



COMPETITION COMMISSION OF INDIA



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

19.12.2013

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**”).
2. The notice was given to the Commission pursuant to an Investment Agreement (“**IA**”), a Shareholder’s Agreement (“**SHA**”) and a Commercial Co-operation Agreement (“**CCA**”), all executed on 24th April 2013. The Parties sought the Commission’s approval for the acquisition of 24 percent equity interest in Jet by Etihad and in relation to all the rights and benefits which the parties have commercially agreed upon in the amended SHA, CCA and CGC. As per the information provided by the Parties, they had also entered into agreements on 26th February 2013 regarding sale of three landing/take-off slots of Jet at London Heathrow Airport to Etihad; and lease of the same slots back to Jet (“**LHR Transaction**”).
3. Based on the information provided by the Parties and that available in the public domain, on 18th October 2013, the Commission issued a show cause notice to Etihad under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 read with Section 43A of the Act (“**Notice**”). It was stated in the notice that the Parties consummated and implemented certain parts of the composite combination viz. LHR Transaction and 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. Etihad was therefore



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called upon to show cause, in writing, within fifteen days of the notice as to why penalty in terms of Section 43A of the Act be not imposed on Etihad.

4. The Commission, vide its order dated 12th November 2013, approved the combination under subsection (1) of Section 31 of the Act. However, the Commission, in its order, had observed that the approval shall have no bearing on proceedings under Section 43A of the Act.
5. The Parties filed their response to the Notice on 28th October 2013. The submission of the Parties are briefly summarised as follows:
 - (a) The LHR Transaction was an independent stand-alone transaction which did not form part of the combination. Completion of LHR Transaction was not in any manner subject to the condition that the proposed transaction (i.e. Etihad's acquisition of 24 percent equity stake and other rights in Jet by way of the IA, SHA and CCA) must happen. Further, on the issue of IA and LHR Sale Agreement making reference to each other, Etihad contended that it was only for the sake of clarity that the documentation in respect of LHR Transaction and proposed transaction made a reference to each other. Such references were incorporated 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 LHR Transaction and the proposed transaction were inter-dependent.
 - (b) Even if LHR Transaction was assumed to be a part of the proposed combination, the trigger document under the Act for filing the notification to the Commission continued to be the IA;
 - (c) The LHR Transaction was an exempted transaction under Item (3) of Schedule I to the Combination Regulations. LHR Transaction was pursued in the ordinary course of business and the 3 slots acquired did not represent Jet's substantial business operations in/from London on



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account of the fact that slots merely represent the landing rights enjoyed by Jet at LHR Airport whereas, Jet's actual revenue and business operations comprised of ticket sales from its flight to London. It has been mentioned that the book value (depreciated) of the three pairs of slots was only a fraction of Jet's worldwide assets. It has also been stated that Jet's revenue from its India – London operations in 2012-13 was [REDACTED]¹ and its revenue in the six months period post completion of the LHR Transaction was [REDACTED]². Further, there had been no change or impact on the business operations of Jet in the India-London sector.

- (d) The LHR Transaction was exempted under Item (10) of Schedule I to the Combination Regulations. On the application of Item 10 of Schedule I to the Combination Regulations, Etihad submits that the LHR Transaction had no effect on the markets in India as LHR Transaction was purely an offshore transaction; after the expiry of lease, Jet may seek a fresh lease from Etihad or choose to use non-value slots (off-peak slots) at LHR or may acquire value slots at other airports at London; since Jet continued to use the slots sold to Etihad to offer services between India and London, there was no change in the competition scenario post transaction; and also that the slots transaction was purely necessitated by Jet's need to raise funds.
- (e) Clause 7 of CCA provides that as soon as reasonably practicable after the commencement date of the CCA i.e. 24th April 2013, the Parties would seek all applicable competition/anti-trust immunity approvals required to give effect to the cooperation contemplated under CCA (emphasis supplied). Further, clause 7.3 of CCA explicitly provides that if the Parties do not obtain the requisite competition approvals to the extent necessary to fully implement the cooperation anticipated under CCA, the Parties shall mutually determine and implement in good faith

¹ Claimed confidential by the Parties.

