COMPETITION ISSUES IN AVIATION

What is Competition?

- It is "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share" (World Bank, 1999)
- It is the foundation of an efficiently working market system.
- The process of rivalry between firms striving to gain sales and make profits
- Motive: self-interest, but outcome mostly beneficial for the society
- Competition is not just an event, but a process
- It is not automatic – needs to be nurtured

OVERVIEW OF COMPETITION ACT 2002

Monopolies and Restrictive Trade Practices Act was enacted in 1969 (MRTP).

Objectives:

- Prevent the concentration of economic power.
- Provide for the control of monopolies.
- Prohibit monopolistic and restrictive trade practices.

Evolution and Development of Competition Law in India

In India the first competition law was enacted in 1969 i.e. Monopolies and Restrictive Trade Practices Act, 1969 ['MRTP Act, 1969']. The Monopolies and Restrictive Trade Practices Bill was introduced in the Parliament in the year 1967 and the same was referred to the Joint Select Committee. The MRTP Act, 1969 came into force, with effect from, 1 June, 1970.

The enactment of MRTP Act, 1969 was based on the socio – economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India. The MRTP Act, 1969 underwent amendments in the 1974, 1980, 1982, 1984, 1986, 1988 and 1991. The amendments introduced in the year 1982 and 1984 were based on the recommendations of the Sachar Committee, which was constituted by the Govt. of India under the Chairmanship of Justice Rajinder Sachar in the year 1977.

FINDINGS OR SACHAR COMMITTEE

- advertisements and sales promotions having become well established modes of modern business techniques
- advertisements to the consumer became deceptive
- fictitious bargain was another common form of deception
- many devices were used to lure buyers into believing that they were getting something for nothing

The Committee recommended that an obligation is to be cast on the seller to speak the truth when he advertises and also to avoid half truth, the purpose being preventing false or misleading advertisements.

Economic Reforms of 1991

Post 1991 policy of Liberalisation, Privatisation and Globalisation introduced.

MRTP Act was found inadequate to meet the challenges of a modern globalised economy.

Government of India in October 1999 appointed a high level Committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law in consonance with international developments.

The Competition Act, 2002

Acting on the report of the Committee, the Government of India passed the Competition Act in the year 2002; to which the President accorded assent in 2003. It was subsequently amended by the Competition (Amendment) Act, 2007.

The broad objectives of the Competition Act, as laid down in its preamble, are:

“to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of the consumers and to ensure freedom of trade carried on by other participants in markets in India”

ELEMENTS OF COMPETITION ACT

- Prohibits Anti-Competitive Agreements
- Regulates Acquisitions, Mergers and Combinations
- Prohibits Abuse of Dominant Position
- Mandates Competition Advocacy

What practices are stopped by it?

Under this act following are restricted practice and these practices are stopped by this act.

- 1. Price fixing:-

If two or more supplier fixes the same price for supply the goods then it will be restricted practice.

2. Bid rigging:-

If two or more supplier exchange sensitive information of bid, then it will also be restricted practice and against competition.

3. Re-sale price fixation:-

If a producer sells the goods to the distributors on the condition that he will not sell any other price which is not fixed by producer

4. **Exclusive dealing:-**

This is also restricted practice. If a distributor purchases the goods on the condition that supplier will not supply the goods any other distributor.

- Above all activities promote monopoly so under competition act these are void and action of competition commission.

Competition law in aviation sector

- As the economies of developing countries grow, their own citizens are already becoming the new international tourists of the future. The more rise in demand for the air services, the more is the supply. The urge to provide more better and better services with the zeal of high profit inducing market players join the regime of Airline Industry. Hence more is the competition among players

- **The civil aviation industry in India has emerged as one of the fastest growing industries in the country during the past few years. India is currently considered the third largest domestic civil aviation market in the world.**
- **Thus, by implication, aviation industry is oligopolistic in nature. Oligopolistic market is characterized by concentration of the market share in a few firms, which exert a significant influence over each other**
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- Interdependence is a common incidence in an oligopoly. This can result in diverse outcomes for the market and the consumers.
- A positive outcome could be in the nature of fierce competition among the firms and thus a lower price and higher consumer satisfaction.
- But what is often seen is that oligopoly can give rise to restrictive practices adopted by the firms by means of collusion to inflate prices and exploit consumers.

- A classic example is of Organization of the Petroleum Exporting Countries, which is a sovereign cartel exerting profound influence over the oil prices all over the world.
- Given the oligopolistic nature of the aviation sector, it becomes imperative that a close watch be kept on the activities of the players in the market.
- The legislative and regulatory framework that governs the aviation sector comprises of the Act, which is an umbrella legislation to assess the practice adopted by industries and the effect of the same on the competition in India. The policies are formulated by the Ministry of Civil Aviation (and the major regulators are the following:

- Airport Authority of India - which regulates construction and management of airports;
- Directorate General of Civil Aviation which regulates safety and operations of aircrafts;
- Bureau of Civil Aviation Security, which regulates airport and airline security standards; and
- Airports Economic Regulatory Authority, which regulates tariffs and fees

In the recent case of In Re Express Industry Council of India , the Competition Commission of India penalized three airlines,

namely Jet Airways(India) Ltd., Spice Jet Ltd. and IndiGo Airlines for collusion to inflate prices of Fuel Surcharge rates for cargo transportation by the domestic airlines and thereby contravening the provisions of Section 3 of the Act.

The Commission arrived at this decision after a careful analysis of the market conditions and the corresponding increase in the surcharge. It went on to distinguish price parallelism with collusion in an oligopoly and dealt with the question of how an anti-competitive agreement is evidenced in an investigation.

