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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2013/05/122)

13.12.2013

Order under Section 43A of the Competition Act, 2002

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

2. Vide my earlier (minority) order dated 14th October 2013, I had expressed the prima facie opinion that the proposed combination is likely to cause an appreciable adverse effect on competition within the market of international air passenger transportation from and to India, and that a notice should, therefore, be issued to show cause to the parties to the combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of the proposed combination should not be conducted. However, the Commission passed the majority order on 12th November 2013 approving the combination under sub-section (1) of Section 31 of the Act.

3. As reflected in my order dated 14th October, 2013, as per details furnished by the Parties they had, inter alia, entered in to a slot purchase agreement for sale of three pairs of Jet's slots at LHR Airport to Etihad. Simultaneously, the parties also entered in to a slot lease agreement for leasing back the same slots to Jet for a period of five years subject to certain conditions (both the

purchase and the lease agreement collectively referred as "**LHR Transaction**").

4. In para 50 of my order dated 14th October 2013, it was stated that I was of the prima facie opinion that the LHR Transaction, which is part of the proposed combination, is likely to cause AAEC in the air passenger transportation services between Mumbai/Delhi and London. It was also observed in para 44 of the order that the CCA has already been implemented with effect from 24th April 2013.

5. On 14th October 2013, the Commission had unanimously decided to issue a notice to Etihad under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**") read with Section 43A of the Act as the parties appeared to have consummated/implemented certain parts of the composite combination i.e. consummation/implementation of the LHR Transaction and the CCA; and Etihad, being the acquirer in the combination, failed to give notice in accordance with sub-section (2) of Section 6 of the Act. Accordingly, a notice under the said provisions of the General Regulations and Act was sent to Etihad on 18th October 2013 ('**Notice**'). Etihad filed its response on 28th October 2013. Etihad was also heard by the Commission on 10th December 2013.

6. It was alleged in the notice that the parties have consummated/implemented the LHR Transaction and the CCA; and Etihad, being the acquirer in the combination, failed to give notice in accordance with sub-section (2) of Section 6 of the Act.

7. After considering the written and oral submissions of the Etihad in response to the notice, it is observed as follows:

LHR Transaction:

7.1 Etihad contends that LHR Transaction is an independent stand-alone transaction, and that while for the sake of clarity, the documentation in

respect of the LHR Transaction and proposed transaction may make a reference to each other, such references have been incorporated merely to record the entirety of the commercial transactions entered into between the same parties in the recent past and such references do not necessitate a narrow interpretation to the effect that the LHR Transaction and the proposed transaction are in any way inter-dependent.

7.2 While the LHR Slot Purchase Agreement, in one of the clauses, specifically refers non-execution of the IA and SHA with thirty days as an event of default, the Commission's approval for '*implementation of the arrangements provided for in each other each of the Transaction Document (including, for the avoidance of doubt, the code-share agreement, CCA and any agreements entered into pursuant to the CCA)* (emphasis supplied)" is identified as a condition precedent for closing of the IA. The IA defines the Transaction document as "*this agreement* [IA]*, the Shareholders Agreement, the Commercially Co-operation Agreement, the LHR Slots Agreement, the FFP Term Sheet, the Phase I Financing Documents...*"

7.3 Going by the aforesaid provisions of the IA and the LHR Transaction Agreements, it is evident that the parties have pursued the IA, SHA and the LHR Transaction as parts of their composite combination comprising different steps. It is also abundantly clear that this transaction has already been executed/implemented.

7.4 In view of the foregoing, the contention of Etihad that LHR Transaction is an independent transaction is clearly an afterthought and is not agreed with. I am unequivocally of the view that LHR Transaction was very much an interdependent component of the composite combination, which has already been implemented.

Commercial Co-operation Agreement (CCA):

7.5 Broadly, Etihad contends that the parties have not taken any action to implement the terms of CCA and the conduct that has been cited as

action towards consummation of the CCA is either pursuant to the parties existing code-share agreement dated 1st July 2008 or a normal industry practice or an independent decision/action of Jet. It has been contended that there has been no coordination between Jet and Etihad.

7.6 It is observed that the parties had initially entered into the CCA on 24th April 2013 and subsequently restated and re-executed the CCA three times, on 25th May 2013, 5th September 2013, and 19th September 2013 respectively. In the initial agreement, it has been stated that the CCA shall come into force on the date hereof i.e. 24th April, 2013. All the restated and re-executed agreements also provide that the CCA shall come into force with effect from 24th April, 2013 which essentially means that though the parties have subsequently re-executed the CCA thrice, they have opted to give effect to the provisions therein from 24th April, 2013.

