Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

14th October, 2013

Combination Case No. 2013/05/122

<u>Order u/s 29(1) of the Competition Act, 2002</u>

1. On 1st May 2013, the Competition Commission of India (hereinafter referred to as the **"Commission"**) received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 ("**Act**") given by Etihad Airways PJSC (hereinafter referred to as "**Etihad**") and Jet Airways (India) Limited (hereinafter referred to as "**Jet**") (hereinafter Jet and Etihad are collectively referred to as the "**parties**"). The notice was filed with the Commission pursuant to the execution of an Investment Agreement ("**IA**"), a Shareholder's Agreement ("**SHA**") and a Commercial Co-operation Agreement ("**CCA**"), on 24th April 2013 (IA, SHA and CCA shall collectively be referred to as the "**Binding Documents**").

2. In terms of Regulation 14 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"), vide letter dated 9th May 2013, the parties were required to remove certain defects and provide information/document(s) by 28th May 2013. After seeking extension of time, the parties filed their response on 3rd June, 2013.

3. In terms of sub-regulation (4) of Regulation 5 and sub-regulation (2) of Regulation 19 of the Combination Regulations, vide letter dated 6th June 2013, the parties were required to provide certain additional information by 20th June 2013. After seeking extension of time, the parties filed their reply on 21st June 2013. Since the information provided by the parties was not

complete, another letter dated 24th June 2013 was sent to the parties requiring them to provide complete information by 9th July 2013. After seeking extension of time five times, the parties filed their reply on 30th August 2013. Since the parties did not provide conclusive and complete reply to the queries raised in the Commission's letter dated 24th June 2013, in terms of Regulation 14 of the Combination Regulations, vide letter dated 30th August 2013, the parties were informed that their reply was incomplete and therefore, they were required to remove the defects and provide final and complete information by 5th September 2013. The parties filed their reply on 9th September, 2013.

4. On 3rd June 2013 and 9th September 2013, the parties intimated certain changes/ amendments to the Binding Documents. The Commission considered these changes, in its meetings held on 6th June 2013 and 23rd September 2013 respectively, and noted the same. As per the undertaking given by the parties during the hearing on 23rd September, 2013 the clock stopped on 24th June, 2013 and would continue as such till the parties confirmed the finality of the transaction documents to the Commission.

5. As per the Parties reply dated 9th September, 2013, the parties have sought the Commission's approval for acquisition of 24% equity interest in Jet and in relation to all rights and benefits which the parties have commercially agreed upon in the amended SHA, CCA and the Corporate Governance Code ("**CGC**"), a governance code agreed to be adopted pursuant to the SHA. It is also noticed that, in terms of Clause 2.2 read with para 7 of Schedule 2 to the IA, the Commission's approval for implementation of each other Transaction Document, defined to include IA, SHA, CCA, LHR Slots Agreements and the FFP Term Sheet, is *inter alia* a condition precedent to the closing of IA.

6. The issue before the Commission for consideration and determination in this order today is as to whether, in the prima facie opinion of the

Commission, the proposed combination is likely to cause, or has caused an appreciable adverse effect (AAEC) within the relevant market in India. In the event of such a prima facie opinion being formed under Section 29(1) of the Act, the Commission shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

7. As noted earlier, the notice u/s 6(2) of the Act was received by the Commission on 1st May, 2013. However, for the purposes of Section 31(11) (210 days) of the Act, and Regulation 28 (6) (180 days) of the Combination Regulations, only 11 days have elapsed so far, in view of the application of Regulation 5(4) and 19(2) of the Combination Regulations, because of the time taken by the parties in furnishing requisite information.

8. It is also noted that provisions for forming a 'prima facie' opinion exist both for Sections 3/4 and Section 5/6 cases essentially with a similar intent and purpose. In cases under Sections 3/4, the practice is that the informant gets only one opportunity at this stage to furnish additional information, and the General Regulations (Regulation 17) provide for a 'preliminary conference' with other persons as may be necessary. In cases under Sections 5/6, however, the practice has been to give several opportunities to the parties to furnish information. Be as it may, the intention in regard to all these Sections is the same, namely to arrive at a 'prima facie' opinion on the basis of a quick preliminary inquiry. In the cases under Section 5/6, Combination Regulation 19(1) lays down the time limit of 30 days for this purpose, subject to Regulation 5(4) and 19(2) which provide not counting the time taken by the parties in furnishing of the information.

9. Unfortunately, in this case, the parties have repeatedly asked for more time for furnishing information, and then furnished vague and incomplete information, thereby inordinately delaying the competition assessment

process at the 'prima facie' stage itself. As a consequence, after the passing of 167 calendar days, for purposes of competition assessment under the Act only 11 days have passed till date, a situation for which the parties are squarely responsible, and which has hindered early finalisation of the case. Be as it may, in my opinion, adequate information is now available for forming a 'prima facie' opinion in the case.

10. It may be noted that in the scheme of Act, the 'prima facie' opinion does not in any way indicate any pre-conceived determination of the final outcome of the case, and the investigating authority is explicitly required not to let the views expressed at this stage influence it in its investigation and findings. That such prima facie opinion is to be arrived at after a very quick preliminary inquiry is evident from the fact that Regulations lay down a maximum time limit of 30 calendar days only for this inquiry and determination and, in case of competition concerns arising during such an inquiry, further action u/s 29(1) of the Act is to be contemplated.

