COMPETITION COMMISSION OF INDIA

Case No. 30 of 2013

In Re:

Express Industry Council of India	**Informant**
And	
1. Jet Airways (India) Ltd.	**Opposite Party No. 1**
2. IndiGo Airlines	**Opposite Party No. 2**
3. SpiceJet Ltd.	**Opposite Party No. 3**
4. Air India Ltd.	**Opposite Party No. 4**
5. Go Airlines (India) Ltd.	**Opposite Party No. 5**

CORAM

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Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Mr. M. S. Sahoo
Member

Mr. Justice (Retd.) G. P. Mittal
Member

Appearances: Shri J. E. Pochkanawala, Senior Advocate with Shri H. D. Pithawala, Ms. Renuka Singh, Shri Ranjit Walia, Advocates alongwith Shri Vijay Singh, COO of Express Industry Counsel of India for the Informant.

Shri A. N. Haksar, Senior Advocate with Shri U A Rana, Ms. Chitra Pranande, Shri Mrinal Mazumdar, Advocates for the Opposite Party No. 1.

Shri Ramji Srinivasan, Senior Advocate with Shri Manas Kumar Chaudhuri, Ms. Aditi Gopalakrishnan, Shri Rahul Kumar, Ms. Sara Sundaram and Ms. Purnima Chatterjee, Advocates for the Opposite Party No. 2.

Shri Rajshekhar Rao, Ms. Manika Brar, Shri Vivek Agarwal, Shri Prateek Bhattacharya, Ms. Gauri Puri, Advocates for the Opposite Party No 3.

Ms. Ayushi Madan, Advocate alongwith Ms. Madhuri Madan, Dy. G. M. for the Opposite Party No 4.

Shri A N Haksar, Senior Advocate with Shri Karan Dev Chopra and Ms. Chitra, Advocates alongwith Shri Prasad M. Pathare, Senior Manager for the Opposite Party No. 5.

Order under Section 27 of the Competition Act, 2002

1. The present information has been filed under section 19(1) (a) of the Competition Act, 2002 ('the Act') by Express Industry Council of India ('the Informant') against Jet Airways (India) Ltd. ('the Opposite Party No. 1'/ OP-1), IndiGo Airlines ('the Opposite Party No. 2'/ OP-2), SpiceJet Ltd. ('the Opposite Party No. 3'/ OP-3), Air India Ltd. ('the Opposite Party No. 4'/ OP-4) and Go Airlines (India) Ltd. ('the Opposite Party No. 5'/ OP-5), (collectively, "the Opposite Parties"/ "OPs") alleging, *inter alia,* contravention of the provisions of section 3 of the Act.

Facts

2. Facts, as stated in the information, may be briefly noted.

3. 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*.

4. 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.

5. 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.

6. 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.

7. 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.

8. The Informant avers that it drew attention, through its various communications, 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.

9. The Informant has also averred that even when fuel prices declined substantially, the Airlines had, in concert, uniformly increased FSC. Reference was also 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.

10. 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.

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

Directions to the DG

12. The Commission after considering the entire material available on record *vide* its order dated 02.09.2013 passed under section 26(1) of the Act, directed the DG to cause an investigation to be made into the matter and submit a report. The DG, after receiving the directions from the Commission, investigated the matter and after seeking extensions submitted the investigation report on 05.02.2015.

Investigation by the DG

13. 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.

14. It was, however, noted by the DG that although no evidence of collusion was found during the course of investigation, behaviour of the Airlines with respect to imposition of FSC was not to be in conformity with market conditions where the domestic players were actively competing. The fuel surcharge which was introduced to address the sharp volatility

in 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.

Consideration of the DG report by the Commission

15. The Commission in its ordinary meeting held on 19.02.2015 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto. The Commission also directed the parties to appear for oral hearing on 01.04.2015 when the matter was adjourned for 19.05.2015. On 19.05.2015, the matter was further adjourned to 23.07.2015 and finally the matter stood adjourned to 13.08.2015 when the arguments of all the parties were finally heard and the order was reserved.

Replies/ Objections/ Submissions of the Parties

16. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the Informant

17. It was argued by the counsel appearing for the Informant that the conclusions arrived at by the DG in the investigation report were not warranted as there was a wide disparity between what the DG found and what the DG concluded. It was argued that if a conclusion of "concerted behaviour" for which there was "no plausible explanation" was arrived at by the DG, who states that this "can certainly not be simply on account of any coincidence", the DG ought to have taken notice of the fact that the concerted behaviour which began in 2008 was continued even thereafter. It was pointed out that when dealing with the factual position (at pp. 94-95 of the Report), the DG had clearly concluded that

there was "concerted action" in 2012.

18. It was submitted that the DG, after reaching a clear finding of "concerted action" in 2012, appeared to have completely abandoned this finding when coming to the final conclusion in the report.

19. It was argued that it was not understood as to why after coming to a definite conclusion that there was "concerted action", the DG sought to find out if there was "concerted practice". It was submitted that the finding of "concerted action" was more than enough to bring a case under section 3 of the Act, and the attempted distinguishing between these two concepts was not warranted. It was argued that what the law required was that the parties should act in concert ("concerted action"), and not that they should practice in concert ("concerted practice").

20. It was further contended that the finding of the DG to the effect that going by the absolute change criteria, all correlations were very close to +1 (being as high as .977 in one case), was itself a sufficient pointer to the cartelized conduct of the Opposite Parties. It was, however, argued that having found a close to perfect positive correlation, the DG noted that obtaining correlation coefficient on the basis of absolute change in the price *may not give* the correct picture. Having observed this, the DG had set out a second correlation matrix based on percentage change, where also the coefficients were all positive except in one case where it was marginally negative. From this, the DG deduced that these figures suggested that during the period 2008-12, the airlines had not behaved in tandem in *all* time periods included in the said time span, with respect to FSC.

21. Challenging the aforesaid deductions drawn by the DG, it was submitted that all such coefficients were also positive and this fact itself further supports the conclusions arrived at previously. It was also argued that

the conclusion of the DG to the effect that the airlines had not behaved in tandem "in all time periods" was unwarranted as it was premised on a wrong proposition that the concerted action in a cartel is necessary at *all* time periods.

22. Next, it was submitted that the present case related to an investigation of a possible cartel in the matter of FSC, and not in the matter of freight charges. As such, it was argued that the DG had drawn a conclusion after relying upon an irrelevant consideration *i.e.* the variability and dynamism of freight rates. It was vehemently argued that the freight rate was not the subject matter of the present investigation as the Informant had raised the issue of cartel behaviour in the matter of FSC, and not freight tariff.

23. It was also pointed out that the observations of the DG in the investigation report clearly showed that there was a "possibility of prior consultation through direct or indirect exchange of information" between the airlines, and that "no specific reason" was given for "this seemingly parallel action". It was, thus, submitted that having come to a definite conclusion about the parallel conduct of the airlines in the matter of FSC, there was no need for the DG to go into the matter of overall pricing- which was neither within the scope of the investigation, nor did a matter complain of. It was argued that it is a well-established principle in law that if a conclusion was based on even one irrelevant factor or consideration, the entire conclusion was vitiated. Since overall pricing or overall freight charges did not form the subject matter of present investigation, any conclusion on FSC based on this factor made the conclusion untenable in the eyes of law.

24. Grievance was also made of the fact that in the present case no real effort was made by the DG to collect evidence regarding exchange of information in respect of prices between the Opposite Parties. Heavy

criticism was made of the "interesting" procedure followed by the DG in asking the airlines if they had indulged in a cartel, and if so, to produce the relevant documents. It was vehemently submitted that if such a procedure was followed to detect a cartel, no conclusion of cartelization could ever be reached. It was also alleged that the DG failed to approach any third party regularity authority to obtain details of exchange of phone calls, messages, e-mails or other similar exchange of information which took place between the airlines over such a long period of time.

