COMPETITION COMMISSION OF INDIA

Case No. 4 of 2009

Dated: 11.08.2011

M.P. Mehrotra — Informant

v.

i) Jet Airways (India) Limited; and
ii) Kingfisher Airlines Limited — Opposite Parties

As per R. Prasad, Member (dissenting):

Order under Section 27 of the Act

I have gone through the majority order of the Commission in this matter. With great respect, I would like to record a dissenting order. In order to avoid repetition of facts and for the sake of brevity, I propose to restate the relevant facts only in brief and will refrain from narrating the details. I proceed to pass the order as follows:

2. The relevant facts relating to the instant information may be summarized as under:-

2.1 The present information was filed by Mr. M.P. Mehrotra (the Informant) on 26.07.2009 under section 19(1) of the Competition Act, 2002 (the Act). The informant has alleged that in October, 2008 Jet Airways (India) Limited (opposite party No.1/ Jet Airways) and Kingfisher Airlines Limited (opposite party No.2/ Kingfisher Airlines) reached an agreement to relating to the following areas:

i) Code- shares on both domestic and international flights subject to DGCA approval;

ii) Interline/ special prorate agreements to leverage the joint network deploying 189 aircraft offering 927 domestic and 82 international flights daily;

iii) Joint fuel management to reduce fuel expenses;

iv) Common ground handling of the highest quality;

v) Cross selling of flight inventories using the common Global Distribution system platform;

vi) Joint network rationalization and synergies;

vii) Cross utilization of crew on similar aircraft types and commonality of training as also of the technical resources, subject to DGCA approval; and

viii) Reciprocity in Jet Privilege and King Club frequent flier programmes.

2.2 As per the information, the opposite party No.1 controls around 31% of the total air passenger traffic and the opposite party No.2 holds around 28%. It has been alleged that following the above-mentioned strategic alliance about 60% of the total air passengers and air transport services are controlled by the opposite parties Nos. 1 and 2 collectively. It has also been alleged that the opposite parties have a bulk of the market share as well as airport slots in the Indian market undermining the ability of other players to compete on a level playing field.

2.3 As per the information, the aforesaid alliance may result in cartelization/ monopoly and the joint network rationalization amounts to agreement to limit production and supply and agreement to allocate markets. It is further alleged that cross selling of flight inventories using

common global distribution system platform and code shares on both domestic and international flights is an exclusive supply/ distribution arrangement that may have an appreciable adverse impact on competition.

2.4 The informant has further submitted that as per the information provided on the websites of the airlines, opposite party No.1 currently operates a fleet of 85 aircraft and opposite party No.2 currently operates a fleet of 73 aircraft. Accordingly, the opposite parties collectively operate a total of 158 aircraft which is 11 aircraft more than the State owned carrier *viz.*, Air India. It is alleged that owing to the collective operations, the opposite parties have a bulk of the market share as well as a bulk of the airport slots placing them in a dominant position and undermining the ability of other players to compete on a level playing felid.

It may be mentioned that the numbers and figures reproduced at paras 2.2 and 2.4 refer to the time of filing of the information.

2.5 The information states that the fuel surcharge is charged at a fixed rate irrespective of distance and while in June 2009, the opposite parties increased fuel surcharge by Rs. 400 on all domestic sectors attributing the same to an increase in aviation fuel prices, the decrease in fuel prices later were not accompanied by decrease in the fuel surcharge rates.

2.6 It has been further alleged that the dominant position held by cartel of the opposite parties allows them float schemes such as ticket booklets i.e. multiple tickets at cheaper prices and reciprocity in their frequent flier programmes. The informant has alleged that the alliance of opposite parties, who are jointly controlling 60% of the market share for commercial air transport services in India are clearly acting in concert to fix prices and

limiting/ controlling supply through route rationalization in violation of section 3 of the Act.

2.7 It has also been alleged that other airlines not enjoying a dominant position are not able to offer such schemes and suffer in comparison. The informant has alleged that this abuse of dominant position is allowing the cartel of the opposite parties to increase their dominant position even further, squeezing out the smaller players and acting as severe disincentive for new entrants in the market.

2.8 The informant has attached various news paper reports and extracts from the websites of the opposite parties to support his submissions. The informant has stated that the information has been filed for the benefit of the consumers whose interest is being affected by the alleged cartelized behavior of the opposite parties. It is further submitted that the alleged abuse of dominant position by the opposite parties is also causing appreciable adverse effect on fair competition.

2.9 The informant as *inter alia* sought the following reliefs:

a) To institute an inquiry against the opposite parties' and direct the Director General (DG) to carry out an investigation into the cartel like behaviour of the opposite parties;
b) Direct the opposite parties to discontinue and not to re-enter such cartel like agreements;
c) Pass an order declaring the agreement between the opposite parties null and void for being anti-competitive;
d) Impose the maximum penalty permissible under section 27 of the Act upon each opposite party for indulging in cartelization.

