

In re: Express Industry Council of India v. Jet Airways (Case No. 30 of 2013)

Decision Date: 07.05.2018

Keywords: *cartelization; information exchange; bid rigging; collusion; lesser penalty regulations*

Issue: Whether collusion in revision of fuel surcharge was anti-competitive practice?

Rule: Sec. 3 and Sec. 46 of the Competition Act, 2002

The Competition Commission of India (CCI) has imposed a total penalty of more than Rs 54 crore on three airlines — Jet Airways, InterGlobe Aviation and SpiceJet — for unfair business practices with respect to fixing fuel surcharge on cargo transport. This pertains to exploitative and collusive pricing practices in gross violation of consumer interest and legal regulations.

Express Industry Council of India had complained that the aforementioned airlines along with Air India Limited and Go Airlines (India) Limited were involved in an act of cartelization by colluding to introduce and subsequently revise a fuel surcharge 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.

DG concluded that collusive actions by Opposite Parties cannot be established. However, Informant 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 behaviour. Informant also challenged DG’s conclusion 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.

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 the airlines 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.

CCI noted that FSC played a vital role in generating revenue for the airlines. 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. CCI came to a conclusion that even though companies are free to revise prices depending on behaviour of competitors and this would itself not be indicative of cooperation among entities in the market, 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. 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.¹

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.² The complaint was filed in 2013 and the CCI has passed a fresh order in the matter after

¹Section 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;”

²*Excel Crop Care Limited v. Competition Commission of India & Ors.* Appeal No. 79 of 2012.

the first ruling was set aside by the then Competition Appellate Tribunal. The CCI has also directed the airlines to “cease and desist” from anti-competitive practices through an authoritative order.

Pursuant to the setting aside by Competition Appellate Tribunal, the CCI, under the leniency provisions reduced penalties to mere 10 % of the original imposition.³

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³‘CCI Order against Jet Airways, Indigo, Spicejet show entities get away by Flouting Competition Norms’ Financial Express, *available at*: <<https://www.financialexpress.com/industry/cci-order-against-jet-airways-indigo-spicejet-show-entities-cannot-get-away-by-flouting-competition-norms/1091853/>>