COMPETITION COMMISSION OF INDIA

Case No. 30 of 2013

In Re:

Express Industry Council of India — **Informant**

And

Jet Airways (India) Ltd. — **Opposite Party No. 1**

IndiGo Airlines — **Opposite Party No. 2**

SpiceJet Ltd. — **Opposite Party No. 3**

Air India Ltd. — **Opposite Party No. 4**

Go Airlines (India) Ltd. — **Opposite Party No. 5**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances: Shri Jimmy Pochkanawala, Senior Advocate with Ms. Renuka Singh, Shri Ranjit Walia and Shri Jaskirat Bir Singh, Advocates for the Informant.

Shri A. N. Haksar, Senior Advocate with Shri G. R. Bhatia, Shri Ujjwal Rana, Shri Rudresh Singh, Ms. Prerna Parashar and Shri Himanshu Mehtra, Advocates alongwith Shri Mukesh Upadhyay, Assistant Manager (Legal) for Opposite Party No. 1.

Shri Ramji Srinivasan, Senior Advocate with Shri Pranjal Prateek, Ms. Avaantika Kakkar, Ms. Arunima Chatterjee, Shri Sagardeep Rathi and Shri Tushar Bhardwaj, Advocates with Shri Rahul Kumar, Associate General Counsel (Litigation) and Shri Bharat Bahadur, Principal Counsel for Opposite Party No. 2.

Shri Balbir Singh, Senior Advocate with Shri Abhishek Singh, Shri Abhishek Sharma, Ms. Kashish Arora and Shri Vineet Dwivedi, Advocate alongwith Shri Govind Mehrotra, Assistant Manager- Legal for Opposite Party No. 3.

Order under Section 27 of the Competition Act, 2002

1. An information was filed under Section 19(1) (a) of the Competition Act, 2002 ('the Act') by Express Industry Council of India ('Informant') against Jet Airways (India) Ltd. ('Opposite Party No. 1'/ OP-1/ Jet Airways), IndiGo Airlines ('Opposite Party No. 2'/ OP-2/ IndiGo), SpiceJet Ltd. ('Opposite Party No. 3'/ OP-3/ SpiceJet), Air India Ltd. ('Opposite Party No. 4'/ OP-4/ Air India) and Go Airlines (India) Ltd. ('Opposite Party No. 5'/ OP-5/ Go Airlines), (collectively, 'Opposite Parties'/ 'OPs') alleging, *inter alia*, collusion in fixing of Fuel Surcharge (FSC) rates for cargo transportation by the domestic airlines and thereby contravening the provisions of Section 3 of the Act.

2. Consequent upon the investigation ordered by the Commission, it was concluded by the DG that based on the analysis of the information and evidences gathered during the course of investigation, there was no proof of the allegations leveled by the Informant that the domestic airlines had indulged in anti-competitive conduct during the period 2008-2013 with respect to fixing of FSC rates for cargo transportation in violation of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

3. The Commission, however, *vide* its order dated 17.11.2015 noted that three of the named airlines (Jet Airways, IndiGo and SpiceJet) had acted in parallel and colluded in fixing of FSC rates. No penalty, however, was imposed upon Air India Limited as its conduct was not found to be parallel with other airlines. Similarly, no finding of contravention was recorded against Go Airlines (India) Limited as it leased its cargo belly space to third party vendors with no control on any part of commercial/ economic aspects of cargo operations done by vendors including imposition of FSC. Such conduct on part of Jet Airways, IndiGo and SpiceJet was found to have resulted in indirectly determining the rates of air cargo transport and thereby to be in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act. Consequently, penalties of Rs. 151.69 crore, Rs. 63.74 crore and Rs. 42.48 crore were imposed upon Jet Airways (India) Ltd., InterGlobe Aviation Limited and Spice Jet Limited respectively for their impugned conduct. Besides, cease and desist order was also issued against these airlines.

4. On appeals preferred by the Airlines against the aforesaid order of the Commission dated 17.11.2015, the Hon'ble Competition Appellate Tribunal *vide* its common order dated 18.04.2016 passed in Appeal Nos. 07/ 08/ 11 of 2016 set aside the said order of the Commission and remanded the matter back to the Commission with the following directions:

> *....In the result, the appeals are allowed, the impugned order is set-aside and the matters are remanded to the Commission with the following directions:*
>
> *(1) The Commission shall re-consider the report of the Jt. DG and take appropriate decision under Section 26(8) of the Act. If the Commission disagrees with the findings and conclusions recorded by the Jt. DG, then it shall indicate the reasons for such disagreement and issue notice to the parties incorporating the*

reasons of disagreement and give them opportunity to file their replies/ objections.

(2) After receiving the replies/ objections of the parties, the Commission shall hear them and pass appropriate order in accordance with law.

5. In the aforesaid backdrop, the report of the DG was re-considered by the Commission in its ordinary meetings whereupon the Commission *vide* its order dated 08.02.2017 noted that the conclusions drawn by the DG in the report did not appear to follow from the material on record. Accordingly, for the reasons mentioned in the order dated 08.02.2017, the Airlines were called upon by the Commission as to why the conclusions drawn by the DG against them be not disagreed with and as to why they should not be held in contravention of the provisions of the Section 3(1) read with Section 3(3)(a) of the Act.

Facts

6. Having noticed the background of the case, it would be appropriate to note the factual matrix in brief leading up to the filing of the instant information.

7. The Informant is a non-profit company incorporated under Section 25 of the Companies Act, 1956, having as its main object, *inter alia*, to secure the welfare of the express industry in all aspects. The Informant is stated to be an apex body of leading express companies and has around 29 members, including several international express companies like Blue Dart, FedEx, DHL, First Flight, UPS *etc*.

8. It is averred in the information that in May 2008, certain domestic Airlines in India connived to introduce a 'Fuel Surcharge' (FSC) for transporting cargo. This surcharge was fixed at a uniform rate of Rs. 5/ Kg and came into force on May 15, 2008.

9. It is alleged that although there does not appear to be any legal provision under which such FSC could have been levied by the Airlines, the ostensible reason given was to mitigate the volatility of fuel prices.

10. It has been further stated that the very fact of levying FSC at a uniform rate from the same date itself constitutes an act of cartelization covered under Section 3 of the Act. The said cartel of the Airlines is stated to be continuing till date.

11. It is the case of the Informant that although the levy of FSC was ostensibly introduced as being an extra charge linked to fuel prices, it is an admitted fact that when such prices were reduced (as in the past), there had been no corresponding decrease in FSC. It was further stated that FSC has actually been increased by the Opposite Parties again acting in concert and that too, by almost the same rate and from almost the same date. Likewise, FSC has been uniformly increased in the past even without a corresponding increase in the fuel prices.

12. It is also stated by the Informant that *vide* various communications, it had drawn the attention of the Opposite Parties to the international practice where FSC is benchmarked to an index, which results in logical transparency and suggested that a similar formula be adopted in India. However, this suggestion was ignored by the Opposite Parties who have taken undue advantage of their dominant position and have continued the practice of increasing FSC uniformly, with no correlation to the increase/ decrease of fuel prices.

13. The Informant has also given data to drive home the point that even when fuel prices declined substantially, the Airlines have, in concert, uniformly increased the FSC. Reference has also been made to the various circulars issued by the Opposite Parties to show that FSC prices have been uniformly raised in concert by the same percentage from the same date.

14. It was alleged that freight charges have been uniformly increased by the Opposite Parties in collusion, in the garb of increasing FSC. This increase is stated to be not only detrimental to the interests of freight companies but also adversely affecting the consumers as higher costs are invariably passed on to the ultimate consumers.

