

**BEFORE THE**  
**COMPETITION COMMISSION OF INDIA**

Case No. 04/2009

*Date of Decision: 11.08.2011*

Shri M.P. Mehrotra  
C-561, Defence Colony  
New Delhi-110024

*Informant*

1. Jet Airways (India) Ltd.  
SM Center, Andheri- Kurla Road  
Andheri (East), Mumbai – 400059

2. Kingfisher Airlines Ltd.  
12<sup>th</sup> Floor, UB Tower  
UB City, No. 24  
Vital Mallya Road  
Banglore -560001

*Opposite Parties*

**FINAL ORDER**

1. The present case relates to the alleged anti-competitive alliance between the two major passenger airline operators in India i.e. Jet Airways (India) Ltd. (hereinafter referred to as "OP 1") and Kingfisher Airlines Ltd. (hereinafter referred to as "OP 2").



2. The information in this regard has been submitted to the Commission by Mr. M.P. Mehrotra (hereinafter referred to as "Informant") under Section 19 of the Competition Act, 2002 (hereinafter referred to as "the Act") on 26.07.2009.
3. The facts and allegations as stated in the information, in brief, are as under:
- 3.1 It has been stated that after year 2005, consolidation of players in the airline industry has taken place. Firstly, Jet Airways acquired Air Sahara and re-branded it as Jet Line. Then Kingfisher merged with Air Deccan and re-branded it as Kingfisher Red.
- 3.2 The informant has submitted that in the passenger air transport services market in India, the OP 1 and OP 2 are two dominant enterprises. In terms of air passenger traffic, the share of OP 1 is around 31 percent and that of OP 2 is around 28 percent and therefore, collectively both the Opposite Parties are holding majority of the market share in air passenger traffic in India. Further, Jet Airways operates a fleet of 85 aircrafts whereas Kingfisher operates a fleet of 73 aircrafts, taking their collective strength to 158 aircrafts. Thus, Jet and Kingfisher have a bulk of the market share as well as airport slots which confers a dominant position upon them, undermining ability of other players to compete on a level playing field.
- 3.3 The informant has alleged that being the two dominant enterprises in the aviation industry in India, OP 1 and OP 2 have entered into a strategic alliance/arrangement with regard to various components/areas of passenger



air transport services on 13.10.2008 which is anti-competitive as per the provisions of section 3 of the Act.

**3.4** As per the averments of the informant the said strategic alliance / agreement between OP 1 and OP 2 was reached on the following issues/ areas:

- a) Code-sharing on both domestic and international flights.
- b) Interline/special prorated agreements to leverage the joint network deploying aircrafts covering both domestic and international flights.
- c) Joint fuel management.
- d) Common ground handling.
- e) Cross selling of flight inventories using the common global system platform.
- f) Joint network rationalization and synergies.
- g) Cross-utilization of crew on similar aircraft types and commonality of training as also of the technical resources.
- h) Reciprocity in Jet Privilege and King Club frequent flier programmes.

**3.5** It has been alleged that through the strategic alliance, the two airlines have worked out a joint network and route rationalization plan which amounts to agreement to limit supply and allocate market of passenger air transport services in India in violation of provisions of section 3 of the Act. Further, cross selling of flight inventories using common global distribution system platform and code sharing on both domestic and international flights is an exclusive supply/distribution arrangement between the Opposite Parties which may have an appreciable adverse effect on competition.

**3.6** It has been further alleged that, in June 2009, both OP 1 and OP 2 simultaneously increased the fuel surcharge by Rs. 400 per ticket on all domestic sectors, irrespective of distances, on the pretext of escalation in



aviation fuel prices. But, they did not lower the fuel surcharge when fuel prices receded. It shows that on one hand the Opposite Parties shifted the cost of increase in aviation fuel prices to the passengers but on other hand the benefit of decrease in aviation fuel prices was not transferred to the passengers which is clearly unfair.

**3.7** It has been also alleged that the dominant position held by Opposite Parties enables them to float schemes such as ticket booklets (multiple tickets at cheaper prices) and reciprocity in Jet Privilege and King Club frequent flyer programme, etc. Other airlines not enjoying such a dominant position are not able to offer such schemes and suffer in comparison. Such schemes have been floated by the opposite parties with the intention to wipe out the competitors from the market.

**4.** The Commission considered this information in its meeting held on 04.08.2009. After considering the matter in the light of facts and circumstances obtaining in this case, the Commission formed an opinion that there exist a prima facie case in the matter and directed the Director General (hereinafter referred to as “DG”) under Section 26 (1) of the Act, to cause an investigation into the matter. Accordingly, on 07.08.2009, DG was directed to conduct an investigation and submit his investigation report to the Commission within 45 days of receipt of the order.

**5. Summary of DG Investigation**

The DG submitted his investigation report to the Commission on 10.11.2010 in accordance with the provisions of Section 26 (3) of the Act. The gist of the DG report is as follows:



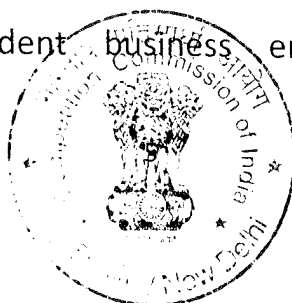
**5.1** The DG framed following issues for the purpose of investigation in the matter:

- i. Whether OP 1 and OP 2 have abused their dominant position?
- ii. Whether the alleged agreement/alliance reached between OP 1 and OP 2 is violative of the provisions of section 3 of the Act?