3. The Commission, on examining the matter, was of the opinion that there exists a prima facie case in the present matter and passed an order under section 26(1) of the Act directing the (DG) to cause an investigation to be made into the matter.

4. The DG submitted his report dated 10.11.2010 to the Commission. In his report the DG has examined in details the allegations relating to section 3 of the Act. The same are discussed and analyzed below:

4.1 As per the report of the DG, the market in India is fairly concentrated and an understanding between the two opposite parties would help them command around 48% of the market share and the next competitor i.e. NACIL would be far behind at 18.3%. The DG has opined that, in view of the above market dynamics, any agreement or understanding or even intention or decision to reach an understanding would have an adverse effect on competition.

4.2 The DG has noted that the opposite parties issued a Joint Announcement under the signature of their respective Chairmen and MDs on 13.10.2008 (the Joint Statement) in which they declared their joint intent to conclude their alliance that will *help both carriers to significantly rationalize and reduce costs and provide improved standards of service and a wider choice of air travel options to consumers with immediate effect*. As per the Joint Statement the scope of the alliance includes the areas (i) to (viii) as detailed in the information and mentioned at Para 2.1 above.

4.3 In the report the DG has concluded that there was an understanding between the opposite parties. To substantiate this above conclusion, the DG

has quoted and relied on the below statements of Mr. Naresh Goyal, the Chairman of opposite party No.1 and Mr. Vijay Mallya, the Chairman of the opposite party No.2.

> *...the Jet Airways Kingfisher alliance represents a completely new industrial model for aviation in India which would be based on an unprecedented depth of cooperation between the two companies. There will be huge cost savings and revenue enhancement opportunities arising from this alliance*
>
> **Mr. Naresh Goyal**

> *This is quantum leap forward in the evolution of Indian aviation which will benefit customers by delivering the most comprehensive integration in the industry. Both Jet and Kingfisher fully realize that better understanding of supply and demand in this capital and labour intensive industry is the key to profitability and enhancement of shareholder value.*
>
> **Mr. Vijay Mallya**

4.4 In this regard, the DG has also relied on the press brief issued by Mr. Mallya which is reproduced below:

> *Dear Friends,*
>
> *The fundamentals for air transport in India remain sound. Our economic growth at a rate of more than 7.5% bears testimony to the fact that the prospect for air transport will also grow in the future.*

However, over the past six months, the Indian aviation industry has suffered due to high fuel prices back breaking taxation, excessive airport charges and over-capacity. Acquisitions, mergers and alliances are common worldwide which lead to consolidation and significant improvement in financial performances. Recognizing the benefits that strong alliances bring, I am delighted to announce our partnership with Jet airways thus bringing together two of India's largest carriers with innumerable benefits in terms of cost savings, revenue improvement and an unprecedented network. I am pleased to attach the joint press statement issued by Naresh Goyal and myself. I look forward to your continued support and co-operation.

Vijay Mallya
Chairman & CEO
Kingfisher Airlines Limited

4.5 Further, it is noted from the report of the DG that no material was made available by the opposite parties to show that the strategic alliance announced in October, 2008 between them was rescinded. In view of the above the DG has concluded that the agreement between the opposite parties continues to subsist and remains intact. Moreover, there is no denial to the effect that other clauses of the alliance would not be brought in force in the future.

4.6 The DG has also noted in the report that the intention of the alliance between the opposite parties was rationalization of network i.e. reduction of routes along which the two airlines *viz.*, the opposite parties would operate.

In this regard the DG has recorded the statement of Mr. Saroj K Dutta, Executive Director of opposite party No.1who stated that the opposite parties expect that the code sharing pact to bring in more passenger traffic to both *viz.*, Jet Airways and Kingfisher Airlines i.e. the opposite parties. The relevant excerpts are reproduced below:

> ...
>
> *It is an announcement of intent to reach some kind of agreement. There was a joint press announcement issued on 13.10.2008. ...*
>
> ...
>
> *There is no alliance agreement. At working level, there are normal airline agreements like inter-line agreements, special re-protection agreements. At technical level, we have an MoU to loan to each other technical staff and equipments, if required at the airports. These arrangements are also with other airlines.*
>
> ....
>
> *The proposed agreement was just an intention. ...*
>
> ...
>
> *There was an intent when joint announcement was made.*

4.7 The DG has noted that some if not all the clauses of the alliance have been operationalised. In this regard the DG has found that after the announcement on alliance on October 13, 2008 there have been meetings and also a technical MoU was signed in May 2009 to provide technical support on line stations. This MoU was also subsequently amended in October 2009. The agreements like interline traffic agreements, interline e-ticketing (IET) agreement, and special re-protection agreements entered into after the announcements are also in force as on date.