15. Based on these allegations and averments, the Informant has filed the instant information before the Commission.

Investigation by the DG

16. Earlier, the DG, after analysis of information and evidences gathered during the course of investigation, concluded that the allegations levelled by the Informant that the domestic Airlines indulged in anti-competitive conduct during the period 2008-2013 in violation of the provisions of Section 3(1) read with Section 3(3)(a) of the Act were not proved.

17. It was, however, noted by the DG that although no evidence of collusion was found during the course of investigation, the behaviour of the Airlines with respect to imposition of FSC was not in conformity with the market conditions where the domestic players were actively competing. The fuel surcharge which was introduced to address the sharp volatility in the Air Turbine Fuel (ATF) prices around 2008 was found to be used by the Airlines as a revenue smoothening levy that bore little correlation with changes in ATF price.

Re-consideration of the DG report by the Commission

18. As noted *supra*, the investigation report of the DG was re-considered by the Commission in its ordinary meeting held on 08.02.2017 whereupon the Commission decided to issue notices to Airlines calling upon them as to why the conclusions drawn by the DG against them be not disagreed with and based upon the material on record and the reasons mentioned therein, be noticed as to why they should not be held in contravention of

the provisions of Section 3(1) read with Section 3(3)(a) of the Act. A notice was also issued to the Informant. The parties were directed to file their responses accordingly within the time stipulated in the notices.

Replies/ Objections/ Submissions of the Parties

19. The Parties filed their responses to the notices issued by the Commission. No response, however, was filed on behalf of OP-4 and OP-5. As such, the responses filed by OP-1, OP-2 and OP-3 are summarized below.

Replies/ Objections/ submissions of OP-1/ Jet Airways

20. OP-1 argued that there was no evidence to show that there was an agreement between the parties beyond reasonable doubt. It was pointed out that the DG in his Report also stated that there was no evidence '*…confirming exchange of information regarding prices between OPs…*' Further, it was stated that the agreement has been presumed to exist from the '*structural features of the industry and behavioural factors of the airlines*' which is not sufficient to establish Appreciable Adverse Effect on Competition (AAEC) in the market. There is no proof of contravention of Section 3 of the Act that proves existence of an unequivocal, precise and coherent agreement.

21. Further, the factors relied on by the Commission to justify 'plus factors' have nothing to do with the positive or implicit conduct of OP-1 so as to suggest, much less arrive at the conclusion that there is a cartel amongst the OPs.

22. It is also stated that the airline industry is an oligopolistic market and there is interdependence between the market participants, due to which price parallelism is a normal result of such market structure. In this kind of market, the players take into consideration the pricing policies of other players in the market which may lead to similar prices as other players tend to 'follow the leader' and a cartel can only exist through an overt or

covert act between the parties and not through passive means. It is further stated that the DG itself has concluded that there is no direct or indirect evidence hinting at cartelization, clearly indicating that OP-1 was not part of an agreement which is in violation of provisions of the Act.

23. It has been submitted that OP-1 has provided adequate and valid justifications for levy and change of FSC for the period starting from 16 May 2008 to 23 August 2013. It was pointed out that movement in FSC is primarily on account of change in ATF prices, USD-INR rate of exchange and increase in aircraft lease cost/ manpower/ service network *etc*. OP-1 also provided detailed reasons for increase in FSC from time to time.

24. It has been pointed out by OP-1 that the Commission has erroneously found the answering OP to have matched the quantum and timing of increase of FSC. This assertion was denied as incorrect for various dates and periods.

25. With respect to FSC increase on 12.11.2012, it was submitted that starting late 2011 to September 2012 ATF prices showed tremendous surges. The price went up from Rs. 51.7 per litre in April 2011 to Rs. 72 per litre in September 2012 which was a surge of about 40%. Similarly, high fluctuations were witnessed with respect to USD –INR Conversion. It was submitted that OP-1 could not have increased FSC by a significant number without the risk of losing its business. Therefore, in November 2012, OP-1 had to increase FSC rate by Rs. 2 to pass on the burden which it had withheld for long.

26. It was also pointed out that as per the analysis of the correlation carried out by the DG between the percentage changes in FSC by airlines is not strongly correlated, indicating the absence of cartel arrangement amongst OPs. Further, as FSC is not revised on a frequent basis, it follows the long term trend of ATF prices.

27. It has been further submitted that it would be legally and factually unjustifiable to apply a 'cherry picking procedure' for reaching a conclusion of price parallelism from only 5 instances and that complete appreciation of facts is important for the Commission to arrive at an adverse finding.

28. On analysis of the market share data in the air cargo industry, the DG Report showed that OP-1's share has been reducing in the market from 2008 to 2014. Also, the DG Report records that market share has changed largely on account of change in fleet size, exit of Kingfisher Airlines *etc.* and not due to change in FSC, indicating that there is competition in the market. The decrease in market share is a crucial factor which shows beyond doubt that Jet Airways had not been a party to the alleged agreement. It is an established jurisprudence that in a cartel set-up, market shares of the participating cartelists appear to remain constant.

29. Further, OP-1 has submitted that it was the first airline to introduce FSC and other airlines followed due to interdependence of strategy. There was neither any motivation, nor evidence to establish existence of plus factors that indicate towards an existing cartel, that leads to AAEC in the market. The nature of the market, degree of transparency, organizational structure and lack of economic and business justifications that prove parallel behaviour are incompatible with finding of tacit collusion.

30. It was also submitted that the DG has factored market intelligence as one of the factors determining FSC. In this regard, it was pointed out that the DG has noted that '*all the companies admitted that the agents appointed by the airlines are a crucial link in providing market feedback as these agents are common for various airlines. Further, the ground offices of various airlines are usually located in close physical proximity with each other and there is day to day interaction between the operational/ sales staff of airlines and these agents*'. Moreover, it was also pointed out that the DG observed that these agents act as an effective channel for transfer

of information from one airline to another.

31. It was submitted that the Commission has relied on the DG's assertion that FSC has been used by the airlines as a revenue smoothening tool and bears little correlation with the ATF prices. However, while Jet Airways has provided valid and substantiated justification for each instance of increase in FSC even assuming that FSC may have been used as a revenue generation levy to meet the excessive turbulence in the market, it does not in any way indicate that the provisions of the Act have been violated.

32. Further, it was pointed out that the Commission has incorrectly relied upon the fact that on a few occasions FSC revision were in similar proportion even though the financial health of OPs was vastly different. It was highlighted that FSC has a direct correlation with ATF prices, USD fluctuation and a few similar market based conditions which are common for all airlines operating in the market and not directly on the financial health of the company.

33. In view of the above, OP-1 submitted that the Commission has erroneously arrived at a pre-determined conclusions which are based on conjectures and incorrect analysis of the factual background. Resultantly, it was prayed that no penalty be imposed upon Jet Airways. However, if the Commission deems it appropriate to impose any penalty, the same should be imposed upon the revenue generated from FSC only for carriage of cargo in India.

Replies/ Objections/ submissions of OP-2/ Indigo

34. At the outset, it was submitted that there was no direct/ indirect evidence of collusion or meeting of minds or existence of any anti-competitive agreement *inter se* with any other airlines that are parties to these proceedings. Further, the 'plus factors' as identified by the Commission do not point to a finding of collusion.