Relevant Market:Likely Impact of the Proposed Combination

11. Both the parties to the combination are airlines. Since Etihad is not operating in the Indian domestic air transportation services, and India has adopted open skies policy for international air cargo transportation, the relevant market would be the international air passenger transportation from and to India. The assessment of the likely impact of proposed combination on the relevant market would need to be done both at macro and micro level, as indicated below :-

a) Macro level impact on the different sectors of international air passenger traffic from and to India; and

b) Analysis of the extent of overlaps of flights of the two airlines between specific points of origin and destination (O&D pairs or routes).

Macro level impact:

12. As per the information available on the website of DGCA, around 75 airlines are offering international scheduled air passenger transport services from India. On the basis of total number of scheduled passengers carried to/from India, details regarding number of passengers carried and market share of top 10 airlines offering international scheduled air transportation services to/from India are as follows:

Airline	2009-10		2010-11		2011-12	
	No. of passengers	Mkt. Sh.	No. of passengers	Mkt. Sh.	No. of passengers	Mkt. Sh.
Air India	4942805	15%	6812621	19%	6871387	18%
Emirates	4023210	13%	4555294	13%	4559780	12%
Jet Airways	3461740	11%	4570912	13%	5247259	13%
Air Arabia	1377527	4%	1485711	4%	1481384	4%
Qatar	969281	3%	1255259	4%	1532999	4%
Lufthansa	1144877	4%	1192830	3%	1185868	3%
Thai Airways	1053052	3%	1112335	3%	1018418	3%
Singapore	997591	3%	1047729	3%	1051086	3%
Saudi Arabia	729344	2%	997148	3%	1159441	3%
British Airways	973078	3%	901850	3%	938272	2%
Others	12403146	39%	11354358	32%	13782845	35%
Total	3,20,75,654		3,51,08,721		3,88,28,739	
Growth Y-o-Y	10.86%		9.46%		10.60%	

13. While the market share details are relevant in understanding the current position of different airlines and the overall state of competition in the civil aviation sector, the same may not appropriately reflect the future state of competition on account of several factors, such as (a) increase in the seat entitlements of a particular airline to operate more flights to/from India (from different cities); (b) changes in foreign investment policies or policy to allow international operations by domestic airlines or alliances between airlines; (c) availability of aircrafts and slots to operate services to/from a particular airport/destination; (d) network and operational strategies of competitors etc.

14. In the instant case also, the current market share of the parties may not be indicative of the future competition between Jet and Etihad, absent the proposed combination, as these market share calculations are based on the current operations under the earlier seat entitlement of 13330 seats per week, each direction, between UAE (Abu Dhabi) and India. Since the Government has recently entered into the MoU with UAE (Abu Dhabi) increasing the seat entitlement of both the countries from the earlier level of 13,330 seats per week to 50,000 seats per week, spread over three years, each direction, with Etihad set to get the entire increase of seats from the side of Abu Dhabi and Jet showing interest in being the designated airline of India to utilize a significant portion of the Indian seat entitlement to/from Abu Dhabi, it is apparent that the proposed combination is likely to result in Jet & Etihad together capturing the largest market share in the international air passenger traffic from/to India, relegating Air India to the second position, as indicated below.

15. With the overall international passenger traffic to and from India growing at around 10 % over the last three years, Etihad and Jet with increased seat entitlement to and from Abu Dhabi are likely to be the major beneficiary of further growth in the overall international passenger market and potentially the largest airline (both taken together), in terms of the total number of passengers carried to and from India. It is observed that since all other major airlines are operating at a reasonably high load factor and significantly constrained by relevant Bilateral Air Services Agreements (BASAs) and/or availability of aircraft for deployment, those airlines are not likely to constrain the combined operations of Jet and Etihad pursuant to the proposed combination. With increase in seat entitlement from earlier limit of 13,330 seats per week to 50,000 seats per week for Etihad; assuming 15,000 additional seats for Jet; keeping seat entitlement of other foreign airlines as constant; and assuming a conservative 6% p.a. growth in the international air passenger traffic, the projected market shares of top 5 airline by 2015-16 is likely to be as under:

S.No.	Airline	No. of Passengers	Mkt. Share
1.	Jet and Etihad	1,23,70,544	25%
2.	Air India	86,74,968	18%
3.	Emirates	48,00,000	10%
4.	Qatar	19,35,377	4%
5.	Air Arabia	18,70,209	3%
6.	Others	1,96,51,417	40%
Total		4,90,20,388	

16. Competition assessment and analysis for proposed combinations primarily involves comparing likely future market scenarios (i) after the combination, and (ii) absent the combination. This would, inter alia, take into account the past conduct as well as the strategies adopted by the parties to the combination. For example, it is noted that Etihad has consciously adopted a global strategy to acquire stake in and/or form operational alliances with a large number of international airlines all over the world which would, over a period of time, give it a very large global footprint with a potentially huge hub at Abu Dhabi. Combined with the recent nearly three-fold increase in the bilateral rights to/from India, this would make it a formidable airline passenger service provider in the relevant market. Jet, on the other hand, has suspended it's operations at Delhi-Milan, Chennai-Brussels, Chennai-Dubai, Hyderabad-Dubai, and Thiruvananthapuram - Sharjah routes which, advertently or inadvertently, synchronise well with the interests of Etihad. It has not been possible to take these factors fully into account in the preliminary projections in the preceding paragraph, which would need to be done an appropriate time, as indicated later in this order. For the present 'prima facie' assessment the preliminary figures above will suffice, since the impact of these factors will only lead to even higher projections for likely combined market share of Jet and Etihad.

