

Competition Law Hotline

December 22, 2015

AIRLINES PENALIZED FOR IMPOSING FUEL SURCHARGE THROUGH CONCERTED ACTION

- Competition Commission of India penalizes airlines for engaging in concerted action to impose fuel surcharge on air cargo transport
- CCI draws adverse inference against airlines for its failure to submit documents relating to costing studies
- CCI acknowledges freedom of parties to fix price based on competition; however, in the absence of corroborating information, an inference may be drawn on collusion
- CCI reiterates well settled principle of law that there is rarely direct evidence of concerted action and presence of cartels must be determined on the basis of preponderance of probabilities

BACKGROUND

The Competition Commission of India ("**CCI**" / "**Commission**") recently imposed a penalty of INR 2.58 billion on three airline companies for causing an appreciable adverse effect on competition in the air cargo industry.¹ The Commission held that Jet Airways (India) Limited ("**Jet Airways**") and InterGlobe Aviation Limited, the parent company of IndiGo Airlines, ("**IndiGo**") and SpiceJet Limited ("**SpiceJet**") were in contravention of Section 3(1)² read with Section 3(3)(a)³ of the Competition Act, 2002 ("**Competition Act**").

FACTUAL MATRIX

Express Industry Council of India ("**Informant**"), an apex body of express companies with twenty-nine members (including several international express companies like Blue Dart, FedEx, DHL, UPS) alleged that the aforementioned airlines along with Air India Limited ("**Air India**") and Go Airlines (India) Limited ("**Go Air**") (collectively, "**Opposite Parties**"), were engaged in an act of cartelization by colluding to introduce and subsequently revise a fuel surcharge ("**FSC**") on cargo being transported through these airlines. Informant claimed that FSC had been increased by the airlines by almost the same rate and from almost the same date on numerous occasions since 2008, and this was indicative of Opposite Parties acting in concert. Based on a *prima facie* review of documents and allegations, the Director General ("**DG**") was directed by the CCI to investigate the allegations made by the Informant.

DG'S REPORT

DG submitted its report after about two years of investigation ("**Report**"). DG concluded that investigation did not reveal concerted or collusive actions by Opposite Parties. However, the DG observed that FSC bore no correlation to the prevailing market conditions and the Air Turbine Fuel ("**ATF**") and was used as a 'revenue smoothening levy'.

RESPONSES TO THE REPORT Informant

The Informant challenged the conclusions of the Report and argued that there was a discrepancy in the findings in the Report. Informant also challenged conclusion ultimately arrived at by the DG that while there was a positive correlation between the fixing and revision of FSC, there was "no plausible explanation" for this concerted behavior. Informant further contended that even as per DG's own analysis, examining absolute change criteria and percentage change criteria, there was a nearly perfect correlation coefficient (barring one of the parameters). Informant also challenged DG's approach in that DG concluded that while there was concerted action there was no 'concerted practice'. Informant contended that the Act did not require concerted practice and if there was concerted action, it was sufficient for holding a party guilty of contravening provisions of the Competition Act. Informant also contended that DG was swayed by freight, which was irrelevant. Informant also contended that DG was swayed by the fact that percentage of FSC constituted only 20-30% of cargo revenue.

Opposite Parties

It was the common submission of the airlines that mere price parallelism as a result of intelligent market adaptation did not amount to cartelization and was a natural occurrence in an oligopolistic market. They also emphasized that there was no direct evidence of action in concert and that Informant was selectively reading parts of the Report. Jet Airways submitted that it had hiked the FSC rates due to increase in ATF price coupled with currency fluctuations.

It was argued by IndiGo and SpiceJet that the air cargo transport industry was a competitive market, free from collusion and cartels and this was evidenced by the fact that the market share of all the players was in a state of fluctuation. SpiceJet further submitted that there were other competitors apart from the airlines like Blue Dart Aviation Limited which controlled about 24% of the market so there could be no cartelization by the Opposite Parties in the present case. SpiceJet also took the defence that there was a time gap between the hike of FSC rates by the other airlines and SpiceJet.

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Air India was able to demonstrate that it had not acted in collusion with other airlines by submitting a table of the changes in the FSC charged by it over time. Air India contended that the table clearly brought out the fact that the FSC charged by Air India was consistently revised based on the changes in the rates of ATF and on occasions had been withdrawn when there was a substantial decline in these rates. Instances where the FSC charged by Air India were less than those charged by the other airlines were also highlighted.