25. Detailed response was also offered to "Summary Check-list of the Investigation" prepared by the DG and the observations contained therein were commented upon.

26. Criticism was also made of the fact that the DG was apparently swayed by the fact that FSC is only 20-30% of the cargo revenue. In this connection, it was argued that the complaint and the investigation pertained to this 20-30% only, and as such, when looked at from this angle, this 20-30% becomes 100% of what is being investigated. It was argued that it hardly needed to be said that it was the duty of the DG to investigate any cartel behaviour and it was irrelevant whether the cartel component is 20% or 30% or even less, of the total price.

27. It was also pointed out that the DG report admits that the facts found on the basis of the investigation did not show a market condition where the airlines were "actively competing". Further, it was also pointed out that DG report also admitted that although introduced to combat ATF prices, FSC had been "used by the airlines as a revenue smoothening levy, that bears little correlation with changes in ATF price". It was submitted that this finding of fact, supported by the indirect evidence found by the DG and the observations made in the Report itself, was sufficient to point to only one possible conclusion which has not been arrived at therein. The Report itself acknowledges that direct evidence of a cartel was difficult

to obtain. It was pointed out by the counsel that this further became impossible, and not merely difficult, if the parties investigated themselves were asked to produce such evidence. The number of coincidences were far too many to warrant a finding of no contravention.

28. Concluding the submissions, it was submitted that the preponderance of the evidence collected by the DG itself points out to nothing short of a cartel and that, even if the DG's Report is taken at its face value, the Commission would, in all probability, come to a definite conclusion of cartel behaviour.

Replies/ objections/ submissions of OP-1

29. Jet Airways *i.e.* OP-1 in its reply dated 14.07.2015 to the objection filed by the Informant submitted that the statements and assertions made by the Informant were incorrect and untenable. It was submitted that after detailed investigation, the DG had noted that in any oligopolistic market, competitors tend to follow each other. It was alleged that the Informant continued to make incorrect assertions and bald statements which were factually insupportable despite the detailed analysis and examination of the factual position, which had culminated in the DG Report. It was also submitted that the Informant proceeded on misconceived notions that there had to be direct correlation between fuel costs and FSC despite the fact that this aspect had been explained in detail in the response filed by OP-1 from time to time.

30. With regard to the issue raised by the Informant that no attempt was made to collect documentary evidence, it was submitted that OP-1 had furnished circulars, e-mails addressed by its General Sales Agents (GSA) to the agents with respect to changes in FSC, correspondence, minutes of meetings of the associations [International Air Transport Association (IATA) and Air Cargo Forum India (ACFI)] and also invoices pertaining to purchase of ATF, details of cargo agents, copies of

certain e-mails as exchanged between concerned officials of OP-1, data pertaining to cargo sales revenue, cargo sales report *etc*. As such, it was stated that the contentions and allegations made by the Informant were without any substance or basis. Moreover, the DG had not recorded any finding that the Opposite Parties herein have not furnished any data/ material.

31. It was argued that the repeated complaint about '*important organization like BAR and other fora where airlines have an opportunity to meet'* was misconceived and contrary to the factual position and was only an attempt to cause prejudice. OP-1 submitted that there was no finding that the Opposite Parties had discussed the issue of FSC at any fora or that there was any concert as falsely alleged. That the Informant's fanciful grievance of OP-1 not furnishing 'direct evidence' was totally misconceived and legally absurd. With regard to the alleged abuse of 'dominant position', it was argued that none of the ingredients of section 4 of the Act was applicable in the facts and circumstances of the present case.

32. OP-1 further averred that the Informant had misrepresented by contending that there was '*clear admission'* that the '*Airlines shared* information *on FSC informally with other airlines'*. It was submitted that the purported and alleged '*admission'* was a statement made by an independent agent and not by any airline. As such, the inference sought to be drawn was patently untenable and the assertions made thereon were incorrect and unwarranted.

33. It was further submitted that it was equally misconceived and inferential to contend that merely because the airlines work in close proximity in the airport premises the same amounted to a concerted. It was submitted that the business of any company whether in the field of aviation or any other field, depended on the comparative market study and the existing

market/ competitive circumstances. Any deviation by one was very likely to be followed by the rest of the companies in the same line of business. That such a pricing pattern did not and could not amount to cartelization by any stretch of imagination unless there existed strong evidence of an agreement or decision to form a cartel and/ or to fix a certain price. Moreover, the information did not contain any particulars of even a single instance of any act that had been committed by OP-1 which in any manner whatsoever was contrary to the provisions of the Act.

34. On the allegation that the concept of FSC got distorted, OP-1 reiterated its earlier reply dated 17.02.2014 to the DG's questionnaire wherein it had stated that "*While levying the fuel surcharges, other important factors such as USD-INR rate of exchange has to be considered for arriving at an amount to be levied as FSC and as such, ATF price alone is not the sole factor. Often the entire incidence of increase/ decrease in the price of ATF may not be passed on to the consumer and the same depends upon the market condition, competitive position along with the cost environment etc. The fuel surcharge is also linked to and pushed by the increased costs arising out of USD-INR rate of exchange*". OP-1 also pointed out that it had also stated that "*since we do not have specific surcharges for other cost elements, sharp escalations of costs such as airport charges are sometime factored in as well*."

35. It was argued that the Informant's objection regarding the FSC mechanism adopted by the airlines by referring to selective paragraphs from the DG report could lead to an improper and incorrect depiction of the factual position, which in turn could create enormous prejudice against the Opposite Parties. It was contended that the allegation of cartelization amongst the airlines for fixation of FSC was incorrect, unsubstantiated and baseless and had been negated by the DG in its Report. That there was no 'admission' by OP-1 anywhere or any

averment even remotely suggesting that the Opposite Parties worked in close contact with one another or in a concerted manner. The contentions about the '*possibility of acting in concert to fix the FSC'* and that the same '*can never be ruled out*' as alleged by the Informant were purely speculative and made only to create prejudice.

36. With regard to the allegation that none of the airlines was able to substantiate the fact that pricing decisions were based on the feedback of the market or other costing factors, it was submitted that it had already been brought on record that whatever market information was available with OP-1 was made available by the agents.

37. It was further submitted that the mere fact that FSC was not commissionable did not in any manner render the same illegal or anti-competitive, nor did it give any credence to the suggestion that airlines were acting in concert when they fixed the FSC from time to time. The business of any company whether in the field of aviation or any other field, depended on the comparative market study and the existing market/ competitive circumstances and the market intelligence analysis. Any deviation by one was very likely to be followed by the rest of the companies in the same line of business. Such a pricing pattern does not amount to cartelization.

38. In the premises of the aforesaid, it was submitted that there was no warrant, basis or material or justification to contend or come to a conclusion that, there was any concert in respect of fixation of FSC as alleged and as such, the prayer made in the objections ought to be dismissed *in limine*.

Replies/ objections/ submissions of OP-2

39. Indigo (OP-2) filed its written submission dated 25.08.2015 in furtherance to the DG's Report, the objections filed by Informant on

23.04.2015 and arguments made by the Informant and OP-2 at the oral hearing on 13.08.2015.

40. With respect to the DG's Report, OP-2 submitted that it was in agreement with the conclusion of the DG that there was no violation of section 3(1) read with section 3(3)(a) of the Act by the OPs in setting and changing of FSC.

41. With regard to the objections raised by the Informant during the oral hearing on 13.08.2015, OP-2 submitted that the Informant had cherry picked specific statements from the DG's Report in order to show a favourable case and a keen consideration of the said Report would suggest that the conclusion arrived at was in line with the factual findings contained therein.

42. It was further stated that a perusal of the table of FSC changes provided in the DG Report suggest two facts: first, there was a strong correlation between prices of ATF and FSC and; secondly, no pattern emerged with respect to the changes in FSC. Therefore, it was contended that it could not be said that all the OPs including OP-2 implemented changes to FSC in a similar manner.

