

In Re: Express Industry Council of India And Jet Airways and Others

Through this quarterly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

Executive Summary

Increased liberalisation and deregulation has radically transformed almost all sectors of the Indian economy, air transport being a case in point. Led by technological advancements and a supportive policy ecosystem, the sector has witnessed increased competition, which has benefitted the consumers in the form of competitive prices, more choice and rapid innovation. This stands true, particularly in the context of the airline industry which has witnessed rapid advancements due to developments in aeronautical sciences and concurrent improvements in management of transport services. This has particularly led to increased competition in the civil aviation and the cargo transport segments.

However, the airline industry functions as an oligopolistic market and displays certain unique characteristics such as significantly high entry barriers and limited number of players, thereby making it more susceptible to anti-competitive conduct. As few players tend to collectively dominate the market and entry barriers remain high, explicit and tacit collusion becomes a genuine possibility.

In this regard, the present case wherein the Competition Commission of India (hereinafter CCI or the Commission) investigated potential anti-competitive imposition of fuel surcharges (FSC) by select airlines is worth analysing. The case was filed by Express Industry Council of India, a non-profit company constituted by express freight service providers against five airlines, alleging contravention of Section 3 of the Competition Act. Earlier, an order was passed in November, 2015 whereby the Commission imposed a hefty penalty on three of the five freight carriers, but the order was set aside in appeal and sent back to the Commission for reconsideration.

As is analysed below, the present case brilliantly imbibes and displays the legal and economic intricacies of enforcement of competition law in oligopolistic market conditions generally and that of India's Competition Act specifically.

CCI's Order

Background

Information in the present case was filed by Express Industry Council of India against five airlines, basically alleging contravention of Section 3 of the Competition Act. The underlying contention was that the opposite parties – Jet Airways (India) Ltd., IndiGo Airlines, SpiceJet Ltd., Air India Ltd. and Go Airlines (India) Ltd. – uniformly increased freight charges in a collusive manner under the veil of increasing the FSC, which is fundamentally an extra charge linked to fuel prices.¹ The informant alleged that despite substantially declining fuel prices, the opposite parties had concertedly and in consonance increased the FSC.²

Box 1. What is Fuel Surcharge?

The FSC, basically represents additions in freight costs due to jet fuel prices. It was introduced in 2008 in India by the airline industry to offset soaring and turbulent prices of airline turbine fuel (ATF). Explaining the rationale behind the move, Air India Chairman and Managing Director V Thulasidas said, "Airlines would not be able to survive if the cost of ATF is so high and competition brings down the fares".³ Notably, rates of ATF in India were almost double the global rates at the time and concurrently accounted for 40 to 45 percent of total airlines expenditure, as opposed to 18 to 20 percent abroad.⁴

Investigation by the DG and CCI's order

Based on preliminary findings, the Commission ordered a detailed investigation into the matter in 2013 and the Director General (DG) submitted the detailed report which came out with interesting findings.

Based on the evidence and information collected during the investigation, the DG stated that no direct evidence of collusion was found and contravention of Section 3 was not made out. However, the Commission found otherwise and stated, "*Although no evidence of collusion was found during the course of investigation, behaviour of the Airlines with respect to imposition of FSC was not to be in conformity with market conditions where the domestic players were actively competing*".⁵

Accordingly, the Commission in 2015 passed an order against three airlines – Jet Airways, SpiceJet and IndiGo held, "*the OPs have acted in parallel and the only plausible reason for increment of FSC rates by the Airlines was collusion amongst them*".⁶

Air India and Go Airlines were not found to be in contravention as their conduct was not in parallel or in concert with that of the others. Accordingly, the Commission imposed a fine of ₹151.69 crore, ₹63.74 crore and ₹42.48 crore upon Jet Airways, IndiGo and Spice Jet Limited respectively for contravention of Section 3 of the Act, and a cease and desist order was also passed.