**5.2** During the course of investigation in this matter the DG sought replies from the Opposite Parties and has also taken into account the information and material furnished by the informant to the Commission. The DG also recorded the statement of Shri Saroj K. Dutta, Executive Director of Jet Airways and has also placed reliance on joint statement issued by Shri Naresh Goyal, Chairman of Jet Airways as well as Dr. Vijay Mallya, Chairman, Kingfisher Airlines on 13<sup>th</sup> October, 2008 in addition to separate press briefing issued by Dr. Mallya in respect of announcement of agreement for the formation of an alliance. Besides, the DG has also taken into consideration findings of the study conducted by the Administrative Staff College of India, Hyderabad on “Competition Issues in the Domestic Segment of the Air Transport Sector in India”.

**5.3 Reply filed by Jet Airways (India) Ltd before DG**

**5.3.1** In response to the notice of DG, the Jet Airways denied that it had signed any agreement(s) with OP 2 on 13th October, 2008. It had contended that the announcement made by it with OP 2 on 13th October, 2008 did not have any intention of forming a group, rather it was intended to help each other to rationalize and reduce the costs and to provide improved standard of services to the passengers. Both the OP 1 and OP 2 continued to function as separate and independent business entities even after the said



announcement. The two airlines only issued a joint press announcement in which they declared their intent to conclude an alliance to enhance their commercial and operational co-operation.

**5.3.2** It was further submitted that neither any formal agreement nor any informal agreement was signed between OP 1 and OP 2 in respect of any matters that contravene the provisions of the Act. The exception was in respect of the allegations relating to 'Interline Agreement' which is a fairly standard airline agreement between most of the airline operators throughout the aviation industry worldwide. The 'Interline Agreement' between the airlines is signed in order to facilitate passengers' travel, particularly on routes/sectors not operated by either parties and in the event of disruption of services or cancellation of flights for technical, commercial, weather or other reasons beyond the control of the operators. The OP 1 and OP 2 have also concluded arrangements for 'E-ticketing facility' and 'Thorough Check in' of passengers between their connecting flights which do not involve any competition issues.

**5.3.3** It was also submitted that aviation industry in India has been passing through an extremely critical phase since the latter half of 2007 because of the global financial and economic meltdown. This financial crisis resulted in rise in Aviation Turbine Fuel (hereinafter referred to as 'ATF') prices, increase in the price of crude oil and severe decline in air passenger travel both on international and domestic routes. In that difficult situation, any technical alliance between OP 1 and OP 2 to save each other from going out of business is not an anti-competitive activity. It was also contended by OP 1 that the two airlines have not taken any measures which could result in



an appreciable adverse affect on competition or result in cartelization as per the provisions of the Act.

**5.3.4** OP 1 also submitted that there are no records or minutes of any meetings that might have been held between Shri Naresh Goyal, Chairman, Jet Airways (India) Ltd. and Shri Vijay Mallya, Chairman, Kingfisher Airlines Ltd. on this issue either prior to or since October, 2008. There has been no consolidation of operations of airlines of OP 1 and OP 2. As on date, OP 1 has a total of 107 aircrafts (84 aircrafts belonging to Jet Airways and 23 belonging to Jet Lite).

**5.3.5** It was further submitted that, in terms of revenue, the combined market share of passengers carried by the Jet group *i.e.* Jet Airways and Jet Lite during January-July, 2009 was 24.7%. There is neither any reciprocity between the frequent flyer programmes of Jet Airways ('Jet Privilege') and Kingfisher airlines ('King Club') nor there is any code sharing on any sector between OP 1 and OP 2.

**5.3.6** OP 1 also submitted that along with its wholly owned subsidiary Jet lite India Ltd. it was the largest domestic airline operator having around 26.2% market share during April-June, 2010. It is also the first Indian carrier to operate on international routes to and from India following the liberalization of international civil aviation policy in December, 2004/January, 2005 by the Government of India. As on 1st August, 2010, the OP 1 has combined flight strength of 113 and operates 516 flights daily. As on date, 7 out of 10 Boeing 777-300 ER aircraft have been leased out to foreign airlines due to the on-going route restructuring and cost saving programmes undertaken by it. It carried 12.04 million passengers on its international and domestic services during the year 2009-10 which was 11.708 million during the year 2008 - 09.



**5.3.7** OP 1 had also taken a plea that the press announcement issued by the Chairmen of OP 1 and OP 2 on 13th October, 2008 was intended to work towards an alliance between the two airlines with the objective of joint fuel management to reduce fuel expenses.

**5.3.8** OP 1 also submitted that till 15th August, 2010 many agreements were signed between OP 1 and many other airline operators world over which include: Multilateral Interline Traffic Agreements(MITA) with 144 operators, Bilateral Interline Traffic Agreements(BITA) arrangements with 13 operators, Interline Electronic Ticketing (IET arrangements) with 83 operators, Special Prorate Agreement with 86 operators, Special Re-protection Agreement (SRA) with 32 operators, Inter Airline Thorough Check in (IATCI) with 38 operators, Code sharing with 13 operators and entering into such agreements is globally accepted practice amongst the airlines.