43. It was submitted that from the observations deduced from data enclosed with its submissions, there was unilateral introduction and revision of FSC which was also recorded by the DG in its Report. Furthermore, one coincidence was not enough to establish the existence of a cartel. It was argued that the levy of FSC by the OPs could not be considered in isolation and the market structure should be considered. In this regard, it was stated that OP-2 concurred with the DG's assessment of the market structure and that the domestic air cargo market was an oligopolistic market. It was also pointed out that the Informant's contention that the OPs collectively introduced FSC in March 2008 was factually incorrect.

It was clarified that OP-2 introduced FSC in March 2007 whereas Air India introduced FSC in March 2006, not May 2008 as contended by the Informant.

44. Regarding the Informant's contention that Commission can take cognizance of a pre-2009 cartel if it is found that the effects of the cartel are continued to be felt, it was submitted that since post-2009 any anti-competitive conduct of OP-2 could not be substantiated by the DG, the pre-2009 analysis was also infructuous. Furthermore, it was contended that '*previous tacit agreement*', as averred by the Informant, did not exist. The existence of such an agreement was premised on the supposed collective introduction of FSC by all OPs in May 2008. Additionally, it was stated that each revision in FSC was an independent and separate movement in the FSC and it could not be said that the effect of the May 2008 revision was continuing or was being acted upon. Further, each revision was subject to different triggering factors in addition to ATF prices such as the USD-INR exchange rate (Jet Airways), financial health (Air India) *etc*. Thus, the Act remained inapplicable for any instance prior to 20 May 2009.

45. It was argued that there was no question of independent agents forming a channel of communication between the OPs. It was submitted that in an oligopolistic market, it was not uncommon to find conscious parallelism between the market participants. This information on FSC was publically available when the circular is published since the market itself functions in a transparent manner.

46. It was stated that the DG had approached several third parties for the purpose of gathering evidence and had also not recorded any finding that the OPs had not furnished information. Thus, it was contended that the DG conducted a thorough investigation on its part.

47. It was argued that the allegation of a cartel between the OPs stood negated on account of their fluctuating market shares in the domestic air cargo market. It was also submitted that the cargo revenue forms less than 10% of the total revenue of all the airlines in the relevant period. FSC itself accounts for around 1-2% of OP-2's total revenue. Therefore, it was contended that it could not be held to be sufficient incentive to cartelize or indulge in '*action in concert'* particularly given that there was no direct or even circumstantial evidence to substantiate such a theory.

48. In view of the foregoing, OP-2 prayed that the matter against the OPs be closed.

Replies/ objections/ submissions of OP-3

49. OP-3 in its reply to the DG's report dated 18.05.2015 stated that FSC was only a component of the cargo tariff and given that the OPs compete on the overall tariff, it would make no economic sense to cartelize on FSC. It was pointed out that the DG's conclusion that revenue from FSC component was predictable unlike freight revenue, was based on an incorrect assumption that "average tonnage carried by an airline is always predictable taking into account its fleet size". It was further submitted that the DG seemed to suggest that since FSC was a flat rate (and not dynamic like the overall price) and the average tonnage carried by an airline was predictable, hence, an airline can forecast with a fair degree of accuracy, the revenue from FSC. However, it was argued that this analysis by the DG overlooked the fact that the OPs compete with each other on the overall price, and competition at this level influences the actual tonnage carried by an airline. Although the total capacity of the airline is known based on the fleet size, the actual tonnage of cargo carried is unpredictable and varies based on factors such as FSC and the other component of the overall price.

50. It was stated that OP-3's corresponding total revenue for the period 2011-12 was INR 394326.2 lakhs and not 4490.12 lakhs as mentioned in the report. This implied that the FSC revenue was approximately 1% of OP-3's total cargo and passenger revenue. Therefore, it rendered any alleged decision to cartelize on such a small component of the overall revenue commercially absurd especially given the serious repercussions of such conduct.

51. It was contended that mere price parallelism did not indicate collusion as it might be a consequence of interdependence in a market that was 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. Therefore, mere similarity in prices or other features that may be observed in an oligopoly which are due to unilateral decision making by the firms alone cannot be considered as proof of an anti-competitive agreement between the firms in the absence of substantially compelling plus factors.

52. OP-3 stated that besides the airlines, there are other scheduled air cargo operators such as Blue Dart Aviation Ltd. which is the largest player with 24% market share in the Indian air cargo market competing with the OPs. It was argued that unlike a cartel, where members generally have stable market shares, in the market for air cargo transport in India, the market shares of the players are fluctuating, which indicates absence of collusion in the market. Further, it was stated that the air cargo industry in India is extremely competitive which, by itself, indicates a free market and absence of collusion amongst market players.

53. OP-3 stated that the primary business of airlines is to carry passengers and their accompanied baggage and thereafter only any spare capacity is

used for carrying cargo. The cargo capacity varies for each flight and cannot be predicted with certainty. Therefore, given such uncertainty in the available cargo capacity, it was submitted that it would be difficult for the airlines to collude for gaining a stable revenue and market share.

54. OP-3 explained the correlation between FSC and ATF prices by stating that there have been only two aberrations (from 1 May 2012 to 5 June 2012 and from 16 September 2012 to 19 November 2012) in the correlation between ATF prices and FSC in the 4 year period which was reviewed by the DG. That these two aberrations can be substantiated by the fact that the comparison between FSC and ATF price is not point-to point and dependent only upon a change in FSC. It was submitted that the comparison ought to be more dynamic taking into consideration the movement in ATF price in the period between the FSC changes. In simple terms, the comparison between FSC and ATF prices should consider that while ATF price is revised on a fortnightly basis, the FSC is more stable and not revised on such a frequent basis. As a result, OP-3 absorbed the ATF cost increase and did not pass it on with every revision of ATF prices, but accordingly revised the FSC at an appropriate time based on market conditions.

55. It was stated that the fact that tonnage carried by an airline was not predictable even when fleet size was considered shows the variation over time in average monthly tonnage and total tonnage carried by the airline and the weight load factor of OP-3. It was explained that the total tonnage carried by OP-3 increased from 15,547 tons in 2009 to 77,833 tons in 2014, and the average monthly tonnage increased from 3,109 tons to 6,486 tons over the same period. However, since this increase could be attributable to an increase in OP-3's fleet, it was also important to analyze OP-3's weight load factor, which is an indicator of OP-3's capacity utilization with respect to cargo. If such weight load factor does

not vary then, as suggested by the DG, based on its fleet size, OP-3 will be in a position to predict its average tonnage and thus the FSC revenue component. However, OP-3 provided a table to highlight that the weight load factor did vary over the period of 2009-2014, which suggested that the tonnage carried by it and thus, FSC revenue cannot be predicted.

56. It was submitted that there has been a variation in the way OPs have revised their FSCs based on the change in ATF prices over time. That this variation in the behavior of OPs indicates absence of any collusion or cartel in the air cargo industry in India. OP-3 has provided a table to yet again highlight that generally ATF price and FSC have been rising over time. It was stated that the only period when ATF price decreased constantly for a long period was from August 2008 to March 2009 and during that period, some of the OPs responded to the fall in ATF price by decreasing the FSC while some withdrew FSC. For instance, in February 2009, Air India withdrew FSC and so did OP-3 in March 2009. Indigo reduced FSC to Rs. 3 from Rs. 5 per kilogram with effect from 1 March 2009, and Kingfisher from Rs. 5 to Rs. 2. Thus, the Informant's contention that FSC was neither decreased nor withdrawn is false as the DG's investigation identified instances where FSC was, in fact, decreased or withdrawn. It was submitted that in the case of OP-3, FSC is related to ATF price and was withdrawn when ATF price decreased steadily for a long duration. Additionally, the variation in the OPs' response to this decline in ATF price- some reducing FSC, some withdrawing it and some keeping FSC constant – also indicated lack of collusion among the OPs.