² *Ibid.*



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what cooperation can be achieved and implemented within the regulatory and competition approvals obtained or mutually decide to terminate CCA.

- (f) Conduct of the Parties (in relation to pricing) pursuant to their code share agreement dated 1st July 2008 does not amount to an implementation of the CCA; and
 - (g) Discontinuation of flights on certain routes by Jet was an independent commercial decision taken by Jet, which had no relation with the CCA.
6. The Commission also heard Etihad on 10th December 2013.
7. With respect to the submission of Etihad regarding LHR Transaction, it is observed as follows:

6.1 The IA stipulated that the Commission's approval for implementation of the arrangements provided for in each of the Transaction Document was a condition precedent to its closing. The IA defined the term Transaction Document as "*this agreement [IA], the Shareholders Agreement, the Commercial Co-operation Agreement, the LHR Slots Agreement [agreements effecting LHR Transaction], the FFP Term Sheet, the Phase I Financing Documents...*" (emphasis supplied). These provisions of the IA and LHR Sale Agreement suggest that the Parties had consciously treated/pursued these two transactions as related transactions. While it may be open for Jet to sell its slots to any airline to meet its financial needs, the fact that the slots were sold to Etihad; and the IA (a) incorporates LHR Slots Agreement as one of the Transaction Documents and (b) stipulates the Commission's approval for implementation of the arrangements provided for in each Transaction Document, suggest that the Parties intended to pursue different steps including the IA, SHA, CCA and the LHR Slots Agreement as one composite business combination.



- 6.2 It is also noted that the relevant clause of the LHR Sale Agreement identifies non-execution of the IA within 30 days as an event of default, giving Etihad the right to terminate the LHR Transaction or change the completion date of the LHR Sale Agreement. It has been argued by Etihad that ‘the fact that there are two options evidences the fact that non-consummation of the proposed transaction was not a ground for termination but allowed for the LHR Transaction completion date to be advanced to a date earlier than 4th April 2013, thus consummating the LHR Transaction irrespective of the proposed transaction’. It is observed that another clause of the LHR Sale Agreement confers on Etihad the right to terminate the agreement if the IA and SHA are not executed within 30 days from the execution of the LHR Sale Agreement. Though it was optional for Etihad to terminate the agreement, inclusion of a condition that IA and SHA had to be executed within 30 days to avoid an event of default, only indicates the intent of the Parties to pursue the IA, SHA and the LHR Slots Agreement as one composite business combination.
- 6.3 Citing reference to the above referred clauses of LHR Transaction Agreements and IA, Etihad alludes that LHR Transaction and the IA are not inter-dependent on each other. It was also contended that even if the LHR Transaction formed part of the combination, the IA continued to be the triggering document for giving notice to the Commission under Section 6 (2) of the Act. This argument of Etihad cannot be accepted in view of the aforesaid facts. Moreover, if the Parties had treated the IA and LHR Transactions as entirely different and independent of each other, the relevant agreements i.e. IA and the LHR Sale Agreement would not have made any reference to each other particularly in the context of an event of default and as conditions precedent. In view of the foregoing, the contention of Etihad that the LHR Transaction was an independent standalone transaction is not tenable.



6.4 Even assuming LHR Transaction as an independent transaction, the Parties ought to have given a separate notice to the Commission under sub-section (2) of Section 6 of the Act as the LHR transaction as an independent transaction, is not covered within the scope of Item 3 and Item 10 of Schedule I to the Combination Regulations.

6.5 Item 3 of Schedule I to the Combination Regulations reads as under:

‘An acquisition of assets, referred to in sub- clause (i) or sub- clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.’

6.6 As regards the applicability of Item 3 of Schedule I to the Combination Regulations, it is observed that the sale/purchase of landing/take-off slots may generally be treated as a transaction in the ordinary course of business. However, in the instant case, the slots sale were coupled with another agreement to lease back the same slots to the seller; and followed by acquisition of equity stake in Jet by Etihad and a wide-ranging commercial co-operation agreement between the Parties.

