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**Aviation Alliances and the Competition Issues  
in the European and Indian Market: A  
Comparative Study Focusing on Code-Sharing  
Agreements and Frequent Flyer Programs**

Arnab Naskar

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# **Aviation Alliances and Competition Issues in the European and Indian Market: A Comparative Study Focusing on Code-Sharing Agreements and Frequent Flyer Programs**

Arnab Naskar\*

## **Abstract**

The liberalization of the air transport sector increased market competition resulting in reduced air fare. The constant effort of airline companies to make themselves cost-efficient and attractive to their consumers have often led them to explore certain unique cooperation structures like Code-Sharing agreements (CSAs) and Frequent Flyer Programs (FFP). This cooperation structures are created either inside an alliance model or externally. The purpose of this thesis is to analyze such unique arrangements that fall under the alliance model, in light of the EU Competition law and the Indian Competition Act. Firstly, the thesis aims to analyze CSAs in light of Article 101 TFEU and section 3 of Competition Act, 2002 and secondly, it seeks to analyze the applicability of the concept of 'loyalty rebates' on the FFPs which airlines employ as a marketing tool. In light of the discussion, the thesis also analyzes the comparative competition law of both jurisdictions. The result of the analysis shows that the consumers, particularly business class travelers, are at the losing end, as this form of arrangements are distorting market competition to a considerable extent in that relevant market.

**Keywords:** EU Competition law; aviation; alliance; Frequent Flyer Program; Code Sharing Agreement; Indian Competition Act.

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## LIST OF ABBREVIATIONS

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<b>ATC</b>	Average Total Cost
<b>AVC</b>	Average Variable Cost
<b>CCI</b>	Competition Commission of India
<b>CJEU</b>	Court of Justice of the European Union
<b>Commission</b>	European Commission
<b>CSA</b>	Code-Sharing Agreement
<b>DoT</b>	Department of Transport (US)
<b>EC</b>	Treaty establishing the European Community
<b>ECJ</b>	European Court of Justice
<b>EEC</b>	European Economic Community
<b>EU</b>	European Union
<b>FFP</b>	Frequent Flyer Program
<b>IATA</b>	International Air Transport Association
<b>ICAO</b>	International Civil Aviation Organization
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OJ</b>	Official Journal
<b>p(p).</b>	Page(es)
<b>para(s).</b>	Paragraph(s)
<b>SAARC</b>	South Asian Association for Regional Cooperation
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations
<b>US</b>	United States of America

## **PART 1**

### **INTRODUCTION**

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The liberalization of the world economy was catalyzed by the increased access of the wide and dense aviation network that developed after the Second World War. Since 1980 the global air traffic experienced an average annual growth of 5% much higher in comparison to the economic growth.<sup>1</sup> To cater this need various airline companies felt the need of increased cooperation at various levels and at various forms. First such airline partnership can be traced back in 1930, in pre-world war era, when Pan American-Grace Airways and parent company Pan American World Airways agreed to exchange routes to Latin America. However, the concept of airline alliance started to develop more robustly only after the 1990,<sup>2</sup> followed by increased market competition due to participation of more market player. With the increased number of aviation enterprise the market volume increased and keeping the pace the market demand of aviation services also increased. This reduced the ticket prices in scheduled air passenger traffic to a considerable extent, reducing the profit margin of the existing airlines. Forced by this gradual reduction of profit margin, the airline operators chose to enter into cooperation arrangements with their competitors to make the services more cost efficient. This gradually led to the formation of a robust aviation alliance network operating in both domestic and international market.

In the European Union (EU), until 1980, the bilateral agreements among the member states used to govern the intra and extra Union aviation policies. The air transport prior to 1980 was overregulated by rather rigid bilateral agreements and international Conventions. This changed with the phase liberalization that EU underwent. The skies

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<sup>1</sup> *Peter Belobaba, Amedeo Odoni & Cynthia Barnhart* (ed.), *The Global Airline Industry*, p. 2.