57. It was further submitted that for the period after the enforcement of the Act, the mere movement of FSC rates of all OPs in the same direction was not indicative of any form of collusive activity. In fact, the similarity in the price movement of the OPs implies that each of the OPs,

including OP-3 has no control over the market and that their price changes are subject to the prevalent market conditions. The similarity in movement, as submitted above, was therefore a consequence of the market being oligopolistic in nature, and not of any collusion among the OPs.

58. Adverting to the objections filed by the Informant to the DG report, OP-3 submitted that the Informant's objections were baseless and without any merit. It was further submitted that the Informant's averment that the DG has contradicted itself was incorrect and without any basis. OP-3 contended that the Informant's own allegation of contradictions in the DG Report was devoid of any legal analysis. That where the DG Report stated that '*an anti-competitive practice or agreement must be inferred from a number of coincidences',* the DG was only setting out the relevant standard required.

59. It was stated that the necessary documents and evidence were submitted as when directed by the DG and the same can be accessed by the Informant also. Therefore, it was submitted that the Informant's averment that the DG has failed to assess all the documents and evidence ought to be rejected on this ground alone.

60. It was further submitted that the allegation that the DG ought to have analyzed the concept of group dominance stood negated as such concept is not recognized under the Act. Further, on the issue of charging FSC based on factors other than increasing ATF prices, it was submitted that the factors on the basis of which the FSC was revised have no bearing on the finding of collusive activities amongst the OPs. That is, regardless of whether the FSC was revised pursuant to a change in ATF prices or manpower costs or lease costs, there continues to be insufficient evidence to establish the requisite standard of proof for finding the OPs in violation of section 3 of the Act.

61. Lastly, it was also averred that apart from being deliberately misleading, the Informant's objections were also misguided and have failed to rebut the analysis of the DG. That the conclusion drawn was also incorrect. It was therefore submitted that the Informant's objections were false, and misleading and the same amount to little more than a vexatious litigation.

Replies/ objections/ submissions of OP-4

62. Air India *i.e.* OP-4 in its reply dated 24.03.2015 to the DG report stated that it agreed with the DG's report unless specifically disagreed in its submissions. It was stated that that the levy of Fuel Surcharge is related to the overall operating costs of the airline and not to ATF prices alone. That in such a case, the question of levying fuel surcharge in concert with other domestic airlines, as alleged by the Informant, does not arise as each airline has its own operating cost and charges fuel surcharge accordingly. It was further submitted that OP-4 had first introduced levy of Fuel Surcharge of Rs. 2/- per Kg w.e.f. 1st May, 2006. Subsequently, the levy of Fuel Surcharge was modified as per the change in ATF prices and in the operating costs of the Airline. A table on the changes in Fuel Surcharge over time was provided by OP-4 in its submissions. It was inferred from the said table that where there was a substantial decline in the fuel costs, the fuel surcharge was withdrawn. However, a small fluctuation/ reduction in the fuel cost would not have a substantial impact on the operating costs of the airline, hence the fuel surcharge was only marginally increased to account for the same. In view thereof, it was submitted that any allegation regarding the lack of transparency in the levy of fuel surcharge was only to mislead the Commission and should be rejected at the very outset.

63. It was further stated that the Informant has not produced any evidence regarding discussions or meetings that OP-4 had with any other airline

operator in respect of the increase in fuel surcharge to be levied. Furthermore, the date of implementation and the levy of fuel surcharge was different in the case of OP-4 than those of the other domestic operators. Hence, it was submitted that the allegation of cartelization was completely unfounded. It was vehemently urged that there was no agreement between OP-4 and other airlines, either tacit or otherwise and that merely because the levy of fuel surcharge by some of the airlines happened to somewhat coincide, would not amount to there being an agreement by nod or wink either.

64. OP-4 submitted that the fuel surcharge was increased keeping in view the operating costs of the airline and also to protect against the volatility of fuel prices. That it was quite obvious that such a similar practice may also be followed by the other airlines to protect their interests in respect of fluctuating fuel prices and in order to maximize their revenue.

65. It was pointed out that the Informant has not presented the correct rates of FSC *qua* OP-4 before the Commission which clearly indicated that FSC was withdrawn in 2009 contrary to what the Informant had falsely represented. It was further added that oil companies typically revise their ATF prices on a monthly or even on a fortnightly basis. It is not feasible for OP-4 to revise fuel surcharge so frequently, as the shippers work out their business projections based on OP-4's rates and that they require some extent of rate stability. It was stated that frequent rate changes cause disruption in the market and create confusion among the customers. It was further stated that OP-4 has revised the fuel surcharge only 8 times since its re-introduction in 2010. Hence, the FSC may not increase in the same proportion as the increase in ATF prices, as it also has to account for the ATF price rise in the intervening period. It was also mentioned that the cargo fuel surcharge levied by OP-4 is a flat rate on chargeable weight basis.

66. It was stated that OP-4 being one of the many players in the cargo market cannot be totally disconnected from the overall market trends *vis-à-vis* cargo tariffs being charged. That in view of the precarious financial position, it was incumbent on OP-4 to set a competitive charge which benefits customers while at the same time earn revenues to mitigate losses. Hence, it was submitted that while OP-4 has periodically increased FSC in view of the overall upward ATF price trend as well as the overall rise in the FSC being levied in the market, to mitigate their losses and improve their financial position; and has nevertheless consistently levied an FSC lower than what other airlines are charging in order to reduce the burden on the customers.

67. It was stated that fuel surcharge is not solely dependent on ATF prices but on the overall operating costs as well as the overall market scenario. It was further stated that the total cargo sales included the basic cargo charge, the fuel surcharge and other charges as applicable. It was submitted that the commission is paid by OP-4 to cargo agents as a percentage of the basic cargo charge component of their sales only. That OP-4 does not pay commission to agents on cargo fuel surcharge. No separate agreement is signed between OP-4 and the cargo sales agents for payment of commission and such commission is determined by IATA norms. It was also stated that the associations of which OP-4 is a member do not relate to fuel surcharges. That they do not deal with cargo tariffs of individual airlines.

68. It was submitted that commission was traditionally paid on the basic freight charges and not on other charges like Air Waybill (AWB) fee, delivery charges, *etc.*, which were a payment against costs incurred by OP-4 on those heads. Fuel surcharge was also introduced as a charge separate from basic freight rate as it was meant to offset costs incurred on fuel. Hence, it was kept as non-commissionable.

69. Furthermore, it was pointed out that the DG contradicted itself when it referred to the domestic air cargo market as an oligopoly. That the DG's own market share analysis supported by the analysis done by the Director General of Civil Aviation which gave unflinching credence to the fact that domestic air cargo industry is intensely competitive. Therefore, the statistics presented by the DG itself exhibit the pro-competitive nature of this industry. Moreover, it was wrong for the DG to allege that there does not exist cross elasticity of demand as the carriers solely dedicated to freight such as Bluedart, fedex *et al* constantly keep a check on the pricing of the domestic airlines regarding cargo. The allegation of presence of barriers to entry was also not supported with any evidence and moreover, the domestic cargo industry does not involve essential facilities. Therefore, it was submitted that it cannot be alleged that there was existence of barrier to entry in the aviation industry.

70. It was stated that it was clear from the statistics provided by the DG that cargo forms under l0% revenue share for most airlines and that for OP-4 it was merely around 6%. Therefore, clearly indulging in price fixing of the Fuel Surcharge as alleged by the informant will lack any windfall financial gains for the airlines including OP-4.

71. It was contended that the findings of the DG in paras 6.20, 6.25-6.28, 6.35-6.38 and 6.41 of the Report were not justified especially in view of the fact that OP-4 has clearly brought to light the factors contributing towards determination of the fuel surcharge in various minutes of meetings submitted to the DG. It was stated that the fuel surcharge does not vary by aircraft type/ flight distance/ flight sector/ flight timing. FSC is based on ATF price movements, operating costs, and market trends. In view of a steady increase in ATF prices, FSC has also been increasing.