However, the Airlines preferred an appeal and were successful in getting the order set aside on the basis of lack of procedural fairness and non-adherence to the principles of natural justice on the part of the Commission. The Competition Appellate Tribunal (COMPAT) sent the matter back for the Commission's reconsideration.⁷

The Commission re-considered the same and came out with the following findings:

- **The Commission has the jurisdictional mandate to analyse conduct which started before but continued beyond May 20, 2009 i.e. when the Act came into effect⁸**

One of the preliminary objections raised by the opposite parties was that the DG could not investigate into the matter as the alleged contravention happened before the inception of the Act in May, 2009. The CCI categorically rejected this plea by stating that even though the Act is not retrospective in nature, it would not preclude the Commission to look into agreements which could have been entered into prior to the commencement of the Act but continued to function beyond May, 2009.

- **Three OPs worked in a concerted manner to fix FSC rates**

In order to re-examine whether the Airlines actually changed and affixed the FSC rates in anti-competitive manner, the DG collected data related to FSC since it was levied up until 2012, and relative movement of FSC rates was tracked and analysed. From the data points, it was observed that the three Opposite Parties (OPs) had actually prescribed FSC on the same date and in a parallel fashion.⁹ The time of imposition and the rate were strikingly similar.

Concurrently, while the three airlines increased the FSC rate in this fashion, it was observed that the ATF prices were actually falling, thus indicating that the increase was artificially created through collusive action and was completely unconnected to the decline in ATF prices.¹⁰ The OPs also contended on the one hand that the FSC rate depended on other factors, such as the US\$-INR rate of exchange, but at the same time, could not justify why the FSC rates were actually not in consonance with the fluctuation of the same.¹¹

Furthermore, the Commission went into detail to negate all possible reasonable explanations of determination and revision of FSC rates and concluded that other than collusion, there was no possible rationale of affixing the prices in the present case. According to the Commission, the OPs failed to provide a concrete and plausible methodology through which prices were determined.

On the basis of the aforementioned analysis, the Commission reaffirmed, *"the OPs have acted in parallel and the only plausible reason for increment of FSC rates by the airlines was collusion amongst them. Such a conduct has, in turn, resulted into indirectly determining the rates of air cargo transport in terms of the provisions contained in Section 3 (3)(a) of the Act"*.¹²

In furtherance of this, the Commission ordered the companies to cease and desist from indulging in the anti-competitive practice and also imposed a revised penalty. As a part of the re-consideration of the previous order, the Commission also determined the quantum of penalties bearing in mind the respective relevant turnover in relation to cargo services of airlines, as opposed to the total turnover.¹³ Accordingly, the fines were imposed as ₹39.81 crore on Jet Airways; ₹9.45 crore on Indi-Go; and ₹5.10 crore on SpiceJet.

Analysis by CUTS

The present case brilliantly imbibes and displays the legal and economic intricacies of enforcement of competition law generally and that of India's Competition Act specifically. If looked at from the legal and economic standpoint, the following chief points of analysis are made out

1. Importance of procedural fairness and adherence to principles of natural justice

The present case represents one of the infrequent instances wherein despite the DGs findings which pointed towards lack of evidence which could establish anti-competitive liability, the Commission went on to investigate based on the data provided by the DG and reached at the opposite conclusion i.e. select OPs had in fact violated Section 3 of the Act.¹⁴

However, while the Commission passed an order in 2015 and imposed fines, the case went to appeal and was reverted by COMPAT for the lack of procedural fairness and the want for adherence of the basic principles of natural justice.

This was because initially in 2015, while the report of the DG was considered and its copies were submitted to the concerned parties, the Commission concurrently formed an opinion which was contrary to the findings of the report.¹⁵ Accordingly, the OPs were not provided a reasonable opportunity to file objections or voice their concerns with the findings of the Commission. As the parties were deprived of this opportunity, COMPAT held this to be a clear contravention of the principles of natural justice (the right to be heard in this case).¹⁶

In appeal, the parties also voiced their concerns related to the quantum of penalty, which was supposed to be imposed by taking into consideration the relevant turnover and not the total turnover. The order was accordingly set aside and the Commission was asked to reconsider the same.

Notably, after the procedural course correction, the Commission heard the parties in detail on merits. As stated in the previous section, the Commission was not convinced and still concluded that the OPs concerted to fix rates of FSCs.