17. The post-combination leadership position of Jet and Etihad, with 25% market share as projected above, raises prima facie concerns that the combination may cause appreciable adverse effect on competition within the relevant market of international air passenger traffic from/to India at the macro level. Such an AAEC could be further compounded in case of a

potential scenario of the combination leading to a future weakening of Air India to an extent that it ceases to have the capacity to provide any significant competitive constraint to Jet and Etihad. This is important since Air India is reported to be already under significant financial stress, and the proposed combination could lead to further losses on some of its important routes. If Air India were to be so weakened, it would change the entire dynamics of the airlines services for international air passenger traffic from and to India. The very adverse impact on the consumers, in case of a major airline closing or becoming substantially weaker, is well-known and documented, including in the relatively recent case of the impact of failure of Kingfisher Airlines in the domestic air transport passenger market.

18. The macro level position and likely impact may be illustrated with the possible implications for the international air passenger traffic between India and North America. As per the information provided on the website of DGCA, around 10,70,974 passengers travelled between India and US during 2011-12. As per the data furnished by the parties, Jet has carried around 2,75,615 passengers (including passengers on Brussels-Newark/New York-Brussels routes) and Etihad has carried around 1,80,360 passengers in their flights between India and US, which translates to a combined market share of around 42%. Keeping in view the increased seat entitlement and the claimed efficiencies accruing to Jet and Etihad as a result of the proposed combination, they are likely to be the largest carrier for serving traffic between India and US. This raises potential competition concerns which need to be examined in-depth.

19. It is noted that currently Jet is the only carrier to operate direct/non-stop flights between India (Delhi and Mumbai) and Brussels. Further, Jet has also been using Brussels as the transit hub for its services between (i) *India and Toronto*; and (ii) *India and Newark*. The services of Jet and Etihad currently overlap with each other in all these routes. However, so far Etihad might not have been a significant constraint to Jet on these routes on

account of limited seat entitlement under the erstwhile BASA (13330 passengers per week, each direction). Since the MoU has increased the seat entitlement of UAE (Etihad) to 50000, absent the combination, it is reasonable to expect that Etihad and Jet would have competitively constrained each other in several O&D pairs, including within the above identified sectors. This potential competition will now be lost after the proposed combination.

20. It is noted that Jet has been the pioneer among the Indian private airlines to offer non-stop services in international routes to/from India. Jet has also been successful in carrying reasonable number of passengers by direct flights to destinations that were hitherto served only by indirect flights. For instance, Jet commenced its operation on the Delhi-Milan route in 2011 and carried around 1,60,000 passengers on the said route during 2012 with around 57% market share. However, this flight was suspended during the last financial year on the purported reason of loss and network valuation. Other routes where Jet has been successful in launching and operating direct flights for the first time to/from India include Delhi-Brussels and Mumbai-Brussels. It is also apparent that Jet's proposed alliance with Etihad is likely to discourage Jet from launching non-stop services to/from destinations that are served by Etihad through connecting flights from Abu Dhabi.

21. The foregoing information/analysis makes it abundantly clear that the proposed combination will create a formidable air service provider in the relevant market, and could well be a game-changer in terms of it's impact on the dynamic structural equilibrium, potentially leading to weakening the ability of other air service providers to provide significant competitive constraints. It is, therefore, absolutely essential to undertake an in-depth analysis of the current international air passenger traffic from/to India, and then build alternate likely future scenarios, to evaluate the actual likely impact on the competition in the market, and assess whether this could

cause consumer harm. For this, it would be necessary to collect credible relevant data and use appropriate analytical models/tools.

22. The information presently available with the Commission has been largely furnished by the parties to the combination only. It has not been possible, despite efforts, to test the veracity of this data independently, as also to collect all the data which would be necessary for this exercise, within the limited assessment mandate at the stage of prima facie consideration of the proposed combination. This has assumed additional importance in view of the frequent variations/changes made in the information furnished by the parties from time to time, the fact that this is a very dynamic market with no independently credible data-base available with any recognized institution/authority, and the various competition concerns arising due to the proposed combination. It should be possible to obtain much of this data from other airlines as also from airport operators. Once the data is available, it would be possible to develop potential alternate future scenarios, with the help of experts who could be engaged by the Commission for this purpose, if necessary.