While the exact percentage of increase of FSC *vis-a-vis* ATF price may not be the same over different points in time, the same overall trend of a steady increase was there.

72. With regard to the data tabulated by the DG in its report on the movement of FSC in domestic market and its inference from the same that the prices of all the companies have generally moved in the same manner and towards similar direction was rebutted by OP-4 stating that the finding was contrary to the statistical data relied upon. It was submitted that levy of Fuel Surcharge by OP-4 has been much lower than the competing airlines and not in tandem as wrongfully alleged in the Report. That the Fuel Surcharge was also withdrawn in 2006 and 2009 by OP-4 while other competing airlines did not do this. It was stated that the finding of the DG seemed more out of place when the Report itself quoted the rationale of OP-4 behind any change in the levy of fuel surcharge in the later part of the report (Paras 6.50, 6.62 & 6.66).

73. It was stated that as far as conclusion of the DG regarding presence of any indirect evidence proving collusive behavior, OP-4 disagreed with certain findings. It was submitted that Issue Nos. 1 and 11 have been wrongly decided as the statistical data relied upon in the Report and the DGCA's reply prove that the domestic air cargo industry is dynamic and highly competitive. Regarding Issue No.2, it was stated that the DG itself admitted that the agents were paid after completion of a cycle, therefore, it was clear evidence as to why the Fuel Surcharge cannot immediately and commensurately reflect the frequent changes in ATF prices. It was averred that Issue No.3 again has been wrongly decided as FSC is indeed a component of freight charges and is reflected in the Airway Bill, however, there is no commission payable on this component. It was further averred that the DG's finding on the Issues Nos. 5,7,8 and 12 are incomplete. OP-4 has reiterated its earlier

submission about factors contributing towards determination of the fuel surcharges.

74. After having argued on the DG's findings on certain issues, OP-4 submitted that the DG was, however, correct in concluding that there has been no evidence against the opposite parties which can be said to contravene the provisions of sections 3(1) and 3(3)(a) of the Act.

75. OP-4 in its reply dated 18.05.2015 to the reply of the Informant to the Report of the DG, disagreed with the submissions made by the Informant. To substantiate, it has reiterated its arguments put forth in its earlier written submission dated 24.03.2015 in its preliminary submission. For the sake of brevity, the same is not repeated herein.

76. In its main reply, OP-4 submitted that the allegation of concerted action of the OPs was speculative and does not have any evidentiary support. It was stated that the DG was correct in noting that freight pricing was dynamic and highly competitive which does not figure in the AWB. Furthermore, agents are provided attractive deal rates by airlines which made freight pricing highly variable thereby blunting any apprehensions regarding collusive price fixing.

77. It was argued that just because certain international airlines were guilty of price fixing, does not imply that the OPs under investigation herein would have necessarily indulged in cartel like behavior. The DG has unequivocally held that there has been no evidence of concerted action regarding FSC between the OPs and therefore, the present case can be clearly distinguished from the international cases that were cited by the Informant. It was further argued that despite the voluminous investigation report of the DG which was prepared after thorough investigation, no evidence of any kind- direct or indirect- of concerted action between the OPs was found. It was alleged that notwithstanding

this, the Informant was still harping on its false allegations without producing even a shred of evidence to support its claims.

78. It was also stated that the Board of directors of OP-4 does not issue directives *qua* FSC. That it has produced all the minutes of internal meetings/ circulars regarding determination of FSC. Apart from explaining the pricing mechanism followed in pricing domestic cargo, revenue attributable to cargo, factors contributing towards determination of fuel surcharge, it was submitted that the domestic cargo FSC may have accounted for 30% of the domestic cargo revenue but it is only about 1% of the total airlines revenues. That the overall cargo rate is factored in by the customers choosing a carrier and not individual components like FSC. Many airlines offer lump-sum all inclusive rates with FSC not being separately factored in at all. That the break-up of the total rate in terms of FSC may affect the agent's commission but will not affect the end customer. Moreover, it was stated that the FSC has not resulted in any profits to OP-4 which has been running in deep losses. Therefore, there was no question of levy of penalty on OP-4. Furthermore, FSC stood withdrawn w.e.f. 1st April 2015.

79. Lastly, it was submitted that the conclusion reached by the Informant was baseless and that the chart produced by the Informant was incorrect *qua* OP-4. In view of its submissions made, it was prayed that the findings of the DG must be upheld and the complaint of the Informant must be dismissed.

Replies/ objections/ submissions of OP-5

80. Besides supporting the DG's report, OP-5 in its reply dated 22.07.2015 to the Informant's objection to the DG report submitted that the complaint filed by the Informant was without any basis and merits *qua* OP-5. It was stated that at every stage of the investigation, OP-5 has co-operated with the DG and provided all the necessary documents in

support of its statements. It was further submitted that OP-5 has never operated directly as cargo carrier and has assigned the business of transporting cargo to cargo agents. Therefore, the customers never booked cargo directly with OP-5 and neither did it issue any bills or receipts to the customers booking cargo with it.

81. It was further submitted that OP-5 has no role in levying or in the revision of FSC or any kind of details pertaining to FSC since it shared aircraft belly space with different vendors over a period of time and was never part of any commercial and economic aspects of fuel surcharges. Moreover, OP-5 has shared the belly space of its aircrafts exclusively to an entity called Sovika Aviation Services Private Limited on a firm revenue commitment basis. It was stated that the Sovika is not OP-5's agent but it acts as the sole cargo service provider. It was further stated that in the past OP-5 has engaged M/s Gammon Logistics Limited as the Sales Agent for Cargo on the Go Air Network.

82. It was also submitted that FSC collected from the customers, if any, is always collected by cargo service providers and OP-5 has no role to play and neither the proceeds of the same are transferred to OP-5's account. That the cargo service provider determined the cargo freight prices and FSC. Neither has it issued any circular with regard to the rates of charging FSC. It was contended that OP-5 had never indulged or planned to introduce FSC for transporting cargo and therefore, the allegation of levying FSC and further leading to the act of cartelization was without any factual basis. It was further contended that for air transport the fuel cost is not the only overhead expense but also included several expenses which have been concealed by the Informant. Also, the charges further varied depending upon the category of airline *i.e.* low cost carrier or full facility carrier.

83. In addition to the submissions made before the DG, it was submitted that OP-5 never connived to introduce FSC for transporting cargo and had never signed any agreement nor was there any consensus between the airline companies on FSC. Moreover, no such communication or issuance of letter was made by OP-5.

84. OP-5 denied the averment of the Informant that all the OPs are members of IATA, BAR, *etc.* In this regard, it was submitted that OP-5 is only a member of Federation of Indian Airlines (FIA) and is not a member of any of the organizations stated by the Informant in its reply. Further, on the submission of the Informant that various other jurisdictions' Competition Authorities have fined the airlines on the issue of fixing FSC, it was argued that the Informant had never earlier relied on the copies of articles and findings of international jurisdiction when the information was instituted before the Commission and not even at any further stage of hearing. It was only now, at this belated stage, is the Informant seeking to rely on these articles and judgments of international jurisdictions. Further, it was stated that OP-5 was never involved in direct cargo operations and had never indulged in any violation of the statutory provision of the Act.

85. It was pointed out that the chart highlighted by the Informant that deals with passenger-wise and cargo-wise market share of all domestic airlines does in no fashion bring to light the allegation that OP-5 was involved in fixing and charging FSC rates.

86. It was further submitted that the alleged admission pointed out in the Informant's reply that '*FSC rate of other airlines are also one of the key factors for determining FSC*' was made by one M/s Sovika Aviation Services- the agent of OP-5 to whom it had rented out its cargo belly space on a monthly basis. Payment of this is made by Sovika to OP-5 *via* a monthly royalty fee which enables Sovika to load their cargo in cargo

belly space rented out by OP-5. It was further submitted that OP-5 was in no manner concerned with any charges/ fee that Sovika charges their clients since it is not OP-5 but Sovika that accepted cargo bookings from their clients. It was once again highlighted that FSC rates were not charged by Go Air but in fact were charged by its cargo agents.

