

COMPETITION COMMISSION OF INDIA

Date: April 28, 2011

Case No. 66/ 2010

Flyington Freighters Private Limited

Informant

v.

Airbus S.A.S.

Opposite Party

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The present information has been filed before the Competition Commission of India ('the Commission') under section 19 of the Competition Act, 2002 ('the Act'). The brief facts of the matter are as follows:

2. Flyington Freighters Private Limited ('the Informant') has stated in the information that it intended to commence a cargo airline business and to develop an air cargo hub at Hyderabad. It is further stated that the Informant planned to start commercial operations by 2007, initially by taking used aircraft on lease and subsequently transitioning to new freighter aircraft.

3. As per the information, the Informant entered into an agreement with Boeing ('the Boeing Agreement') for the supply of aircraft. Boeing also facilitated an agreement between the Informant and Avion for acquiring pre-owned Airbus aircraft ('Pre-owned Aircraft') to assist the Informant to commence its air cargo business immediately, without waiting for delivery of the new aircraft from Boeing.

4. It is alleged by the Informant that pursuant to the public announcement of the Boeing Agreement, Airbus S.A.S. ('the Opposite Party') made a lucrative offer to supply aircraft to the Informant with substantial discounts and subsidies. It is alleged that the above offer was made by the Opposite Party with the intention of (a) ousting Boeing from the Indian market; and (b) to gain an advantage in the United States Defense Department for the Provision of KC-X military tanker aircraft ('the USAF Bid') by showing the Informant as a launch customer and to weaken Boeing's prospects in the USAF Bid.



5. It is alleged that on being misled by the Opposite Party's luring tactics, the Informant cancelled the Boeing Agreement and signed a purchase agreement with the Opposite Party for six aircraft ('the Purchase Agreement'). It is further averred that the Informant was again lured by the Opposite Party to increase the number of aircraft to twelve.

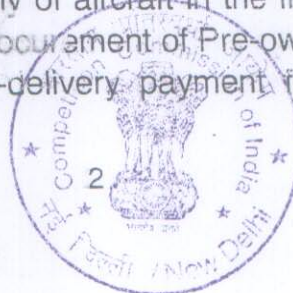
6. It is also stated in the information that the Opposite Party imposed discriminatory and onerous conditions while giving its consent for the financing of aircraft and also delayed its consent in some cases to prevent the Informant from obtaining timely financing for the aircraft and thereby creating a default situation for the Informant. It has been submitted that as a result of the Opposite Party's failure to perform, the Informant has not been able to commence its cargo business in India.

7. The Informant has further stated that the Opposite Party had made reckless commitments on the delivery of the aircraft without proper regard to its own capacity to fulfill its obligations. It is alleged that in order to step back from its own commitments, the Opposite Party forced not only various amendments to the Purchase Agreement which resulted in postponement of delivery of aircraft but also alterations to the entire commercial terms, which amount to placing unfair condition in sale of aircraft. It is also alleged that the Opposite Party, by not supplying the aircraft to the Informant, preserved the Indian market for Etihad and MNG who are allegedly the Opposite Party's largest customers.

8. It is alleged that the Purchase Agreement has been a barrier and hindrance for the Informant's entry into the Indian market, and has resulted in foreclosure of competition between the Informant and the Middle East players in India and has therefore, caused an appreciable adverse effect on competition in India in contravention of section 3(1) of the Act.

9. It has also been alleged that the Opposite Party gave a veiled threat to the Informant that the operation of the Pre-owned Aircraft would be impossible without the manufacturer's i.e. Opposite Party's support. Therefore, it is submitted that the Opposite Party had allegedly tied its product with the 'type certification' of the Pre-owned Aircraft necessary for a successful launch of the Informant's business thereby allegedly forcing the Informant to agree to such a tie-in arrangement and commit to purchase the Opposite Party's aircraft. The Informant has alleged that this conduct of the Opposite Party amounts to a contravention of section 3(4)(a) of the Act.

10. The Informant has further alleged that the Opposite Party enjoys a dominant position in the manufacture and supply of aircraft in the Indian market and has abused the same by (a) creating hurdles in procurement of Pre-owned Aircraft; (b) not rendering appropriate co-operation in the pre-delivery payment financing and instead putting



onerous terms in giving its consent that resulted in causing delay; and (c) forcing on the Informant amendments to the Purchase Agreement to delay the delivery and change the commercial terms pertaining to the sale of aircraft. It has been argued by the Informant that the acts of the Opposite Party amount to imposing unfair and onerous conditions in the sale of goods namely aircraft, in contravention of section 4(2)(a)(i) of the Act, and result in limiting and restricting production of goods and services in the Indian market, in contravention of section 4(2)(b)(i) of the Act.