23. It is important to note that the highly dynamic market of international air passenger traffic is impacted by a variety of variables. Airlines have to take appropriate counter-measures and adopt suitable counter-strategies in the event of any significant developments in this market, including mergers, acquisitions, alliances, bankruptcies etc. The exercise to project alternate future scenarios in this case would, therefore, need to inescapably take into account the strategies competing airlines, particularly the major ones, may be contemplating. Obtaining the views of other stakeholders, including consumers and airport operators would also be necessary. Amongst the airlines, the views of those who have relatively significant market share, like Air India, Emirates etc., as well as of those who have the resources and interest in increasing their market share, like Lufthansa, Singapore Airlines etc., would need to be ascertained. Similarly, data would need to be

collected from airports like Delhi, Mumbai, Hyderabad, Bengaluru, Chennai, Kochi etc. Consumers' views may need to be ascertained through consumer surveys etc. Thus, third parties have to be inevitably involved in this exercise under Section 29(3) of the Act.

24. A robust competition assessment would be possible once the above information has been collected and in-depth analysis undertaken. In the analysis it would need to be kept in mind that not only there should be no likelihood of AAEC over a long time-horizon, but there should not be any interim or transition period also during which such AAEC is possible. This aspect is particularly important since even if the relevant market is assessed as one capable of correcting itself over a long period, the intrinsic entry barriers and long gestation periods inherent in the relevant market, may make AAEC over relatively short/medium periods quite likely. In case such a situation appears likely, appropriate modifications (whether structural or conduct remedies) to the proposed combination may need to be considered under relevant provisions of Section 31 of the Act.

25. In addition to the above, the following facts regarding the exit of certain code-share agreements envisaged in the proposed combination also lead to the prima facie conclusion that the proposed combination is likely to cause AAEC in the relevant market:-

25.1 The CCA requires Jet to exit, as soon as reasonably practical, those existing code share arrangements or joint ventures with third party carriers which have the effect of bypassing the Abu Dhabi airport as the transit hub for traffic to/from the Exclusive Territory. The term Exclusive Territory has been defined in the CCA as Africa, North and South America and the UAE, excluding Canada until appropriate amendments to the relevant air service agreements allow Jet to operate to Canada through Abu Dhabi with 5th freedom right.

25.2 On a specific query of the Commission, the parties have replied that at this stage, no code share agreement or joint venture has been identified by Jet to exit from their existing arrangements. However, it is likely that, in future, Jet may terminate its code share relationship with certain partners who are in competition with Etihad's network.

25.3 It is observed that Jet's exit from certain code-share agreements may result in weakening/elimination of inter-hub competition and may restrict passengers' choice in their journey to/from certain destinations. Passengers may be served by an airline by having alliance with other airlines. For Instance, Jet currently has direct flights between India and Brussels; and its code share agreement with Brussels Airlines was stated to facilitate services to/from Birmingham, Madrid, Lyon, Barcelona, Berlin, Paris, Manchester, Hamburg, Marseille, Toulouse, Geneva, Vienna and Bristol. It may be appropriate to consider Brussels as an economical/effective alternative hub in Europe for destinations therein. However, the proposed combination would discourage Jet from using Brussels as its transit hub for its services to/from Europe and North America in favour of Abu Dhabi; and thereby weaken/eliminate the inter-hub competition between Brussels and Abu Dhabi for services in India-US and India-Europe sectors.

26. *In brief, based on information available in regard to the proposed combination, and for reasons stated earlier, I am of the prima facie opinion that the proposed combination is likely to cause AAEC within the overall international air passenger transportation market in India, and investigation needs to be conducted in the matter.*

Origin & Destination (O & D) Pairs

27. As observed earlier, both the parties are airlines offering international air passenger transport services. Considering the fact that passengers of scheduled air transport services buy tickets for particular points of origin and destination (O&D pair or routes), it is an internationally accepted practice to consider each O&D pair as a separate and distinct relevant market in micro-level analysis from the consumer's point of view. In this case this would mean that the relevant market comprises the airline services from and to specific locations in India, to and from specific locations abroad, since the origin and destinations are not substitutable products for the consumer.

28. In the notice filed on 1st May 2013, the parties gave details only in respect of 74 origin and destination pairs, where both Jet and Etihad offer international air passenger services ('overlapping routes'). However, the parties, in their submission dated 3rd June 2013, submitted that the services of Jet and Etihad overlap in 197 routes. The number of overlapping routes was again revised to 203 in the parties' submission dated 21st June, 2013 and was subsequently further revised in the parties submission dated 30th August 2013.

29. As per the latest information provided by the parties, both Jet and Etihad offer international air passenger transport services on 188 overlapping routes. It has been claimed that out of these routes, each of the parties carried more than 100 passengers (per annum) and has 2 or more percent of market share in 83 routes. Of these 83 overlapping routes, 55 routes have either points of origin or destination in India and the rest 28 routes are foreign O&D pairs. Out of the 55 international overlapping routes, each of which has either point of origin or destination in India, 9 routes are between Abu Dhabi and India and rest of the routes are between other foreign destinations and India.

30. An analysis of the above 55 routes raises competition concerns in case of two O & D pairs in India-UAE sector. In these 2 O & D pairs in India-UAE sector viz. Mumbai-Abu Dhabi and Delhi-Abu Dhabi, competition concerns arise due to the high combined market share Jet and Etihad will enjoy post-combination. Additionally, competition concerns regarding 3 other O & D pairs in the sector arise from the likelihood of Jet exiting from these routes post-combination, while Etihad is already not operating on these routes.

