



“CCI’S IMPLICATIONS ON MERGER CONTROL REGIME IN JET-ETIHAD CASE” *

ABSTRACT

The Competition Commission of India recently approved the largest investment in the Indian aviation sector. The clearance decision provides important lessons about the Commission’s approach in reviewing composite merger transactions in India. The decision marks the first: dissent of the Indian competition bench in the area of merger control, merger approval to be challenged (on merits), competitive analysis of collaborative ventures under Indian competition law, besides being a rare instance where the Commission analyzed the concept of ‘control’ under Indian merger control law. The research paper mainly focus upon how CCI’s decision has given a clear picture in relation to the merger control regime in India and what have the lacuna in the decision which might affect the merger transactions.

I. INTRODUCTION

The very first ever investment by foreign airline in Indian airline which is worth \$339 million with the proposed acquisition of 24 % stake equity by the Etihad Airways (herein referred to as Etihad) in Jet Airways India Limited (herein referred to as Jet) has been approved by the Competition Commission of India (herein referred to as CCI) on 12th November, 2013.¹ The decision (Jet-Etihad decision) is remarkable one as it has set up the detailed reference for future airline merger in India regarding its competitive assessment and also the competition commission has marked the first dissent in the Indian merger control. The decision was divided between two opinions, that are, firstly, the majority decision² of the CCI where the 24 % equity investment by Etihad into Jet was approved by the commission and second one was the minority decision³ who required a detailed investigation for the purpose of analyzing the

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¹ The acquisition was notified by the CCI on 1st May, 2013. The parties submitted additional information to the CCI for correcting previous defects in information or in response of clarifications and questions raised by the CCI on 3rd June, 21st June, 30th August, 9th September, 14th October and 30th October, 2013

² Order of the CCI dt. 12th November, 2013 in Combination Registration No. C-2013/05/122. Decision Available at <http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-05-122%20Order%20121113.pdf> (last accessed on

³ Minority order of the CCI dt. 12th November, 2013 in Combination Registration No: C-2013/05/122. Decision available at:

[http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/FINAL%20Order%20M\(AG\)%20-%20141013.pdf](http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/FINAL%20Order%20M(AG)%20-%20141013.pdf) (Last accessed on

competition assessment by the Director General (herein referred to as DG), the investigative arm of the CCI.⁴

The Jet-Etihad transaction is the first merger approval decision of the CCI which has been challenged before the Competition Appellant Tribunal (herein referred as COMPAT) of India.⁵ This might cause the delay of the functioning of the transaction as the guideline and the specific time limit within which the COMPAT will decide the appeal has not been specified and a further appeal for the decision of COMPAT can also be challenged before the Supreme Court (herein referred as SC) of India. These developments could impact the Mergers and Acquisitions (M&A) activity in India directly as it will hinder the ability of Indian deal makers to stick to their deal timelines. Through the decision of the CCI on the Jet-Etihad deal, the deal makers will have the opportunity to understand the treatment of collaborative agreements, joint ventures and concept of control by a minority investor under the Indian merger control laws and economic evidence in the competitive assessment.

II. THE PARTIES AND THE TRANSACTION

Prior to 2012, the foreign investment in India was not allowed by India. But the Indian government in 2012 allowed foreign airlines to own upto 49 % stake through the foreign direct investment (FDI) in any Indian airlines which opens the gate for Etihad⁶ to hold 24% equity in Jet Airlines. The deal between Jet-Etihad includes two factors. Firstly, 24% equity stake by Etihad into Jet and secondly, a Commercial Co-operation Agreement (herein referred as CCA) between the parties, through which some co-operative procedures will be agreed upon by the parties in relation to⁷:

- a) Joint route and scheduled coordination
- b) Joint pricing
- c) Joint marketing, distribution, sales representation and cooperation
- d) Joint/reciprocal airport representation and handling
- e) Joint/reciprocal technical handling, belly hold cargo and dedicated freight capacity on services in and out of Abu Dhabi, India and beyond

The parties agreed upon on making Abu Dhabi exclusive hub for services scheduled to and from Africa, North/South America and UAE for the Use of Jet and intended to establish centers either in India or Abu Dhabi. Further, Jet airlines was restricted from entering into any code sharing agreement with any other any other airlines which has the effect of (i) bypassing