35. By way of background, it was stated that FSC was introduced to respond to sharp volatility in ATF prices. FSC, which was introduced by IndiGo on 10.03.2007, is a fee or charge added to the base freight to recover portion of other costs, including the costs incurred towards procurement of ATF and was meant to provide stability and cushion to cover/ recover cost of ATF in addition to 'core expenses' like lease costs, ground-handling costs, inflation *etc.* It was further submitted that FSC is revised considering any perceived or any anticipated changes in ATF prices among other costs.

36. Adverting to the Commission's finding as recorded in the show cause notice to the effect that there is no correlation between the movement of FSC *vis-à-vis* the movement of ATF prices, it was submitted that if the movement of FSC during the period of investigation is considered in its entirety, it is evident that no pattern emerges in 26 out of 31 instances which cannot possibly suggest that the movement of FSC charges was imposed by the Airlines in any anti-competitive manner. In the 5 other instances, there has been same/ similar revisions and these have been duly explained by IndiGo with specific averments in addition to market intelligence that is readily available in the market.

37. It was also submitted that the time gap in respect of each revision by each airline varies and is totally inconsistent. It was stated that there was only one instance when four airlines (IndiGo, Jet Airways, Spice Jet and Air India) changed their FSC on the same date. In one instance, three Airlines changed FSC on the same date. On 6 occasions, 2 Airlines have changed FSC on the same date whereas there are 23 standalone instances of independent FSC changes made by one Airline.

38. On the finding that no documentation was provided by the Airlines in support of the other parameters which are used for determination of FSC, it was submitted that the publicly available circulars regarding revision of FSC constitute relevant records of the decisions taken by IndiGo. The fact

that IndiGo was able to explain the reasoning and rationale behind each and every decision to revise the FSC demonstrates the existence of a system of reference to costs and other factors within the organization and the same can be referenced with context to the date of these decisions for FSC revision.

39. It was also submitted that the parallel behaviour may amount to an "agreement" only if there would be no plausible explanation for the parallel behavior. In other words, the facts must prove that the parallel behaviour would not be possible "but for" an agreement. In this case, the oligopolistic nature of the market and readily available public market information explain the parallel behaviour exhibited by the Airlines.

40. It was also submitted that during the course of investigation, the DG has failed to investigate the effect of dedicated cargo carriers and in fact other airlines that are also competing for the same business on the sustainability of the alleged cartel strategy.

41. It was pointed out that the Commission's notice also places unjustifiable reliance on certain observations of the DG Report without offering any rationale or reasons for its disagreement as to why the clear findings and conclusions in the DG Report are incorrect or have been completely ignored. It was highlighted that based on the material on record and certain economic factors in the DG Report, which do not form the reasons for disagreement by the Commission, the DG concluded that an anti-competitive agreement between IndiGo and any other airlines does not exist. The Commission must also consider these economic factors in its assessment.

42. It was also argued that it was not appropriate to compare revisions in FSC with financial health of the Airlines. While it may be understandable that increase or re-introduction of FSC would have certain degree of impact on the financial health of an airline by reducing some costs, it is not conceivable how such revisions could be expected to have incidence on

the overall profit levels of an airline for the entire financial year. FSC contributes a miniscule percentage to the overall total revenue, and the DG's reasoning was misplaced to expect that FSC revisions would have any quantifiable effect on profit levels/ financial health of IndiGo.

43. Responding to the DG's observation that FSC revisions showed parallel behaviour with profit levels of Airlines, it was submitted that the observation is not true and is inconclusive as OP-2 was the only airline making profits consistently during the period of investigation and the alleged cartel, even if assumed, would be unstable. It is hard to explain the fact that while one of the airlines remains profitable, the others continue to suffer losses. The profit levels of the airlines were also vastly different and did not appear to be coherent or conclusive.

44. Objection was also taken to the jurisdiction of the Commission to investigate into matter prior to 20.05.2009. It was submitted that subsequent action of IndiGo and other Airlines were not in continuation, nor in subsistence of its past revision of FSC in May, 2008 till the date the Act came into force *i.e.* 20.05.2009. Therefore, it was submitted that the revision of FSC by IndiGo in May, 2008 does not fall within the purview of the Act.

45. It was submitted that the revenue generated from the cargo operations is no more than 6.40% of the total revenue of IndiGo and as such the argument that the alleged collusion for the imposition of FSC causes an appreciable adverse effect on competition, lacks sound basis.

46. Attention was also drawn to the DG conducting the investigation on correlation of movement of FSC based on both absolute change in FSC as well as percentage change in FSC. While the exercise based on absolute change showed high degree of correlation, the exercise based on percentage change showed significantly lower degrees of correlation which rules out any coordinated behaviour amongst IndiGo, Jet Airways,

Spice Jet and Air India.

47. It was further submitted that the DG's analysis highlights that revision of FSC by one airline does not impact the volume of cargo carried by it. An increase in FSC by one airline does not lower the volume of cargo it carries. Similarly, a decrease in FSC by one airline does not increase the volume of cargo it carries. This indicates that FSC in itself is not a factor on which the Airlines compete. It was reiterated that it is the base freight tariff negotiated with individual cargo agents which ultimately determines which airline carries the consignment.

48. It was argued that the DG has categorically recorded that the freight tariff is highly variable, which is decided on the basis of several factors including (i) existing demand compared to flight capacity of that particular sector (ii) existing flight capacity and competition in a sector (iii) total distance travelled by flights in that sector (iv) flight timings (v) product requirements.

49. Elaborating further, it was submitted that the airlines compete with each other by introducing discounting mechanisms such as "deal rates" and "spot rates" whereas FSC is a flat, non-discountable rate levied on a per kilo basis, published by way of public circulars by each airline and accordingly, every cargo agent is fully aware of the prevailing FSC at the time of booking a consignment. A cargo agent then chooses one airline over another only on the basis of the base freight tariff component since it is subject to negotiations and further discounting.

Replies/ Objections/ submissions of OP-3/ SpiceJet

50. While responding to the notice issued by the Commission, OP-3 submitted that the Commission has adopted a 'pick and choose' approach towards the Report instead of considering the same in its entirety. A comprehensive reading of the Report would lead to a conclusion that no

substantial evidence of concerted action by the Airlines in respect of FSC was proved during the investigation. FSC was merely a measure to overcome the issue of volatility in fuel prices. It was submitted that the average price of ATF increased during 2005 to 2008 at a compounded annual growth rate of 27%. It was further pointed out that the average price of ATF increased steeply by 30% particularly from February 2008 to May 2008. This, it was argued, led to introduction of FSC in May 2008 in India.

51. Further, the prime factor determining FSC is ATF prices and as far as the correlation between ATF prices and FSC is concerned, it was submitted that in case of OP-3, there were only two aberrations (from 01.05.2012 to 05.06.2012 and from 16.09.2012 to 19.11.2012) in the 4 year period reviewed by the DG. It was submitted that ATF prices are revised on a fortnightly basis. As a result, OP-3 chose, on certain occasions, to absorb the increase in ATF cost and did not pass on the same with every revision.

52. It was pointed out that till the end of 2012, OP-3's cost of fuel per kg of cargo was higher than FSC charged by it. OP-3 chose to absorb this deficit for a period of almost four years and only starting in November, 2012 did OP-3 cover the cost of fuel. Accordingly, it was argued that from a commercial standpoint, it was irrational to imagine that cartel participants were consistently incurring losses over time. In fact, when ATF prices were falling from August 2008 to March 2009, some of the Airlines decreased and even withdrew FSC, and so did OP-3 in March 2009.

53. It was submitted that in the years 2009 and 2010, some Airlines including OP-3 had withdrawn FSC altogether, whereas others chose to continue the levy. The DG Report did not take these years into account as FSC was either withdrawn or charged by just one airline in either of the years. This fact is sufficient to establish the absence of collusion or agreement between the parties.