4.8 In the report, the DG has noted that the agreements between the opposite parties talk about settlement on revenues based upon published and unpublished fares and are statements of commercial intent of the two airlines.

4.9 The DG has from the investigation gathered that there was a joint call from Federation of Indian Airlines to call for strike on August 18, 2009. The opposite parties were also part of this strike call and the respective chairmen of the opposite parties together made a joint announcement calling for a one day suspension of flights.

4.10 A study was commissioned by the Commission on Competition Issues in the Domestic Segment of the Air Transport Sector in India which was carried out by the Administrative Staff College of India, Hyderabad. As per the study has *inter* an analysis of market shares in terms of slots shows that the opposite parties are controlling a major share of slots as well as control of slots in the peak period. Further, the study states that an analysis of the slots on the Delhi-Mumbai route for 2008 shows that out of a total of 58 slots the opposite parties had 30 slots and out of the 15 peak time slots, the opposite parties had 8 slots.

4.11 The DG has noted that a media presentation made by opposite party No.2 in October 2008 brings out that *industry consolidation would be driven through exit of fringe players and rational capacity addition linked to demand by existing players in the near term. ...Kingfisher and Jet Airways have announce an agreement to form a alliance of wide ranging proportions that will help both carriers to significantly rationalize and reduce costs by offering a unique high product quality with improved standards of service to*

its consumers. ...Further consolidation would result in exit of fringe players; rational capacity addition and viable pricing.

4.12 In the report, the DG has also highlighted the below excerpts of Mr. Mallya's statements in a press interview reported on October 22, 2008:

> *We are not going to unnecessarily deploy capacity which we cannot fill...if in non-peak hours Jet flight is not full and Kingfisher flight is not full, it makes sense for us to co-operate and fly one aircraft instead of two. (With this) the economics of airlines will improve substantially.*
>
> He also said the two private carriers would co-operate on international routes, *"The world is big enough. We have enough routes to operate without clashing with anyone unnecessarily,"*

4.13 In the report of the DG, it is also stated that there is a high degree of price parallelism between the opposite parties. The DG has compared the prices of the tickets of the opposite parties on particular routes to the fares charged by Air India on the same route on the same day. From the above comparison, it is clear that the amounts charged by both the opposite parties were the same and were higher than the corresponding fares charged by Air India. The study carried out by the administrative staff college of India, Hyderabad has also noted that a high degree of price parallelism in the opposite parties' flights has also been seen.

4.14 As per the report of the DG, the scope of the alliance between the opposite parties, the joint network rationalization amounts to an agreement to limit production and supply and to allocate markets. The DG examined the

annual report of OP2 and found that 05 Airbus 320, 04 ATR 42 and 01 ATR 72 aircrafts were withdrawn from a service by OP2. This resulted in 17% drop in capacity in the financial year 2009 but the total passenger carried decreased by only 2%. In the financial year 2011 Kingfisher showed 22% growth and a 12% increase in load factor. The domestic revenues increased despite the reduction in number of seats. In fact Shri Vijaya Malya in a statement

> *"We are not going to unnecessarily deploy capacity which we cannot fill... if in non-peak hours Jet flight is not full and Kingfisher flight is not full, it makes sense for us to co-operate and fly one aircraft instead of two. (With this) the economics of airlines will improve substantially".*

The DG also found that Jet Airways had also resorted to a reduction in capacity. In fact in May 2009, OP1 wanted to reduce domestic capacity by 10% within a month. This was over and above the 20% capacity reduction that OP1 had carried out in November 2008 to May 2009. The DG found that though there was a reduction in capacity the profitability of OP1 and OP2 had increased. The DG therefore came to the conclusion that if one took a look at the scope of the airlines to join the network rationalisation it amounted to an agreement to limit and restrict supply in the market. Further, the alliance is also in a position to determine price patterns as reflected in the high degree of price parallelism between the two opposite parties. Though it was claimed by both OP1 and OP2 that the alliance was entered in to decrease costs and enhance efficiency, the objective was to cut down supply and increase revenue. The DG also considered the factors mentioned in this Section 19(3) of the Competition Act and found that the factors mentioned that were applicable to the facts of this case. Accordingly, as per the DG the alliance in question is anti-competitive in terms of section 3(3)(a) and 3(3)(b) of the Act and hence in contravention of section 3 of the

Act. The DG has further observed that even a decision to enter into such an alliance is violative of the provisions of section 3 of the Act.

5 The opposite party No.1 submitted their reply/ preliminary objections and detailed comments/ objections to the DG and the Commission and a brief summary of the same is given below:

5.1 In its reply dated 25.08.2009, the opposite party No.1 has submitted that Jet Airways and Kingfisher Airlines have not signed any agreement(s) in respect of the proposed co-operation between the two airlines. The opposite party No.1 has further submitted that on October 13, 2008 the opposite parties announced that they had agreed to an alliance that will help both carriers to significantly rationalize and reduce costs and provide improved standards of service to the traveling public. The opposite party No. 1 has stated that the above announcement had also clearly indicated that the two airlines did not have any intention of becoming a group and continue to functions as separate and independent business entities.