87. Lastly, it was denied that on 14.05.2008 a circular was issued by OP-5 announcing charging of FSC. It was submitted that it was possibly the cargo agents of OP-5 who had sent such communications with regard to charging of FSC to its customers on whom the management of OP-5 has no control. It was also denied that OP-5 has made any statement or tendered any evidence with regard to how FSC rates are determined. Furthermore, OP-5 has no remote connection with the levy of FSC rates unlike other airlines operators and hence, statements tendered by any other airline cannot be blindly applied to OP-5. It was also contended that OP-5 has never imposed any FSC and thus, allegations pertaining to concerted action on behalf of domestic airlines to increase FSC charges do not concern OP-5 and thus it cannot be brought within the ambit of any illegality committed, if any.

88. In view of the above submissions, it was prayed that the Commission may dismiss the complaint of the Informant with costs.

Analysis

89. On a careful perusal of the information, the report of the DG and the replies/ objections filed and submissions made by the parties and other material available on record, the following issue arises for consideration and determination in the matter:

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

90. It is noted that the Informant - 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.* - is essentially aggrieved of the conduct of the OPs in fixing the FSC rates over a period of time which allegedly affected the interests of freight companies.

91. Before adverting to the merits of the case, the Commission deems it appropriate to address some attendant issues which have a bearing upon the present case.

92. To begin with, it would be appropriate to ascertain as to what are the factors which are taken into consideration by the airlines while calculating the overall pricing of the air cargo charges. On a careful consideration of the replies filed by the parties, it appears that, apart from FSC, other components like Airway Bill fee, freight documentation, X-ray, delivery order charges, *etc*. are considered by the airlines while formulating the overall pricing of air cargo charges. Further, the Commission is also in agreement with the DG's finding that the freight tariff, which is the most important component in the overall pricing of air cargo transportation by airlines, is highly variable and dynamic. It may be also seen that the air cargo rates for any airline vary from sector to sector, flight to flight, nature of cargo, weight of cargo, flight timings, belly space, *etc*. As such, it appears that each airline takes into account several factors including FSC while deciding its overall calculation of the air cargo prices.

93. Further, it is observed from the DG report that cargo revenue ranged

from 20% to 30% of the overall revenue of the airlines and thus cartelization could not be ruled out. In fact, considering the annual tonnage carried by each airline and the fact that FSC is levied at a flat rate on per kg of chargeable weight of cargo, it was observed by the DG that the revenue on account of FSC component is a predictable amount and unlike freight tariff, which is dynamic and not amenable to revenue forecasting, revenue on account of FSC can be easily forecasted with a fair degree of accuracy. Thus, it was noted that FSC is not only a significant component of overall cargo pricing but also a predictable amount.

94. In this connection, the Informant argued that whether FSC is a component of the overall price or not was secondary but it nevertheless agreed with the DG's finding that it is a significant component. OP-3, however, argued that the DG overlooked the fact that the OPs compete with each other on the overall price and competition at this level influences the actual tonnage carried by an airline. Although the total capacity of the airline is known based on the fleet size, the actual tonnage of cargo carried is unpredictable and varies based on factors such as FSC and the other component of the overall price.

95. It is observed from the records that OP-1 in its reply dated 21.01.2015 to the DG stated that of the total domestic cargo revenue which included both bonded cargo and PO mail, FSC accounted for 24 % and 30 % for the years 2011-12 and 2012-13 respectively. OP-2 stated in its reply dated 20.01.2015 to the DG that the total 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 the FSC of the total cargo revenue for the year 2011-12 was 25.2 % and for 2012-2013 it was 35.08 %.

96. In view of the above, the Commission notes that the revenues generated by the airlines through FSC are not insignificant for the airlines. Further, it is also an admitted fact that the levy of FSC is at flat rate on per kilogram basis of the cargo weight. OP-1 to OP-4 have further confirmed the same in their replies to the DG that FSC is not affected by aircraft type/ flight distance/ flight sector/ flight timings, *etc*. This is indicative of the fact that the revenue on account of FSC can be easily forecasted with a fair degree of accuracy. In view of the foregoing, it is opined that FSC plays a vital role in generating revenue for the airlines. The Commission, therefore, agrees with the DG that FSC is certainly a significant component of the overall price so as not to rule out any possibility of any cartelization.

97. At this stage, it would be instructing to note the various factors which influence the determination of FSC by the airlines. In this connection, the DG, after having examined the replies and statements of all the parties concerned, noted that all the airline companies indicated that turbulence in ATF price was 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*. It was further noted that none of the airlines was able to furnish any data or costing studies of any kind whatsoever in support of the determination of FSC. No Airline has been able to give any systematic break-up of weight attached to any parameter claimed to be important in determination of FSC. The above was found by the DG to point towards the premise that there had been no systematic basis for fixing the FSC and the same was a nebulous, unilateral fixation by each airline.

98. In this regard, the Informant submitted that one of the factors considered by airlines to levy FSC was the levy of FSC by competitors and the same

fact was also admitted by OP-4 and recorded in the DG report. Further, OP-4 submitted that the levy of fuel surcharge was related to the overall operating costs of the airline and not to ATF prices alone and it has its own operating cost and charges a fuel surcharge accordingly. It was further pointed out that though OP-5 has categorically denied that it had taken decision on FSC, the circular dated 14.05.2008 issued by it announcing charge of FSC says otherwise. It was alleged by the Informant that despite bringing such facts to the notice of the DG, the same were ignored.

99. On a careful perusal of the material on record, the Commission is of opinion that ATF price movement is the main factor considered for determining FSC by all the airlines. Apart from this, other factors that are taken into account are market conditions/ trends, pricing by competitors, USD-INR rate of exchange, operating costs, infrastructure, manpower, *etc*. It is noted that each airline takes into account several factors to determine FSC, yet ATF price is the only consistent factor amongst all the airlines. The Commission also takes note of the fact as pointed out by the DG that none of the airlines was able to furnish any data or costing studies of any kind whatsoever in support of the determination of FSC rates.

100. Adverting to the justifications put forth by the airlines in respect of changes/ revision in FSC, the DG noted from the replies of the OPs that no specific reason for FSC revision on various instances was provided by the airlines. It was further noted that though ATF price volatility has been stated to be the most important factor, this correlation between ATF price and FSC breaks down on several occasions. Further, after having examined the correlation between ATF and FSC rates, the DG noted that there were certain instances when FSC rate was increased despite the fall in ATF price. It was also noted that the authorized representatives of OPs could not furnish the rationale for revision of FSC on certain

occasions. Therefore, the DG found that explanation put forth by the OPs in respect of changes/ revision of FSC was not justified.

101. The Commission notes that in case of OP-1, it has given the explanation that due to increase in ATF price coupled with increase in dollar exchange rate, the FSC rate was increased. However, on certain dates even though the ATF price came down there was an increase in the US dollar rates and on certain dates US dollar rate would decrease and ATF price would increase. In such scenario also, OP-1 was apparently compelled to increase the rate of FSC. 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, the reasoning provided was that the increase in ATF price and USD rate in the last few months had a very detrimental effect. This reasoning cannot be accepted. On the one hand, OP-1 submits the increase of either ATF or USD rate caused the increase in FSC rate and on other hand it is seen that neither ATF nor USD rate had any effect on the FSC rate to be charged. OP-2 has also cited ATF price rise as one of the main reasons to increase the FSC rate but has failed to justify as to how FSC was increased when ATF price was stable. Similarly, OP-3 failed to provide any rationale on the same. Further, after having examined the movement of FSC *vis-à-vis* the movement of each airline, it is noted that FSC changes have not been made in tandem with the fluctuation in ATF price on various instances and such behaviour is seen to be exhibited by the airlines in similar time period particularly in the years 2011 and 2012. There have been instances of revision of FSC when there was negative correlation between ATF price and FSC rate. The OPs were neither able to substantiate the correlation between FSC and other components.