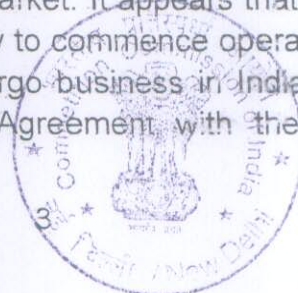
11. The Informant has *inter alia* sought a direction to the Opposite Party to discontinue its practice of abuse of dominant position and to refrain from re-entering into any anti-competitive agreements. The Informant has also sought an interim relief to restrain the Opposite Party from taking coercive action against the Informant during the pendency of proceedings like termination of the Purchase Agreement.

12. The Commission has considered the matter in its meeting held on 14.12.2010 and asked the Informant to make oral submissions in support of its case. On 5.1.2011 Senior Advocate Dr. Abhishek Manu Singhvi appeared on behalf of the Informant.

13. After hearing the counsel for the Informant and from the perusal of the information, and on consideration of the submissions and the material on record, it is found that the Informant and the Opposite Party entered into an agreement in furtherance of their respective business interests. The Informant cancelled the Boeing Agreement and entered into the Purchase Agreement with the Opposite Party since the terms of the latter appeared more attractive, favourable and lucrative to the Informant.

14. From the perusal of the material available on record, it appears that the Informant was not under any kind of compulsion to cancel the Boeing Agreement and to enter into the Purchase Agreement with the Opposite Party. It seems that the Informant chose to do so to better its business prospects and secure the potential commercial gains that were likely to ensue in the future from its association with the Opposite Party.

15. In this regard, we may refer to the provisions contained in section 3 of the Act which states that no enterprise shall enter into any agreement which causes or is likely to cause an appreciable adverse effect on competition in India and any such agreement shall be void. While determining whether there is any appreciable adverse effect on competition under section 3, the Commission shall have due regard to the factors listed in section 19(3) of the Act which *inter alia* include (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; and (c) foreclosure of competition by hindering entry into the market. It appears that the Purchase Agreement was entered into by the parties voluntarily to commence operations of the Informant and to introduce a new entrant in the air cargo business in India. It seems to us that the Informant entered into the Purchase Agreement with the Opposite Party for the

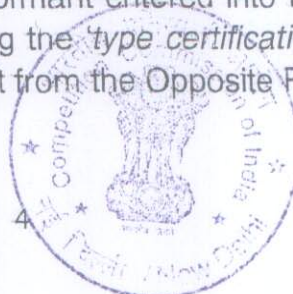


discounts and subsidies offered and wanted to avail of these monetary benefits and other facilities. The fact that the Informant could not obtain these benefits as promised does not appear to be a competition issue. Further, reckless commitments without proper regard to its capacity by one party or lack of industry knowledge and market practices by a party by themselves do not attract provisions of the Act.

16. The alleged 'loss of opportunity' for the Informant because of the Opposite Party's conduct also cannot be assumed to be an act of foreclosing the competition between the Informant and the Middle East players or in the air cargo market in India. It is pertinent to note that as per the information, the cap on Foreign Direct Investment (FDI) was raised from 49% to 74% in 2008 and this "quickly attracted international players such as Etihad, Emirates, Saudi Air and Qatar who lost very little time in setting shop aggressively occupying the market". Further, the 'loss of opportunity' for the Informant is based on its assumption that had the Informant commenced commercial operations before the FDI cap was raised in 2008 it would have been able to secure its place, stabilize its operations and ensure market presence before the entry of the Middle East players. This is mere conjecture and based on surmises. Inability to reap projected benefits based on speculation by the Informant may not be considered as hindering entry, denying market access or foreclosing competition in favour of other participants.

17. There is no material to show that there has been foreclosure of competition in the relevant market due to the actions of the Opposite Party or that because of the Opposite Party's alleged conduct there was denial of market access to the Informant. In view of the above, the allegation that the Purchase Agreement entered into between the Informant and the Opposite Party has been a barrier and hindrance for the Informant's entry into the Indian market does not hold good.