5.2 The opposite party No. 1 has submitted that in light if the critical state of the aviation sector at that time, it was imperative for all the operators to investigate possibilities of reducing costs and achieving economies by higher degree of cooperation and better utilization of joint resources and higher productivity.

5.3 The opposite party No.1 in its reply has submitted that no formal alliance agreement has been concluded by the opposite parties except the 'interline agreement' which is fairly standard airline agreement concluded by most airlines throughout the aviation industry worldwide in order to facilitate

passengers travel particularly on routes/ sectors not operated by either party as also in the event of disruption of services or cancellation of flights for technical, commercial, weather or reasons beyond the control of the operators. The opposite party No.1 in its reply has also denied the allegations relating to taking measures which could result in an appreciable adverse impact on completion or cartelization and have submitted that there is no violation of any provisions of the Act.

5.4 In its reply dated 03.12.2009 the opposite party No.1 has reiterated the submissions made in earlier reply and stated that the information is wholly misconceived, based on inferences and surmises and/ or speculative and is liable to be dismissed. With respect to the interline agreement, the opposite party No.1 has submitted that the interline agreement between the opposite parties which has been put into effect is a voluntary commercial agreement between individual airlines.

5.5 In its reply dated 27.09.2010 the opposite party No.1 has argued that Section 3 of the Act applies only to agreements entered into after the relevant provisions of the Act came into force i.e 20.05.2009. The opposite party No. 1 has further argued that *arguendo* the provisions of the Act apply to agreements entered into a prior to 20.5.2009 the provisions of the Act can be applied to only such agreements which will continue to operate after the abovementioned effective date.

5.6 The opposite party No. 1 has once again stated that there is no alliance agreement at all in place between the opposite parties save and accept the interline agreements which enables the passengers to seamlessly use different service providers. The opposite party has submitted that it has a similar interline agreement with Air India. It is submitted by the opposite

party that Jet Airways and Kingfisher Airlines are in fierce competition and offering full service flights as well as in low fare services to the consumers. And each of them is promoting in competition to the other the level and quality of the services to increase its own respective market share and this is done by making more and more facilities available to its customers both at ground level and in flight. At the time of downturn in the market and considering severe constraint on financial as well as on physical resources the two airlines had discussions so as to avoid or mitigate the wastage of resources. It is submitted that the discussions between the two had up to an extent been fruitful but no final conclusion could be reached. It is submitted that as it is inevitable airlines strain to stagger flights in a manner as would give them higher and higher capacity. This is not an anti-competitive practice but simply a matter of a sensible and prudent management of resources. There is no any covert or overt agreement between the competitor airlines.

5.7 This arrangement is more in the nature of passenger-facility and it is completely at the option and will of the passenger to avail of the facility, if so desired. Respondent has entered into multilateral interline traffic agreement with Respondent No.2. This agreement forms the pre-requisite for any subsequent interline relationship. Besides Respondent No. 2, the Answering Respondent has MITA agreements with more than 140 IATA approved carriers (airlines) across the world, including Air India/India Airlines. It is general commercial practice prevailing in aviation industry, which ultimately benefits the passengers. The said interline agreements between the Respondent airlines, does not in any manner adversely affect the competition with each other in the industry. The consumers availing of the services of the Answering Respondent or the Respondent No. 2 are not in any way precluded from availing of the services of similarly situated

service providers. None of the Respondents control the price of the air tickets or any part of the market. It is denied that the said interline agreements are/or amounts to any cartel or any cartel-like behavior. Respondent has not sought to impose any unfair or discriminatory conditions on the passengers as alleged or otherwise, while availing of the services of the Answering Respondent.

5.8 The opposite Party No.1 in its reply dated 15.2.2011 to the report of the DG has stated that public announcement of alliance can never be construed as decision taken under section 3 (3) of the Competition Act. In absence of any concluded agreement/contract and or any conclusive decision to implement any alliance, it is not just, proper or appropriate to even suggest that Jet Airways and Kingfisher Airlines are acting in concern and thereby affecting competition adversely. It further submitted that DG has misconstrued that many of the clauses of the alliance have been operationalized and or are still in operation. The alliance as mentioned in the announcement dated 13.10.2008 has not been put into effect at all in respect of any of the aspects or scope of the proposed alliance. Hence the question of rescinding an alliance which never came into existence in the first place does not arise at all. Only certain arrangements or agreements common in the Airlines industry have been entered into which have nothing to do with the announcement. Thus alliance per say cannot be termed violating of provisions of section 3 (3) of the Act.