#### **5.4 Reply filed by Kingfisher Airlines Ltd. before DG**

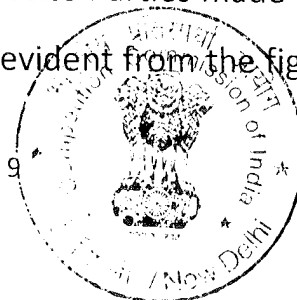
**5.4.1** The Kingfisher Airlines Ltd. submitted that it has not formed any group with OP 1 as envisaged in the provisions of section 4 of the Act and therefore the question of joint abuse of dominant position does not arise.

**5.4.2** Kingfisher also submitted that in October, 2008, when OP 1 and OP 2 announced the alliance, the global oil prices were at all time high and there was a worldwide recession resulting into 40% drop in the passenger traffic. Many airlines all over the world had gone out of business. Both the Opposite Parties at that time were also in deep financial crisis. Because of this they had decided to enter into an alliance/agreement with a view to save costs by rationalizing the use of certain common resources.





- 5.4.3** It has also submitted that the objective of the proposed alliance was only to enable the two airlines to significantly rationalize their operations and derive the maximum synergies and thereby to offer the best possible prices to the consumers.
- 5.4.4** It was also urged that it is an internationally accepted practice amongst the airlines to enter into code sharing agreement and/or interline/special prorate agreement. The proposed measures in the said alliance, if put in place, would be in the national interest. The two airlines had not yet put in place any of the measures contemplated in the proposed alliance. At present, Kingfisher has 89 such interlined agreements with different airlines world over.
- 5.4.5** It was denied that a joint network rationalization, even when put in effect, would amount to an agreement to limit production and supply of passenger air transport service or an agreement to allocate market. The objective of route rationalization, if put in place, is to reduce the cost of operation of both the Opposite Parties and consequently the high price burden on the passengers would reduce. It was submitted that neither the cross selling of flight inventories using common global distribution system platform agreement nor the code sharing on domestic nor international flight agreement between the OP 1 and OP 2 has been put in place till date.
- 5.4.6** OP 2 denied that it was enjoying dominant position in the market of passenger air transportation services in India. It was stated that not only the Opposite Parties but also all the airlines had increased fuel surcharge uniformly by Rs. 400 per ticket in June, 2009.
- 5.4.7** It was further denied that the Opposite Parties made money out of repeated increase in passenger fares as it is evident from the figures that the OP 2 had



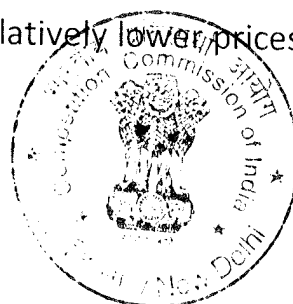
incurred losses to the tune of Rs. 2155.21 crores during the financial year ending 31.03.2009 and to the tune of Rs.2418 crores during the financial year ending 31.03.2010. It was submitted that the proposed alliance between OP1 and OP 2 was nothing but an attempt to reduce costs and to keep the air fares low.

**5.4.8** The OP 2 denied that smaller players have been squeezed because of the proposed alliance between the Opposite Parties and that Air India suffered losses due to the said alliance. It is submitted that the Opposite Parties are not holding majority share in the air passenger transport service market in India as alleged by the informant.

**5.4.9** It was also contended that the 'alliance' between OP 1 and OP 2 cannot be termed as agreement as it was only a broad understanding between the Opposite Parties as stated in the press statement dated 13.11.2008. There were no minutes of the meeting between OP 1 and OP 2 including the meetings between Mr. Naresh Goyal Chairman, Jet Airways (India) Ltd. and Shri Vijay Mallya, Chairman, Kingfisher Airlines Ltd. It was denied that there was joint network rationalization and code sharing between the two Opposite Parties and was submitted that there is no reciprocity between Jet Privilege and King Club frequent flyer programmes.

## **5.5 Findings of DG Investigation**

**5.5.1** The DG has investigated the case to ascertain whether OP 1 and OP 2 have reached any agreement/alliance that amounts to cartelization which have an appreciable adverse effect on competition in India as per the provisions of section 3 of the Act and whether by launching different schemes of ticketing under which air tickets are sold at relatively lower prices, both OP 1 and OP 2



have abused their dominant position in the relevant market as per the provisions of section 4 of the Act.

**5.5.2** For the purpose of investigation in this case, the DG has taken the relevant market as the 'services for transportation of passengers on aircrafts in India'.

**5.5.3** As per the DG investigation report, OP 1 and OP 2 cannot constitute a group as per the requirements of the definition of "group" envisaged in clause (c) of explanation to section 4 read with clause (b) of the explanation to section 5 of the Act. Because, both OP 1 and OP 2 do not fulfill any of the conditions with respect to the voting rights, appointment of Board of Directors and control over the management of the enterprise. Thus, dominance of the enterprise in the instant case is to be assessed individually rather than considering both the enterprises as a group.

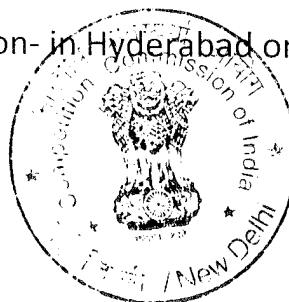
**5.5.4** It is observed by DG that at least 4 major players such as; Jet Airways, Kingfisher Airlines, National Aviation Company of India Ltd. (NACIL) – Air India and Indigo Airlines are operating in the relevant market. Each of the above airlines are having market share in the range of around 17% to 27%. Given the above market share figures of the stated airline operators, it is difficult to ignore the presence of other players in the relevant market. Moreover, during the last two to three years, the market shares of these airlines have been more or less constant. In terms of size and resources the position of three major players such as Jet Airways, Kingfisher Airlines and NACIL group of companies are not incomparable. All the above three airline operators are in a position to compete independently with each other. On the basis of above analysis the DG report concludes that the allegation regarding abuse of dominant position by OP 1 and OP 2 are not sustainable.