6.7 It is further observed that 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



the scope of Item 3. In the instant case, Jet has been offering its service between India and London through the use of the three (3) landing/take-off slots at LHR Airport. Further, Jet neither owned any other slots nor offered services to/from any other airport in London. Therefore, the three (3) landing/take-off slots at LHR Airport formed the basis of Jet's entire business operation between India and London. Etihad's contention that the value of the slots sold was a fraction of Jet's worldwide asset is also not tenable as the relevant yardstick for comparison is Jet's business operations between India and London. Considering that Jet had no other take-off/landing slots at London, the 3 slots formed the basis for Jet's entire services between India and London; and absent these slots, Jet would have no business operation nor would have earned any revenue in the said sector. Therefore, it is considered that the subject matter of acquisition effectively represented the entire operations of Jet between India and London. For the same reason, the submission of Etihad regarding exemption under Item 3 of Schedule I to the Combination Regulations is not tenable.

- 6.8 The contention of Etihad to the extent that the LHR Transaction does not change the market scenario and therefore Item 10 is applicable in the instant case is misconceived as the same is of no relevance in determining whether notice needs to be given to the Commission. This is primarily because the framework of the Act as well as the Combination Regulations requires the Commission to determine the likely competition concerns of combinations with a view to regulate the same. Though Item 10 uses the words '*insignificant local nexus and effect on markets in India*', the terms *nexus* and *effect* could not be understood to mean a greater or reasonable probability of the proposed combination causing/raising any competition concern. Rather these words essentially mean the *sufficient relevance* of the



proposed combination to the markets in India, which would depend on the facts and circumstances of each case.

6.9 In the instant case, Jet had been using the 3 LHR slots for the purpose of offering services between India and London. In such a case, these slots beyond doubt relate to/concern the services enjoyed by passengers from/to India and the claim of Etihad that the transaction has no effect on the markets in India is misplaced and cannot be agreed with.

6.10 In view of the foregoing, it is observed that the Parties consummated the LHR Transaction, a part of the combination, without giving notice to the Commission as well as without waiting for the approval of the Commission. Even if the LHR Transaction was assumed to be an independent transaction, the Parties failed to give notice to the Commission as the LHR Transaction did not fall under the exemptions as now claimed by the Parties.

8. With respect to the submission of Etihad regarding CCA, it is observed as follows:

7.1 While Clause 7 of CCA clearly envisages that the Parties have to seek required competition/anti-trust immunity approvals and the Parties would change the terms of cooperation or terminate CCA if they do not obtain regulatory and competition/antitrust approvals, CCA nowhere provides that the Parties would not give effect to it until the approval of the Commission. The Parties initially executed CCA on 24th April 2013. Subsequently, the Parties restated and re-executed CCA on 27th May 2013, 5th September 2013 and 19th September 2013. All the subsequent versions of the CCA consciously provide that the CCA shall come into force on 24th April 2013.



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- 7.2 The Parties' submission that clause 7 of the CCA requires them to take competition/anti-trust approval to give effect to the cooperation contemplated under the CCA is baseless since these words are not found in clause 7. Unlike the IA, the Commission's approval is not a condition precedent to the closing of the CCA.
- 7.3 While the Parties deny that they have taken any action to implement the terms of the CCA, Jet's recent conduct of offering new daily services between Kochi and Abu Dhabi and leasing 3 of its Boeing 777-300(ER)s to Turkish Airlines are in conjunction with the obligations agreed under clause 2.2.1 and clause 2.2.3 of the CCA whereby it was agreed that: (a) Jet will add new daily services between Abu Dhabi and different call points in India no later than 2013 IATA winter season; and (b) Jet may sub-lease upto three of its finance leased B777-300ERs for a period of twelve months and the remainder of the said aircrafts shall be in Jet's fleet on or before 30th November, 2013. On a specific query posed during the hearing, Etihad submitted that the said actions were just a coincidence and were not done to implement the provisions of the CCA. These actions cannot be taken as mere coincidence but only suggests coordination between the Parties in vital aspects. Therefore, in the facts and circumstances of the case, we are not able to accept that the Parties have not taken any action to implement the provisions of the CCA and the Parties awaited the Commission's approval to implement the provisions of the CCA.
- 7.4 In view of the foregoing, it is concluded that the Parties implemented CCA before giving notice to the Commission and continued with certain actions that were in conjunction with some of the obligations envisaged under the CCA without awaiting the approval of the Commission.