54. It was highlighted that the DG correctly concluded that reliance on absolute changes in price would not give the correct picture, and it would be appropriate to examine correlation, if any, on the basis of percentage change in FSC. On doing so, the DG found that the figures revealed that the Airlines does not behave in tandem. Further, the DG found that there was no direct or exact relationship between FSC and the tonnage of cargo carried by an Airline.

55. It was also stated that as the nature of market is that of an oligopoly, the price and output decisions taken by a firm affect decisions of the other competitor firms in the market. Prices accordingly move in tandem in a band because of the competition between the firms in an oligopoly. In this regard, it was pointed out that the DG itself observed that mere price parallelism did not indicate collusion as it might be due to interdependence in an oligopolistic market. Therefore, if any similarity is observed in the movement of FSC across Airlines, it cannot be attributed to cartel behavior and is merely on account of the market being an oligopoly.

56. It was submitted that in the absence of any evidence pointing towards collusive action by the Airlines, no inference can be drawn to presume collusive action and consequently, no action can be taken against the Airlines on the basis of the DG report. It was pointed out that existence of an "agreement" cannot be presumed, either on the basis that certain parties have acted similarly, or that the said parties have purportedly been unable to give a satisfactory explanation which would establish that they acted independent of each other. As the "agreement" itself could not be proved, question of plus factors does not arise and the purported presence of plus factors have no relevance to the present matter as the DG concluded that there was no evidence to show collusive behavior by the Airlines.

57. Additionally, it was stated that since the Act contemplates levy of penalty, its provisions should be construed strictly. The burden of proving innocence, as it were, cannot be put on Airlines, who are alleged to have

violated Section 3 of the Act. It was submitted that unless there is clear and sufficient evidence to positively establish cartelization or action in concert, no adverse orders, including penalty, may be passed. In the existing regulatory scenario, to put the burden on the service providers, to justify their tariff or any component and presume the existence of an agreement prohibited by Section 3 of the Act in the absence of acceptable justification, would really be in the nature of tariff fixation and the regulation of competition.

58. It was pointed out that the Airlines, including OP-3, compete on their final rates for carriage of freight. There was no complaint that the final rates for carriage of freight are being determined collusively. If so, again, no question of any "appreciable adverse impact on competition within India", or of violation of Section 3 of the Act, can arise. The mere levy of purportedly similar amounts as FSC, which is one of the many components which go into fixation of final price, during certain selective time periods, cannot be said to have any appreciable adverse impact on competition.

59. It was also submitted that the market shares of individual airlines have been varying over the years which have been dealt with by the DG. Airlines like Air India have lost market share, Jet Airways has lost, and then regained some market share and during another period, GoAir has first lost and then increased its market share during certain periods. In so far as OP-3 is concerned, its market share varied from 0 to 6.5%, 9.8%, 11.5%, and 15.1%. This shows healthy competition in the market and absence of any collusion.

60. It was stated that it is the cargo tariff which is the most important component in the overall price of air cargo transportation, and is highly variable, dynamic and differentiated across airlines. Various factors go into the determination of the final cargo price/ tariff, including the type of cargo, weight of cargo, distance to be transported, sectoral differences

type of flight, seasonality/ festivals, *etc*. Moreover, FSC is only a component of the final cargo price/ tariff, and various other components are also relevant such as Air Waybill (AWB) fee, X-Ray charges, Handling charges, Delivery Order charges and Service Tax. Given that the Airlines compete on overall tariff, it would make no economic sense to cartelize on FSC alone.

61. It was highlighted that the Airlines compete with each other on the overall price, and competition at this level influences the actual tonnage carried by an airline. Although, the total potential capacity of the airline may be known based on the fleet size, the actual tonnage of cargo carried is unpredictable and varies based on factors such as the overall price as well as the actual capacity available since it is only spare capacity in a passenger airline which is used for cargo. However, since the increase in tonnage of OP-3 is attributable to an increase in its fleet, it is also important to analyse OP-3's weight load factor which is an indicator of its capacity utilization with respect to cargo. It was shown that OP-3's weight load factor did vary over the period of 2009-14, which suggests that tonnage carried by OP-3 and FSC cannot be predicted.

62. It was further stated that the average fuel surcharge revenue for OP-3 in 2011-12 was Rs. 4490.12 lakh. It was submitted that OP-3's corresponding total revenue for the same period was Rs. 3,94,326.2 lakh, which implies that the fuel surcharge revenue was approximately 1% of OP-3's total cargo and passenger revenue and has never been more than 10%. This renders any allegation regarding cartelization on such a small component of the overall revenue earned commercially absurd.

63. It was contended that air cargo industry is extremely competitive as pressure to compete for air cargo transport is exerted not only from passenger airlines using their spare capacity, but also from dedicated cargo operators like Blue Dart Aviation Limited which operates its own freight aircraft in India. Blue Dart is the largest player with the consistently

growing market share of 24% in the Indian cargo market, and is a competitor of OPs in India. The primary business of Airlines is to carry passengers and their accompanied baggage and only spare capacity is used for carrying cargo. The cargo capacity therefore varies for each flight and cannot be predicted with certainty. Given such uncertainty in the available cargo capacity, it would be difficult for the Airlines to collude for gaining a stable revenue and market share.

64. Lastly, it was submitted that no positive evidence or material has been placed on record that conclusively establishes existence of prohibited agreement between the Airlines and the case of the Informant is based on mere likelihood and probabilities. Further, the DG has also concluded that no evidence of collusion has been found during the course of investigation and in light of such specific findings, no case against OPs is made out.

Analysis

65. By way of background, it may be noted that the present information was filed by Express Industry Council of India against OPs alleging *inter alia* contravention of the provisions of Section 3 of the Act. Consequent upon the investigation ordered by the Commission, it was concluded by the DG that the analysis of information and evidences gathered during the course of investigation did not prove the allegations levelled by the Informant that the domestic Airlines indulged in anti-competitive conduct during the period 2008-2013 in violation of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

66. As noted earlier, the Commission *vide* its order dated 17.11.2015 noted that the three of the named airlines (Jet Airways, IndiGo and SpiceJet) had acted in parallel and colluded in fixing of FSC rates. No penalty, however, was imposed upon Air India Limited as its conduct was not found to be parallel with other airlines. Similarly, no finding of contravention was recorded against Go Airlines (India) Limited as it was found to have leased its cargo belly space to third party vendors with no

control on any part of commercial/ economic aspects of cargo operations done by vendors including imposition of FSC. Such conduct of the said three airlines was found to have resulted in indirectly determining the rates of air cargo transport and thereby was found to be in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

67. On appeals preferred against the aforesaid order of the Commission, the Hon'ble Competition Appellate Tribunal *vide* its common order dated 18.04.2016 passed in Appeal Nos. 07/ 08/11 of 2016 set aside the said order of the Commission and remanded the matter back to the Commission.

68. Accordingly, the Report of the DG was re-considered by the Commission whereupon *vide* order dated 08.02.2017, OPs were issued notices calling upon them to show cause as to why the conclusions drawn by the DG *qua* them be not disagreed with and, for the reasons mentioned therein, to show further cause as to why they should not be held in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

69. As such, the parties filed fresh replies/ objections to the DG Report. The Commission also heard the respective learned counsels for the appearing parties besides perusing the material placed on record. None appeared on behalf of Air India and Go Airlines.