To investigate on the allegation of anti-competitive alliance/agreement between OP 1 and OP 2, the DG Report has considered the level of market concentration of different airlines operating in the relevant market. As per the DG Report, the market of passenger air transport services in India is fairly concentrated with Herfindahl–Hirschman Index (HHI) of 1924.1 and this factor may give rise to competition concerns. In the relevant market, both the OP 1 and OP 2 command nearly 48% of the market share together whereas the market share of their nearest competitor *i.e.* NACIL is 18.3% which is far below than the combined market share of the Opposite Parties.

**5.5.5** The DG has noted that with fair degree of market concentration in the civil aviation industry, any agreement or understanding or even intention or decision to reach an understanding between any airline operators would have adverse effect on competition. The joint announcement between the Chairman and MD of OP 1 and OP 2 created an impression that both the parties will jointly operate in the market.

**5.5.6** Taking into account the comments of the Chairmen of OP 1 and OP 2 on the press announcement dated 13.10.2008, the statement of Saroj K. Datta Executive Director of OP 1, the pictures of Chairmen of OP 1 and OP 2 while travelling in a golf cart to the venue of the India Aviation 2008 International Exhibition and Conference on Civil Aviation- in Hyderabad on 15.10.2008 ,



- 5.5.7** the DG report concluded that after the announcement of said alliance both the Opposite Parties are meeting together on different occasions.
- 5.5.8** After the announcement of the alliance, a technical Memorandum of Understanding (MOU) was also signed between the Opposite Parties in May, 2009. Moreover, after the announcement of alliance, many agreements such as Interline Traffic Agreements (ITA), Interline E-ticketing Agreements (IET) and Special Re-protection Agreements (SRA) were entered into between OP 1 and OP 2 and these agreements are also in force as on date. Thus, some of the clauses of the alliance announced on 13th October, 2008 have been operationalised between the Opposite Parties.
- 5.5.9** Relying on the findings of the study on the “Competition Issues in the Domestic Segment of the Air Transport Sector in India” conducted by the Administrative Staff College of India, Hyderabad, the DG report concludes that OP 1 and OP 2 are controlling a major share of slots as well as controlling slots in the peak period. Further, a high degree of price parallelism in OP 1 and OP 2 flights at peak hours has also been noticed in some of the air sectors. The tendency of price collusion, at later stage, may leads to over pricing.
- 5.5.10** The DG has also cited the European Commission decision in Case No. 2001/776 concerning SAS and Maersk in which the co-operation agreements between the two airlines were found to be anti competitive and substantial fines were also imposed.
- 5.5.11** In the DG investigation, it is also revealed that when there was an increase in ATF by 12.25% the fuel surcharge component of the air fare were increased by Rs. 400 by OP 1 and OP 2. On the other hand when ATF prices were



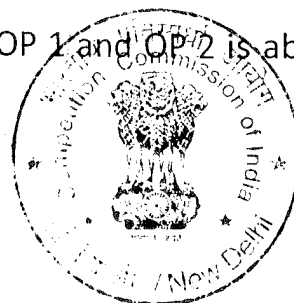
reduced by 5.7% on 15.07.2009, the fuel surcharge component of air fare have not been reduced. The OP 2 had also increased the fares during May-July, 2009 even when the ATF prices had come down. The DG also noted that fuel surcharge has been fixed by both the OP 1 and OP 2 for all places irrespective of actual distance.

**5.5.12** It is also reported that the Chairmen of two airlines have met on common platform. On 18th August, 2009 on the occasion of joint call from 'Federation of Indian Airlines' for strike, both the OP 1 and OP 2 were also part of this strike call. Since they command the majority of the market share, the call of strike could have a huge impact on the civil aviation industry and on the consumers. Thus, any decision of two airlines joining hands may have serious consequences upon competition.

**5.5.13** The DG investigation revealed that post alliance, the two airlines have successfully enhanced their market share and also increased their profitability. The revenue of OP 1 increased by 30.25% from Rs. 8811.10 crores in 2007-08 to Rs. 11476.97 crores in 2008-09. The passenger revenue, excess baggage revenue, cargo revenue of OP 1 has also increased. For the quarter 2 of 2009, OP 2 has increased its guest count by 9% in spite of a capacity reduction of 17% in the domestic market.

**5.5.14** DG had noted that although once the elements of section 3(3) are established a presumption arises with regard to appreciable adverse effect on competition but for further clarity the DG has also discussed the factor enumerated under Section 19(3) of the Act.

- a) There are limited numbers of player in the airline industry in India and in this market the combined market share of OP 1 and OP 2 is about 48%. No new



player will gainfully enter into the market since majority of slots, including peak slots, majority of passenger share are covered by both the Opposite Parties. Therefore, it creates barriers to new entrants in the market.