Regardless of the end result in this case, what is important to note here is that the Commission, while exercising its quasi-judicial functions was yet again reminded about its responsibility of abiding by the standard of procedural fairness and ensure that the principles of natural justice are imbibed in the enforcement process. This requirement is a crucial prerequisite of enforcement and other nascent jurisdictions which have started to enforce competition laws can learn from India's experience in this regard. This is just one of the many cases wherein the COMPAT set aside the Commission's orders based on the want for observance of principles of natural justice and safe to say, the same has now become a *sine-qua-non* of the implementation of the India's Competition Act.¹⁷

2. Collusion in oligopolistic markets – a complex analysis

Looking at the substantive element of the case, one can clearly make out that investigating and detecting possible cartel-like behaviour in oligopolistic market structures, such as the airline industry is a tricky exercise, to say the least.

The inherent challenge in identifying illegal activity in such markets basically originates from the interconnectedness of decision making, where price and output of one competitor is interlinked with the others.¹⁸ As a result, players functioning in an oligopoly are usually aware of and highly influenced by the actions of other competitors, and while fixing prices in such conditions, parallelism becomes a natural consequence.

Hence, price parallelism, although an indicator of collusive behaviour, is not in itself sufficient to prove cartelisation. However, at the same time, oligopolistic market conditions also increase the probability of concerted anti-competitive action and in such cases, direct evidence to prove collusion is seldom available. Nevertheless, the result of such cartelisation is the same and consumers are harmed regardless.

Box 2. Oligopoly

"An oligopoly is a market structure in which a few firms dominate. When a market is shared between a few firms, it is said to be highly concentrated. Although only a few firms dominate, it is possible that many small firms may also operate in the market".¹⁹

Oligopolies generally exhibit high entry barriers, high interdependence between players and competition on pricing as well as non-pricing factors, such as consumer loyalty. Naturally, when the firms in the market are limited in number and entry barriers are high, they would enter into profit maximisation techniques and collusion to set prices or output levels might appear lucrative and inviting.

This dilemma was at the heart of the present case. The OPs put forth the general view that the mere fact that the FSC rates were in parallel does not make it a consequence of collusion but is, on the contrary, on a natural result of oligopolistic market conditions.²⁰ It is pertinent to note that price parallelism is considered to be a natural and legal outcome of oligopolistic conditions where the correlated action is the result of "a rational, independent calculus by each member", and is not a consequence of explicit or tacit agreement between the actors.²¹

The Commission was well aware of this phenomenon and mentioned, "there can be no quarrel with the proposition that parallel behaviour of competitors may be a result of intelligent market adaptation in an oligopolistic market".²² In the absence of direct evidence of collusion, it was understandable that the DGs analysis based on available information and data could not conclude that the competitors had in fact consciously agreed to fix the FSC rates. Hence, the DG gave the benefit of doubt to the OPs.

However, the Commission was well-aware that in such instances, collusion through concerted agreements is a genuine possibility and the presence of other factors that ought to dissimilarly influence FSC rates of individual airlines (but actually did not) injects doubt *vis-à-vis* the significance of price parallelism in the present case. Hence, the Commission analysed whether collusion was the only reasonable explanation to

the conduct of OPs and decided after a detailed hearing that the FSC rates were in fact set through anti-competitive means.

Having said that, it is also important to critically analyse the manner in which the Commission interpreted and rebutted the DGs findings. The DG had concluded that no evidence of collusion was found during the course of investigation and no case of contravention of Section 3(1) read with 3(3)(a) was made out. The Commission, laying down the foundational arguments in favour of a 'wide' interpretation of the term 'agreement' under 2(b) of the Competition Act, went on to examine whether the parties acted in a concerted manner. By analysing data available, there were clear indications of price parallelism.

However, it is also obvious that there was no evidence available with the DG which could prove that the existence of price parallelism was due to collusive action. The DGs findings also clearly indicated that there was no evidence 'confirming exchange of information' between parties.²³ To rebut these findings along with the OPs arguments, the Commission's chief arguments had to be economically as well as legally compelling. Unfortunately, this does not seem to be the case as the Commission was not able to put forth any new findings or evidence which went beyond the DGs detailed analysis. The Commission's highly sceptical and selective interpretation of the DGs investigation report was perhaps triggered by the following finding by the DG:

"The behaviour of the Airlines with respect to imposition of FSC was not in conformity with the market conditions where the domestic players were actively competing. The fuel surcharge which was introduced to address the sharp volatility in the Air Turbine Fuel (ATF) prices around 2008 was found to be used by the Airlines as a revenue smoothening levy that bore little correlation with changes in ATF price".