<sup>2</sup> IATA, *IATA Economics Briefing*, (2012) at p. 1.

were gradually opened for private players and Member States relaxed their regulatory framework to promote increasing market competition. Thus the erstwhile Flag carriers shifted from state-owned, quasi monopolist entities to business entities with an expectation to make profit in a competitive environment. This wave of privatization entered the Indian airline sector post 1990, whereby the private players were allowed to enter the Indian commercial aviation market.

Alliances usually cooperate at different levels of cooperation from joint marketing to business integration. Alliance cooperation includes Code-Sharing Agreements (**CSAs**), Frequent Flyer programs (**FFPs**), network sharing, common ticket booking center, sharing airport hangers, etc. Economists in late 1990s and early 2000 have established that benefits accrued through this cooperation is not only restricted to the airlines but it also passed to the consumers. Countless studies have established that the cooperation gives the airlines the opportunity to expand existing market through traffic feed from partner airlines and also to explore previously unexplored markets through CSAs. Not only the market reach expanded but also the quality of service improved because of the initiatives like FFPs which takes into consideration the individual needs of the valued clients. On the other hand the consumers benefitted largely from the lower fare that resulted due to increased competition. Moreover, programs like FFP resulted to alliance cooperation have enhanced the service frequency and service expectation.

All the above discussion may provide a 'rosy' picture of the alliance cooperation in air transport sector. But it will too early to come to any conclusion. Many authors have argued that this alliance cooperation have also resulted in anti-competitive effect which distorts the market competition. This thesis aims to analyze certain modes of aviation

cooperation promoted by the alliance structure and their anti-competitive behavior in this liberalized market economy.

## **A. Motivation and Research question**

*OECD* (2014) analyzed the competition issues in aviation sectors under three heads: hybridization of business models following low-cost carriers' entry; consolidation through the proliferation of alliances; and State aids in aviation sector.<sup>3</sup> This thesis aimed to discuss the competition issues under EU and Indian law, related to the proliferation of alliances with reference to CSAs and FFPs.

The three global alliances: *Oneworld*, *SkyTeam* and *Star Alliance*, covers almost 80% of the aviation market in Europa and Asia<sup>4</sup>. This is creating a market concentration which is becoming a matter of discussion under competition law. Around the world it has been observed that airline industry is getting concentrated. In US market analysts are sensing that this reduced competition can be witnessed in the recent pricing trends of air tickets.<sup>5</sup> Moreover some report also suggested that the cabin fare for the business class is more or less constant despite the fact that the aviation fuel price reduced significantly.<sup>6</sup>

This thesis aimed to analyze the how competition legislation had and can deal with certain anti-competitive issues in aviation industry and also to provide a comparative analysis on the existing legal framework in term of competition law jurisprudence in both EU and in India. The reason of comparing both the jurisdictions is three fold: *Firstly*, EU is

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<sup>3</sup> *Secretariat OECD*, Executive Summary of the discussion on Airline Competition, p. 3.

<sup>4</sup> *IATA*, IATA Economics Briefing, p. 1.

<sup>5</sup> *Joe Pinsker*, Here's why flying is still so expensive - even though fuel has become so cheap (2016).

<sup>6</sup> See Annexure I.

currently the second largest aviation market next to US. At present though India is ranked as the 9<sup>th</sup> largest aviation market in the world, it is expected to be the 3<sup>rd</sup> largest market by the next decade.<sup>7</sup> Profits margins in Asia-Pacific region are expected to grow from \$5.8 billion in 2015 to \$6.6 billion in 2016 whereas in Europe it is expected to grow from \$6.9 billion in 2015 to \$8.5 billion in 2016. This encourages not only the traders to align their market strategies suitable for both the markets but also for the legal professionals to structure and align the regulatory laws so as to make them predictable and uniform. *Secondly*, as Indian competition law is more or less structured according to the European competition law framework, it will be relevant and an interesting comparative study. *Thirdly*, this thesis is restricted only to the concept of CSAs and FFPs as both the EU and Indian competition authorities have shied from analyzing, on merits, the anti-competitive aspect of these coordinated cooperation. This thesis thereby aimed to provide a comparative study of both the jurisdiction aiming to answer certain questions that developed due to this changing dynamics of aviation sector.