31. In the above context, it is noted that as per the information provided by the parties, the combined market share of the parties is high between different call points in India and Abu Dhabi, particularly between Mumbai-Abu Dhabi and Delhi–Abu Dhabi, where the combined market share of the parties is 55% and 50% respectively. While Air India is the only other airline offering non-stop flight between Mumbai-Abu Dhabi, no airline other than Jet and Etihad currently offers non-stop services between Delhi–Abu Dhabi.

32. In analysing air passenger traffic between any O & D pair, it is important to note the distinction between non-stop services, and air-services offered with one or more stops en-route. There is a distinct category of consumers who almost invariably opt for non-stop flights, making the non-stop air services market as the 100% market for such consumers. This category includes almost all executive/first class passengers, apart from some who travel economy. In shorter haul flights like India-UAE almost all the passengers prefer non-stop air services. This factor has to be kept in view in combination assessment while analysing market shares of different airlines.

India-UAE Sector

33. Parties have claimed that Dubai, Sharjah and Ras Al Khaimah are substitutable destinations to Abu Dhabi as they are located in the same catchment area and the respective airlines of Abu Dhabi (Etihad) and Dubai

(Emirates) offer chauffeur/shuttle services to these destinations. However, the details of overlapping routes provided by the parties show that passengers travelling to Dubai are not using Abu Dhabi as a substitutable option. For instance, out of 5,79,292 passengers who travelled between Kozhikode and Dubai during 2012, only 2 passengers flew through Etihad (i.e. travelled to Dubai via Abu Dhabi). Similarly, out of 12,71,202 passengers who travelled between Abu Dhabi and India (9 different call points) during 2012, only 4 passengers have used the services of Emirates (i.e. travelled to Abu Dhabi via Dubai). It is also noticed that the websites of none of the Indian carriers, including Jet, Indigo and Spicejet, show Dubai as substitutable to Abu Dhabi or vice versa. This shows that neither the Indian airlines, including Jet, nor the consumers treat Abu Dhabi and Dubai as substitutable.

34. Similarly, a comparison of the airfares (for October, 2013 illustratively) of different airlines to the said destinations suggests that the airfares to Abu Dhabi and Dubai from Mumbai/Delhi are reasonably different, and the airlines treat them as non-substitutable products. For example, Emirates charges Rs. 10,823 for Mumbai-Dubai sector, while Etihad charges Rs. 21,737 for Mumbai-Abu Dhabi. The natural conclusion is that the consumers do not see the air services to the different airports in the UAE as substitutable.

35. It is also found that the services of Etihad do not include any itinerary to Sharjah and Ras-Al-Khaimah. Similarly, the services of Air Arabia to/from Sharjah and the services of Rak Airways to/from Ras Al Khaimah do not include any itinerary to/from Abu Dhabi. Moreover, Rak Airways offers services only between Ras-Al-Khaimah and Kozhikode and no other airlines operate between India and Ras-Al-Khaimah. This also shows that these regional airlines, including Etihad, do not treat Abu Dhabi, Sharjah and Ras-Al-Khaimah as substitutable to each other.

36. It is evident from the foregoing that air services to the different airports in India-UAE sector are not treated as substitutable products by the consumers, and even by the airlines themselves.

37. *Based on analysis of the information provided by the parties, I am of the prima facie opinion that the proposed combination is likely to result in appreciable adverse effect on competition on air passengers transportation on five O&D routes namely, Mumbai – Abu Dhabi,Delhi – Abu Dhabi, Mumbai –Dubai, Delhi – Dubai, and Kochi – Sharjah in India-UAE Sector, for reasons given below:-*

(i) Mumbai – Abu Dhabi

37.1 Currently, Jet, Etihad and Air India are the only carriers offering non-stop services between Mumbai and Abu Dhabi. Based on the information supplied by the parties, around 2,57,000 passengers travelled during 2012 on the Mumbai-Abu Dhabi route (two way), out of which 1,03,370 (40%) and 38,916 (15%) passengers travelled by Jet and Etihad respectively.

Market (2012)	**MIDT Marketsize pa**	**Direct Flights**			**Indirect Flights**			
		EY	9W	AI	GF	WY	QR	Others
AUHBOM	257006	15%	40%	32%	6%	5%	1%	1%

Source: Parties submission dated 30th August 2013.
Note: The combined market share of the parties in the market for direct flights is around 63% followed by Air India with 37% market share.

37.2 It is observed that Jet and Etihad have been effective competitors for each other in the Mumbai-Abu Dhabi route in past, but the proposed combination will eliminate the competition between Jet and Etihad as they are likely to effectively coordinate as one airline for operational purposes, pursuant to the proposed combination. Further, the only other non-stop service provider, Air India, due to its widely reported financial/fleet constraints, is not likely to be able to exert sufficient competitive restraints that the parties exercised on each other before the combination. Post combination, the parties are likely to have a combined market share higher than the present 55%, with the only competitive constraint coming from a weak Air India. Therefore, the reduced competition pursuant to the combination is likely to result in higher air-fares, even if the seat availability rises due to the revised Bilateral Air Services Agreement (BASA), as there will not be sufficient competitive restraint from major airlines to prevent a fare increase.