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9. It is observed that sub-section (2) of Section 6 of the Act requires any person or enterprise, who or which proposes to enter into a combination, to give notice to the Commission disclosing the details of the *proposed* combination, within the time prescribed therein (emphasis supplied). In the instant case, the Parties consummated LHR Transaction without giving notice to the Commission. Similarly, the Parties agreed that CCA shall come into force on 24th April 2013, whereas the notice was given to the Commission only on 1st May 2013. Moreover, the Parties even pursued certain actions, both before and after giving notice, that are in conjunction with the obligations envisaged under the CCA, without waiting for the approval of the Commission.
10. In view of the foregoing, it is concluded that Etihad failed to give notice under sub-section (2) of Section 6 of the Act of LHR Transaction and CCA and the Parties implemented LHR Transaction and CCA without giving notice as well as without awaiting the approval of the Commission.
11. 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 percent of the total turnover or the assets, whichever is higher, of such a combination. In the instant case, one percent of the combined value of turnover of the Parties is more than INR 400 crore and one percent of the combined value of asset of the parties is more than INR 700 crore.
12. It is a settled law that every discretion has to be exercised judicially. Section 43(A) of the Act gives discretion to the Commission to impose penalty in case a person or enterprise fails to give notice to the Commission under section 6(2) of the Act. This penalty can extend up to 1% of the total turnover or the assets of such a combination, whichever is higher. Thus the discretion available to the Commission is quite wide. The Commission may impose penalty of only a token amount or up to 1% of the turnover or assets of the combination. While exercising this discretion, the Commission has to keep into mind the conduct of the parties and the circumstance under which the parties failed to give notice



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to the Commission. In the present case, the parties filed before the Commission, the combination for approval on 1st May, 2013. In the combination, the parties made disclosure of all the agreements entered into between them including LHR transaction and CCA. Thus, it is apparent that there was no effort on the part of the parties to conceal the transactions from the Commission. The fact of consummation of LHR and CCA has also been gathered by the Commission only from the filings made by the parties. The contention of the parties is that they were under an impression that LHR was an independent transaction. This contention has not found favour with this Commission but the fact remains that the party was under an impression, though wrongly, that LHR transaction was an independent transaction and the party consummated LHR transaction. Notice of CCA was given to the Commission within the time limit prescribed by law. Some actions required to be taken under CCA were taken by the parties during pendency of the approval application before the Commission. However, it cannot be denied that the parties had been mending and changing transaction terms and conditions according to the advise/requirements of different regulators from time to time. This fact is also evident that one of the parties to the combination was in dire need of financial support being provided by the other party to the combination and it seems to have shown its willingness and bona-fides by taking steps in accordance with CCA during pendency of approval itself. These facts show that the conduct of the parties was not such so as to attract severe penalty and the conduct of parties in consummating LHR transaction and CCA was under the circumstances stated above. The Commission therefore considers that in the instant case, keeping in view the facts and circumstances, the penalty of INR one crore would serve the ends of the justice. The Commission, therefore, in exercise of powers under Section 43A of the Act imposes a penalty of INR 1,00,00,000 (Rupees one crore) on Etihad as the obligation to give notice to the Commission, as per Regulation 9 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, was on Etihad. Etihad shall pay the penalty within 60 days from the date of this order.



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13. The Secretary is directed to communicate to Etihad accordingly.

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(Ashok Chawla)

Chairperson

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(Geeta Gouri)

Member

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(M.L. Tayal)

Member

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(S.N. Dhingra)

Member

-sd-

(S.L. Bunker)

Member