Go Air submitted that it did not operate as a cargo carrier and had been sharing the belly space of its aircraft with another third party cargo service firm exclusively and Go Air did not play a role in levying or revising FSC, which was collected by the cargo service provider.

ISSUES

The only issue before the Commission was whether the airlines operated in a concerted manner in fixing the FSC and thereby violated the provisions of Section 3(1) read with Section 3(3)(a) of the Competition Act?

JUDGMENT AND ANALYSIS

CCI drew an adverse inference since the Opposite Parties were not able to furnish any data or costing studies in support of their contentions on determination of FSC rates. CCI also noted that Jet Airways, IndiGo and Spice Jet could not furnish minutes of meetings which they had admitted had taken place between their respective cargo department staff members. Air India, however, was able to produce a document which evidenced introduction of FSC. Consequently, CCI rejected the contention of Opposite Parties that there was no discussion of FSC at any meeting.

CCI rejected in part DG's analysis of the relation between FSC and demand for cargo services. CCI also concluded that FSC played a vital role in generating revenue for the airlines. CCI noted that while many factors were considered for determining FSC by all the airlines such as market conditions/ trends, pricing by competitors, currency fluctuations and exchange rates, operating costs, infrastructure, manpower, etc., ATF rate was the main factor and the only consistent factor among all airlines. Thus, the fact that FSC was hiked by airlines despite no upwards movement in ATF was a clear indication of concerted action. Noting that cases of cartelization and concerted actions will not have direct evidence, CCI observed that movement of FSC was indicative of concerted action. CCI also noted that Jet Airways, IndiGo and SpiceJet changed their FSCs at approximately the same time, and on this basis, rejected the conclusion of DG. CCI rejected the argument that there was time-gap in FSC revisions and held that this argument ought not to be 'countenanced' in proceedings relating to anti-competitive practices. CCI rejected the analysis with respect to coefficient correlations as the findings of the two tables were contradictory.

CCI held that companies are free to revise prices depending on behavior of competitors and this would itself not be indicative of cooperation among entities in the market. However, coordinated action by parties was suggestive of prior information exchange and such actions cause inefficiencies in the market.

CCI imposed a penalty equal to 1% of the average turnover of Jet Airways, IndiGo and SpiceJet for the years 2010-11 to 2012-13 and ordered them to cease and desist from engaging in such anti-competitive activity.

CCI accepted the objections raised by Air India and Go Air and did not hold them guilty of anti-competitive behavior.

CONCLUSION

This counts among the rare cases where the DG concluded that there was no violation and the CCI differed with the conclusion of the DG. CCI did not rely on any new material, but relying on the same material collected by DG, came to a different conclusion. The conclusion that Opposite Parties violated the Competition Act is premised more on the failure of Opposite Parties to rebut claims of concerted action than unimpeachable evidence from the DG or the Informant. This is particularly remarkable since only in September 2015, CCI concluded that there was no cartelization by suppliers to a rail coach factory, even though, prices quoted in tender were nearly identical.⁴ These aspects emphasize the need to provide sufficient and relevant documents during investigations along with explanations while making representations before CCI. As the informant also pointed out before the CCI, there appears to be an international trend where the competition authorities of various jurisdictions (such as the European Commission ("EU"))⁵ have been penalizing airlines for imposing FSC in a concerted manner. The order of the CCI appears to be in line with this trend.

While the penalty does appear modest (1% of turnover), it appears that penalty has been imposed on total turnover rather than relevant turnover. The Competition Appellate Tribunal has observed in the past that penalty should be imposed taking into consideration relevant turnover.⁶ It is important to note that news reports suggest that the Opposite Parties would be challenging this ruling.⁷

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You can direct your queries or comments to the authors

¹ Case No. 30 of 2013. Order dated 17th November, 2015.

² Section 3(1) reads as "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."

³ Section 3(3)(a) deals with the entering into agreements by cartels to fix prices and read as "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;"

⁴ *In Re: Deputy Chief Materials Manager, Rail Coach Factory, Kapurthala*, Reference Case No. 06 of 2013.

⁵ The decision of the EU in *Comp/39258-AirFreight*, dated November 9, 2010, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39258/39258_6547_3.pdf. Please also see the EU's public press release IP/10/1487 which summarizes this ruling. The press release is available at http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en

⁶ *Excel Crop Care Limited v. Competition Commission of India & Ors.* Appeal No. 79 of 2012.

⁷ Airlines to challenge competition watchdog fine, Business Standard, November 19, 2015, available at http://www.business-standard.com/article/companies/airlines-to-challenge-competition-watchdog-fine-115111800283_1.html.

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