

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS (ISSN 2582 – 6433)

VOLUME I ISSUE VII
(DECEMBER 2020)

Email - editor@ijlra.com

Website - www.ijlra.com



IJLRA

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

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CASE ANALYSIS ON: ETIHAD AIRWAYS PJSC & JET AIRWAYS (INDIA) LTD.

-AVANI VIJAYAN, BENSHA C SHAJI & ANGEL SHAJI¹

INTRODUCTION

Combination Registration No. C-2013/05/122

Decided by: Competition Commission of India on 12/11/2013 (Panel headed by Ashok Chawla (Chairman) Geeta Gouri, M.L. Tayal and S.N. Dhingra (other members))

In air transportation context, and also for the CCI, this case serves as a landmark ruling. By integrating FDI into the air transport sector, the Govt of India allowed up to nearly 50% of the sectoral cap, culminating in this combination and foreign direct investment in the Indian airline industry, stimulating the economy of efficiencies, activity at Indian airports, and the development of job prospects across the aviation and tourism industries. All parties gained immensely with exposure to a more advanced global network, increased accessibility for tourists, business travellers and the wider flying population. The government has made progress with this agreement as it allowed passengers from both countries to fly and also influenced country's GDP growth. On Nov 20, 2013, Etihad Airways concluded a deal to subscribe to a 24% minority stake in Jet Airways. A combined network of 140 destinations worldwide provides for this alliance.

By analysing deals, regulations and various other facets of competition in the airline industry that are already in place, such as services, costs etc, the CCI comes into the picture to check if this agreement would have any AAEC on the Indian airline industry. Each phase of the JET Airways and Etihad Airline combination agreements was seen affirmative by CCI and thus granted permission to complete the combination. Security Exchange Board of India (SEBI), Foreign Investment Promotion Board (FIPB) and the Cabinet Committee of Economic Affairs (CCEA) have also sanctioned this initiative. Subsequently, the Investment Agreement, the Shareholders Agreement and the Jet-Etihad Commercial Cooperation Agreement were presented to CCI for approval.

¹ Avani Vijayan, Bensha C shaji, Angel Shaji, LL.M, Christ University Bangalore

FACTS:

Jet Airways (India) Ltd & Etihad Airways PJSC were the parties to the combination. A UAE-based company named Etihad, which is a UAE domestic airline, offered to purchase 24 percent of India-based Jet, a listed company. Etihad is wholly government-owned. Abu Dhabi and is primarily involved in international air passenger services, etc. Jet Airways was a listed company registered under the Companies Act 1956, has been required to supply low cost and full-service timetabled flights services to and from India including the cargo, servicing, maintenance, etc.

CCI received a notice released by Etihad Airways and Jet Airways in May 2013 under Sec 6(2) of the Competition Act. Under The combination Regulations of the Act, i.e. Until 28 May 2013, Regulation 14 obliged the Contracting Entities to remove certain defects as well as to provide records. The Contracting Parties submitted their reply on 3 June 2013 after requesting an extend of the deadline.

By 29 Oct 2013, Air India was requested, by Regulation 19(3) of the Combination Regulations, to submit its views on the proposed combination to CCI. Upon requesting a time extension twice, Air India submitted its reply on 8 Nov 2013, addressing two main risks on a wide basis, respectively. The alliance's effects on the competitive market of the path between India and Abu Dhabi and the alliance's effects on Indian airlines and Air India. In the evaluation of the combination, these questions were recognized and answered.

RULES (LAWS) INVOLVED IN THE CASE:

CCI Regulations, 2011

- Regulation 14
- Regulation 16
- Sec 6 and Sec 20 of the Competition Act, 2002

DECISION:

The viewpoints held by the CCI representatives, a few in support of such a combination, and some were opposed to such a combination, would have a negative impact on the market and

will hinder good competition among airlines. Taking into account the evidence on the ground and the data gathered in the notice provided for in Section 6(2) of the Act and the related factors referred to in Section 20(4) of the Act, CCI noted that the agreement of airlines contributes to the enhancement and expansion of operations, hence increasing competition in the market.

