DOES INDIAN COMPETITION LAW MEASURE UP TO INTERNATIONAL STANDARDS?

In January 2006, the Indian aviation sector witnessed its biggest merger so far when Jet Airways ("Jet") announced its acquisition of Air Sahara ("Sahara") for an estimated Rs. 2,300 crores (US$ 500 million). The deal created quite a stir in the aviation industry, and competitor airlines felt that the merger would create a monopoly, as Jet, who already enjoyed a dominant position in the Indian aviation sector, would gain further market share post-merger.

In March 2006, after a detailed review, the Aircraft Acquisition Committee cleared the transfer of all of Sahara's assets to Jet. The Ministry of Company Affairs also gave its green signal to the merger under section 108A of the Companies Act, 1956, under which the Central Government's prior approval has to be taken if a body corporate acquires more than 25% of the paid-up equity share capital of a public company, and either the acquirer or the target is a dominant undertaking (i.e., it controls 25% or more of any services that are rendered in India). Furthermore, the Monopolies and Restrictive Trade Practices Commission ("MRTPC") gave its go ahead after the Director General of Investigation and Registration ("DGIR") found that the merger between the two entities did not violate the provisions of the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act").

The reasoning given by the DGIR and other government bodies to justify the merger was that, there had been tremendous growth in the civil aviation sector in the past few years and the sector was subject to healthy competition. Moreover, new carriers like SpiceJet, Kingfisher and Air Deccan created a wider playing field for consumers, and, therefore, the Jet-Sahara merger would not affect public interest.

Clearly, the government authorities, including the MRTPC, have taken a soft approach towards this merger between Jet and Sahara. When two companies garner almost 50% market share in an industry, this should merit stricter scrutiny. For example, the merger control authority in Europe rejected the proposed GE-Honeywell merger some years back on anti-competition grounds. Unfortunately, the MRTPC has also been watered down significantly over the years and the Competition Act, 2002 (the "Act") is not fully in force. As of now, the more important provisions of the Act relating to anti-competitive agreements, abuse of

dominant position and regulation of combinations have not come in force. This may also be another reason why the merger passed regulatory muster.

Another hurdle in this merger was regarding the use of airport infrastructure and landing rights, as there were no guidelines in this regard.

This obstacle was cleared by the Ministry of Civil Aviation, which has now approved merger and acquisition guidelines relating to airport infrastructure ("Guidelines"). The Guidelines have been drafted keeping in mind various global practices and are based on the following general principles:

The government's approach towards airlines must be non- discriminatory.

The guidelines must not cause public inconvenience by disrupting flight schedules.

The guidelines must not be arbitrary, and should not hamper growth and consolidation of the airline industry.

According to the Guidelines, only user rights like parking bays, landing slots, etc., given to a particular airline on a non-payment basis, can be used by the airline that takes over the aircraft of that particular airline. In other words, Jet cannot sell or transfer the airport infrastructure allotted to Sahara. These facilities can be used only by Jet or returned to the airport operator. Besides this, the airline that takes over the aircraft can only use those user rights, which are actually being used by the airline that transfers the aircraft and only until such time that the infrastructure is in actual use. For all other rights, the terms of lease/sale agreement between the airport operator and the airline will apply.

The Guidelines will ensure that airport infrastructure is used for its designated purpose by an acquirer for the benefit of the consumer and is not to be regarded as a tradeable commodity.

For any additional information on foreign investment in India, competition, company, M&A and related matters, please contact Akil Hirani at akil@majmudarindia.com.

Mumbai Office – Tel: +91 22 6630-7272; Fax: 6630-7252; E-mail: mailbox@majmudarindia.com
Bangalore Office – Tel: +91 80 4147-0000; Fax: 4147-0010; E-mail: mailbox@majmudarindia.com
Integrated Network Offices – New Delhi, Chennai and Hyderabad