This led me to questions that:

- i. Whether the alliances are exploiting the market by creating anti-competitive foreclosure through the CSAs and FFPs?
- ii. Whether the time-sensitive consumers (business class) and the efficient competitors are facing the heat of such kind of anti-competitive foreclosure which the airline alliances are exploiting?

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<sup>7</sup> KPMG, India on way to become the third largest aviation market by 2020.

## **B. Limitation**

For the purpose of the present thesis, I will be only concerned with certain aspects of the air service agreement aimed to create cooperation among various aviation networks and the overlapping concepts of the competition law. Technically, aviation alliances or cooperation in the similar aspects comes under the purview of horizontal cooperation, so this thesis while referring to the comparative competition law will be restricted only to the laws applicable for horizontal cooperation.

Moreover, this study could only refer to economic study on aviation alliances that took place prior to 2010, due to the lack of economic studies in European and Indian context in recent years.

These are general assertions which are in addition to certain section specific limitation, mentioned in the respective sections.

## **C. Overview of the thesis**

In order to understand the aviation market it is be pertinent to mention the historical background and the evolution of the aviation industry in both EU and in India. Unlike India, EU is not a sovereign State and therefore the competence to deal with the aviation sector vis-à-vis competition law came to EU institutions in phases. The abovementioned contents have been explained in the *second part* in addition to alliances and some basic concepts related to aviation sector. The *third part* gave a holistic view towards the EU and Indian competition law regime. This *part* also explained how the concept of relevant market is important to determine the anti-competitive agreements and abuse of dominant position in both the jurisdictions.

The *fourth part* dealt with the concept of code sharing agreement and the applicability of Article 101 Treaty on the Functioning of the European Union (**TFEU**) and the corresponding provision under the Indian Competition Act, 2002 (**Act**). This *part* also compared both the laws in relation to CSAs and the actions taken by the respective competition authorities in this regard. In the *fifth part* the thesis analyzed the concept of exclusionary abuse and the applicability of the same for FFPs. This chapter also discussed the analytical development of rebates related scrutiny under Article 102 TFEU and the corresponding Indian provision and have tried to analyze whether the FFPs can be treated as a ‘loyalty rebate’. Finally, the thesis is concluded in the *sixth part*.

## **PART 2**

### **EVOLUTION OF AIR TRANSPORT SERVICE IN EUROPEAN AND INTERNATIONAL ARENA**

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This part will analyze the evolution of the international convention regime with regard to the air transport sector. EU was tremendously affected by the changing regime that started from Paris Conference in 1919. As India entered the aviation market later, the change was realized by the Indian market at a subsequent stage. This part also explains how the US has been a catalyst throughout this entire process: from Chicago till the Open Sky era.

The present open skies regime calls for a robust cooperation amongst the competition authorities of various countries to deal with the competition cases with specific reference to aviation sector. This part has acknowledging this pressing need.

#### **A. From Paris Convention to Open sky agreement – Advent of the Liberalization regime**

The sub-part studied the global changes that the civil aviation sector experienced after the two World Wars. From state control to the open market, this sub-part mentioned the key events to understand the evolution of the aviation industry in global platform.

##### ***I. Pre and post war scenario - Paris and Chicago***

The Paris Peace Conference of 1919 recognized that every nation has sovereignty over the airspace above its territory and gave the competence to the national governments to regulate airlines operating in their domestic airspace.<sup>8</sup> The aviation industry received drastic change during the two World Wars. Both the World Wars opened the

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<sup>8</sup> *Seth M. Warner*, 43 AM. U. L. REV., 1993, p. 282.



possibilities of flourishing civil aviation market. This induced US to take initiative to establish an international aviation accord for promoting freedom in air commerce at the closing of World War II.<sup>9</sup> In the Chicago Convention, 1944, the US endorsed for *laissez faire*, free-market philosophy, through which all airlines would have unrestricted operating rights on international routes.<sup>10</sup> This was not supported by the other participants; however the Conference did formally recognize five “*freedoms of the air*”<sup>11</sup> and reaffirmed States’ sovereignty over their airspace.