Thus it asserted that the combination proposed could lay the foundation for many other related combinations by other investors and thus increase competition in the market. The value of the planned investment contribution was also taken into account by CCI, Jet Airways was experiencing this certain recession, such a combination could allow Jet to remain competitive successfully in the relevant Indian and global markets. CCI stated that the proposed combination isn't really likely to have AAEC in India and also that the combination was thus accepted with care that the agreement was permitted. It was also obligatory on the companies to guarantee that this former approval did not result in an ex-post infringement of the Law's requirements. And by Section 31(1) of the Act, the CCI therefore allows the same matter. However this acceptance shall have no effect on the procedures referred to in section 43A of the Act.

REASONINGS:

Whether the proposed combination was probable to provoke AAEC in India was the crucial problem before CCI. CCI initially examined the relevant market in order to analyse the effect of the new combination. CCI observed that the relevant market for commercial air transportation was usually specified on a non-directional basis i.e O&D points(origin and destination points). Thus, from the viewpoint of customers, each O&D pair made a separate market. 2 airports could be considered to be part of almost the same market and an O&D pair could be replaced in some instances.

CCI also argued that customers should deem nonstop flights and intermediate flights to be replaceable. CCI noticed that this airline substitution could be calculated by various other factors and it was therefore plausible that indirect competitive flights could be seen as an alternative for customers.

CCI further indicated that it was necessary to recognise new categories of passengers in the demand-based approach and suggested that various systems would replace new categories of passengers. CCI acknowledged that there are now time-sensitive passengers and price-sensitive passengers, and it'd be necessary to investigate the impacts of the new combination

with both groups of passengers in accordance with these terms. CCI considered that in order to evaluate the proposed combination, the impact of the proposed combination on the service rendered from both parties must be determined.

CCI found that the competition assessment is usually carried out outside its entry point traffic when considering market power and is not constrained to O&D points. CCI observed that, whether it be through alliances or strategic equity joint ventures, airline systems are established. Was also been shown that parallel Jet and Etihad routes also made the impacts of the network more successful. CCI acknowledged the economic advantages of integrating capital from Jet and Etihad and also recognized that it was not a lack of competition to solely have lot of competitors in an O&D pair.

ANALYSIS & CONTEMPORARY RELEVANCE OF THIS CASE:

Here, CCI has examined in much deeper level than many other cases, the effect of the proposed combination on Etihad and Jet Airways and its potential repercussions for India's competitiveness. In addition, a member issued a dissenting opinion regarding the Proposed Combination for the first time, and this was also shortly discussed. The Ruling takes a balanced and comprehensive approach to the examination and interpretation of the findings available, to the analysis of competition and to the drawing of inferences on the effects of the New Combination on competitive market. As well as helping to standardise the assessments carried out to show the social consequences of combinations, this CCI comprehensive analysis acted as a true reflection for future offers.

Under this case, for its first time, CCI was assessing a merger or agreement in the background of airline industries. CCI didn't specify any foreign judgments within this decision, however CCI's response was close to the European Commission's strategy to address competitiveness in the sense of combinations and operating agreements among airline industry. EC in the merger between British Airways & Iberia, analysed how the merger will not impact competition and how the new entity formed after the merger would tend to increase competition from several other companies as well². In the merger between Northwest Airlines and Delta Airlines, the EC approved the merger and observed that the abilities from

² European Commission - IP/10/938 14/07/2010, available at http://europa.eu/rapid/press-release_IP-10-938_en.htm

both airlines were complementary³ and also considered the purchase of Martinair by KLM⁴ where it investigated and subsequently authorised almost same evaluation.

But in the situation of Lufthansa's purchase of SN Brussels Airlines⁵, certain doubts were expressed by the EC, and as a result Lufthansa began making compromises. After reviewing those compromises, the EC sanctioned the purchase, where it had looked closer into the changes made complying to the norms suggested by EC⁶.

Here in this case the majority ruling was held by forming a clear opinion with the help of sec 31(1) of the act, but it was the dissenting opinion which led to the conclusion that an investigation needs to be ordered under the Act. The above-mentioned EC rulings indicate that if an option is given to a side, the commission's concerns can be mitigated.