⁴ The scheme of assessing an acquisition of shares/assets or mergers transaction under the Indian merger control regime includes a two phased process. The CCI based upon the information provided by the parties form a prima facie view regarding possible anti competitive effects of the proposed transactions in the relevant market under Phase I. If not satisfied by the prima facie view on absence of anti competitive effect then a detailed investigation by the DG is recommended under Phase II of its merger assessment. For further details on Indian Merger control laws, see Competition Act, 2002: Provisions relating to Combinations, Available at:

<http://www.cci.gov.in/images/media/Advocacy/Combinations2012.pdf> (last accessed on

⁵ The present appeal is only the second time the COMPAT has been asked to review a decision of the Commission in the area of merger control and is the first appeal which challenges a decision of the Commission on merits. The only previous occasion, where the COMPAT has reviewed a merger approval decision of the Commission was for the limited purpose of expunging certain particular observations of the Commission (see: *Telewings Communications Services Pvt. Ltd v Competition Commission of India*, Appeal No. 138/2012., dated January 3, 2013).

⁶ Etihad is a wholly owned company of the Government of Abu Dhabi and is primarily engaged in the business of international air passenger transportation services. The Jet-Etihad deal is proposed to make India Etihad's largest single country market.

⁷ *Supra* note 2

Abu Dhabi as the hub for traffic to and from the above locations; or (ii) is detrimental to the co-operation contemplated by the CCA.

III. APPROVALS REQUIRED FOR DEAL BY JET ETIHAD

In order to purchase the stake in jet, Etihad had to acquire a lot of approvals for its deals. The approvals so acquired include Foreign Investment Promotion Board (FIPB) approval, Cabinet Committee on Economic Affairs (CCEA) approval, Securities and Exchange Board of India (SEBI) approval under various regulations of Takeover Code and the CCI approval.

III.1 FIPB and CCEA Approval

FIPB approval is required by a foreign airline who intends to invest into a domestic airline. In order to sought the approval by FIPB, the Jet (herein the target company) filed before FIPB for seeking approval of preferential allotment of shares to Etihad. The application was laid down first before FIPB on 14th June, 2013 but it was delayed due to foreboding that the effective control of Jet might pass to Etihad which can further violate FDI policy.⁸ During the time period of delay of the deal, clarifications regarding the ownership and effective control of Jet after the effectiveness of deal were acquired by FIPB from Jet and Etihad. When the revised proposal was submitted by both the parties to FIPB, the approval was given subject to conditions that (i) Indian government's approval will be required prior to entering into any amendment to the shareholders' agreement by both the parties. (ii) Indian government approval will also be required for amending the change in shareholding of Etihad. (iii) Indian law will be applicable on the entire Shareholders' Agreement disputes.⁹ Further, the deal was also approved by CCEA on 3rd October, 2013.¹⁰

III.2 SEBI APPROVAL AND CONCEPT OF CONTROL

Under the SEBI Takeover Code, 2015, an acquirer together with persons acting in concert cannot acquire shares or voting rights in a target company which would entitle them to exercise 25% or more of voting rights in such target company without making a public announcement of an open offer.¹¹ Further, irrespective of any acquisition of shares or voting rights, if the acquirer directly or indirectly acquires control over a target company, then it must make a public announcement of an open offer which must be at least 26% of the total shares of the company for the acquisition of shares or voting rights from the public shareholders.¹²

Here, under the present case, the parties came up with the view that the thresholds for open offer under the Takeover Code were not met as per the deal hence Etihad doesn't need to come up with an open offer. The deal was then examined by SEBI for verifying if Etihad acquired control over the Target or if it was acting in concert along with the promoters. After the detail examination, SEBI made the view that there doesn't appears any prima facie change of control through the rights proposed to be acquired by Etihad and hence the provisions with respect to open offer under the Takeover code do not get attracted.¹³ SEBI also opined that Etihad will

⁸ 'Terms of Deal for discussions on FIPB concerns on the clauses in the Transaction Documents', Available at <http://fipb.gov.in/Forms/FIPBVIEW2011-13.pdf>

⁹ *Supra* note 2

¹⁰ Under the FDI Policy, any proposal with total equity inflow of more than INR 12,000 million requires the approval of the Cabinet Committee on Economic Affairs ("CCEA"), after the same has been approved by FIPB.