5.9 The opposite party No.1 has submitted that the conclusion of the DG that if not all, some of the clauses of the alliance announced on 30.10.2008 *viz* .interline agreement and special re-protection agreement, have been operationalized is erroneous. The opposite Party No. 1 has further submitted

that the DG's conclusion that such interline agreements are voilative of the provisions of the Act is also erroneous for the following reasons:

i. **Multilateral interline traffic agreement (MITA)**: say this agreement is a voluntary commercial agreement between individual airlines to handle passengers travelling on itineraries that require multiple airlines and is made between two carriers operating schedule air transportation services, who desire to enter into arrangements under which each party may sell transportation over the rules of the other carrier. The opposite party No.1 has submitted that it has entered into MITA with almost 140 IAT approved airlines across the world including kingfisher airlines and Air India.

ii. **Interline Electronic ticketing (IET):** The opposite party No.1 has submitted that this agreement has primarily of technical nature to facilitate issuance of interline E-ticket documents and does not involve per say any commercial or financial benefits for the opposite parties. The opposite Party No.1 has further submitted that beside opposite party No.2, it has IET agreements with more than 80 IAT approved carriers across the world.

iii. **Special Re-protection agreement:** This is a bilateral agreement between the carriers who operate similar routes to protect their passengers in case of any disruption in operating carrier schedules due to flight cancellation, delay or re-timing of the flights. The opposite party No.1 has submitted that apart from Kingfisher Airlines it has entered into similar agreements with more than 28 carriers including Air India.

iv. **Technical MOU**: The opposite party No. 1 has submitted that it is memorandum of understanding signed between two airlines to provide technical services to each other at certain line stations and that prior

to the said MoU with Kingfisher Airlines the opposite party No.1 has a similar arrangement with Air India.

5.10 The opposite party No.1 has argued that the above makes it amply clear that such agreements area common industry practice and have nothing to do with the press announcement relating to the alleged alliance. The opposite party No.1 has submitted that Jet Airways and Kingfisher Airlines are operating totally independently and continue to compete in the market and pursue their own respective policies and strategies with the sole aim of offering seamless and quality service to its respective passengers. The opposite party No.1 has submitted that conclusions have been drawn by the DG that there are serious competition concerns is not only imaginary and farfetched but also incorrect.

5.11 As regards the allegations of price parallelism the opposite party No.1 has submitted that the opposite parties compete vigorously in several domestic sectors. The opposite party No.1 has submitted that Jet airways and Kingfisher Airlines files their fares through Airlines Tariff Publishing Company (ATPCo) which in turn, distributes the fares to various Global Distribution System and within a matter of hours the fares become transparent to the outside world. The opposite party No. 1 has submitted that it constantly watches its competitors'' actions through ATPCo and takes a call on its own fares. In this regard the opposite party No.1 has also submitted that the fare that is 'actually' offered to the customer at a particular point in time for the flight of choice is determined by seat availability which is managed by the opposite party No.1 computerized Revenue Management systems. The opposite party No1. Has argues that in light of the above factual explanation, the close-to identical match of fares of

the tickets of the opposite parties cannot be said to be price parallelism as sought to be shown in the report of the DG.

6. The opposite party No.2 submitted their reply/ preliminary objections and detailed comments/ objections to the DG and the Commission. A brief summary of the same is as under:

6.1 The opposite party No. 2 in its reply dated 25.8.2009 has argued that since the information received by the Commission is with regard to an agreement alleged to have been reached amongst the opposite parties in October 2008, the Commission has no jurisdiction or authority to investigate into matters prior to 20.5.2009 i.e. the date on which sections 3 and 4 of the Act were notified. The opposite party No. 2 has further submitted that neither section 3 nor section 4 of the Act has retrospective effect and there cannot be any retrospective effect given the penal consequences of fine and imprisonment prescribed by the provision of the Act.

6.2 The opposite party No. 2 has also argued that in light of provisions of section 66 of the Act, the Commission has no jurisdiction or authority under the Act in the present matter given that the monopolies and restrictive trade practices Commission (MRTPC) under the monopolies and restrictive trade practices Act, 1969 (MRTP Act) is seized of an enquiry in respect of the same alleged agreement of 2008 in No. UTP Enquiry No. 172 of 2008 *Director General of Investigation and Registration v. Jet Airways (India) Ltd. and Kingfisher Airlines Ltd.*

6.3 The opposite Party No.2 has requested that in light of the facts and circumstances as stated in its reply above, the notice sent to the opposite

party be withdrawn and the Commission not take any cognizance of the information.

7. After considering the entire relevant material on record including the report of the DG, and the submissions of the parties, the main point for determination before the commission is:

Whether the opposite parties have violated the provisions of section 3 of the Act.