Chicago Conference also established the International Civil Aviation Organization (ICAO), a UN agency, to regulate safety, communications, and technological aspects of international civil aviation.<sup>12</sup> This opened the era of State owned airlines restricting private and foreign investment by foreign investors in air services. The Chicago Convention in simple terms precipitated the development of a bilateral agreement regime to determine international airline routes, frequency, and capacity.<sup>13</sup>

## **II. *Bermuda I and Bermuda II***

In 1946, the United States and the United Kingdom signed a bilateral air transport agreement, Bermuda I, which served as a model for negotiating bilateral air transport agreements for next 30 year.<sup>14</sup> The agreement is significant for two reasons: firstly it gave the IATA the authority to establish fares on international routes, subject to the

<sup>9</sup> ICAO, The Postal History of ICAO.

<sup>10</sup> Seth M. Warner, AM. U. L. REV., 1993, p. 283.

<sup>11</sup> ICAO, Freedoms of Air.

<sup>12</sup> Initially the Provisional International Civil Aviation Organization (PICAO) was established in 1945 which was replaced by the permanent organization on 4 April 1947, ICAO, The Postal History of ICAO; Timothy M. Ravich, 10 FIU L. Rev. 500 (2014-2015).

<sup>13</sup> Seth M. Warner, AM. U. L. REV. 1993, p. 285; Sock-Yong Phang, Comp. L. REV. 285 (2009).

<sup>14</sup> *Agreement between the Government of the United Kingdom and the Government of the United States of America relating to Air Services between their Respective Territories*, February 11, 1946, US-UK, T.I.A.S. No. 1507.

consent of the concerned governments affected by IATA fare decisions. And secondly, it eliminated competition except in the field of non-price competition and that to in limited extent.<sup>15</sup> In 1976 the Bermuda I was replaced by Bermuda II<sup>16</sup> which was considered as much more restrictive than its predecessor. However, the Bermuda II was not that efficient as Bermuda I. In 1978, the US moved away from the Bermuda II model and concluded more liberal bilateral air transport agreements with the Netherlands,<sup>17</sup> Belgium,<sup>18</sup> and Israel.<sup>19</sup> These agreements removed limitations on numbers of carriers, capacity and rates and thereby introduced the international liberalization in air transport.<sup>20</sup>

### ***III. Open skies agreement***

The European airlines are now entitled to fly without restrictions from any point in the EU to any point in the US. This was however unimaginable in the Bermuda regime when the protectionist principle was widely applauded by the nation states. This gradual departure from the protectionist regime to a liberalized regime catalyzed the genesis of the ‘open skies agreement’. The ‘open skies agreement’ is considered as a unilateral approach by US to achieve a certain degree of liberalization through less restrictive bilateral.<sup>21</sup> The first true evidence of ‘open skies agreement’ can be traced back in 1992 between Netherlands and the United States.<sup>22</sup> This ‘open sky agreement’ followed the characteristics laid down by the US DoT in

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<sup>15</sup> *European Air Law Association* (2013), p. 30.

<sup>16</sup> *Agreement between the Government of the United Kingdom and the Government of the United States of America related to Air Transport Service Agreement*, July 1977, T.I.A.S. No. 8641.

<sup>17</sup> *Protocol Amending the Air Transport Agreement of 1957*, as amended, United States and Netherlands, 31 March 1978, T.I.A.S. No 1507.

<sup>18</sup> *Agreement Amending the Air Transport Services Agreement of 1946*, as amended, United States and Belgium, 12-14 December 1978, T.I.A.S No 9207.

<sup>19</sup> *Protocol Amending the Air Transport Agreement of 1950*, as amended, United States and Israel, 16 August 1978, T.I.A.S No 9902.

<sup>20</sup> *Emilie Baronnat* (2007) p. 31.