7.7 It is well known and self-evident that all combination filings are made by parties after very detailed scrutiny and extremely careful consideration of all aspects of the deal. The fact that every time the parties decided to re-state and re-execute the CCA, they deliberately continued to provide that CCA shall come into force on 24th April, 2013 itself indicates that the CCA had already come into force, as otherwise there would be no sense in making an agreement signed in September, 2013 effective retrospectively from 24th April, 2013. It would be extremely naive and quite unacceptable to assume that this was a mere oversight, and the parties were in fact waiting for the Commission's approval before consummating the CCA. No further evidence is actually required in this regard.

7.8 In case an investigation had been conducted, as envisaged on the minority order dated 14th October, 2013 there could have been more evidence of consummation of the CCA, and on whether Section 3(3) was already being violated. However, additional facts are available, even without an investigation, further establishing that CCA had indeed been consummated before the proposed combination was

approved by the Commission. The first such fact is Jet's conduct of offering new daily services between Kochi and Abu Dhabi in tune with clause 2.2.1 of CCA, quoted below, which includes "Cochin" as one of the eight destinations mentioned therein:-

Clause 2.2.1

"The addition by Jet of new daily services between Abu Dhabi and eight destinations in India, namely Ahmadabad, Bombay, Delhi, Bangalore, Chennai, Cochin, Hyderabad, Trivandrum commencing as soon as possible in 2013 but no later than the 2013 IATA winter season."

7.9 The leasing of 3 of its Boeing 777-300(ER)s to Turkish Airlines by Jet, in line with clause 2.2.3 of CCA quoted below, is another additional factor which further confirms consummation of the combination before it was approved by the Commission:-

Clause 2.2.3

"*Furthermore, the parties agree that Jet may sub lease up to three of its finance leased B77-300ERs for a period of 12 months. The remainder of these aircrafts shall be in Jet's fleet on or before 30th November, 2013.*"

7.10 When these facts were pointed out specifically during the hearing on 10.12.2013, the parties stated that these actions were pursuant to an earlier code- share agreement dated 1st July, 2008 but no supporting evidence was adduced. Further, any reasonable interpretation of the facts of the case would clearly indicate that Jet's action above cannot be a coincidence --- that would be rather incredible, and was indeed taken in pursuance of the CCA.

7.11 It is evident from the foregoing conduct of the parties that a number of steps had been taken by them to implement at least some of the

provisions of the CCA even before the proposed combination was approved by the Commission.

8. After considering the submissions of the parties in their written response as well as during the hearing, and for reasons recorded above, I conclude that Etihad has not given notice in accordance with sub-section (2) of Section 6 of the Act, and find that it has consummated the LHR transaction and the CCA even before the approval of the proposed combination by the Commission, which amounts to a very grave deliberate failure to notify the Commission about extremely critical facts of the case, crucial in the process of competition assessment of the proposed combination and the parties are liable to be penalised under Section 43A of the Act.

9. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination. Information regarding the value of assets and turnover of the parties has been provided in the notice. Since the information regarding the assets/turnover is confidential, and the penalty I intend to impose is much less than one percent of assets/turnover, this information is not being mentioned in this order.

10. Having concluded that the parties have violated Section 43A of the Act, and that the LHR transaction and the CCA had actually been implemented and consummated before approval of the proposed combination by the Commission, it is necessary to assess the severity of this violation for the purposes of imposing penalty under Section 43A of the Competition Act, 2002.

11. In this context, it is relevant to note that the IA identifies LHR Slots Agreement as one of the Transaction Documents and envisages the Commission's approval to the implementation of the arrangements provided for in each other Transaction Document (including the LHR Transaction) as

a condition precedent to its closing. However, the parties in their submissions claim LHR Transaction as an independent Transaction not notifiable to the Commission. Etihad contents that under clause 7 of the CCA the parties have agreed to seek on applicable competition/anti-trust immunity approvals required to give effect to the co-operation contemplated under the CCA. It is evident from a reading of the said clause that the phrase 'to give effect to' is a new insertion not actually found in the said clause.

12. The above conduct of the parties bears closer scrutiny. They first claim that this transaction, finalised on 26.2.2013 is independent, and then subsequently go on to include it for approval in the filing for the combination under consideration. Then they go on to argue that actually the transaction is covered under exemption provided under Item 3 and Item 10 of Schedule I to the Combination Regulations. The relevant provisions of the Regulation are examined below.

13.1 It is observed that Regulation 4 of the Combination Regulations makes a presumption that the categories of transactions listed in Schedule I to the Combination Regulations are ordinarily not likely to cause AAEC. However, the option given to parties to a combination is limited to determine whether their transaction falls within the scope of any of the categories of transactions listed in Schedule I and if so, whether to give notice to the Commission or not. However, the provision does not enable any one to dispense with the mandatory requirement of filing notice in respect of a combination, not covered under Schedule I, on the basis that the parties believe that their combination does not raise any competition concern or cause AAEC. It is for the Commission to determine whether a combination is likely to cause AAEC, and it cannot be used by a party to the combination as the criterion for application of any of the Items of Schedule I to the Combination Regulations.