¹¹ Regulation 3(1) of SEBI (Substantial Acquisition of shares & Takeover) Regulations, 2011

¹² *Ibid*, Regulation 4

¹³ 'Jet-Etihad deal gets Sebi green signal; no open offer required', Economic Times, October 1, 2013 Available at: http://articles.economictimes.indiatimes.com/2013-10-01/news/42576616_1_abu-dhabi-based-etihad-commercial-cooperation-agreement-jet-airways

not be considered as the promoters of the Target and further SEBI has the right to declare Etihad as a promoter if it comes to the knowledge or declared by any other agency or regulator that Etihad is acquiring control over Jet.¹⁴

CCI observed that Etihad has joint control over the assets and operations of Jet through the governance code under CCA. Due to this observation SEBI decided to re-examine its decision and accordingly served a show cause notices (SCN) to promoters of Jet naming Naresh Goyal, Anita Goyal and Tail Winds Limited and Etihad for coming up with an open offer as per Regulation 4 of the Takeover Code alleging joint control over Jet by Etihad.¹⁵ The parties raised a number of contentions against the notice stating that the decision of SEBI should not be relied upon the observations and decision of CCI as the objective of CCI and Takeover code are different. Further, the CCA was executed merely for the purpose of expansion of networks by rationalizing costs. Also Etihad has no substantial right over the Jet regarding the transfer of shares. Taking these contentions into consideration SEBI held that no open offer is required under the Takeover code and concluded that the deal is in compliance with the FDI policy as it has already been approved by FIPB and CCEA.

Further, the definition of 'control' under Competition Act is much wider than Takeover Code as under the Competition Act control refers to controlling the affairs and management of the company dealing with the power to appoint majority of directors and taking decisions and hence SEBI isn't obliged to follow CCI decisions. Further, Etihad doesn't have complete controlling rights over Jet as Etihad could only appoint 2 directors out of 12 directors; it has lack of quorum rights in board as well as general meeting and doesn't even have veto or affirmative voting rights or tag along rights.

IV. TREATMENT OF JVs AND COLLABORATIVE AGREEMENTS

The joint ventures and collaborative agreements under the Competition Act are examined under the provisions regarding horizontal anti-competitive agreements¹⁶ or under the merger control regulations¹⁷ or under both. Those enterprises which are engaged in identical or similar trade of goods and services under joint venture agreement are presumed to be anti-competitive in nature as per Section 3(3) of the Competition Act, 2002. This can be negated if the agreement shows or proves that it will increase the efficiency in production, supply distribution, acquisition and control of goods and services. The Competition Act, 2002 doesn't provide for the concept of 'full function joint venture'¹⁸ and when there is no guidance by the commission, the treatment of joint ventures under the act remains uncertain. But the Jet-Etihad case has provided some recommendations on such uncertainty. CCA has the essentials of extracting the wider airline network and as per CCI it is the part of the Etihad's equity investment into Jet and could have been reviewed by CCI either under Section 3, 5 and 6 of the Competition Act, 2002.¹⁹ Accordingly, CCI suggested that collaborative agreements which are accompanied with share acquisition of merger where collaborative agreement is mandatory to fulfill the business objectives of the commission itself will be treated as a 'composite combination' under the Indian merger control regime. The treatment of stand-alone

¹⁴ Ibid

¹⁵ 'SEBI may re-examine its order on Jet-Etihad', CNBV-TV18, 16th December, 2013 Available at: http://www.moneycontrol.com/news/business/sebi-may-re-examine-its-orderjet-etihadhtml/sebi-may-again-take-up-open-offer-issue-in-jet-etihad-deal.aspx?utm_source=ref_article

¹⁶ § 3(3) of Competition Act, 2002

¹⁷ § 5 and 6 of Competition Act, 2002

¹⁸ A full function joint venture is the one which performs (on a lasting basis) all the functions of an autonomous economic entity (for example, because it has its own dedicated day-to-day management team, and access to resources such as finance, staff and assets).