<sup>21</sup> *Cornelia Woll* (2005), p. 14.

<sup>22</sup> *Emilie Baronnat* (2007) p. 32.

1992.<sup>23</sup> Stimulating competition in the international air transport market and that to with minimal government involvement was the prime motive behind the 1992 agreement.<sup>24</sup>

In the last decade the aviation world has been surrounded by the debate on the ‘transatlantic Open Aviation Area’ between EU and US. According to the Commission the ‘transatlantic Open Aviation Area’ means “*a single air transport market between the EU and the US with free flows of investment and no restrictions on air services, including access to the domestic markets of both parties*”.<sup>25</sup> The First Stage EU-US ‘Open-Skies Agreement’ came into effect in 2008, introducing new commercial freedoms for operators and an unprecedented framework for regulatory cooperation in the field of transatlantic aviation. The Second phase of the agreement, incorporating both Iceland and Norway (both non-EU members), was signed in June 2010. In 2013 the same was revised and Croatia was made a part of it when Croatia joined the EU. Study showed that the open-skies agreement between EU and US is expected to increase competition between transatlantic carriers and also reduce fares, resulting in an increase in passenger traffic.<sup>26</sup>

### **B. Applicability of Competition law in air transport section: ushering a new era in EU**

This sub-part explains how the gradually the door for the EU competition law authorities opened in the field of air transport sector. It explained the step by step liberalization of Air transport sector in EU.

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<sup>23</sup> See general, *United States of America, Department of Transport* (1992).

<sup>24</sup> *Seth M. Warner*, AM. U. L. REV., 1993, 300.

<sup>25</sup> *European Commission*, Press release (2008).

<sup>26</sup> *Kenneth Button*, *More Flexible International Travel*, p. 32.

### ***I. Answering a long standing debate on restricted applicability of competition law in transport sector***

It was a long standing debate whether 84(2) of the Treaty of Rome (now Article 100 TFEU) restricted the applicability of competition law in the field of air transport without any express consent of the European Council. The debate was rested in 1974 in *French Sea case*<sup>27</sup> wherein the ECJ held that general treaty rules<sup>28</sup>: viz. non-discrimination on national grounds, right of establishment, competition, mobility of labour and equal pay, apply to sea and air transport as long as the Council acting under Article 84(2) Treaty of Rome has not decided otherwise.<sup>29</sup> However the Title IV (transport) remained inapplicable to air transport.<sup>30</sup> In 1985 Commission took a strong approach regarding applicability of competition law in the field of air transport in the Olympic Airlines case and held that there is no legal basis that restricts the applicability.<sup>31</sup> In 1986 the ECJ in the *Nouvelles Frontières case*, confirmed that in absence of specific language within the Treaty of Rome, air transport is “*subject to the general rules of the Treaty, including the competition rules*”.<sup>32</sup>

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<sup>27</sup> Judgment in *Commission of the European Communities v French Republic*, Case 167-73, ECLI:EU:C:1974:35, para. 44,46.

<sup>28</sup> Paul Stephen Dempsey (1992), p. 335.

<sup>29</sup> *European Air Law Association* (2013), p. 7.

<sup>30</sup> See *Ibid.*

<sup>31</sup> “Giving judgment in Case 167/73 (*Commission v. French Republic*) (1) the Court of Justice upheld the Commission's view that, although under Article 84 (2) sea and air transport were not covered by the provisions of Title IV relating to the common transport policy until such time as the Council decided to include them, nevertheless they were, on the same basis as other modes of transport, subject to the general provisions of the Treaty“, Commission Decision in *Olympic Airways*, 85/121/EEC, OJ L 46, 15.2.1985, para. 5.

<sup>32</sup> Judgment of 30 April 1986, *Ministere Public v Asjes (Nouvelles Frontières)*, Joined Cases 209 to 213/84, ECLI:EU:C:1986:188, para. 45; Paul Stephen Dempsey (1992), p. 338.