102. It is seen from the above that FSC is an important component of the overall pricing of the total cargo charges and generates significant

amount of revenue for all the airlines. However, it is noted that the explanation given by the OPs regarding the changes in FSC rates due to the changes in ATF prices and USD rates were not satisfactory. Though it was stated that apart from ATF price and USD rates there were various other components to be considered, they were unable to provide any cost studies or data to support their submissions. OP-1 even stated that it has no formal meetings or internal notings with reference to each FSC rate revision. It is strange to note that OP-1, OP-2 and OP-3 despite admitting to discussions and meetings of their respective Cargo Department staff members relating to determination of FSC; have failed to furnish any internal notings/ minutes of the meetings. In fact, they have singularly failed to place copies of the minutes of even a single meeting before the Commission. It may be pertinent to note here that all these OPs have given the same reply that they do not have the minutes of any meeting with them on record. OP-4, however, has provided at least one document regarding the introduction of FSC. OP-5 claimed that it did not charge FSC and therefore had no such documents to furnish. In these circumstances, the plea taken by the parties contending that no records of the meetings where FSC rates are determined and maintained, does not inspire any confidence.

103. In view of the above, the Commission finds that the explanations provided by the parties on the changes/ revision in FSC rates were not justified.

104. The Commission may now move to address the main issue arising for determination in the present case *i.e.* whether the 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.

105. The DG noted that parallel action was being exhibited by the airlines in determination of FSC on certain nearby dates. In order to further analyze

whether such parallel action would fall within the realm of 'concerted action', the DG examined (i) the correlation between behaviour of individual airlines; (ii) behaviour of market in terms of tonnage during periods of revision of FSC by one airline and (iii) the dynamics and competitiveness of overall prices. After having analysed the above, the DG concluded that the data relating to the FSC movement of all the airlines do not show any concerted practice amongst the OPs regarding revision of FSC. Therefore, 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.

106. *Per contra*, the Informant argued that after concluding that there was a parallel action by the airlines in the determination of FSC through direct or indirect exchange of information, the DG began to justify the conduct of the airlines by seeking to find correlation between the behaviour of individual airlines. Further, despite the finding that "*no specific reason for this seemingly parallel action in FSC fixation in certain periods has been given by the airlines*", the DG has stopped short of inquiring as to why the airlines load other factors into FSC when they are charging air freight any way. It was submitted that the obvious answer was that FSC is not commissionable and air freight is commissionable. Thus, it was submitted that the airlines conspired to load the FSC instead of legitimately loading the air freight with their other factors only to deny commission to the agents. This concerted behaviour though touched upon by the DG in the investigation report, has not been drawn to its logical conclusion of anti-competitive behaviour indulged in by the airlines.

107. It was, however, vehemently submitted by OP-1 that there was no

warrant, basis or material or justification to contend or come to a conclusion that there was any concert in respect of fixation of FSC. OP-2 argued that the allegation of a cartel between the OPs stood negated on account of their fluctuating market shares in the domestic air cargo market. It was submitted that the cargo revenue forms less than 10% of the total revenue of all the airlines in the relevant period and that FSC itself accounts for around 1-2% of OP 2's total revenue. Therefore, it was contended that it cannot be held that there was sufficient incentive to cartelize or indulge in '*action in concert'* particularly given that there was no direct or even circumstantial evidence to substantiate such a theory.

108. It was argued by OP-3 that mere price parallelism does not indicate collusion as it may be a consequence of interdependence in a market that 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 stated 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 the OPs. It was argued that unlike a cartel where members generally have stable market shares in the market for air cargo transport in India, the 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.

109. OP-4 submitted that the levy of FSC by it has been much lower than the competing airlines and not in tandem as wrongfully alleged in the investigation report. It was contended that FSC was also withdrawn in

2006 and 2009 by OP-4 while other competing airlines did not do so. It was argued by OP-5 that it has never imposed any FSC and thus, the allegations pertaining to concerted action on behalf of domestic airlines to increase FSC charges do not concern OP-5.

110. The Commission has carefully examined the rivals submissions besides perusing the material available on record.

111. 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 wink. There is rarely a direct evidence of action in concert and in such situation 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 the light of the definition of the term 'agreement', the Commission has to find sufficiency of evidence on the basis of benchmark of preponderance of probabilities.

112. In view of the above and further considering the fact that since the prohibition on participating in anti-competitive agreements and the penalties the offenders may incur being 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 that 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.

113. Applying the aforesaid tests to the present case, the Commission may now proceed to examine whether the OPs have acted in concerted manner in fixing the FSC rate. For this purpose, the movement of FSC in domestic cargo was analyzed by the DG and the same is excepted below:

Time Period	Jet Airways (OP-1)			IndiGo (OP-2)			SpiceJet (OP-3)			Air India (OP-4)		
	Dt of decision	Date of Implementation	FSC Rate (Rs. Per kg)	Dt of decision	Date of Implementation	FSC Rate (Rs. Per kg)	Dt of decision	Date of Implementation	FSC Rate (Rs. Per kg)	Dt of decision	Date of Implementation	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

114. The Commission notes from the above movements of FSC that in the year 2008, OP-1, 2, 3 and 4 had charged the FSC at Rs. 5 per kg at the time same time. It appears that none of these OPs could provide any valid explanation nor furnish any methodology/ market study on the basis of which the rate was imposed. It is further noted that the DG did not examine 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 only noted the 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 failed to notice that OP-1, OP-2 and OP-3 increased the FSC rate to Rs. 9 per kg. In fact, OP-2 and OP-3 increased the same on the very same date. Similarly, for June 2012 and September 2012, the DG has given time lag of just few days as the basis for not drawing any inference of concerted action amongst the OPs. In case of November 2012, it is noted that OP-1 and OP-2 had increased the FSC rate on the very same date. The airlines yet again tried to justify the movement in FSC by linking the same with increase in ATF prices and other operational costs. It was rightly noted by the DG in its report that it defies normal logic as to why two airlines would issue circular increasing FSC by the same amount on the same date even though the ATF price was falling and neither party was in a position to furnish any methodology / market study justifying the quantum to raise the FSC. It may also be pertinent to note here that the same logic will apply in case of OP-3 as well as it too had increased the FSC rate at nearly the same time. The so-called time gap is just a matter of few days. It would be travesty of competition norms if such lag theory is countenanced by the Competition Agency. It is neither the requirement of law nor any other jurisprudence that cartels must originate symmetrically, progress symmetrically and culminate in a similar fashion. More often than not, the colluding parties would like to break the patterns through artificial gaps and arrangements so as to create a façade of competitive behaviour. In such a projected "competitive landscape", it is the bounden duty of the Authority to pierce this artificial veil and to examine the real behaviour of the colluding parties. The present case perfectly fits such stratagem where artificial lags and gaps were sought to be passed off and projected to envision a competitive scenario when none existed. In fact, such justifications and explanations only complete the chain of the arrangement and understanding reached amongst the parties. Furthermore, the explanations tendered by them, as noted earlier, are not

correct and stood contradicted.

115. Having discussed the above, it is noted that whenever the FSC of one airline has gone up it was followed by the rest of the airlines simultaneously on several occasions. Thus, it is seen that the airlines exhibited parallel behaviour. However, parallel behaviour of competitors can also be a result of intelligent market adaptation in an oligopolistic market. Therefore, it becomes important at this stage to analyze if collusion is the only reasonable explanation to the conduct of the OPs.

116. The Commission observes that the DG has examined the correlation between behaviour of individual airlines; behaviour of market in terms of tonnage during periods of revision of FSC by one airline and the dynamics and competitiveness of overall prices and came to the conclusion that no concerted action could be inferred from the same.