¹⁹ Since § 3 of the Competition Act applies *ex-post*, for a joint venture agreement to be reviewed under § 3 of the Act, the agreement must have been implemented. The merger control provisions of the Competition Act, *i.e.*, § 5 and 6 apply *ex-ante*.

collaborative agreements or joint ventures under the Competition Act, 2002 still remains uncertain.²⁰

The Commission states that immunity will not be granted from the subsequent proceedings before the CCI if the approval of the transaction under Section 5 and 6 of the merger control provisions of the competition act, 2002 has been granted. Hence, if in future it appears or comes to the knowledge of the CCI that CCA's provisions are anti-competitive in nature or Jet-Etihad has become the dominant entity in the Indian airline industry then the proceedings under Section 3 or 4 of the Competition Act can be initiated against the parties.

V. CCI DECISION

The Jet-Etihad case is considered to be one of the most influential decisions by CCI as through this case, CCI has provided the detailed analysis of relevant merger market and competition assessment. The decision is based on the reasoning given by majority as well as minority opinion where competition bench has focused on the Indian merger control which is further challenged before the COMPAT.

V.1 COMPETITION ASSESSMENT

The Commission's competition assessment of the Jet-Etihad deal was undertaken for: (a) overlapping 'point of origin and point of destination' (O&D) pairs between nine cities and Abu Dhabi and (b) 38 other O&D pairs to/from India to other destinations where Jet and Etihad are presently competing with each other. On all the 47 O&D pairs, the Commission found the transaction would not alter the competitive scenario, or there were significant competing airlines that could restrain the combined market power of Jet and Etihad on such routes.²¹ The Commission considered competing airlines to include: (a) airline carriers providing indirect service between such O&D pairs and (b) airlines operating flights to one of the other airports which the Commission considered interchangeable with Abu Dhabi (*i.e.*, Dubai and Sharjah).

The Commission also considered the potential anti-competitive effects of the Jet-Etihad CCA, which required Jet to:

- (i) Use Abu Dhabi as the exclusive hub for its scheduled services to and from Africa, America and the UAE; and
- (ii) Cancel its code-sharing agreements with other airlines on certain O&D pairs, in order to flow its traffic through Abu Dhabi.

The Commission noted that it is conceivable that cancellation of code share agreements can lead to market foreclosure and abuse of dominance of such routes in the absence of strong competitors. However, the Commission's market study has revealed that on a majority of such O&D pairs, the combined market share of Jet and Etihad is less than 30 per cent and there are other credible competitors, which would constrain the market power of Jet-Etihad's combined operations.

In approving the acquisition, the Commission also noted the potential efficiencies that the proposed acquisition would create, including improved capacity utilization, lower transaction costs, lower fares for passengers travelling to smaller Indian cities, who would be able to seamlessly travel to international destinations without interlinking to Delhi or Mumbai and

²⁰Mayer Brown and Khaitan & Co 'Joint Venture under India's Competition Act', (February, 2011).

²¹ *Supra* note 1, ¶¶ 35-38

thus saving on interline fares. The acquisition would allow Jet and Etihad to expand their network and increase their traffic density on each city pair, allowing them to optimize their economies of scale and operate larger, more efficient aircrafts. The transaction would also mean better customer service, in terms of ticketing, seat selection, airport lounges, gate allocation for connecting services etc. The transaction also strengthens the operational viability of the currently debt beleaguered Jet, by providing with the much needed equity infusion, thereby allowing an important enterprise of the Indian aviation sector to continue to compete effectively in the relevant markets in Indian and internationally.²²

The minority opinion considered the market power of Jet Etihad's combined operations to be problematic on the Mumbai-Abu Dhabi and the Delhi-Abu Dhabi routes, where the combined market share of the parties, post combination would be 55 per cent and 50 per cent respectively. As per the minority opinion, Air India, the only other credible competitor on the abovementioned routes (the remaining being airlines which operate indirect flights and have less than 10 per cent of the market share), having a market share of 32 per cent and 24 per cent respectively, with its widely reported financial and fleet constraints, would not likely to be able to exert sufficient competitive constraints.²³ The minority also has expressed concern about the potential effect of the transaction on Jet's operations between certain Indian cities and Dubai and Sharjah where currently Etihad does not operate. As per the minority decision, under the Jet-Etihad CCA, Jet has agreed to use Abu Dhabi as its exclusive hub on certain international routes and transition out all of its current services to and from Dubai and Sharjah. As per the minority opinion, such stoppage of Jet's services to and from Dubai and Sharjah in future would weaken/eliminate the competitive constraints currently exerted by Jet on other airlines operating on such routes, leading to a potential rise of air fares on such routes.²⁴