## II. *First package*

The above mentioned facts and circumstances and the implementation of the Single European Act, encouraged the Commission to introduce the ‘first package’ of air transport liberalization legislation at the end of 1987.<sup>33</sup> The first package contained two Regulations<sup>34</sup> and one Directive<sup>35</sup> and one Decision.<sup>36</sup> The ‘first package’ removed ‘single designation’ provisions so as to enable any number of airlines to operate on the major international routes in the Community.<sup>37</sup> It also overruled Member States demand of granting their national airline 50 per cent share of the market. It also removed the ability of Member States to block proposals for low fares in aviation industry from private sectors.

With the implementation of the first package, the ECJ also expanded the scope of Article 85, Article 86 Treaty of Rome. In the *Ahmed Saeed case*,<sup>38</sup> the ECJ went further and asserted that Article 86 Treaty of Rome (now Article 102 TFEU), as opposed to Article 85 Treaty of Rome (now Article 101 TFEU) is directly applicable to air transport services even on third country routes, provided that there is an effect on trade between Member States. Pending proceeding, the Council adopted its First Package of Liberalization and the Commission applied the Regulation in response. The Court expanded the scope of *Nouvelles Frontières* case and held that the Article 85 Treaty of Rome is “*directly applicable to intercommunity tariff agreements even in*

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<sup>33</sup> *European Air Law Association* (2013), p. 8.

<sup>34</sup> Council Regulation (EEC) No 3976/87 on the application of Article 85 (3) of the Treaty, OJ L 374, 31.12.1987; Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty, OJ L 374, 31.12.1987.

<sup>35</sup> Council Directive 87/601/EEC on fares for scheduled air services between Member States, OJ L 374, 31.12.1987.

<sup>36</sup> Council Decision 87/602/EEC on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, OJ 1987 L 374.

<sup>37</sup> *Louise Butcher*, Aviation: European liberalisation, 1986-2002, (2010), p. 3.

<sup>38</sup> Judgment of 11 April 1989, *Ahmed Saeed v Zentrale zur Bekämpfung*, Case 66/86, ECLI:EU:C:1989:140, para 33.

*absence of implementing legislation, issued by Member State or Commission”*.<sup>39</sup>

### ***III. Second and Third package***

In 1990, the Second Package of air transport regulation was adopted followed by the Third Package in 1993. It is pertinent to mention that in 1990 the Maastricht treaty came into force which replaced the Treaty of Rome with the EC Treaty. The Second Aviation Package comprised Council Regulations on fares,<sup>40</sup> market access and the application of Article 85 of the EC Treaty. The Third Package of liberalization measures, finally liberalized the internal community market, dismantling the bilateral restrictions. The Third Package introduced common licensing criteria for air carriers across the whole of the EU.<sup>41</sup> The only significant restriction which persisted after 1993 is the cabotage services: “*domestic services operated in one EU Member State by a carrier licensed in another Member State*”. This restriction is however lifted from 1 April 1997 as the transition period expired on the same day.

### ***IV. Expansion of Commissions competence in competition matter- from intra community to third country***

Way back in 1974, the ECJ affirmed that the competition law applies to the air transport industry.<sup>42</sup> However, that authority of the Commission was only at that time restricted to the intra-community aviation services. The power of the commission to implement Article 85 Treaty of Rome and Article 86 Treaty of Rome was not expanded

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<sup>39</sup> *European Air Law Association* (2013), p. 9.

<sup>40</sup> Council Regulation (EEC) No 2342/90 on fares for scheduled air services, OJ L 217, 11.8.1990.

<sup>41</sup> Council Regulations (EEC) Nos 2407/92, 2408/92 and 2409/92, now replaced by Regulation (EC) No 1008/2008 of the European Parliament and of the Council, OJ L 293, 31.10.2008.