7.1 Section 3 of the Act which deals with anti-competitive agreements reads as follows:

> *3. (1) No enterprise or association of enterprises or person or association of persons shall 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.*

7.2 An agreement for the purposes of the Competition Act is defined very widely and is not limited to the conventional understanding of the term 'agreement'. Section 2(b) of the Act defines an agreement to include

> *any arrangement or understanding or action in concert,—*
> *(i) whether or not, such arrangement, understanding or action is formal or in writing; or*
> *(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;*

7.3 Section 3 covers agreements, as defined under the Act, which cause or are likely to cause appreciable adverse effect on competition in India. It is pertinent to note that the agreement need not have taken effect or have been operationalising for the provisions of section 3 of the Act to apply. Further, section 3(3) which deals with horizontal arrangements covers not only agreements, as defined in the Act, but also practice carried on, or decision taken by, including cartels, enterprises engaged in similar trade of goods or provision of services. It is clear that the legislative intent was to ensure that all types of arrangements, understanding, actions in concert by enterprises engaged in similar trade of goods or provision of services would be covered by this provision.

7.4 It was submitted by the opposite parties that the alliance did not materialize, except for some arrangements like inter-line agreement and special prorate agreement. However, their conduct and submissions in this regard have been inconsistent. Before the Monopolies and Restrictive Trade Practices Commission (the MRTPC) the opposite parties argued that no aspect of the proposed alliance has been given effect. On this basis the MRTPC passed its order dated 04.09.2009 holding that the alliance between the opposite parties had not come into existence and therefore the apprehensions raised by the DG cannot be taken into consideration. Accordingly the MRTPC closed the matter. However, before the Hon'ble High Court of Bombay the opposite parties argued that the Commission would have no jurisdiction since the matter was pending at the MRTPC and given that the agreement was made prior to the enactment of the Act, the provisions of which do not have retrospective effect, the same would not apply to the agreement. The opposite parties then went on to submit before the DG and the Commission that the proposed alliance had not been

operationalised in its entirety and only certain interline agreements had been entered into between the opposite parties. It was further submitted that the above-mentioned interline agreements were very common in the national and international aviation market and were not anti-competitive in nature. In his statement, when examined by DG, Mr. Saroj Dutta of opposite party No.1 has admitted that apart from the airline agreements like interline agreements, special re-protection agreements at a working level the opposite parties have also executed a MoU to loan each other technical staff and equipments, if required at the airports. The changing stands of the opposite parties and the inconsistent submissions before the various forums regarding the existing of the alliance/ agreement and extent of operationalisation of the agreement shows that the opposite parties have not come with clean hands.

7.5 It is also noted that while the alliance/ agreement was announced with grandeur, there was no public announcement or communication that the alliance has been revoked or rescinded. In view of the above, the DG has concluded that the decision and the intent of forging alliance on all lines as mentioned in the announcement dated 13.10.2008 still subsists and hence the agreement/ alliance in question continues to be in place.

7.6 It is also pertinent to mention the inherent contradictions in the Joint Statement which states that:

> *...the two airlines will be able to rationalize their operations and derive maximum synergies and thereby offer the best possible fares for the benefit of the consumers. ....The proposed alliance between Jet Airways and Kingfisher is in the national interest by*

incorporating the international best practice to strengthen the Indian aviation industry.

7.7 The Joint Statement quotes the Mr. Naresh Goyal, the Chairman of opposite party No.1 stating:

> *...the Jet Airways Kingfisher alliance represents a completely new industrial model for aviation in India which would be based on* ***an unprecedented depth of cooperation*** *between the two companies.* ***There will be huge cost savings and revenue enhancement opportunities arising from this alliance.***

7.8 Further, the Joint statement quotes and Mr. Vijay Mallya, the Chairman of the opposite party No.2:

> *This is quantum leap forward in the evolution of Indian aviation which will benefit customers by* ***delivering the most comprehensive integration in the industry****. Both Jet and Kingfisher fully realize that better understanding of supply and demand in this capital and labour intensive industry is the* ***key to profitability and enhancement of shareholder value.***

7.9 While the Joint Statement explicitly mentions that the proposed alliance is in the national interest, the statements of the Chairman of the opposite party No.1 assert that the focus of the alliance is to save costs and revenue enhancement opportunities of the two companies. It is obvious that the alliance was aimed at benefiting the individual interest of two of the major private players in the aviation sector *viz.*, the opposite parties and not in the national interest as claimed in the Joint Statement. That profitability

was the underlying focus of the proposed alliance is also reinforced by the statement of the Chairman of the opposite party No.2 which states that the alliance was owing to the realization of the both the opposite parties that the cooperation would help achieve profitability and enhance shareholder value. Mr. Dutta's statement to the DG also mentions that the prime focus of the alliance was cost reduction.

7.10 The Joint Statement by the opposite parties was nothing but a public announcement of their joint decision to execute the proposed alliance. It is evident that the opposite parties had already decided to cooperate with each other on various issues in their common business and the Joint Statement which was signed by their respective Chairmen and MDs was a written declaration of this agreement. Further, the fact that there was an agreement, as defined under the Act, between the two opposite parties is reinforced by the statement of Mr. Dutta provided in the report of the DG.