117. With regard to the correlation between behaviour of individual airlines, the DG analysed the same in the following manner:

Absolute change: (Table –A)

	OP-1(Jet Airways)	OP-2 (Indigo)	OP-4 (Air India)	OP-3 (Spice Jet)
Jet Airways	1.0000			
Indigo	0.9777	1.000		
Air India	0.9145	0.9345	1.000	
Spice Jet	0.9478	0.9569	0.8645	1.000

Percentage Change: (Table –B)

	OP-1(Jet Airways)	OP-2 (Indigo)	OP-4 (Air India)	OP-3 (Spice Jet)
Jet Airways	1.0000			
Indigo	0.2743	1.000		
Air India	0.6388	0.2018	1.000	
Spice Jet	0.0445	0.0509	-0.0151	1.000

118. It may be noted that a correlation coefficient indicates the strength and direction of the linear relationship between two variables. In the Table A, pair wise correlations have been computed between Jet Airways, Indigo, Air India and Spice Jet. The variable under consideration is the absolute change in the FSC for the period 2008-12 for the respective airlines. The table shows a high degree of positive pair wise correlation between this variable for different airlines indicating that the FSC of the airlines have moved in tandem during 2008-12. However, it is noted that since the data under consideration is a panel dataset, the DG has computed the pair wise correlations based on percentage change in the FSC. Table B gives the pair wise correlation coefficients based on this variable. It can be observed that the direction of correlation in each case is positive (except in the Air India and Spice Jet case correlation) but the degree of correlation is very low, indicating a weak linear association between the variables. On this basis, the DG concluded that the airlines have not behaved in tandem in respect of the FSC for the period 2008-12. The Commission, however, notes that the two cases above give significantly conflicting observations, as using absolute change in FSC as a variable gives a high degree of positive pair wise correlation between the variables but taking percentage change in FSC as the variable gives a very low degree of pair wise correlation for the same period. Therefore, correlation analysis is not a good indicator of the behaviour of the movement of FSC of the airlines for the period 2008-12 and does not provide any conclusive evidence of the nature of this relationship. Also, the DG has not lucidly explained as to why the percentage change variable was considered when high degree of correlation was already established using absolute change. In view of the foregoing, the conclusion arrived at by the DG stands negated.

119. With regard to the behaviour of market in terms of tonnage during the revision of FSC, it was noted by the DG that on some occasions, the cargo carried by an airline increased with the fall in FSC, while on other occasion decreased and *vice versa*. The DG was, therefore, of the view that since there was variations in cargo tonnage carried by the airlines, there was no pattern being followed by the airlines. That FSC being only a component of a total freight, a change in FSC will not affect the demand of cargo services so much. In other words, with limited options left with the consumers, the demand of cargo space will hardly be affected irrespective of the fact that FSC was charged high or low. The Commission agrees on this aspect with the DG, however, it disagrees that FSC has insignificant role to play in the whole cargo services. The DG has tried to obfuscate the matter by putting in the FSC and cargo tonnage unrelated link in the analysis. It may be noted here that it has already been opined above that FSC plays a vital role in generating revenue for the airlines. Furthermore, by stating that *FSC is only a component* of the total freight charge, the DG has contradicted its own earlier finding.

120. In view of the above, it is opined that the DG was not correct in coming to the conclusion that there was no concerted practice amongst the airlines regarding the revision of FSC. 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 is noted that the DG failed to establish if there was any contact or communication exchanged between the airlines directly or indirectly regarding FSC rates though several statements of parties including third parties were recorded. It may be noted that a parallel conduct is legal only when the adaptation to the market conditions was 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.*

121. 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 Manger (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 contacts eliminates or substantially reduces in advance any uncertainty that might otherwise would have existed regarding commercial conduct of other competitors in the market and also in such scenario the concerned company takes into account such information before determining its own conduct. It is clearly 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 dates or nearby dates are reflective of some sort of understanding amongst the 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 concerted manner. Though there is no evidence of direct meetings, the 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 intentions in the market indirectly.

122. 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. Thus, such 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.

123. In case of agreements as listed in section 3(3) (a) - (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; the onus to rebut the presumption would lie upon the opposite parties. In the present case, the opposite parties could not rebut the said presumption. It has not been shown by the opposite parties how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Neither, the opposite parties could explain as to how the said conduct did not foreclose competition.

124. As regards OP-5, it was noted by the DG from the replies submitted and depositions made during the course of the investigation that it gave cargo belly space to third party vendors to undertake cargo functions. Further, it was stated that OP-5 has no control and was never part of any commercial/ economic aspects of cargo operations done by vendors including imposition of FSC. As such, the DG did not include OP-5 in its analysis in the investigation report and no finding of contravention was recorded against it.

125. Further, so far as OP-4 is concerned, there are certain peculiar features which need to be taken into account. From the analysis made earlier in the order in respect of movement of FSC rates in domestic cargo, it is noted that during September 2012, all the airlines had increased the rates in an identical manner and fixed the FSC rate identically @ Rs. 13 per kg, whereas OP-4 during this period fixed FSC rate @ Rs. 11 per kg

which was lower than the rate fixed by other airlines. Similarly, lower rate can be also observed during November 2012 when all other airlines charged FSC rate @ Rs. 15 per kg whereas OP-4 charged the same @ Rs. 13 per kg during that period. Moreover, it appears that in respect of OP-4 FSC rates were almost consistently moving in tandem with the change in ATF rates. The Commissions has also taken note of the submissions made by OP-4 to the effect that it had first introduced levy of Fuel Surcharge of Rs. 2/- per Kg w.e.f. 1st May, 2006 and subsequently, the levy was modified as per the change in ATF prices and in the operating costs of the Airline. A table on the changes in Fuel Surcharge over time was also provided by OP-4 to demonstrate that where 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.

126. In the result, 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.

127. The Commission, therefore, passes the following:

ORDER

128. OP-1 to OP-3 are directed to cease and desist from indulging in the practices which have been found to be anti-competitive in the preceding paragraphs under the provisions of section 3(1) read with section 3(3)(a) of the Act.

129. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. 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 are parties to such agreements or abuse. Further, in cases of cartelization, 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.

130. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalties are: (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalties 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.

131. The Commission would now bestow a thoughtful consideration to the aggravating and the mitigating circumstances that may be available to the OPs. 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. Such cartels in the air cargo industry particularly undermine economic development in a developing 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 firms 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 who include express companies, freight forwarders and ultimately the end users and

thereby will also harm the competition. At the same time, it cannot be disputed that airlines are incurring losses besides groaning under accumulated debts. After duly considering the matter, the Commission finds it appropriate to impose a penalty on OP-1 to OP-3 at the rate of 1 % of their average turnover of 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:

(In crores)

S. No.	**Name of OPs**	**Turnover for 2010-11**	**Turnover for 2011-12**	**Turnover for 2012-13**	**Average Turnover for Three Years**	**@ 1 % of average turnover**
1.	**Jet Airways** **[Jet Airways (India) Limited]**	12932.27	15173.08	17403.17	15169.50	151.69
2.	**IndiGo Airlines** **[InterGlobe Aviation Limited]**	3947.34	5718.06	9458.31	6374.57	63.74
3.	**SpiceJet** **[SpiceJet Limited]**	2963.91	4019.11	5762.48	4248.5	42.48

132. Accordingly, the Commission imposes a sum of Rs. 151.69 crores on OP-1, Rs. 63.74 crores on OP-2, Rs. 42.48 crores on OP-3 as penalties for the impugned conduct in contravention of the provisions of section 3(1) read with section 3(3)(a) of the Act.

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

134. It is ordered accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C. Nahta)
Member

Sd/-
(M. S. Sahoo)
Member

Sd/-
[Justice (Retd.) G. P. Mittal]
Member

New Delhi
Date: 17/11/2015