<sup>42</sup> Judgment of 4 April 1974, *Commission v French Republic*, Case 167-73, ECLI:EU:C:1974:35, para 32.

to air transport services between Community and third countries.<sup>43</sup> Therefore, the Commission was only allowed at that time to evaluate the competitive nature of only the European aviation alliances. The Commission at that time could only invoke Article 85 Treaty of Rome to open an investigation in cooperation with relevant member states and to propose appropriate measures to end the infringement of EC Competition Rules. Thus in 1996 despite the fact the Commission initiated the proceedings for the cooperation arrangement between Lufthansa, SAS and United Airlines under Article 101(1) TFEU (ex-Article 81 EC Treaty), the Commission lacked the competence to issue a decision. This laid to closure of the case on the basis of commitment proposed by the parties in 2002.<sup>44</sup> Two subsequent EU Regulation: Regulation 3975/87 and Regulation 1/ 2003 also failed to address this anomaly. Finally on 2004 the Commission passed Regulation 411/2004<sup>45</sup> which extended Commission's authority to investigate the air transport service arrangement between EU and third countries. However, it was only in 2008 when all the bilateral agreements between EU member states and US were replaced by EU-US Air Transport Agreement, the efficient coordination between two economies by formalizing the cooperation on competition matters took place.

### **C. Evolution of aviation industry in India**

Though India entered the civil aviation market late as compared to its European counterpart, the liberalization in 1990 helped Indian market to catch with up the global changes in the field of aviation. This sub-

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<sup>43</sup> *Emilie Baronnat*, Aviation L. & Pol'y (2004-2008) p. 4254.

<sup>44</sup> This is the opinion of the report by the European Commission and the United States Department of Transportation, *European Commission and US Department of Transport*, Transatlantic Airline Alliances: Competitive Issue and Regulatory Approaches, p. 15, para. 60.

<sup>45</sup> Council Regulation (EC) No 411/2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003 in connection with air transport between the Community and third countries, OJ L 68, 0603.2004.

part analyzed the reforms in the field of India's Civil Aviation in three phases.

### ***I. First phase (till 1986)***

The origin of the Indian aviation sector can be traced back from 1912, when Jehangir Ratanji Dadabhoy<sup>46</sup> set up Tata Airlines, the first Indian commercial carrier to transport mail and passengers within India.<sup>47</sup> This Tata Airlines was the first to venture into scheduled passenger traffic in India. Subsequently this Tata Airlines became Air India in 1946. In 1948, after the independence of the India, the Government purchased 49% of the company with the liberty to purchase another 2%. The government thereby established Indian Airlines to run domestic services while Air India International, for operating international flights. In 1956 due to financial problems in the aviation sector, the Government of India nationalized the aviation industry. The newly enacted Air Corporations Act, 1956 gave birth of Indian Airlines (new entity formed by merging 8 airlines) and Air India. This 1956, Act gave exclusive monopoly to Air India in domestic market and shared market with Indian Airlines in international market.<sup>48</sup>

### ***II. Second phase (1987-2003)***

The Indian aviation industry entered the second phase 1986 when the private players like *Air Sahara*, *Jet Airways*, *Damania Airways*, *Modi Luft*, *NEPC Airways* entered the Indian market. Due to the market liberalization in 1990, the Indian government repealed the Air Corporations Act, 1956. Contrary to the market analysts prediction of a brighter market picture; the India aviation entered a dark phase in the later part of 1990s. In 1998 six private airlines left the Indian

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<sup>46</sup> Founder of Tata enterprise and also was the Chairman of IATA from 1957-58.

<sup>47</sup> IATA, History - The Father of Indian Aviation (2011).

<sup>48</sup> Nancy Shah, Competition Issues in the Civil Aviation Sector (2007), p. 11.



aviation market,<sup>49</sup> leaving only two private airlines in India: Jet Airways and Air Sahara.

### ***III. Third phase (2004-till date)***

The duopoly in airline private sector was challenged by Jet Airways in 2003, followed by Kingfisher Airlines in 2005. Both these new entrants followed the footsteps of low cost airlines. Moreover, the Jet Airways introduced the concept of dynamic ticket system which was unknown at that time in the Indian transport sector.<sup>50</sup> In 2007 the merger of Jet-Sahara and Indian Airlines-Air India ushered a new era in India. This consolidation attempt followed the footsteps of the US aviation sector.