Relying on this selective finding, the Commission went on to question the very manner in which FSC was fixed by the parties. This approach seems to be a bit far-fetched and forced. The underlying theory of harm is unclear and also seems to be standing on a weak footing. This is because while looking for additional indicative or circumstantial evidence which can prove the presence of an anti-competitive conduct, the Commission's statutory prerogative does not seem to include an assessment which questions how and why a particular price was set by market players.

Here, it is also worth mentioning that the burden of proving that an *agreement* in the first place exists and lies with the Commission or the investigating body.²⁴ This burden cannot be shifted to the opposite parties. In order to rebut the finding of the DG (*vis-à-vis* existence of an agreement), the Commission seems to have shifted the burden of providing proof on the OPs by asking them to prove the legitimacy of the manner in which they fixed their prices and tariffs. Such an approach is analogous to components of a price-fixing exercise and looks less of an *ex-post* analysis of identification of anti-competitive behaviour.

3. Lessons in store from international experiences

Other jurisdictions have also successfully identified similar cases of collusion in the air transport sector. However, the identification of anti-competitive conduct in these cases relied on direct evidence. For instance, in 2006, authorities in the Europe and the United States (US) conducted a joint investigation into possible anti-competitive conduct of airlines *vis-à-vis* fixing of FSC rates.²⁵ As a result, several airlines (British Airways, Korean Airlines and Qantas Airways) were found guilty by the US Department of Justice.

Similarly, in 2012 the Office of Fair Trading of the UK issued a decision that British Airways and Virgin Atlantic Airways engaged in anti-competitive practices in the pricing of air passenger fuel surcharges.²⁶ Likewise, the Italian competition authority imposed fines on several airlines for agreements on fuel surcharges and put forth a similar perspective stating, "*The simultaneous application of an identical fuel surcharge effectively enabled the Airlines to 'freeze' the market situation*".²⁷

In these cases, the competition agencies relied on some form of direct evidence to strengthen and corroborate their analyses. In the British Airways case, it was found that "BA and VAA co-ordinated their surcharge pricing on long-haul flights to and from the UK through the *exchange of pricing and other commercially sensitive information*."²⁸ Similarly, the Italian Competition authority also stated that, "following *an exchange of information* encouraged and coordinated mainly by Alitalia according to the evidence, simultaneously introduced an identical fuel-related surcharge applicable to all domestic routes, indicated separately from the basic fare."²⁹

Another noticeable fact is that in some of these instances, despite the intervention of competition authorities and imposition of fines, FSC rates have continued to follow a similar pattern.³⁰ It has also been observed that although huge fines have been imposed by select competition agencies, the benefit of the underlying enforcement

action has not metamorphosed into consumer benefit as FSC rates have historically tended to increase in a similar fashion (in select jurisdictions).³¹

Hence, after successfully identifying and dissuading anti-competitive conduct in such cases, it would be beneficial for the competition authority to also gauge whether their intervention was beneficial for the consumer.

Overall, there seems to be merit in revisiting the overarching approach undertaken in the present case, especially in light of the Commissions statutory role and also the decisions taken by other competition authorities in similar circumstances. Likewise, in order to prevent possible anti-competitive behaviour in the future, regular checks ought to be conducted. As the number of players in the market is few, this should not be a resource intensive exercise. Finally, bearing in mind the high possibility of presence of such conduct, market players should be encouraged to utilise the leniency mechanism and act as whistleblowers.

Conclusion

It is well recognised that identification of anti-competitive agreements entails exposure of explicit cartels, where direct evidence of collusion is apparent as well as prevention of tacit agreements, where firms usually act in concert.

As discussed, oligopolistic market conditions generally display coordinated pricing and high interdependence between players while deciding output, which makes identification of cartel-like behaviour a very challenging affair. There seems to be a very fine line which distinguishes price levels based on concerted action vs. naturally occurring price parallelism. Eventually, it all boils down to the legal rigour and economic soundness of enforcement action, which the Commission might not have successfully been able to bring to the table in this case.