(ii) Delhi – Abu Dhabi

37.3 Jet, Etihad and Air India are stated to be the only carriers offering non-stop services between Delhi and Abu Dhabi. Based on the information supplied by the parties, around 1,74,282 passengers travelled during 2012 on the Delhi-Abu Dhabi route (two way), out of which 59,270 (34%) and 27,558 (16%) passengers travelled by Jet and Etihad respectively.

Market (2012)	**MIDT Marketsize pa**	**Direct Flights**			**Indirect Flights**				
		EY	9W	AI	GF	4Q	WY	QR	Others
DELAUH	174282	16%	34%	24%	7%	7%	7%	4%	1%

Source: Parties submission dated 30th August 2013.
Note: The combined market share of the parties in the market for direct flights is around 68% followed by Air India with 32% market share.

37.4 As per the details available on its website, Air India no more offers non-stop services on this route. Consequently, it is observed that Jet and Etihad are the only remaining competitors in the Delhi - Abu Dhabi direct route; however, the proposed combination will eliminate the competition between Jet and Etihad as they are likely to effectively operate as one airline pursuant to the proposed combination. Therefore, the reduced competition pursuant to the combination is likely to result in higher air-fares, even if the seat availability rises due to the revised BASA, as there will not be sufficient competitive restraint from major airlines to prevent a fare increase.

37.5 It is also observed that for short haul routes (flights with flying time of less than 4 hours) such as Mumbai-Abu Dhabi and Delhi-Abu Dhabi, indirect flights may not be considered as an effective/substitutable option as compared to a direct point-to-point flight, for the average passenger. This is because a premium customer who travels business/executive class is time-sensitive and will therefore prefer a direct point-to-point connection over a connecting one-stop or two-stop flight. For the remaining passengers who are not time-sensitive but may be fare-sensitive, again the direct point-to-point flight may be the preferred option over connecting flights for the routes Mumbai-Abu Dhabi and Delhi-Abu Dhabi, as the direct flights are found to be cheaper on average as compared to connecting flights. It is noticed that the airlines offering one-stop services such as Qatar Airways, Oman Airways and Gulf Airways have lesser market share and do not have significant presence on these routes. As earlier demonstrated, the other airlines of UAE offering services to/from Dubai and Sharjah also do not exert any significant competitive constraint on these routes. Limited seat entitlements under relevant BASAs also act as significant limitation for these airlines to constrain the behaviour of the parties pursuant to the combination. Therefore, airlines providing one-stop services can only be considered as remote competitors neither exerting nor likely to exert any significant competitive constraint on the parties.

(iii) Jet's services on Mumbai-Dubai, Delhi-Dubai & Kochi-Sharjah routes:

37.6 Under Clause 2.2.5 and Clause 2.2.10 of the CCA, it has been agreed that Jet would use Abu Dhabi as the hub for its scheduled services to and from Exclusive Territory (Africa, North and South America and the UAE but excluding Canada) unless it is mutually agreed that Jet operating non-stop services between India and any particular location in the Exclusive Territory is economically beneficial to the parties. Consequentially, Jet has agreed for timely transition of all its current services to and from Dubai and Sharjah to Abu Dhabi when the same becomes economically viable.

37.7 It is observed that currently Jet offers flights between India and Dubai/Sharjah in the following routes: Mumbai-Dubai-Mumbai; Delhi-Dubai-Delhi and Kochi-Sharjah-Kochi. Details of the market share of the parties and other airlines in these routes are as follows:

O&D Route	Market size	Market Share (%)					
		9W	EK	G9	SG	AI	6E
BOM-DXB	1684216	28% (463560)	40%	14%	6%	6%	-
DEL-DXB	1121716	11% (122734)	39%	-	9%	16%	18%
COK-SHJ	585841	39% (226136)	-	33%	-	28%	-

Source: Parties submission dated 3rd June, 2013.
Note: Jet operates four daily flights in BOM-DXB route and each one daily flight in DEL-DXB and COK-SHJ routes.

37.8 It is considered that stoppage of Jet's services to and from Dubai and Sharjah in future may weaken/eliminate the competitive constraints currently exerted by Jet on other airlines operating in the concerned sectors to Dubai and Sharjah, leading to a potential rise in air fares on these routes. The parties claim that the different airports within UAE (Dubai, Sharjah, Abu Dhabi and Ras-Al-Khaimah) are substitutable as all of them fall under the same catchment area and well inter-connected by road and rail. However, for the reasons cited earlier, this claim of the parties is not acceptable.

38. It is also noted that Jet has already discontinued its services on Chennai-Dubai-Chennai; Hyderabad-Dubai-Hyderabad; and Thiruvananthapuram-Sharjah-Thiruvananthapuram routes during the last financial year, despite having reasonably high number of passengers and revenues as compared to certain other routes of Jet to/from Abu Dhabi.

CCA and Efficiencies

39. The proposed combination is a composite transaction, comprising *inter alia* the IA, SHA and the CCA. From the background of the respective agreements, it is observed that the parties have entered into the IA and SHA with a view to enhance their airline business through a number of *joint* initiatives. In such a case, Etihad’s acquisition of twenty-four (24) percent equity stake and the right to nominate two (2) directors, out of the six (6) shareholder directors, including the Vice-Chairman, in Jet, is considered as significant in terms of Etihad’s ability to have access to and participate in, the managerial affairs of Jet.