18. With respect to the allegations of the tie-in arrangement forced by the Opposite Party, it may be noted that purchasing the aircraft from the Opposite Party was not a mandatory pre-condition to leasing the Pre-owned Aircraft as the Informant had already entered into an agreement with Avion in this regard. Further, there was no obligation on the Informant to enter into the Purchase Agreement and it was free to continue to deal with Boeing and Avion. According to the information, the Opposite Party made a "representation that a business deal with them to purchase new aircraft would ensure quickest, smoothest and most economical 'type certification' of the desired [Pre-owned Aircraft] aircraft". As per the Informant's admissions "it was lured by the representations made by the Opposite Party" and hence it cannot be said to have been forced or compelled to do so. It appears that the informant entered into the Purchase Agreement for the additional benefit of easily obtaining the 'type certification' and not because the same was tied-in to the purchase of aircraft from the Opposite Party.



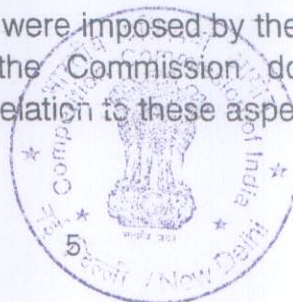
19. Having considered the submissions made, no *prima facie* case of a contravention of the provisions of section 3 of the Act has been made out.

20. In so far as the allegations of abuse of dominance by the Opposite Party in contravention of section 4 of the Act are concerned, it is pertinent to note that the provisions of the Act do not prohibit a 'dominant position' *per se* but the abuse of such position. Further, only certain acts by an enterprise that enjoys a dominant position are considered abuse of its dominant position. As per section 4 of the Act there shall be an abuse of dominant position if an enterprise follows the practices covered in the said section including directly or indirectly, imposes unfair or discriminatory condition in (i) purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service etc.

21. Elaborating the nature of transactions and in particular, the practices adopted by the Opposite Party, the counsel appearing for the Informant vehemently argued that the intention and plan of the Opposite Party was to induce the Informant to agree to terms which were designed to oust the Informant from the relevant market. The theory of *mens rea* was also advanced to support this argument and it was contended that the 'object test' should also be applied to assess the conduct of the Opposite Party. In this regard, the counsel also made a reference to the term '*with a view to reduce or eliminate the competitors*' appearing in Explanation (b) to section 4 of the Act.

22. It may be noted that the term '*with a view to reduce or eliminate the competitors*' appears in Explanation (b) to section 4 of the Act defining 'predatory pricing' and not in Explanation (a) to section 4 of the Act defining 'dominant position'. It is certainly not the case of the Informant that the Opposite party indulged in predatory pricing. Therefore, the contention advanced by the counsel for the Informant is not acceptable.

23. The allegations with respect to creating hurdles in procurement of Pre-Owned Aircraft or not rendering appropriate co-operation in the pre-delivery payment financing and instead imposing onerous terms in giving its consent, which resulted in causing delay, may relate to non-performance of contractual obligations and lack of co-operation by the Opposite Party. However, for such breach of contractual obligations remedy may be available before other appropriate forums but not under the Act. Further, the allegation that the amendments in the Purchase Agreement delaying the delivery and changing commercial terms were forced on the Informant cannot be accepted as the agreements were entered voluntarily by the Informant and there is no material on record to show that the consent of the Informant was obtained by fraud or by misrepresentation or that unfair conditions were imposed by the Opposite Party by using its alleged dominant position. Hence, the Commission does not find force in the contentions raised by the Informant in relation to these aspects.



24. It is trite law that everyone has a right to carry on business and the freedom of trade including the right to choose his or its trade and business partners. Competition law issues arise when the contract or the conduct of the parties is likely to distort the market or adversely affects the competition. Mere failure by a dominant enterprise to perform or fulfill its contractual obligations does not necessarily amount to abuse of dominant position under section 4 of the Act unless other ingredients of the said section are satisfied. It appears that business considerations led the Informant to agree to the amendments to the Purchase Agreement. The Informant could have chosen to terminate the Purchase Agreement but instead preferred to negotiate and agree to the amended terms for reasons best known to it. The mere possibility that the successful launch of the Informant's operations might have further enhanced competition in the air cargo business in India does not imply that the failure to commence operations had an adverse impact on the market and involves anti-competitive concerns.

25. After going through the entire material on record and taking into consideration the facts and circumstances of the case and the issues involved, the Commission is of the considered opinion that no *prima facie* case is made out in the present case. Accordingly, the Commission decides to close the matter forthwith under section 26(2) of the Act.

26. The matter is hereby closed.

27. The application seeking interim relief also stands disposed of accordingly.

28. The Secretary is directed to intimate the Informant accordingly.

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