties' customers to their network.
2. The substitutability approach with reference to airports, that has been observed by CCI and asserted by the parties, is found on wrong principles. As air services to the different airports in India-UAE sector are not treated as substitutable products by the consumers, and even by the airlines themselves.
3. The presence of competitors has been on all routes, however, it is observed that Jet and Etihad are the only remaining competitors in the Delhi - Abu Dhabi direct route; and the proposed combination will eliminate the competition between Jet and Etihad as they are likely to effectively operate as one airline pursuant to the proposed combination.
4. Also, airlines providing one-stop services can only be considered as remote competitors neither exerting nor likely to exert any significant competitive constraint on the parties.

Therefore, it was concluded by minority order that, the proposed combination is likely to cause an appreciable adverse effect on competition within the market of international air passenger transportation from and to India, and investigation was necessary to be called upon.

Analysis of the Order:

As mentioned, this case has been a first by CCI, wherein it examined the combination arrangement between two airlines. CCI decision has primarily been based upon the observation that there has been sufficient competition in the relevant market and therefore it is not likely that there would be AAEC in those markets. This approach has been said to be inspired from the decision in the merger between British Airways

and Iberia, wherein, European Commission held that the said merger will not affect competition till the time effective and credible competitors are there in the relevant market.

As already mentioned the proposal was approved by SEBI, FIPB and CCEA and different approval was sought under FEMA. The case involved many regulators, including CCI, looking in to various aspects of this deal. Furthermore, this particular case has been the case where, CCI decided upon AAEC without getting into investigation and basing its conclusion majorly upon the information/details provided by the parties. And therefore re-emphasising the idea that where the material available is sufficient to form opinion for the purpose to ascertain the issue in a combination case, investigation is not necessary. However, the dissenting ruling asserted the need for investigation for giving approval to the proposed combination. It should be noted that the decision has been clear, that in case of any incorrect information or in case of any modification in the proposed combination, fresh approval would be sought by the parties.

Having said that, post its decision, CCI has imposed Rs. 1 crore penalty under section 43 of the Act⁴, on Etihad for consummating parts of the deal without getting its approval. Etihad in February this year purchased three Heathrow airport slots of Jet Airways for \$70 million and leased it back to the Indian airline ahead of the deal. Despite the matter being pending for approval, the two parties entered into an agreement which was not disclosed to CCI. However, the said penalty will have no bearing on previous approval of the Jet-Etihad deal by CCI. Meanwhile, Competition Appellate Tribunal has admitted a plea challenging CCI's approval for the said deal.

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⁴ Section 43 of the Competition Act, 2002- Penalty for failure to comply with the directions of the Commission or Director.