40. With a view to achieving the purported objective of enhancing their airline business through joint initiatives, the parties have entered into the CCA. Under the CCA, the parties have *inter alia* agreed that: (A) they would frame co-operative procedure in relation to (i) joint route and schedule coordination; (ii) joint pricing; (iii) joint marketing, distribution, sales representation and cooperation; (iv) joint/reciprocal airport representation and handling; (v) joint/reciprocal technical handling and belly-hold cargo and dedicated freight capacity on services (into and out of Abu Dhabi and India and beyond); (B) the parties intend to establish centres of excellence either in India or Abu Dhabi; (C) Etihad would recommend candidates for the senior management of Jet; (D) Jet would use Abu Dhabi as its exclusive

hub for scheduled services to and from Africa, North and South America and UAE; and (E) Jet would refrain from entering into any code sharing agreement with any other airline that has the effect of: (i) bypassing Abu Dhabi as the hub for traffic to and from the above said locations and (ii) detrimental to the co-operation contemplated by the CCA. Towards formulation of the co-operative procedures, the parties have agreed to establish a Governance Structure comprising the Cooperation Committee and four (4) facilitation groups to implement and co-ordinate and develop the commercial cooperation contemplated by the CCA.

41. The CCA is a condition precedent for closing of the Investment Agreement. One of the objectives of the aforementioned features of the CCA is apparently to increase efficiencies. In general, efficiencies are recognized for the purpose of competition assessment if the efficiencies are *verifiable* (quantified by the parties to the combination); *combination-specific* (implying that there is no other less alternative means to achieve those efficiencies); and it is likely that the benefits achieved are *passed-on* to the consumers.

42. The notice as well as the subsequent submissions/replies of the parties makes several claims on efficiencies that are likely pursuant to the proposed combination including lower airfares for interlining passengers: elimination of double marginalization; lower fares resulting from network efficiencies and cost savings; and cost reductions through coordination of second-degree competition parameters. However, all the efficiencies claimed are qualitative and none of them are quantified. It is also observed that the parties have not demonstrated that the efficiencies claimed are specific to Etihad's proposed acquisition of 24 percent equity stake in Jet and that the proposed combination would lower air-fares in those areas where the services of the parties overlap with each other. While it can be argued that airline alliances in general may result in efficiency gains to the parties, in the present transaction it is not appropriate/possible to take

cognizance of the efficiency claims purely on the basis of economic theory or unsubstantiated statements, as they have not been quantified and are, therefore, not verifiable.

43. Further, considering that the CCA envisages joint operations between Jet and Etihad on various operational issues such as pricing, scheduling, networking etc., the CCA is apparently an agreement which may be covered within the scope of Section 3(3) of the Act, an extract from which reads as follows :

> "*(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:*
>
> *Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services."*

44. It is noted that the CCA has already been implemented with effect from 24th April, 2013. Considering the fact that Sections 3 & 4 of the Competition Act, 2002 apply ex-post, while Sections 5 & 6 apply ex-ante, at present it could be argued that CCA seems to be in violation of Section 3 of the Act, unless it is considered to be an agreement as per the proviso to Section 3(3) above, and is seen to increase efficiency. The parties have, therefore, to furnish specific information and justification to establish that the agreement leads to increased efficiencies. However, since this is not an issue for consideration in this order, which is being issued u/s 29(1) of the Act, no comment/determination is required in this regard at this stage.

45. It is, however, noted that approval of a proposed combination by the Commission does not exempt the parties from application of Section 3 of the Act subsequently. Unlike some other jurisdictions, the Competition Act, 2002 does not have any provision for grant of anti-trust immunity for any specific transaction. It is, therefore, essential to ensure that the ex-ante approval of the proposed combination now does not lead to ex-post violation of Section 3 of the Act. It is necessary to obtain and analyse relevant data for this purpose, and specifically ascertain and quantify the likely efficiencies. Such efficiencies cannot be assumed on basis of economic theory or analysis/findings in cases of combination of airlines in other jurisdictions. Combination assessment in this case must arrive at this conclusion based on facts and circumstances of this particular proposal. In case the claimed efficiencies are not quantified and verified so as to, inter alia, satisfy the proviso to Section 3(3) quoted above, AAEC would have to be presumed in terms of Section 3(3) of the Act. As of moment, the parties have failed to furnish the requisite quantification for meeting the requirements of this proviso, and also to satisfy the parameters mentioned in para 41 above.

46. *In view of the above, prima facie, AAEC appears to be likely in this case. Considering this, and the prima facie competition concerns mentioned earlier, it would be necessary to issue a notice under Section 29(1) for*

further investigation and, subject to the view taken on receipt of the response of the parties, include the collection and analysis of the relevant data for this purpose also as part of further investigations.