70. Before adverting to the main issue arising in the present case, it would be apposite to deal with a preliminary objection taken by the parties to challenge the jurisdiction of the Commission to investigate into the matter in respect of the conduct having taken prior to 20.05.2009 *i.e.* the date of enforcement of the provisions of Section 3 of the Act dealing with anti-competitive agreements. It was submitted that action of IndiGo and other Airlines post - 20.05.2009 were not in continuation of past revision of FSC in May, 2008 and as such the DG could not have examined the conduct which has taken place prior to 20.05.2009.

71. The Commission notes that the plea is without any substance. No doubt, the Act is not retrospective in nature. Yet, nothing prevents the Commission from looking into and examining the anti-competitive conduct which continues post - 20.05.2009. Moreover, while examining the impugned conduct, the Commission is entitled to look into the facts anterior to 2009 in order to examine the matter even though the findings of contravention would be confined to a period post - 20.05.2009.

72. In this regard, the Commission notes that on the issue of applicability of the Act to events prior to coming into force of the provisions of Sections 3 and 4 of the Act on 20.05.2009, the decision of the Hon'ble High Court of Bombay in W.P. No. 1785 of 2010, *Kingfisher Airlines Ltd.* v. *Competition Commission of India* decided on 31.03.2010 is squarely on the point. In this case, it was held:

> *"The question here is whether this agreement, which was valid until coming into force of the Act, would continue to be so valid even after the operation of the law. The parties as on today certainly propose to act upon that agreement. All acts done in pursuance of the agreement before the Act came into force would be valid and cannot be questioned. But if the parties went to perform certain things in pursuance of the agreement, which are now prohibited by law, would certainly be an illegality and such an agreement by its nature, therefore, would, from that time, be opposed to the public policy. We would say that the Act could have been treated as operating retrospectively, had the act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the parties treat the agreement as still continuing and subsisting even after coming into force of the Act, which prohibits an agreement of such nature, such an agreement cannot be said to be valid from the date of the coming into force of the Act. If the law cannot be applied to the existing agreement, the very purpose of the implementation of the*

public policy would be defeated. Any and every person may setup an agreement said to be entered into prior to the coming into force of the Act and then claim immunity from the application of the Act, such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements."

73. Thus, even though the Act is not retrospective, it would cover within its ambit all agreements which might have been entered into prior to the commencement of the Act but continue post - 20.05.2009. Hence, the Commission has jurisdiction to examine the anti-competitive conduct which continues post - 20.05.2009. As noted *supra*, for examining such a conduct, the Commission may even look into historic patterns of conduct and data even though the findings would be confined to the period post - 20.05.2009.

74. At this stage, the Commission deems it appropriate to deal with yet another preliminary objection raised by the learned senior counsel Shri Balbir Singh, appearing on behalf of SpiceJet. It was urged by the learned counsel that the Commission has expressed a *prima facie* view that it does not agree with the conclusions drawn by the DG in its report. In that case, the Commission may issue notice to DG to appear before it either in person or through an officer as is prescribed in such circumstances by Regulation 21(9) of the Competition Commission of India (General) Regulations, 2009 read with Section 35 of the Act.

75. The Commission has examined the plea in light of statutory architecture. For felicity of reference, it would be appropriate to note the provisions of Section 35 of the Act and these are quoted below:

Appearance before Commission

Section 35. A person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal

practitioners or any of his or its officers to present his or its case before the Commission.

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76. Thus, a person or an enterprise or the DG may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission. The Commission is of the opinion that it is an enabling provision and it is left to the concerned parties to avail the opportunity provided thereunder, as and when called upon by the Commission, by either appearing in person or by authorizing the specified professional representatives to present their respective cases before the Commission. No obligation is cast upon the Commission to direct the DG to appear before it and much less is a right conferred upon any of the parties to move an application before the Commission seeking appearance of the DG before it. Hence, an application at the instance of the parties, seeking presence or appearance of the DG during inquiry before the Commission, is wholly misdirected.

77. In the present case, notices were issued to the parties pursuant to the order of the Commission passed on 08.02.2017 calling upon the Airlines as to why the conclusions drawn by the DG against them, be not disagreed with and further as to why, they should not be held in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act. The parties were directed to file their response by 15.03.2017 and the matter was fixed for hearing on 20.04.2017 whereafter it was adjourned from time to time and, finally, the hearing concluded on 02.11.2017. It is noted that SpiceJet filed its response to the notice on 06.04.2017. The learned counsel appearing on its behalf made submissions before the Commission on 13.09.2017 and on 15.09.2017, an application was moved on behalf of SpiceJet praying to the Commission to issue notice to the DG directing it to appear before the Commission. The chronology of events makes it clear that the request does not seem to have been made *bonafidely* as any such

request, assuming that such a request could have been made, had to be made at the earliest opportunity *i.e.* when the notices were issued to the parties. After conclusion of arguments, entertaining such a request would result in re-summoning of the parties again. The Commission is constrained to note that SpiceJet has not cited any reason much less shown any prejudice which has been caused or otherwise occasioned to it, due to the absence of the DG before the Commission. In the circumstances, the Commission does not find any merit in the plea made by the learned counsel appearing on behalf of SpiceJet.

78. Having disposed of the preliminary objections raised by the parties, the Commission may now deal with the substantive competition issues arising in the present case. Based on the DG Report, notice issued by the Commission & the replies filed thereto by the parties, submissions made by the parties and other material available on record, the following issue arises for consideration and determination in the matter:

Whether OPs have operated in concerted manner while fixing FSC and thereby violated the provisions of Section 3(1) read with Section 3(3) of the Act?

79. To examine the allegations of cartelization by the Airlines in fixing FSC, the Commission finds it appropriate to first note the market structure to appreciate the behavior of the market players. In this connection, DG has brought out that there are five main airlines which compete with each other in domestic market for passenger flights and cargo business. Though DG pointed out that there are few dedicated express cargo carriers who are operating in domestic as well as international area, yet their market share in cargo business was found to be in a niche segment. Hence, it was observed that air cargo as a product is majorly captured by the domestic passenger airlines and the remaining market share is catered to by the dedicated express cargo specific service providers such as BlueDart.

80. Taking into consideration the consolidation in the market as also the number of players present, the Commission is of the opinion that such oligopolistic structure of the market is conducive for a coordinated and concerted behaviour.

81. Further, low cross elasticity of demand of air cargo services coupled with high entry barriers, common intermediaries (cargo agents) resulting in a channel for sharing of information amongst the players and presence of trade associations, makes the coordination amongst the players easier in domestic air cargo market.

82. Before proceeding further, the Commission deems it appropriate to deal with the contention raised by the parties that FSC being a small component of the total freight charges, there was no incentive for the players to cartelize on FSC alone. From the records, it transpires that for OP-1, FSC accounted for 24% and 30% of the total domestic cargo revenue for the years 2011-12 and 2012-13 respectively. OP-2 stated in its reply dated 20.01.2015 to the DG that FSC as a percentage of the total cargo revenue was 20.31 % and 31. 72 % for the years 2011-12 and 2012-13 respectively. Similarly, OP-3 stated in its reply dated 29.01.2015 that FSC as a percentage of the total cargo revenue for the year 2011-12, was 25.2 % and for 2012-2013, it was 35.08 %.

83. Thus, the Commission notes that nearly 20-30% of the freight revenue is from FSC. Resultantly, contention of the parties that FSC is only a minor component of the total freight charge and there would be no incentive to cartelize on FSC, is misconceived.