The CCI technique gives guidance about the changes to be made to examine how AAEC is directly or indirectly influenced by a combination, and then this investigation will also enable the company evaluate whether or not such a planned agreement would be acceptable under the Act. The Majority Ruling's rationale and findings were focused on indisputable evidence and it's an immensely significant point since it explicitly puts the burden on the entities to actually prove their arguments before the CCI.

On the basis of its rationale, CCI reached the conclusion that it was unlikely that the proposed combination would have an AAEC and therefore, accepted the proposed combination. In addition, the Opposing Viewpoint argued that the information provided by the Contracting Parties could not have been checked independently and therefore the effect of the proposed combination could never be successfully investigated. Furthermore, it was not possible to disregard the negative effect of Jet leaving its code sharing agreement on competition. The Minority Opinion also argues that the O&D pairs tested may not explain absolute complementarities but also that the Majority Ruling's finding that there'd be no effects on competition may not be valid as a result. In the very same light, the Conflicting Opinion argues that it is just not possible to eliminate the likelihood of AAEC.

³ European Commission - IP/08/1245 06/08/2008, available at http://europa.eu/rapid/press-release_IP-08-1245_en.htm. The European Commission noted similar commercial principles in the case of merger between United Airlines and Continental Airlines, European Commission - IP/10/1010 27/07/2010, available at http://europa.eu/rapid/press-release_IP-10-1010_en.htm

⁴ European Commission - IP/08/1995 17/12/2008, available at http://europa.eu/rapid/press-release_IP-08-1995_en.htm,

⁵ European Commission - IP/09/129 26/01/2009, available at http://europa.eu/rapid/press-release_IP-09-129_en.htm.

After its judgment, under sec 43 of the Act, CCI placed a Rs. 1 crore penalty on Etihad for rekindling sections of the transaction without obtaining its authorization. Etihad bought Jet Airways' 3 Airport spots for \$70 million and rented them back to the Indian airline regardless of the contract. The 2 parties reached into an arrangement which has not been revealed to CCI, notwithstanding the issue being awaited for clearance. Such a fine would, have really no effect on CCI's authorisation of the Jet-Etihad contract. But then a complaint questioning the authorization of CCI for the above deal has been approved by the Competition Appellate Tribunal (COMPAT).

CONCLUSION:

This rational and flexible approach has been well envisaged by firms interested in entering into combinations at both the vertical or the horizontal and also at the domestically or internationally level.

It is significant to mention that the problem of foreign investment in India is mainly monitored by the Foreign Exchange Law Regulations (FEMA). So as a listed company, besides accordance with the guidelines under the Companies Act, 1956 (and possibly the Income Tax Act, 1961 , Jet is however forced to adhere with different guidelines made by SEBI. The CCI judgement authorises the proposed combination if from the point of view of competition in the market. The SC of India did not raise a problem concerning various regulators' competing jurisdictions, and it can be understood that the approval of one control board is not binding and hence does not constitute an accurate depiction of enforcement for the requirements of yet another regulator.

The SEBI considers the implications of the merged entity, while the CCI emphasizes on the implications of the merged entity outside the merged entity within the applicable market. The judgment of Jet/Etihad is relevant not just to break from the prior emphasis of the CCI on relating control to affirmative rights, but also to enable the SEBI to distinguish between the definition of control under the Competition Act and the understanding under the 2011 SEBI Regulations, i.e. the Takeover Code. Following the CCI ruling, the SEBI were relied upon to decide if Etihad had in fact gained control" over Jet, that will give rise to the necessity under the Takeover Code and make an open bid. To distinguish between the aim and intent of the Competition Act and the Takeover Code, SEBI held that the criterion under the Competition Act of "control over affairs and management" was much broader than the condition under the Takeover Code of "control over management or policy decisions.

As a result regulators like CCI started experimenting with new facets of this agreement. In addition, this specific case was the situation in which without going into investigative process, CCI concluded on AAEC and based its assumption largely on the input provided by the entities. Consequently, re-emphasizing the concept that if the info available is satisfactory to make a judgment for the determining the concern in a combination case, no need for an investigative process. The opposing ruling, nevertheless, argued necessity for investigation in attempt to grant the proposed combination permission. It must be acknowledged that it was apparent from the decision that in the event of any wrong data, or in the event of any change of the proposed combination, the parties would indeed be required to obtain new permission.