Although the Commission rightly probed deeper by searching for presence of concerted action, the corresponding arguments did not seem to be rigorous enough so as to rebut the findings of the DG. By analysing and questioning the manner in which the FSC rates were actually fixed, the Commission seemed to have played the role of a price regulator (as was also argued by one of the OPs). This is not an encouraging precedent. In this regard, it might be useful to probe deeper into the specific theory of harm to be applied and revisit the approach in light of similar cases which have already been decided by other competition authorities.

Endnotes

- 1 In Re Express Industry Council of India Vs. Jet Airways (India) Ltd. & Others. Case No. 03 of 2013 (order dated 17th November, 2015) available at: <http://www.cci.gov.in/sites/default/files/302013.pdf> at p.5
- 2 Ibid., at p.4
- 3 The Outlook, *Airlines mull fuel surcharge to offset losses*, available at: <https://www.outlookindia.com/newswire/story/airlines-mull-fuel-surcharge-to-offset-losses/3605>
- 4 Ibid.
- 5 In Re Express Industry Council of India vs. Jet Airways (India) Ltd. & Others. Case No. 03 of 2013 (order dated 17th November, 2015) available at: <http://www.cci.gov.in/sites/default/files/302013.pdf>, p.5
- 6 Ibid. at p.46
- 7 In Re Express Industry Council of India vs. Jet Airways (India) Ltd. & Others. Case No. 03 of 2013 (order dated 7th March 2018), p.6
- 8 Ibid., at p.22
- 9 Ibid., at p.28
- 10 Ibid., at p.29
- 11 Ibid., at p.32
- 12 Ibid., at p.35
- 13 In accordance with the precedent by the Supreme Court, laid down in the case of *Excel Crop Care Limited v. Competition Commission of India & Another* (2017) 8 SCC 47
- 14 Nishith Dasai Associates, *Competition Law Hotline*, (October 2015 issue)
- 15 COMPAT, The Secretary, Competition Commission of India, Express Industry Council of India, Jet Airways (India) Limited, Spice Jet Ltd, Air India Ltd, Go Airlines (India) Ltd. Appeal no. 07/2016 available at: <http://compatarchives.nclat.nic.in/Judgements.aspx?type=2&SearchT=2016-04-18&CauseType=0>
- 16 Ibid.
- 17 COMPATs orders have actually brought Section 36 of the Competition Act to life and ensured that principles of natural justice guide the Commission's enforcement action.
- 18 Dustin Appel, *Air Cargo Fuel Surcharges and Tacit Collusion under the Sherman Act: What Good Is Catching a Few Bad Guys if Consumers Still Get Robbed*, 73 J. Air L. & Com. 375 (2008) <http://scholar.smu.edu/jalc/vol73/iss2/3>
- 19 Economics Online, *Oligopoly*, available at: http://www.economicsonline.co.uk/Business_economics/Oligopoly.html
- 20 Supra n.7, at p. 29
- 21 Supra 18
- 22 Supra n.7, at p.30
- 23 In Re Express Industry Council of India vs. Jet Airways (India) Ltd. & Others. Case No. 03 of 2013 (order dated March 07, 2018), p.26
- 24 Cyril Shroff & Nisha Kaur Uberoi, *Cartel Enforcement in India: Standard and Burden of Proof*, CPI Antitrust Chronicle February 2013 (1), available at <http://awards.concurrences.com/IMG/pdf/india.pdf>
- 25 Supra 18
- 26 *Airline passenger fuel surcharges on long-haul flights: price-fixing*, available at: <https://www.gov.uk/cma-cases/airline-passenger-fuel-surcharges-on-long-haul-flights-price-fixing>
- 27 *Press Release: the competition authority has imposed fines on alitalia and other airlines for agreements on fuel surcharges*, available at: <http://www.agcm.it/en/newsroom/press-releases/1595-campagnie-aeree-fuel-surcharge-html>
- 28 <https://www.gov.uk/cma-cases/airline-passenger-fuel-surcharges-on-long-haul-flights-price-fixing>
- 29 <http://www.agcm.it/en/newsroom/press-releases/1595-campagnie-aeree-fuel-surcharge-html>
- 30 Supra 18, at p.399
- 31 Supra 18, at p.398

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