84. Hence, the Commission notes that the revenues generated by the Airlines through FSC are a significant portion of their overall revenue. Further, OP-1 to OP-3 have confirmed in their replies to the DG and it is an admitted fact that levy of FSC is at a flat rate on per kilogram basis of the cargo weight, and this is not a function of aircraft type/ flight distance/ flight sector/ flight timings, *etc.* As a result, the revenue on account of FSC

can be forecast with a fair degree of accuracy.

85. The Commission may now move to address the main issue arising for determination in the present case *i.e.* whether OPs have operated in a concerted manner in fixing the FSC and thereby violated the provisions of Section 3(1) read with Section 3(3) of the Act.

86. It was submitted by OP-1 that the past order passed by the Commission contained no evidence to show that there was an agreement between the parties which can be proved beyond reasonable doubt. In fact, it was submitted that the DG Report had also stated that there was no evidence '*confirming exchange of information*' regarding prices between OPs. While arguing, OP-2 also submitted that there was no direct/ indirect evidence produced by the Commission that proved collusion or meeting of minds or existence of any anti-competitive agreement *inter se* with any other airlines. It was submitted that even the 'plus factors' as identified by the Commission do not point to the finding of collusion. OP-3 also argued on similar points and submitted that the case of complaint is based on mere likelihood and probability. Moreover, DG has himself concluded that no evidence of collusion has been found during the course of investigation. Thus, no case in contravention of Section 3(1) read with 3(3)(a) against OPs should be made out.

87. The Commission has carefully examined the rival submissions besides perusing the material available on record.

88. It may be noted that the definition of 'agreement' as given in Section 2(b) of the Act requires *inter alia* any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. The understanding may be tacit and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely a direct evidence of action in concert and in such a situation,

Commission has to determine whether those involved in such dealings had some form of understanding and were acting in cooperation with each other. Further, considering the fact that since the prohibition on participating in anti-competitive agreements and penalties the offenders may incur if found in contravention of the provisions of the Act are well known, it is normal that such activities are conducted in a clandestine manner, where the meetings are held in secret and the associated documentation reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between enterprises such as the minutes of a meeting, it will normally be only fragmentary and sparse. So, it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement. In the light of the definition of the term 'agreement' stated above, the Commission has to find sufficiency of evidence on the basis of benchmark of preponderance of probabilities.

89. The Commission now proceeds to examine whether OPs have acted in a concerted manner in fixing FSC rate. For this purpose, data pertaining to FSC was gathered from the date of implementation till November 2012 and movements of FSC levied on domestic cargo was analyzed by DG. The same is reproduced below:

Table-1

Time Period	Jet Airways (OP-1)			IndiGo (OP-2)			SpiceJet (OP-3)			Air India (OP-4)		
	Date of decision	DoI*	FSC Rate (Rs. Per kg)	Date of decision	DoI*	FSC Rate (Rs. Per kg)	Date of decision	DoI*	FSC Rate (Rs. Per kg)	Date of decision	DoI*	FSC Rate (Rs. Per kg)
May 2008	12.5.08	16.5.08	5	13.5.08	16.5.08	5	16.5.08	16.5.08	5	15.5.08	16.5.08	5
Apr-Jun 2011	30.3.11	16.4.11	9	19.5.11	1.6.11	9	18.5.11	1.6.11	9	-	-	-
Jun 2012	18.5.12	1.6.12	11	30.5.12	5.6.12	11	28.5.12	5.6.12	11	-	-	-
Sep 2012	4.9.12	10.9.12	13	10.9.12	16.9.12	13	10.9.12	16.9.12	13	6.9.12	16.9.12	11
Nov 2012	12.11.12	16.11.12	15	12.11.12	16.11 12	15	15.11.12	19.11.12	15	14.11.12	20.11.12	13

Note: DoI* indicates date of implementation

90. From the details of FSC tabulated above, it is observed that in the year 2008, OP-1, OP-2 and OP-3 had implemented FSC on the same date and all of them had levied a rate of Rs. 5 per kg at the same time. It is further noted that DG has not examined the years 2009 and 2010 as the FSC was either withdrawn or charged by just one airline in either of the years. For the time period April-June 2011, the DG noted a time lag of 45 days between OP-1 and OP-2 when the FSC was implemented and concluded that no concerted action could be inferred. However, the DG omitted to consider that again OP-1, OP-2 and OP-3 increased the FSC rate by the same amount *i.e.* Rs. 9 per kg. Further, it may be noted that OP-2 and OP-3 increased the same on the very same date. Similarly, in June 2012 and September 2012, time lag of just few days is observed in the dates of implementation of revised FSC. Again, in November 2012, it is noted that OP-1 and OP-2 had increased FSC rate on the very same date.

91. The Airlines sought to explain the revision of FSC effected in a close timeframe by pointing out that the time gap in respect of each revision by each airline which varies. It was contended that there was only one instance when four airlines (IndiGo, Jet Airways, Spice Jet and Air India) changed their FSC on the same date. In one instance, three airlines changed FSC on the same date. On 6 occasions, 2 airlines have changed FSC on the same date whereas there are 23 standalone instances of independent FSC changes made by one airline.

92. The Commission is of opinion that the explanation put forth by the airlines does not carry any merit. It is not necessary that cartels must operate in a symmetric, syncretic and aesthetic way all the time. More often than not, every attempt would be made by the participants to hide the coordinated behavior and it would be only on a few occasions when the authorities may be able to gather evidence of the entire concerted behavior. More often than not, participants in a cartel would try to mislead the Authorities by breaking the patterns of coordinated action from time to time in order to create a façade of competitive scenario when none exists. In such a

situation, few instances would indicate a smoking gun and which would unfold the entire conspiracy alongwith other factors.

93. Next, the airlines sought to justify the movement in FSC by linking the same with increase in ATF prices and other operational costs, as detailed and adumbrated *supra*. For examining this aspect, the Commission observes that it defies logic as to why different airlines would issue circular increasing FSC by the same amount on the same date even though ATF prices were falling. Such a conduct further strengthens the existence of concert when neither party is able to furnish any methodology/ market study justifying the quantum to raise the FSC at that time. No minutes of meeting regarding any discussion have been produced by any of the OPs to justify the changes in FSC.

94. On a holistic and comprehensive appreciation of revisions effected by the airlines in FSC as detailed above, a clear pattern is seen to emerge which indicates concerted and coordinated efforts by the airlines. The present case is an example of stratagem employed by the participants in a cartel where minor lags in revisions are sought to mask the collusive conduct and to portray that a competitive scenario is prevailing the sector.

95. OPs have further argued that mere price parallelism does not indicate collusion as it may be a consequence of interdependence in a market which is oligopolistic in nature. Given the air cargo transport market in India is an oligopoly, prices of various airlines tend to broadly move in tandem as they respond to market forces of demand and supply, including the price of their competitors. OP-3 further argued that besides the airlines, there were other scheduled air cargo operators such as the Blue Dart Aviation Ltd. which is the largest player with 24% market share in the Indian air cargo market competing with OPs. It was also argued that unlike a cartel where members generally have stable market shares in the market for air cargo transport in India, market shares of the players are fluctuating which indicate absence of collusion in the market. Moreover,

the air cargo industry in India is extremely competitive which, by itself, indicates a free market and absence of collusion amongst market players.

96. There can be no quarrel with the proposition that parallel behavior of competitors may be a result of intelligent market adaptation in an oligopolistic market. In an oligopolistic market, it is normal for one firm to change its price while following the price increase by another. Parallel pricing alone therefore, cannot be the sole factor for establishing an anti-competitive behavior. Though interdependence/ price parallelism might indicate that the price levied on cargo handled might change as per movements in rivals' cargo prices but the parties have not been able to justify as to why such coordinated behavior should spill over into FSC rates as the fuel consumption would vary not only based on cargo handled but also based on passenger miles handled by each of OPs. At this stage, it becomes important to analyze if collusion is the only reasonable explanation to the conduct of OPs. Accordingly, examination of other factors and behavior becomes relevant to establish concert.