- b) In the past OP 1 removed Sahara India and OP 2 removed Air Deccan from the market by merging the two with them. Considering past action, the alleged agreement of OP 1 and OP 2 may drive out the existing competitors out of the market.
- c) The act of announcing alliance by OP 1 and OP 2 leads to foreclosure of competition since these two airlines control majority of the market share and slots.
- d) There is no accrual of benefit to the consumers from the alliance between OP 1 and OP 2.
- e) The alliance has not led to any improvement in the production or distribution of goods or provision of services rather capacity has been reduced which leads to lesser availability of airline services.
- f) There is no positive outcome achieved either in terms of improvement in production or distribution of goods or provision of services or in terms of promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services as a result of the alliance of the two airlines.

**5.5.15** The DG has concluded that the alliance announced by OP 1 and OP 2 in October, 2008 has still not been rescinded and many of the clauses of the alliance have been operationalized and are still in operation. The clauses of the agreement have implications on reduction in capacity amounting to limiting supply, sharing of markets, synergize on cost and revenue matters



between OP 1 and OP 2. Further, existence of high degree of price parallelism is a serious competition concern. These practices of OP 1 and OP 2 are anti competitive therefore, violate the provisions of section 3(3)(a), 3(3)(b) and 3(3)(c) of the Act.

**5.5.16** With regards to applicability of section 4 of the Act, the DG has found that the OP 1 and OP 2 cannot be considered as a group in terms of the provisions of section 4 of the Act. Individually, OP 1 and OP 2 are not in a dominant position in the relevant market. Thus, as per DG report, allegations regarding abuse of dominant position by OP 1 and OP 2 are not established.

**6.** The Commission considered the DG investigation report in its meeting dated 05.01.2011 and decided to send a copy of the report to the informant and Opposite Parties for inviting their replies/objections. Accordingly, the parties have filed before the Commission their replies/objections to the DG investigation.

## **7. Replies to DG Investigation Report by the Parties**

### **7.1 Reply of the Jet Airways (India) Ltd.**

On 15.02.2011 OP 1 has submitted its reply on DG investigation report to the Commission. The gists of submission of OP 1 are as follows:

**7.1.1** The OP 1 has replied that the observation in the DG report that the absence of public announcement of rescinding the alleged alliance by OP 1 and OP 2 on 13.10.2008 has given an impression to the stake-holders that Opposite Parties are operating together under an agreement is misconceived and is liable to be rejected as the said alliance was never put into effect.



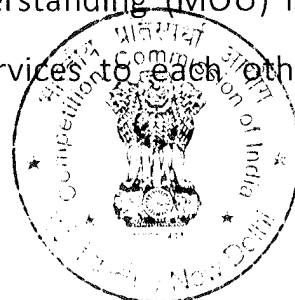


- 7.1.2** The said public announcement of alliance can never be construed as 'decision taken' under section 3 (3) of the Act as has been considered by DG in his investigation report. In absence of any concluded agreement or any conclusive decision to implement any alliance, it is not appropriate to even suggest that Opposite Parties are acting in concert and thereby affecting competition adversely.
- 7.1.3** In the DG report it is stated that many of the clauses of the alliance have been operationalized and are still in operation between OP 1 and OP 2. This conclusion is misconstrued and wrong and has been arrived at without referring to the specific clauses. Further, the conclusion drawn by the DG that the said alliance between OP 1 and OP 2 has still not been rescinded is not supported by any cogent evidence on record. In fact as the alliance as announced on 13<sup>th</sup> October, 2008 was not put into effect at all, the question of rescinding it does not arise.
- 7.1.4** It has been contended that only certain arrangements for agreements which are quite common in the airline industry have been entered into which have nothing to do with the said announcement. Such arrangements are prevalent in the civil aviation industry all over the world for passenger facilities and are completely at the option and will of the passenger to avail such facility or not. Further, these agreements are only intended to provide efficient and better services to the passengers and not for reducing competition in the market as concluded by DG. Therefore, such agreements cannot be termed as alliance per se and are not anti-competitive. These agreements in fact give an option to the passengers and are for their convenience.



**7.1.5** Jet Airways has submitted that the conclusion drawn by the DG that the agreements entered between OP 1 and OP2 are violative of the provisions of the Act is erroneous because of the following reasons:

- a) Under Multilateral Interline Traffic Agreement (MITA), two airlines operating scheduled air transportation services can enter into agreement to handle passenger travelling on itineraries that require multiple airlines and handling such passengers and their baggage and each party may also sell transportation over the routes of other carrier. Jet Airways has entered into MITA with almost 140 IATA approved airlines across the world, including Air India and Kingfisher.
- b) The OP 1 has entered into Interline Electronic Ticketing (IET) agreements with more than 80 carriers across the world including Air India. This agreement is primarily technical in nature and is implemented to facilitate issuance of interline e-ticket documents and does not involve any financial benefits to the parties to the agreement.
- c) The Special Re-protection Agreement (SRA) is a bilateral agreement between the operators who operates on similar routes to protect their passengers' interest in case of any disruption in operating carrier's schedules due to flight cancellation or delay or re-timing of flights. The OP 1 has entered into similar agreements with more than 28 carriers all over the world including Air India, Spice jet and Indigo. Such agreements are not for any commercial benefits to the airlines as they are invoked only under exceptional circumstances as enumerated above.
- d) The technical Memorandum of Understanding (MOU) is signed between two airlines to provide technical services to each other at certain line



stations. Such agreements are a common industry practice and have nothing to do with the announcement relating to the so called alliance.