7.11 As mentioned earlier, for the purposes of the provisions of section 3 of the Act, it is not relevant whether the opposite parties executed further agreements in writing to operationalise the alliance. It is sufficient that the opposite parties decided to cooperate and coordinate with each other on the subject matter of the alliance.

7.12 As per section 3(3) any agreement, practice, or decision etc., which *inter alia* 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 is presumed to have an appreciable adverse effect on competition.

7.13 As per section 4 of Indian Evidence Act whenever it is directed that the court shall presume a fact, it shall regard such fact as proved unless and untill it is disproved. While section 3(3) contains the phrase 'shall presume' stating that in case there are horizontal agreements 7.14 within the meaning of that section, it shall be presumed that there is appreciable adverse effect on competition. Section 19(3) states that the Commission while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the factors listed therein

7.15 However, if it is established that an agreements covered under section 3(3) of the Act (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; or (d) directly or indirectly results in bid rigging or collusive bidding, it will be presumed that the agreement has an appreciable adverse effect on competition and the onus shifts to the opposite parties to prove that this is not the case.

7.16 With respect to the effect and objective of the agreement between the opposite parties, it is significant to mention the DG's observation that the announcement of the proposed alliance coupled with the media coverage of the interactions between the Chairmen of the opposite parties including the pictures of them embracing each other created an impression all around that the two will now jointly operate in the market.

7.17 Further, as per the above statements of Mr. Goyal claiming that the alliance would be based on an unprecedented depth of cooperation and that of Mr. Vijay Mallya that the alliance will deliver the most comprehensive integration in the industry clearly indicate that the alliance would in effect allow them to operate as one unit as far as the market and the customers are concerned allowing the opposite parties to share the market, customers and fix prices of the services and it is clear that the proposed alliance is more than likely to cause an appreciable adverse effect on the competition in sector.

7.18 The opposite parties could have resorted to measures independent of each other to reduce costs and improve efficiency. Coordinating with the immediate competitor for these purposes will not only impact the ordinary market dynamics but also enable them to distort the market in their favor. In the absence of such an alliance or an understanding to enter into such an agreement the opposite parties would have competed with each other as well as the other players in the market boosting the competition in the sector which would *inter alia* lead to the availability the best possible options to the consumers. However, instead of operating independently the opposite parties decided to coordinate with each other so as to share provision of services and number of customers.

7.19 The DG has also found that there is a high degree of price parallelism between the two airlines which is in contravention of section 3(3)(a) of the Act. Further, the conduct of the opposite parties of simultaneously increasing the fuel surcharge by Rs. 400 owing to the increase in the Air Turbine Fuel prices has also been examined by the DG. It is also important to note that while the opposite parties increased the fuel surcharge consequent to the rise in price of the air turbine fuel, neither opposite party reduced the fuel

surcharge rates when there was a decrease in prices of the air turbine fuel. The conduct of the opposite parties in respect to the ticket prices and the increase in fuel surcharge appears to be actions in concert.

7.20 Further, the agreement between the opposite parties not only has the effect of foreclosing competition in the market but is also likely to create entry barriers in the sector for new players.

7.21 In view of the above, it is found that the opposite parties by entering into an agreement to execute an alliance as detailed in their Joint Statement have contravened the provisions of section 3 of the Act.

8.1 The informant had claimed violation of Section 4 of the Competition Act but the DG found that Section 4 would not be applicable in this case because there is no law against group dominance under the Indian Competition Act. The DG therefore did not examine as to whether the agreement entered into were hit by the provisions of Section 4 of the Act. Under Section 2(h) of the Competition Act an enterprise has been defined which includes a person. Section 2(l) defines a person and includes an association of persons or body of individuals whether incorporated or not in India or outside India. Agreement has been defined in Section 2(b) of the Act and it includes any arrangement or understanding or action in concert. In this case the agreement in question or the alliance which was announced means an agreement. When one person enters into an agreement with another person with some objective and it can be termed as an association of persons or body of individuals whether the AOP or BOI is incorporated or not. Therefore after the agreement the two airlines could be classified as an association of persons. Now under Section 4 no enterprise can abuse its

dominant position. An association of person is an enterprise and it can be held after the alliance /agreement that they constituted an AOP.