97. In this regard, it is relevant to examine the justifications offered by OPs to determine and revise FSC. OPs have stated that there are various factors which influence the determination of FSC by the airlines. In this connection, it is observed that all the airlines have stated turbulence in ATF price as the main reason for introduction of FSC in domestic cargo market. Apart from ATF price, certain other factors which were stated to be taken into account while determining FSC included financial health of the company, dollar exchange rate, cost environment and market feedback *etc.* Each of the OPs tried to justify change in FSC by arguing that FSC rates are not revised frequently with every change in ATF price. But it tends to follow the long term trend of ATF prices. OPs provided diverse reasons for effecting changes in FSC and the same are dealt with in the succeeding paras.

98. The Commission notes that OPs have stated that each airline takes into account several factors to determine FSC, yet by their own admissions, the reason provided by OPs for introduction of FSC was 'sharp volatility' in ATF prices. It appears that OPs, while trying to justify the changes in FSC, have paid no heed to the purpose admitted by them for levying FSC and have now provided reasons which go far beyond the avowed objective behind introduction of such a levy. In fact, from the reasons adduced by OPs, Commission has no hesitation in holding that the very purpose of introduction of FSC to cushion the volatility in ATF prices has been relegated to the margins long back and, instead, all sorts of reasons have now been offered to explain the continuous and coordinated revisions in FSC by the airlines. Thus, far from being a cushion to hedge the volatility in ATF prices, FSC has become a tool to seek rent from the potential users of cargo services in the garb of various reasons which have nothing to do with the stated objective.

99. There are also serious loopholes in the justifications provided by OPs. The OPs have associated random factors to FSC prices, without having a systematic mechanism to arrive at these prices. For example, it may be noted that OP-1 has explained that it was due to increase in ATF price coupled with increase in dollar exchange rate, that FSC was increased. However, there have been instances when the correlation between the ATF price and USD exchange rate *vis-à-vis* FSC rate has been missing.

100. No correlation between the percentage changes in FSC with the percentage change in the factors mentioned by respective OPs is found. For example, OP-1, on 06.04.2010, increased FSC from 6 to 7. However, it is noted that the fall in ATF price was of about 39% *i.e.* from 69.4 to 42.3 and increase in USD-INR rate was 4%. At the same time, on 02.04.2011, increase in ATF price was 12.8% *i.e.* from 51.7 to 59.3 and fall in USD-INR rate was 4%, yet the FSC was enhanced from 8 to 9 i.e. by Rs. 1 Per kg. Again, on 25.05.2012, when both the rate of ATF and exchange rate increased by 8.7% and 10.7% respectively, then also the

change in FSC rate was from 10 to 11. From the analysis, it is seen that irrespective of the factors taken into account for implementing the change in FSC, change in FSC rate is always the same. There is no systematic pattern or relation by which the pattern of change in FSC rate can be justified and that is why perhaps one of the learned senior counsels, Shri Ramji Srinivasan, chose to call each increase a 'guesstimate'.

101. The Commission notes that each OP has stated various factors that determine FSC. Inspite of citing diverse factors that determine the change in FSC, as noted in Table-I *supra*, all OPs have increased FSC by the same amount. It is difficult to comprehend as to how even after considering variety of factors determining the change in FSC rates, all OPs could have reached a similar rate to affect an increase in FSC rates on various occasions.

102. Further, when questioned as to how the rate of FSC was increased on 12.11.2012 despite the decrease in ATF price as well as USD rate, reasoning provided by OP-1 was that the increase in ATF price and USD rate in the last few months had a very detrimental effect on FSC rates. This reasoning provided by OP-1 cannot be accepted as on one hand, OP-1 has submitted that the increase of either ATF or USD rate caused the increase in FSC rate and on the other hand, it is observed that the movements in ATF and USD are not synchronized with each other. But they move rather in a random fashion. It may be noted that the explanation given by OPs regarding changes in FSC rates due to the changes in ATF prices, USD rates and other factors is also not satisfactory. Even though OPs have stated that apart from ATF price and USD rates there were various other components to be considered for the change in FSC, they were unable to provide any cost study or calculation to explain the change quantifiably in their submissions. Lastly, Commission is of the view that ATF price by itself is a final price at which fuel is procured by the airlines. Thus, the said price would subsume the inherent movement/ volatility in the exchange rates (USD). Therefore, the arguments made with respect to

changes in effecting FSC is disagreed with and the Commission does not find any rationale in the fact that there exists a correlation between FSC prices and factors pleaded by OPs in support of revision in FSC.

103. To sum up, the Airlines were unable to furnish any data/ calculation/methodology or costing of any kind whatsoever in support of the determination of FSC rates. Even the authorized representatives of OPs could not furnish the rationale for revision of FSC on certain occasions when questioned in front of the DG. Merely providing factors which are not correlated to the FSC is a futile exercise conducted by the OPs. This is unable to justify the concerted acts of the OPs.

104. On the DG's conclusion that top agents of each airline were by and large the same who handle about 80% cargo business and act as an effective channel for transfer of information from one airline to another, it was submitted by OP-1 that these agents act as a channel to transfer information from one airline to another which happens to be located at close proximity with each other and there is close interaction between the operational/ sales staff. OP-2 has also submitted that the exchange of information through common agents in the present scenario cannot be concluded to be the result of a collusion as the existence of a system among common agents and the concerned airlines involving gathering of market intelligence is a routine and a legitimate business exercise in the domestic cargo market. Further, the decision to change FSC is not reactionary but takes into account a lead time analysing other factors such as internal costs and anticipated movement of ATF price in the future.

105. The Commission is of the opinion that in a competitive market, to have an edge over the other competitors, a player will have incentive to hide any change in its price. Further, an increase in price may affect the customers and hence, any collusion to increase the price may only be profitable for OPs. In such a situation, having the same market intelligence/ agents associated amongst the airlines, negates the case of OPs further. These

communications with rivals should be avoided in a competitive market, let alone be used to justify a concerted action.

106. In this connection, it is noted that Shri K. Rammohan, Senior General Manager of OP-1 stated before the DG that the information on revision of FSC though communicated between their own staff, there's likelihood of transmission of such information to other competitors by agents though it is understood and implied that confidentiality should be maintained. It was also stated that information on competitor's price revision on FSC is received through multiple sources and through common agents. Similarly, Ms. Madhuri Madan, Deputy General Manager (Cargo Department) of OP-4, Shri Raghuraman Venkatraman, Vice President (Cargo) of OP-3 and Shri Mahesh Kumar Malik, Vice President (Cargo Sales & Services) of OP-2 stated that the information on pricing by other airlines including FSC rates are provided by common agents too. Such point of contact eliminates or substantially reduces in advance any uncertainty that might otherwise would have existed regarding commercial conduct of other competitors in the market. Also, in such a scenario, concerned company takes into account such information before determining its own conduct. It is evident that the airlines were well aware of the changes in FSC rates, if any, by their competitors in advance. The increments of the rates on same date or a nearby date are reflective of some sort of understanding amongst OPs. Also, the unreasonable explanation of increase of FSC rates clubbed with no data on cost analysis, evasive replies and no documents despite admitting to the fact that meeting/ discussions took place with regard to FSC rate, only further confirm the fact that airlines were acting in a concerted manner. Though there is no evidence of direct meetings, OPs participated in passive manner as they had the requisite means to access and exchange information though their common agents and circulars. This also shows that the OPs had a way to express their intention in the market indirectly. Further, it has been admitted by the airlines that they have common agents and these agents act as a conduit for exchange of information with respect to rates levied on cargo handled and changes

in FSC proposed to be implemented which has not been disputed.