**7.1.6** With regards to the observation of DG relating to price parallelism it has been submitted that both OP 1 and OP 2 are competing with each other in several domestic sectors. Since the product and services of both OP 1 and OP 2 are similar, the OP 1 cannot out-price OP 2 in sectors it competes with it nor does it have a desire to under sell its flights either. Jet Airways files its fares through Airline Tariff Publishing Company (ATPCO) which in turn distributes the fares to various Global Distribution System (GDS). Because of this within a matter of hours its fares become transparent to the outside world and so do the fares of other carriers such as Kingfisher. Jet Airways after considering its competitors fares through ATPCO determines its own fares. It has also submitted that the fare that actually is offered to a customer at a particular point in time is determined by seat availability which is managed through computerized revenue management system. It has been contended that any airline offering substantially higher fares than its competitors is likely to face a situation where no customer will be willing to buy its ticket which would ultimately force it to lose out its market share. For this reason all the airlines always strive to put its fares at same or similar level compared to other airlines. The fares of OP 1 and OP 2 in respect of some sector might be close to each other which cannot be treated as price parallelism as concluded by the DG in his report.

**7.1.7** It has been submitted that the DG has failed to notice that both Jet Airways and Kingfisher 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 their respective passengers.

**7.1.8** With regards to the conclusions drawn by DG it has submitted that:

- a) Since there is no alliance between OP 1 and OP 2 operationalised, there is no question of public announcement regarding 'no alliance in operation between OP 1 and OP 2'.
- b) With regards to linking fuel surcharge to actual distance it is submitted that such arrangements is already in place except that it is implemented in a slab wise manner. All other airlines operating domestically levy fuel surcharge on the same basis. So, to single out OP 1 on this issue is not fair.
- c) With regards to DG recommendation that reduced ATF prices should be passed on to the consumers it is submitted that this argument is not justified because there is no scientific mechanism anywhere in the world to link the actual quantum of the fuel surcharge to prevailing price of ATF.

**7.1.9** Finally, it is submitted that OP 1 has not imposed any unfair and discriminatory conditions on its passengers and has not violated any provision of the act as alleged by the informant.

## **7.2 Reply filed by Kingfisher Airlines Ltd**

The OP 2 has submitted its reply/objection to DG investigation report to the Commission on 28.01.2011 and also filed summary of oral submissions on 24.03.2011. The gists of reply and oral submissions of OP 2 are as follows:

**7.2.1** It has been submitted by OP 2 that some of the contents and conclusions of DG report are factually incorrect such as; there is no special pro rate agreement between OP 1 and OP 2, no written agreement was executed between OP 1 and OP 2, comparison between Kingfisher red fares with



Kingfisher class fares is misleading, objective of alliance was not to limit supply and co-operate on revenue and cost matters, etc.

**7.2.2** Kingfisher Airlines reduced its capacity because of global recession in the civil aviation industry. Further, though it reduced Kingfisher class capacity because of global slowdown but at same time it raised the capacity of low cost Kingfisher Red due to increase in demand for low cost carriers.

**7.2.3** It has submitted that (i) the technical MoU signed between OP 1 and OP 2 has nothing to do with the public announcement of alliance made in October, 2008. It is a general practice in the aviation industry to sign technical MoUs amongst different operators so as to optimize the utilization of man power, (ii) the special re-protection agreement is limited only to cases where there is a disruption in the flight schedules of either of the airlines due to any unforeseen reason, (iii) with regards to interline traffic agreement it is submitted that it has entered into such agreement with 88 airline operators worldwide. Similarly, it has also entered into e-ticketing agreements with 65 airlines operators worldwide. So the reasons cited by DG to arrive at the conclusion that the OP 1 and OP 2 have violated provision of section 3 of the Act by entering into these kinds of agreements is misleading and erroneous.

**7.2.4** The DG report has concluded that 'even a decision to enter into such an alliance would be violative of the act'. In this regard Kingfisher Airlines submitted that the same is ex facie erroneous because the term 'decision taken' used in section 3(3) of the Act is applicable only in case of association of enterprises or association of persons and to attract provisions of section 3(3) of the Act there must be an agreement between Kingfisher Airlines and



Jet Airways. Furthermore, even if the announcement made by the Opposite Parties can be taken as decision the provisions of section 3(3) of the Act will not apply to a decision taken prior to coming into force of relevant section.

**7.2.5** It has also been contended that the conclusion of the DG that after the declaration of alliance between OP 1 and OP 2 the market share of OP 2 has increased is wrong and not based on actual fact. Rather, the fact is that after the announcements of the said alliance the market share of OP 2 has declined.

**7.2.6** With regards to the conclusion of DG report that after the announcement of alliance there was a reduction in capacity of OP 1 and OP 2, it has been submitted that the DG has failed to take into account the fact that this reduction in supply took place during the global slowdown. Further, it is not only the OP 1 and OP 2 who reduced their capacity but also other airline operators, including Air India, have reduced their capacity.

**7.2.7** The OP 2 has also denied the conclusion drawn by DG that because of the declaration of alliance between OP 1 and OP 2 the market share of Air India has reduced. It has been pointed out that DG has failed to take into account the fact that while the market share of Air India has reduced the share of other airlines apart from Kingfisher and Jet Airways has also risen.

