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**Airline mergers and competition**

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***Aviation M&As have peculiarities but that must not deter good judgement***

Yet another airline merger has taken off. The Indian government has reportedly cleared the way for the merger of the two state-owned and operated airlines Air India and Indian (formerly, Indian Airlines). Merger talk vis-à-vis airlines in India was in the air even earlier. Some time ago, there was a lot of publicity around the proposed merger of Sahara and Jet Airways which did not materialise. It is yet to be seen how many more mergers and acquisitions (M&As) are likely in the Indian aviation sector.

For competition authorities across the world, mergers pose a different kind of challenge altogether. Unlike regular cases of abuse of dominance or anti-competitive agreements which require an ex-post analysis, merger review is an ex-ante exercise. The quest is to find out whether the combination of such merging parties will ultimately result in the creation of market power that is likely to be abused either unilaterally or in collusion. This is about a prospective state of affairs in the future, this makes the analysis that much more difficult. It is akin to future gazing—to balance competition concerns with efficiency concerns arising from the proposed merger. In case of merger review, the concerned competition authority is conscious that it is walking the razor's edge, as the blocking of an efficiency enhancing merger is as erroneous as allowing an anti-competitive merger to take place.

While the majority of mergers in general have not been found to result in anti-competitive outcomes, a few mergers do raise legitimate competition concerns that cannot be ignored by any fair system of regulation. However, the manner in which these cases are dealt with tends to include several finer calls of judgment that are based on an intricate analysis of sectoral dynamics, business influence and power exertion.

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Mostly, the addressal of competition concerns arising out of a merger involves the competition authority suggesting remedies that would ensure that the cause of fair competition in the sector does not suffer. These could, for example, include suggesting the divestiture of business units or components which would adversely affect competition in a post-merger scenario.

Very few mergers are eventually blocked in toto by the competition authority. Statistics bear this out. For example, in 2004, of the 1,377 merger notifications received by the US antitrust agencies, only 24 (that is, a tiny 1.7%) transactions were challenged in their entirety. Similarly, during 2003, the EC reviewed 222 notifications and cleared 205 of them (that is 92%) without modifications and cleared 17 with remedies.

The substantive review of an airline merger by a competition authority now has a fairly well established methodology. The definition of a 'market' in the airline industry is usually based on pairs of flight destinations that constitute a route (the Delhi-Mumbai route, for example, is one such pair). The competition in the market is accordingly analysed in terms of the level of competition in these city-pairs. The airline industry is normally seen as a network of such city-pairs. Quite often, the economic impact of airline mergers is, therefore, seen in terms of the nature of the merging networks

While the merger of non-overlapping networks may not raise serious competition issues when analysed market by market, the resultant larger network may attain dominance on the whole by virtue of increased coverage and the power of size. There are several advantages of operating a larger network. Loyalty schemes like frequent flier programmes for passengers and incentive schemes for travel agents are heavily loaded in favour of larger networks, which offer greater economies of scope and ease of customer attraction

Moreover, while analysing the effects of airline mergers, the competition concerns also relate to the effect of the merger on the control over complementary services—like take-off and landing slots at airports, gates, baggage handling and passenger handling facilities, and so on, for the merging parties and competitors. A merger between two large carriers can easily turn such access to ground facilities lopsided, to the detriment of competitors. Every industry has its peculiarities, aviation even more so.

Yet, a competition policy must always use broad principles of application. Under India's Competition Act, 2002, factors have been laid down to determine whether a merger would have an appreciable adverse effect on competition in the relevant market. The various factors to be considered include extent of barriers to entry, market share of enterprises, individually and as a combination, competition through imports, level of concentration in the market, degree of countervailing power, availability of substitutes, likelihood of significant and

sustainable increase in prices and profit margins after merger, likelihood of removal of a vigorous and effective competitor, likelihood of sustainability of effective competition, nature and extent of vertical integration, possibility of a failing business, nature and extent of innovation, relative advantage by way of the contribution to the economic development and whether the benefits of combination or merger outweigh the adverse impact of the combination.

However, the enforcement provisions of the Competition Act, including those relating to regulation of mergers and other forms of combinations, have not yet been notified—and hence the Competition Commission of India cannot at this stage undertake inquiries under these provisions of the Act.