8.2 It has now to be decided whether there was an abuse of dominant position because this AOP of the two OPs controlled nearly 59% of the market. The first issue to be decided is whether the reduction in the number of seats limited or restricted provision of services. There is no doubt that provision of services has been reduced in the market which created a shortage of seats and therefore led to a price increase. The analysis by the DG shows that though the seat capacity had decreased the revenues of the airlines had gone up. Further issue to be decided is whether the claim of the two airlines that it increased the efficiency of the two airlines and the profitability was a reasonable ground to hold that the reduction in the number of seats was justified. There is no doubt that in August- September 2008 economic slowdown started all over the world. This was the primary reason for the alliance between OP1 and the OP2 so that the combined synergy could lead to better results for both the airlines but the fact is that to the consumer the availability of seats decreased and led to a higher price. There is no doubt that the airlines were under pressure but also there is no doubt that the consumers suffered due to the activities of the two airlines. The facts therefore clearly show that the AOP of the OPs had contravened the provisions of Section 4(b)(i) of the Competition Act.

8.3 The next issue to be considered is the issue of fuel surcharge. Fuel surcharge is levied when the fuel prices increase but they should also decrease when the prices come down. It has been observed that the fuel surcharge levied by OP1 & OP2 was not decreased when the fuel prices came down. Both the OPs stated that it is an industry practice and they were not at fault and they should not be singled out when the entire industry is following this practice. Further fuel prices should be linked to the kilometers

covered and cannot be the same for all the routes where the rates are different. This cannot be a plea because if someone commits an error it does not been mean that everyone should commit the same error especially when OP1 & OP2 were the major players in the airline sector in India. This is an unfair condition of service and both OP1 & OP2 who form an AOP are guilty of this unfair condition. Thus, the provisions of Section 4(2)(a)(i) of the Act are contravened.

8.4 While determining abuse of dominance the factors mentioned in Section 19(4) have to be examined by the Commission. In this case the market share of OP1 & OP2 together amounts to 59%. As OP1 & OP2 has come together by an alliance, I have already held that they constitute an AOP and for this reason the market share, size and resources of the said enterprise and the economic power of the enterprise are extremely high. Therefore clauses (a) (b) and (d) of Section 19(4) are attracted in this case. The dominance is created by the AOP by pooling of the resources of OP1 & op2 and therefore it would be hit by the item 'otherwise' mentioned in clause (g) of Section 19(4). The joint venture which is in AOP would have countervailing buying power and would be in a position to act independently in the market. Therefore many of the factors mentioned in 19(4) are applicable to the facts of this case.

8.5 The issue is as to whether the coming together of OP1 & OP2 would be a joint venture or not. Joint venture can also be formed by creating third entity known as a Special Purpose Vehicles (SPV). Joint venture can also be formed by pooling of resources and in this case by the agreement in October 2008, this is what was proposed. Both OP1 & OP2 have been in operation for the number of years. It is not clear as to why the interline/special pro-rate agreements were not entered into by this two airlines at an earlier date. Joint full management, common ground handling selling of flight inventories

and joint network rationalisation and synergies lead to a conclusion that the entire idea was to create a colossus so that the other operators in the airline industry would not be in a position to match them. There is no doubt that many of these agreements are normal and the airlines enter into them for efficiency and consumer service. But by bringing these very items in the alliance in October 2008 the idea was to have a synergized entity which would be profitable both for OP1 & OP2 and in that case both OP1 & OP2 would have profited. In the consequence the competitors and the consumers would have suffered.

9.1 To sum up violation of Sections 3(3)(a) and 3(3)(b) of the Act as well as that of Sections 4(2)(a)(i) and 4(2)(b)(i) are found to be contravened.

9.2 As violation of different sections of the Competition Act have been found in this alliance between OP1 & OP2 and as the said agreements could lead to likely appreciable adverse effect on competition, the agreements have to be held as anti competitive in terms of Section 3(1) of the Competition Act. Therefore the agreement, though not acted upon as stated by the both OP1 & OP2, have not been abrogated. The agreement has to be held as void in view of Section 3(2) of the Competition Act. The DG has demonstrated that by cutting down supply and increasing fares the consumers have been put to a harm/loss and therefore their economic surplus would decrease. For this reason as well as the reasons as already discussed above the alliance caused an appreciable adverse effect within India. Therefore as already held Section 3(1) and 3 (2) are also applicable.

10.1 In accordance with the provision of Section 27 of the Act OP1 & OP2 were directed to discontinue the alliance in accordance with Section 27(a) of the Act. As far as interline drafted agreement, interline electronic ticketing, special protection agreement and technical MOU are concerned OP1 & OP2

can enter into these agreements again provided this does not put them in a position where they can act independently of the market, the competitors and the consumers..

10.2 As far as fuel surcharge is concerned, it has already been held that the behaviour of both OP1 & OP2 is anti-competitive. Therefore OP1 & OP2 are directed to increase / decrease the fuel surcharge as and when fuel prices go up and come down.

10.3 OP1 & OP2 consider increasing the seat capacity on the different routes and they should also compete against each other subject to the fact that they are able to operate with viable capacity.

10.4 OP1 & OP2 should inform the Commission regarding the action taken by them on the directions given, within three months of this order.

The Secretary should serve this order on the OP1 & OP2 and enforce compliance to the directions given.

Certified True Copy

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