13.2 The exception to Item 3 to Schedule I categorically provides that acquisition of assets that represent the substantial business operations of the target enterprise, in a particular location or for a particular product or service, are not covered within its scope. In the instant case, Jet has been offering its service between India and London through the use of three (3) landing/take-off slots at LHR Airport. Further, Jet neither owns any slots nor offer services to/from any other airport in London. Jet could not have offered the said services and earned any revenue from the said services absent the LHR slots. Therefore, the three (3) landing/take-off slots at LHR Airport is the basis for Jet's entire business operations between India and London. Accordingly, the LHR Transaction does not fall within the purview of Item 3 of Schedule I to the Combination Regulations, and the submissions made are unacceptable.

13.3 Similarly, the LHR Slots being the basis for Jet's services between India and London, the sale of such slots essentially has nexus and affects business for scheduled air passenger transportation services between India and London. Therefore, the contention of Etihad that the LHR Transaction is covered under Item 10 of Schedule I to the Combination Regulations is entirely misconceived.

13. The above conduct of the parties is, in fact, in line with many of their other submissions regarding various decisions taken by Jet during the period when the combination was apparently being discussed between the parties. Considering the size and complexity of the transaction, this period of discussions would obviously be fairly long, commencing much before the final agreement. The parties would have us believe that many of the decisions taken by Jet in the period before the final agreement were independent decisions of Jet, without any connection with the discussions in progress; and it was a strange and unaccountable coincidence that they turned out to be in sync with the strategy and provisions envisaged in the final transaction. Two such incredible coincidences would suffice to illustrate the point.

14.1 The Show Cause Notice made reference to suspension of Jet's services on Delhi – Milan; Chennai-Brussels-New York; Hyderabad – Dubai; Chennai-Dubai and Trivandrum-Sharjah routes. On this, it was submitted that in the recent past, Jet has re-planned its network reach and cancelled certain destinations while adding others on account of factors endemic to each particular route. It is also contended that Jet has also withdrawn its operations on various other domestic and international routes and Jet's operations ceased in some of these routes in May – June 2012, at which time the proposed transaction was not even being contemplated.

14.2 With regard to the flight operated by Jet on behalf of Etihad on the Mumbai-Abu Dhabi route, it has been stated that the said flight was taken on a wet lease from Jet and is manned and operated by Jet/Jet crew. It has been further stated that such practice is a normal industry practice. Towards this argument, reference has been made to Etihad's wet lease arrangement with Virgin Australia and Air France in Abu Dhabi – Kuala Lumpur and Abu Dhabi – Paris routes. It is pertinent to note that all wet lease arrangements of Etihad referred to in the submission, are with airlines with which Etihad has commercial co-operation agreement.

14. These facts reflect quite adversely on the conduct of the parties and clearly suggest that Etihad has not come before the Commission with clean hands, which is an aggravating factor in determination of the penalty.

15. As regards the CCA, it is necessary to review the implications of the CCA in the context of the provisions of the Act. The following extract from para 44 of the minority order dated 14th October, 2013 is relevant in this context:-

"…… it could be argued that CCA seems to be in violation of Section 3 of the Act, unless it is considered to be an agreement as per the proviso to Section 3(3) above, and is seen to increase efficiency."

16. This factor was not considered further for the purposes of combination analysis as this was not an issue for determination at that time. However, the fact that CCA appeared to be prima facie violative of Section 3(3) of the Act, and could have attracted severe penalties unless proved to be covered under the proviso to Section 3(3) regarding increased efficiencies, clearly underlines the sensitivity of the Agreement apart from it's importance arising from the fact that CCA is indeed the heart of the entire transaction. To consummate the CCA without due approval of the combination by the Commission is, therefore, a matter of very grave concern.

17. In my view, a harmonious and internally consistent construct/interpretation of the majority order dated 12.11.2013, approving the proposed combination supports the contention that CCA is subject to Section 3(3) of the Act. The following specific observation of the majority in para 58 of the order is relevant in this context :-

"This approval should not be construed as immunity in any manner from subsequent proceedings before the Commission for violations of other provisions of the Act. It is incumbent upon the Parties to ensure that this *ex-ante* approval does not lead to *ex-post* violation of the provisions of the Act."