107. The Commission observes that no evidence of any action being taken by the airlines against these common agents for breach of confidentiality by those agents seems to have been initiated by these airlines.

108. In view of the above discussion, it is held that the conclusion recorded in the Investigation Report that there was no concerted practice amongst the airlines regarding the revision of FSC cannot be agreed. Further, the Commission has examined other aspects also in order to come to a conclusive finding that the parallel conduct of the OPs was due to collusion amongst them only. It may be noted that a parallel conduct is legal only when the adaptation to the market conditions are done independently and not on the basis of information exchanged between the competitors, the object of which is to influence the market. One of the elements that indicates concerted action is the exchange of information between the enterprises directly or indirectly. Price competition in a market encourages an efficient supply of output/ services by companies. Any company is free to change/ revise its prices taking into consideration the foreseeable conduct of its competitors. That however is not suggestive of the fact that it cooperates with the competitors. Such coordinated course of action relating to a change of prices ensures its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date, *etc*.

109. In view of the foregoing, it is opined that the OPs have acted in parallel and the only plausible reason for increment of FSC rates by the airlines was collusion amongst them. Such a conduct has, in turn, resulted into indirectly determining the rates of air cargo transport in terms of the provisions contained in Section 3 (3)(a) of the Act. It may be noted that in terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter

into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. By virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

110. In case of agreements as listed in Section 3(3) (a) to (d) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition in India; and onus to rebut the presumption would lie upon the parties. In the present case, OP-1, OP-2 and OP-3 could not rebut the said presumption. Further, they have not been able to show how their impugned conduct resulted in accrual of benefits to the consumers or made improvements in the production or distribution of the goods in question *etc*.

111. As these OPs are engaged in similar business and are therefore operating at the same level of the production chain, allegations of anti-competitive agreements, decisions or practices among them squarely stand covered within the ambit of Section 3(3) read with Section 3(1) of the Act.

112. Further, it may be noted that definition of an 'agreement' as given in Section 2(b) of the Act requires, *inter alia*, any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term 'agreement', the Commission has to assess the evidence on the basis of preponderance of probabilities.

113. Further, since the prohibition on participating in anti-competitive agreements and the penalties which the infringers may incur are well known, it is normal for such practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, and for associated documentation to be reduced to a minimum. The Commission in this regard notes that, in respect of cases concerning cartels which are hidden or secret, there is little or no documentary evidence and evidence may be quite fragmentary. The evidence may also be wholly circumstantial. It is therefore, often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia, which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

114. Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that OP-1, OP-2 and OP-3 have acted in a concerted manner in fixing and revising the FSC rates and thereby contravened the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

115. The Commission, however, does not deem it appropriate to proceed against OP-4 and OP-5. It was noted by the DG that OP-5 gave its cargo belly space to third party vendors to undertake cargo functions. Further, it was stated that OP-5 had no control and was never part of any commercial/ economic aspects of cargo operations done by its vendors including imposition of FSC. As such, the DG did not include OP-5 in the analysis in the investigation report and no finding of contravention was recorded against it. Further, so far as OP-4 is concerned, the Commission notes that when there was a substantial decline in the fuel costs, the fuel surcharge was withdrawn. In these circumstances, it is difficult to record any definite finding of contraventions against OP-4 as well.

ORDER

116. Based on the above discussion, the Commission is of that opinion that the impugned acts/ conduct of OP-1, OP-2 and OP-3 are found to be in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

117. Accordingly, OP-1, OP-2 and OP-3 are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act.

118. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty as well. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which is party to an anti-competitive agreement or abuse of dominance. Further, in cases of

cartelisation, the Commission may impose upon each such cartel participant, a penalty of upto three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

119. It may be noted that the twin objectives behind imposition of penalty are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of penalty will deter the infringing undertakings. Therefore, the quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

120. The Commission has given its thoughtful consideration to the issue of quantum of penalty and has considered the submissions advanced by the parties on the issue of quantum of penalty.

121. In this connection, it would be apposite again to refer to the recent decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited* v. *Competition Commission of India & Another* (2017) 8 SCC 47. One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on the total/ entire turnover of the offending company, or only on the "relevant turnover" *i.e*. relating to the product/ service in question?

122. After referring to the statutory scheme as engrafted in Section 27 of the Act and analysing the case laws at length, Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with the ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:

"When the *agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'."*

123. Having considered the various mitigating factors pleaded by OPs as enumerated earlier and other pleas urged by them on relevant turnover, the Commission finds merit in the contention of the parties that the total revenue cannot be taken into account while quantifying penalties. However, the Commission does not agree with the contention that only revenue generated from imposition of FSC alone would constitute relevant turnover. It may be pointed out that FSC is only a component of freight revenue earned from cargo handling operations and the airlines by fixing FSC in collusion have directly or indirectly fixed the freight rates. As the infringing product involved in this case is provision of air cargo transport services, revenue generated from that service only is required to be taken for the purpose of computation of relevant turnover. Hence, it would be appropriate to consider the revenue generated from cargo handling operations for quantifying the penalties in the present case.

124. Besides, the Commission notes that the basic concern in the present case is the overcharging of cargo freight, in the garb of fuel surcharge, by the air cargo transport operators which adversely affect consumers beside

stifling economic development of the country. It is important for the growth of the market that these cartels be broken and more transparency be brought in price fixing by the airlines by taking firm steps in this direction. Else, the fuel surcharge, which was essentially introduced to mitigate the fuel price volatility, will continue to be used as a pricing tool to the detriment of the users which include express companies, freight forwarders as well as the end users and thereby will harm the competition. At the same time, it cannot be disputed that many airlines were incurring losses at the relevant time besides having accumulated debts. The Commission has also taken note of the fact that FSC constitutes about 20% to 30% of domestic cargo revenue of the Airlines. After duly considering the matter, the Commission finds it appropriate to impose a penalty on OP-1 to OP-3 at the rate of 3 % of their average turnover earned from levy of FSC on the volume of cargo handled during the last three financial years based on the financial statements filed by them. Details of the quantum of penalties imposed on OPs are set out below:

(Rs. in crore)

S. No.	Name of OPs	Relevant Turnover from cargo operations for 2010-11	Relevant Turnover from cargo operations for 2011-12	Relevant Turnover from cargo operations for 2012-13	Average Relevant Turnover from cargo operations for Three Years	@ 3 % of Average Relevant Turnover from cargo operations
1.	**Jet Airways [Jet Airways (India) Limited]**	1219.6	1337.86	1424.12	1,327.19	39.81
2.	**IndiGo Airlines [InterGlobe Aviation Limited]**	245.126	290.372	410.294	315.26	9.45
3.	**SpiceJet [SpiceJet Limited]**	163.064	196.884	150.117	170.02	5.10

125. Accordingly, the Commission imposes a sum of Rs. 39.81 crore on OP-1, Rs. 9.45 crore on OP-2, Rs. 5.10 crore on OP-3 as penalties for their impugned conduct which has been held to be in contravention of the provisions of Section 3(1) read with Section 3(3)(a) of the Act.

126. The Commission further directs the above OPs to deposit the penalty amount within 60 days of receipt of this order.

127. The Secretary is directed to communicate to the concerned parties accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 07/03/2018