In Re Express Industry Council of India v. Jet Airways (India) Ltd et al., Case No. 30 of 2013 (CompetitionCommission of India, 07/03/2018)

- Public institutions and authorities have the onus to cultivate and maintain fairness and equality in the market.
- The same applies to the ones entrusted with the regulation of the aviation sector. Tremendous power and influence is attached to institutions such as the DGCA, AAI etc. An error, intentional or unintentional, in terms of policies or their implementation would lead to catastrophic results that may lead to unmatched and unwarranted advantage for a few market players at the cost of others.
- As a consequence, the objective of achieving fairness in the market's competition would be defeated at the very beginning

Competition Commission of India

The Competition Commission of India (CCI) was established under the Competition Act, 2002 for the administration, implementation and enforcement of the Act, and was duly constituted in March 2009. The following are the objectives of the Commission;

1. To prevent practices having adverse effect on competition.
2. To promote and sustain competition in markets.
3. To protect the interests of consumers
4. To ensure freedom of trade
5. Look after the interest of the consumers
6. Create awareness and advocate for fair competition practices

Powers of CCI

- To eliminate practices having adverse effect on competition, promote and sustain competition, protect interests of consumers and ensure freedom of trade by other participants
- ***Inquire into certain agreements and dominant position of enterprise***
- ***Inquiry into combinations***– Section 20 of the Act entrusts the Commission with the power to inquire into any information relating to acquisition and determine whether such combination or acquisition may have an appreciable adverse effect on competition (AAEC).
- ***Power to issue interim order***– Section 33 of the Act empowers the Commission to issue interim orders in cases of anti-competitive agreements and abuse of dominant position, thereby temporarily restraining any party from carrying on such an act

- To deal with cross border issues CCI is empowered to enter into any MoUss or arrangement with any foreign agencies and countries with the prior approval of Central Government.
- CCI has been vested with the powers of Civil Courts

AIRLINE CARTELIZATION

- The Act defines a "cartel" to include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

The Commission vide its judgement(et Airways, IndiGo, SpiceJet) dated March 7, 2018, elaborately discussed that cartelization occurs usually in a clandestine fashion being hidden or secretive without leaving behind any documentary evidence. Therefore, the existence of such anti-competitive practices are required to be inferred from the circumstantial analysis devoid of any plausible explanation.

- Price competition in a market encourages an efficient supply of output/ services by companies. Any company is free to change/ revise its prices taking into consideration the foreseeable conduct of its competitors. However, the association of enterprises/ persons aiming for collective profits disturbing the market regulators by way of cartelization are not permitted as per the Act, the same being against the healthy growth of competition.

SLOT ALLOCATION AND EMERGING ISSUES

- "SLOT" is a permission given by a coordinator for a planned operation to use the full range of airport infrastructure necessary to arrive or depart at a Level 3 airport on a specific date and time.
- to ensure the most efficient use of airport infrastructure and in order to maximize benefits to the greatest number of airport users, it is essential to have a policy for allocation of constrained or limited airport capacity to airlines and other aircraft operators through a transparent and equitable mechanism so as to ensure viable airport and air transport operations.

- Classification of Airports:
- Level 1:

where the capacity of the airport infrastructure is generally adequate to meet the demands of airport users at all times.

Level 2:

where there is potential for congestion during some periods of the day, week, or season which can be resolved by voluntary cooperation between airlines.

Level 3: where capacity is constrained due to lack of sufficient infrastructure

- A transparent and equitable mechanism is needed for viable and smooth operations at the airports.
- Slot allocation should be considered an interim measure till a longer-term solution of expanding airport capacity is implemented, according to the guidelines of the civil aviation ministry.
- Airlines give airports their schedule before summer and winter seasons as per International Air Transport Association norms. Domestic airlines submit their schedule to the Airports Authority of India (AAI) and private airport operators, and foreign airlines to AAI

What are the current shortcomings?

The information about available slots at any busy airport is not placed in the public domain, so there is apprehension of opacity in the slot allocation process.

Airlines tend to block slots without utilizing them. The dates for filing of slots by local airlines are not fixed.

The appellate mechanism needs to be made more robust.

The guidelines should be well-defined and in tune with global best practices.

Code sharing agreements and legal issues

- Today the business concept of the airline alliance is deemed as the correct answer, as many big airlines have joined to secure their business.
- Code-share arrangements could be seen as the perfect implementation of an airline alliance. Alliances are more flexible than cross-border mergers and takeovers due to national restrictions, making it legally viable.

Legal Issues

- **However, code-share arrangements have further legal implications that have led into classification of carriers and ended up a liability issue.**
- **There are several applicable conventions and protocols dealing with liabilities to protect airline passengers**
- **Anti-competition and consumer protection issues are the other main issues**
- **Codeshare agreements may also be caught by competition law provisions prohibiting an abuse of a dominant position if one or both parties to the codeshare agreement are dominant in the market concerned and where the codeshare agreement contributes to the creation, maintenance or strengthening of their market power or allows them to exploit such market power.**

Solutions

- Codeshares which bring about restrictive effects on the market may still be exempted if they create efficiency gains and other economic benefits for consumers.
- Depending on market circumstances, economic benefits that will justify an exemption or immunity include increased destinations, complementary networks, increased capacity, new or improved airline services, improved connectivity, better scheduling, shorter transfer times, higher load factors, better seat management, increased availability and flexibility of discounted tickets, improved frequent flyer programmes, more efficient use of resources.


thank you!