London-Heathrow Airport Slots

47. As per the information available in public domain, London Heathrow Airport ('*LHR Airport*') is one of the most congested airports of the world and the slots at London Heathrow airport are generally considered to be scarce and expensive. It is observed that three pairs of Jet's slots at LHR Airport were sold to Etihad pursuant to the LHR Transaction. Simultaneously, the LHR slots were leased back to Jet for a period of five years subject to certain conditions including Etihad's right to terminate the lease if Jet's utilization of the LHR slots is less than 85 percent. It is observed that these three (3) landing/take-off slots at LHR Airport form the basis and represent Jet's entire business operations, with respect to international air transportation service, between India and London. Currently Jet operates 2 non-stop flights between Mumbai-London and one non-stop flight between Delhi-London. The details of market share of the different airlines in these routes as provided by the parties are as follows:

Market (2012)	**MIDT Marketsize pa**	**Direct Flights**				**Indirect Flights**				
		9W	BA	AI	VS	IT	EK	EY	QR	Others
BOMLHR	946114	35%	22%	14%	4%	5%	6%	1%	2%	11%
DELLHR	1140142	19%	21%	18%	20%	4%	5%	1%	5%	7%
Source: Parties submission dated 30th August 2013. Note: The market share of Jet in the market for direct flights on BOM-LHR and DEL-LHR rotes is around 47% and 24% respectively.										

48. Jet also feeds these flights with passengers to/from other call points in India and abroad, thereby serving passengers from the said areas.

O&D Route	Market size	Market Share (%)	
		EY	9W
TRV-LHR	44808	13%	2% (1060)
MAA-LHR	205262	2%	10% (20452)
AMD-LHR	106913	1%	27% (28765)
COK-LHR	120182	6%	19% (22584)
HYD-LHR	140932	3%	17% (23530)
BLR-LHR	229290	3%	11% (25012)
Source: Parties submission dated 30.08.2013			

49. It is likely that Etihad may prefer to use the LHR slots leased to Jet if it chooses to offer additional services between Abu Dhabi and London. In such a case, Jet may terminate/reduce the frequency of its direct services between India and London resulting in the relevant O&D pairs getting further concentrated, thereby reducing consumer choice for direct services. Since slots at London Heathrow are a scarce and valuable resource, non-availability of the same to Jet for any reason would prejudice competition in the market for direct air passenger transportation services between India and London.

50. *I am, therefore, of the prima facie opinion that the above mentioned transaction of all the three slots earlier held by Jet, which is part of the proposed combination, is likely to cause AAEC in the air passenger transportation services between Mumbai/Delhi and London.*

<u>FFP Integration:</u>

51. It is observed that implementation of the FFP Acquisition (proposal for Etihad acquiring majority stake in Jet's FFP programme) is a condition precedent to the closing of IA and the parties have agreed that Etihad would pay a sum of USD 150 million, in addition to USD 379 million for the 24% equity stake in Jet. Further, as a part of the CCA, the parties have agreed that they would cooperate for full reciprocal frequent flyer participation so as to create loyalty scheme neutrality within the carriers'

networks and that Jet agrees to join the Etihad's Global FFP which Etihad is currently establishing. As FFPs are loyalty inducing programs intended to keep passengers closed within the relevant network, integration of FFPs of the parties is likely to create entry/expansion barriers, making it difficult for competitors/new entrants to shift the parties' customers to their network. Therefore, the integration of FFPs of the parties would further magnify the concerns discussed above. However, the parties, in their submission dated 3rd October, 2013 have stated that the FFP acquisition is not a part of the proposed combination notified to the Commission and the parties have not signed definitive binding agreement in relation to the FFP acquisition yet. It has been further stated that the parties will make a separate filing with the Commission upon execution of the definitive documents.

52. Certain decisions of European Commission (EC) confirm that integration of FFPs could raise competition concerns in certain circumstances and in those instances the EC had accepted modifications in relation to FFPs with a view to mitigate the harm to competition. Relevant decisions of the EC include Case No. COMP/39.596 – British Airways /American Airlines /Iberia Case No COMP/M.3280 Air France/KLM.

53. Since the parties have submitted that they would separately file a notice with the Commission in respect of the FFP Acquisition, the Commission may consider the impact of the same at that stage.

Order

54. As per the provisions of the Act, in case of a prima facie opinion being formed that the proposed combination is likely to cause AAEC in the relevant market in India, a show cause notice shall be issued to the parties. After considering the response of the parties, the Commission may take further action in terms of the provisions of Sections 29(1A) to 29(6), which lay down the procedure for investigation, and Section 31 which provides for

approval, direction that the combination shall not take place, or appropriate modification to the proposed combination.

55. It is evident from the assessment in the earlier part of the order that, prima facie, the proposed combination is likely to cause AAEC in the international air passenger transportation market, including in the India-US and India-Europe sectors, Mumbai/Delhi-London sectors and air passenger transportation services on five O&D routes namely Mumbai – Abu Dhabi, Delhi – Abu Dhabi, Mumbai – Dubai, Delhi – Dubai, and Kochi – Sharjah in India-UAE Sector. Further, considering that verifiable, combination-specific efficiencies, the benefits of which are likely to be passed on to the consumers also, are one of the most important reasons/justifications for combinations, analysis in this regard also, prima facie, indicates that the proposed combination is likely to cause AAEC.

56. In view of the above, I am of the prima facie opinion that the proposed combination is likely to cause an appreciable adverse effect on competition within the market of international air passenger transportation from and to India. A notice may, therefore, be issued to show cause to the parties to the combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of the proposed combination should not be conducted.

57. Secretary is directed to take further action accordingly.

(Anurag Goel)
Member