**7.2.8** On price parallelism between OP 1 and OP 2 it has been submitted that the DG has considered the air fares of OP 1 and OP 2 in isolation. If a comparison of air fares of all airlines operating in India into full service and low cost category is made it will be seen that the air fares offered by airlines in each category are similar in range to other competing airlines. These fares are governed by market forces, demand and competition and any airline



offering significantly higher fares than its competitors is likely to lose out on market share.

**7.2.9** On recommendations made by DG in his report it has been urged that OP 2 is not required to make any public announcement regarding non-existence of alliance between OP 1 and OP 2 because such announcement is unnecessary and liable to misuse. With regards to linking fuel surcharge with actual distance it has been submitted that there is already an arrangement in place by which fuel surcharge is linked to distance, except that it is done in a slab-wise manner. It was submitted that the DG recommendation that air fares be reduced as and when ATF prices come down is not justified.

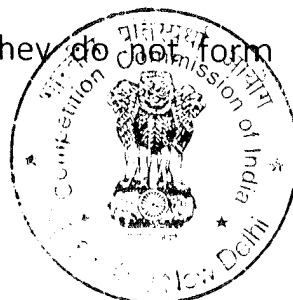
**7.2.10** Finally, it has been submitted by OP 2 that the complaint against it deserves to be dismissed and investigation in this regard should be closed.

## **8. Decision**

**8.1.** The Commission has carefully pursued the entire material submitted by the informant, the submissions made by the Opposite Parties before the DG, the Report of the DG, the written submissions filed by the Opposite Parties and the Informant before the Commission and all other relevant material and evidence available on record.

**8.2.** From the available material on record, it is noted by the Commission that activities being performed by the Opposite Parties are covered within the definition of 'enterprise' under section 2 (h) of the Act.

**8.3.** After examining the applicability of the provisions of section 4 of the Act, DG has come to the conclusion that individually neither of the Opposite Parties is in a dominant position and since they do not form part of a group as



envisaged in section 4 the allegation of abuse of dominance by the Opposite Parties has no substance. In the absence of any evidence to the contrary, there is no reason to disagree with the findings of the DG in this respect.

**8.4.** As regard to the applicability of section 3 of the Act to the present matter the DG has concluded that as the announcement of the alliance made by Jet Airways and Kingfisher Airlines on 13<sup>th</sup> October, 2008 was not rescinded publicly by the Opposite Parties and in fact they entered into technical MOU, Interline Traffic Agreements (ITA), Interline E-Ticketing (IET) agreement and Special Re-protection Agreements (SRA) after the announcement of alliance goes on to show that if not all, some of the clauses of the alliance have indeed been operationalized. The DG has drawn the conclusion that given the facts that both airlines together command 48% of the market share in the market of 'services for transportation of passenger on aircrafts in India', high degree of price parallelism in air fares of the Opposite Parties in some sectors, reduction in capacity and cooperation through route rationalization amount to price fixing, limiting the supply and allocating the market in violation of provisions of section 3(3)(a), 3(3)(b) and 3(3)(c) of the Act.

**8.5.** It is seen from the record that Jet Airways and Kingfisher Airlines issued a joint statement on 13 October, 2008 to announce an agreement to the formation of an alliance which would help both carriers to significantly rationalize and reduce costs and provide improved standard of service and a wider choice of air travel options to consumers and which will also offer the best possible fares for the benefit of the consumers. Further, the purported purpose of alliance was to tide over the slowdown in the aviation industry



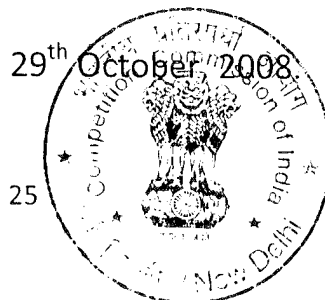


due to global recession. The scope of the alliance extended to the following areas :

- i) Code-sharing on both domestic and international flights.
- ii) Interline/special prorated agreements to leverage the joint network deploying aircrafts covering both domestic and international flights.
- iii) Joint fuel management.
- iv) Common ground handling.
- v) Cross selling of flight inventories using the common global 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.
- viii) Reciprocity in Jet Privilege and King Club frequent flier programmes.

**8.6** The Kingfisher Airlines has submitted alongwith the summary of the oral submissions filed on 24.03.2011 that it has entered into the following agreements/arrangements with Jet Airways on different dates :

- i) Special Re-protection Agreement on 21<sup>st</sup> May, 2009 which was extended from time to time.
- ii) Interline Traffic Agreement on 24<sup>th</sup> October, 2008.
- iii) E-Ticketing Arrangement on 29<sup>th</sup> October, 2008.

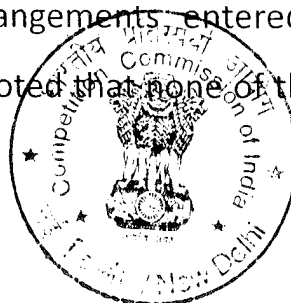


iv) Technical MOU on 25<sup>th</sup> May, 2009.

**8.7** Both the airlines i.e. Jet Airways and Kingfisher have maintained that the alleged alliance announced by them has not been given affect to and it was only an intent to conclude an alliance to enhance their cooperative commercial and operational partnership with a view to help both carriers to rationalize and reduce costs and improve standard of service to the travelling public. They have also repeatedly contended that all these agreements/arrangements are common industry practice and these have not been entered in pursuance of announcement of alliance on 13 October, 2008. They have also contended that they have such kind of agreements/arrangements with large number of domestic and international airlines including the third largest market player NACIL, a Government owned company and such agreements do not violate provisions of section 3 of the Act.