The minority opinion also took note of the combined market share of Jet and Etihad for air traffic between India and North America, which at present is 42 per cent, and post-combination, could make them the largest carrier on this route.²⁵

V.2 THE APPEAL AGAINST THE COMMISSION'S DECISION

An appeal against the Jet-Etihad Decision has been challenged before the COMPAT, by Mr. Jitendra Bhargava, a retired executive director of Air India. Air India competes with Jet in the domestic and international markets and with Etihad in the international market. Mr. Bhargava has submitted that the Commission has failed to effectively carry out an independent assessment of the probable anti-competitive effect of the acquisition to the Indian aviation sector and in doing so, has placed all Indian air passengers and indeed the entire Indian airline industry in a grave risk of suffering irreparable damage by permanently eliminating competition.²⁶ He has further alleged that the Commission has conducted an "incorrect analysis" of the relevant merger market and had not taken third-party concerns on board.²⁷ He has prayed that the Commission's decision be set aside and it be directed to carry out a detailed Phase II analysis²⁸ in accordance with the provisions of the Competition Act.²⁹

²² Commission's case No. COMP/M.4439 – Ryanair/Aer Lingus (June 27, 2007). ¶¶ 41-45

²³ *Supra* note 2, ¶¶ 37.2-37.4

²⁴ *Ibid*

²⁵ *Ibid*, ¶ 18

²⁶ *Compat issues notices to CCI, Jet Airways*, Economic Times, December 19, 2013.

²⁷ *Former Air India exec Jitendra Bhargava appeals against Jet-Etihad deal*, Firstpost, December 12, 2013.

²⁸ *Supra* note 3

²⁹ *Former Air India executive moves Appellate Tribunal over Jet-Etihad deal*, The Hindu: Business Line, December 12, 2013.

The COMPAT has refused to put a stay on the Commission's approval but has agreed to hear the appellant further.³⁰ If the appeal is admitted and a stay granted on the Commission's decision, it could delay the functioning of the Jet-Etihad transaction indefinitely and could even ground the deal. Further, these developments will have a direct impact on the ability of Indian deal makers to stick to their deal time lines and could affect Indian M&A activity negatively.

Like many competition law jurisdictions, the merger approval process under the Competition Act is designed in a manner to provide finality of timing regarding the approval process. The Commission reviews potential transactions in two phases. In phase I, the Commission, based upon the information provided by the parties, forms a preliminary view about the probable anticompetitive effect of a proposed transaction. If the Commission is satisfied that the transaction would not cause any anti-competitive effect on the market, it approves the transaction. Otherwise, it recommends the transaction for a detailed investigation by the Director General (the investigative arm of the Commission) in Phase II of its merger assessment. Phase I review is required to be completed within 30 calendar days of notifying the Commission and Phase II of the investigation, if initiated, is required to be completed within 210 calendar days from the date of notifying the Commission.

VI. CONCLUSION

Despite the lacunas in the majority order, in the end, it is probable that the combination deserves clearance from the Commission. It is equally pertinent that the Indian aviation sector, due to faulty policies and flawed managerial choices, now requires such consolidation and investment. However, it warrants a debate as to why a combination proposal, into which so little in-depth research was conducted by the Commission itself in the first place, was allowed to be cleared. The order has itself observed that the parties were primarily responsible for the delay in clearance due to the innumerable times additional information as well as amended information was supplied and it was also agreed by the parties in an undertaking filed by them before the Commission that the parties would not raise an issue of elapsing of two hundred and 10 days, as there was a "continuing defect" due to the time period taken by the parties to submit the final transaction documents to the Commission, hence there really was no such urgency.

It is this hastiness to assess and clear which has resulted in so many questions being raised on different aspects of the combination and which ironically, may now prevent the conclusion of the transaction in this financial year.

³⁰ *Jitendra Bhargava v. Competition Commission of India and Others* (order of the COMPAT, dated December 19, 2013). Decision available at: http://compat.nic.in/upload/PDFs/decordersApp2013/19_12_13.pdf (Accessed on 9th October, 2016)