18. The "other provisions of the Act" here refer basically to Section 3 dealing with anti-competitive agreements and Section 4 dealing with the abuse of dominance. It is noteworthy that approval of a proposed combination under Competition Act, 2002 never gives immunity from violation of Section 3 and 4 of the Act. It is for this reason that such a statement has not been made in even one of the other 137 combinations approved by the Commission so far. It is, therefore, necessary to understand the possible reasons for this

observation in para 58 of the order, after approving the combination in para 57.

19. Competition analysis in combination cases primarily involves in-depth structural analysis of the proposed combination, and review of the past conduct of the parties, to assess whether the combination is likely to have appreciable adverse effect on competition (AAEC). In-depth analysis and determination of the likelihood of cartelisation or abuse of dominance post-combination is part of this process. In case post-combination structure raises competition concerns, these are mostly taken care of through modifications involving structural and/or conduct remedies, instead of prohibiting/blocking the combination altogether. The Act provides for such modifications under Sec 31(3), which reads as follows:-

> "31(3): Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination."

20. The observation in para 58 of the majority order mentioned above seems to indicate that the majority took note of the fact that the CCA could be violative of Section 3(3) of the Act unless it was covered by the proviso relating to increase in efficiency, and also the fact that unlike in some other jurisdictions the Act does not have any provision for grant of anti-trust immunity for a specific transaction, and decided to clearly/specifically cast the responsibility for non-violative conduct on the parties, instead of going in for investigation and designing of specific conduct remedies if required. Be as it may, the importance and implications of CCA seem to be implicit in the aforementioned observation in the majority order in terms of Section 3(3) of the Act extracted below:-

> "Sec 3(3): Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons,

including cartels, engaged in identical or similar trade of goods or provision of services, which –

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

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

21. This conclusion seems to be further borne out by the treatment of efficiencies in the majority order dated 12.11.2013 in paras 46 to 50, wherein the "potential efficiencies" arising from airline alliances, economics of traffic density, network efficiencies etc. have been dwelt upon. It would be useful to first illustrate the normal practice in treatment of efficiencies in merger cases globally, with the following extract from the International Competition Network's Investigation Technique Handbook for Merger Review (Chapter 4 on "The Role of Economists and Economic Evidence in Merger Analysis"):-

"3.8 **Efficiencies**

…….

The treatment of efficiencies in merger review is highly complex. Efficiencies need to be validated against a test that aims at checking

their verifiability, their merger specificity and importantly their pass-on to customers."

…….

3.8.2 **Assessment of Efficiencies in Merger Review**

"Most jurisdictions consider a set of cumulative requirements to take efficiencies into consideration. Efficiencies have to:

- be verifiable, i.e., only those efficiencies which are demonstrated to have a high probability of realization, are taken into account in the assessment;
- benefit consumers usually in the form of lower prices, increased quality or increased output : efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant for the assessment of efficiencies than reductions in fixed costs, as they are more likely to result in lower prices for consumers; and
- be merger-specific, i.e., not likely to be produced or available at as low of a cost absent the merger. The verification of this requirement entails the specification and possible quantification of alternative scenarios, i.e., different forms of non-merger cooperation between the companies such as joint ventures."

22. The fact that efficiencies have been assumed in the majority order purely on the basis of general economic theory without specific quantification/assessment and testing of underlying assumptions, contrary to the normal global practice of more robust analysis and application of economic theory to combination analysis in terms of facts and circumstances of each specific case individually, seems to indicate that the majority cast the responsibility for ensuring increased efficiencies on the parties with reference to Section 3 of the Act, in accordance with para 58 of the aforesaid order. The parties will be responsible to ensure this an on-going basis at all times, starting from the initial consummation/implementation of the CCA. Given this context, the fact of prior consummation of the CCA, in my view, becomes an even more serious aggravating factor.

23. It is evident from the foregoing that the CCA was not only a critical component of the combination from the transaction perspective, but was also a very important factor in the competition assessment of the proposed combination. In the event of the Commission coming to an adverse finding based on an in-depth assessment of efficiencies to the effect that the combination as proposed would have AAEC in the markets in India, the consummation of the Agreement without prior approval of the Commission would have created a very serious situation, justifying harshest possible remedies provided for in the Act, even if otherwise there could have been simpler remedies available to meet the potential competition concerns. To implement the CCA, without prior approval of the Commission is, therefore, a major and substantial aggravating factor in determining the penalty under Section 43A of the Act, and it amounts to a very grave deliberate failure to notify the Commission about extremely critical facts of the case, crucial in the process of competition assessment of the proposed combination.

24. In view of the foregoing, I consider it appropriate to levy a penalty of INR 10,00,00,000 (Rupees Ten Crore only) on Etihad under Section 43A of the Act.

25. The Secretary is directed to take necessary action accordingly.

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(Anurag Goel)
Member