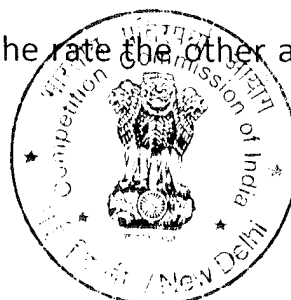
**8.8** It is evident from the record that no other agreement apart from the agreements referred in para 8.6 has been entered into between the Opposite Parties. There is no evidence on record which could establish that the alliance as announced was operationalized in toto. Had all the elements of publicly announced alliance were given affect to and coordination between the Opposite Parties had extended to the fullest extent then that might have given rise to competition concern in view of the combined market share of Jet Airways and Kingfisher Airlines.

**8.9** On examining the agreements/arrangements entered into between Jet Airways and Kingfisher Airlines it is noted that none of these agreements can



be said to have either determining the airfares or limiting the supply or allocating the market in terms of the provisions of section 3(3)(a), 3(3)(b) and 3(3)(c) of the Act. Additionally it is also seen that such kind of agreements/arrangements have not only been entered between Jet Airways and Kingfisher Airlines but they have also separately entered into such kind of agreements with large number of domestic as well as international airlines and most of these agreements have also been entered by them with the NACIL (Air India). It is also noted that the market share of both the parties has remained constant even after passing of almost two years of the public announcement. In fact Kingfisher Airlines has reported losses in subsequent years ending March, 2009 and March, 2010.

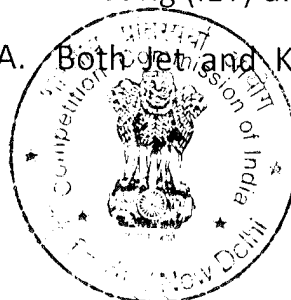
**8.10** Admittedly the Special Re-protection Agreement which was entered into between Jet Airways and Kingfisher Airlines on 21<sup>st</sup> May, 2009 and extended from time to time is an agreement which has limited application and can be invoked only when there is disruption in the schedule of either of the party due to unforeseen reason. When such occasion arises then it enables the airline whose schedule has been interrupted to transfer its passengers on another airline operating on the same route. Very clearly such agreement cannot be said to be one which either determines purchase or sale price, or limits or controls production, supply, markets etc or provision of services, or which allocates the market. On the contrary DG has himself stated in the investigation report that it is beneficial because passengers are not stranded in case of disruption of flight and the airport staff is aware of the fact that on which other carrier services the affected passengers are to be transferred. It has also been mentioned that since the rate the other airline will receive for



such transfers has been determined under the SRA, it prevents competitors from taking undue advantage of a disruption situation and increasing their fares at the last minute. Thus, it is apparent that SRA is in fact beneficial to the consumers and in no way it can be said to be anti-competitive in terms of section 3(3) (a)/(b)/(c) of the Act.

**8.11** Jet Airways and Kingfisher airlines entered into Interline Traffic Agreement on 24<sup>th</sup> October, 2008. There is also no dispute about the fact that this is an internationally accepted practice amongst the airlines worldwide to enter into such kind of Interline Agreements. It is also borne out from the record that Jet Airways has entered into MITA with 140 airlines across the world including Air India and Kingfisher and similarly Kingfisher Airlines has 88 such agreements with various airlines including Air India. This agreement is entered into between individual airlines to handle passengers travelling on itineraries that require multiple airlines and is made between two carriers operating scheduled air transportation services and under this agreement each party is able to sell transportation over the routes of other carrier. This agreement also includes handling passengers and their baggage. Considering the nature and purpose of such kind of agreements which appear to be common industry practice, there does not seem to be any violation as provided in 3(3)(a), 3(3)(b) and 3(3)(c) of the Act. Rather such arrangement appears to facilitate passengers travel.

**8.12** The third agreement which was entered between the Opposite Parties on 29<sup>th</sup> October, 2008 is Interline Electronic Ticketing (IET) arrangement is only a technical requirement following ITA. Both Jet and Kingfisher have such



agreements with 65 – 80 airlines including Air India. This agreement only facilitates issuance of Interline E-Ticket document and does not involve any commercial benefits. The DG in his report has mentioned that if such kind of arrangement is not there a passenger will end up paying more for his tickets and it will be inconvenient and tedious for him. Quite obviously this arrangement also cannot be said to be fixing price or limiting output or allocating the market.

**8.13** The fourth agreement is a technical MOU signed by the Opposite Parties on 25<sup>th</sup> May, 2009 and is also a common practice in airline industry. As per the submissions of the Kingfisher Airlines it has 25 similar arrangements with various airlines including Air India. Both the parties have claimed that it is nothing but ground handling arrangement and the purpose behind such agreement is optimum utilization of manpower resources. Such agreements enable the airlines to cut down their operating costs which in turn results into better fares for passengers. There is nothing in DG report to contradict such claim made by the Opposite Parties. In this case also clause a, b & c of section 3(3) are not attracted.

**8.14** In view of the foregoing discussion, no violation of either section 3 or section 4 is found to have been established against Jet Airways and Kingfisher Airlines and matter deserves to be closed.



8.15 The matter is closed forthwith. Secretary is directed to inform the parties accordingly.

Member (R)

Member (GG)

Member (P)

Member (AG)

Member (T)

Chairperson

Certified True Copy