In 2005, India entered into open-skies agreement with US. India is currently planning to establish aviation policy whereby the government will be permitted to enter into 'open skies agreement' with South Asian neighbours and countries beyond 5,000 km.<sup>51</sup> This is expected to result in unlimited flights to and from Europe and the SAARC nations.

### **D. Aviation alliances**

The liberalization of air transport industry demanded consolidation of airline activities across borders for attaining economies of density, scale and scope. However, it will be misleading to say that such demand was an automatic affair. As pointed out by *Cornelia Woll* (2005), that some EU airlines (*Sabena, Sabena, Air France, Aer Lingus, Iberia, TAP Portugal and Olympic*) were in support of protectionist regime.<sup>52</sup> However, the situation changed with the

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<sup>49</sup> *Sundeep Khanna*, India needs more, not less Kingfishers (2013).

<sup>50</sup> *Aneesh Phadnis*, 40 Years Ago...And now (2015).

<sup>51</sup> *BS Reporters*, Open skies get a push in draft aviation policy (2015).

<sup>52</sup> *Cornelia Woll* (2005), p. 23.

introduction of the ‘open-skies agreement’ as the EU airlines sensed the prospect of liberalized air transport market. Now the question arose what will be appropriate way to increasing the market presence. Nationality restrictions contained in Air Service Agreements makes international mergers in the field of air transport difficult.<sup>53</sup> This paved the way for alliances model.

As stated by *Amit Goel*, (2003)<sup>54</sup> there is lack of consensus on classification of alliances in airline industry. Therefore, in this sector I have tried to refer various studies to create a holistic approach towards the classification of alliances. In the empirical study, *Park* (1997) distinguished two major types of alliances on the ground of overlapping and non-overlapping route as parallel and complementary alliances respectively.

The Report by *EC and DoT* (2010) provides a useful discussion on various types of airline alliances relying on different levels of cooperation in various spectrums.<sup>55</sup> Tactical alliances: This type of alliance is formed from the bilateral agreement between two carriers and covers a limited number of routes, with the principal objective of providing connectivity to each carrier’s respective networks.<sup>56</sup> Branded Strategic alliances: This type of alliance is usually preferred by international aviation services due its global reach. *Star Alliances*, *SkyTeam* or *Oneworld* have been placed under this category. It is also clarified that Carriers participating in broader global alliances, are not necessarily precluded from pursuing tactical alliances with non-

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<sup>53</sup> “Cross-border mergers among airlines are prevented by nationality and ownership restrictions contained in most ASAs” *OECD Secretariat*, Airline Competition (2014), p. 24.

<sup>54</sup> *Abhishek Goel*, Strategic Alliances in the Global Airline Industry (2003), p. 15.

<sup>55</sup> Refer Annexure II.

<sup>56</sup> *European Commission and US Department of Transport*, Transatlantic Airline Alliances: Competitive Issue and Regulatory Approaches, p. 4.

aligned carriers and in exceptional cases with members of other global alliances.<sup>57</sup>

*Amit Goel*, (2003) categorized the alliances based on the ‘extent of coordination’:

1. Simple route by route alliance or interline: The most basic form of cooperation involving cooperation in the field of ground handling, joint use of ground facilities, code sharing and joint operations (limited routes), block space sale, and co-ordination of flight schedules for directly related flights.
2. The Broad Commercial Airline Alliance: This form of cooperation is more extensive than the interline one and it extends co-ordination to joint development of systems and joint marketing activities. This may involve CSAs (majority of routes), FFPs, transfer of traffic at hub airport to other airline. Usually the Global alliances like One World, Star Alliance, Sky Team fall under this category. This thesis is mostly concerned with this form of cooperation.
3. Equity alliance: This involves the most extensive degree of cooperation and may involve equity swap among the partners. The alliance between American Airlines (AA) and Canadian Airlines International (CAI) of 1994 can be cited as an example of this kind of alliance. Interesting to note that, this form of alliance raises the risk of anti-competitive foreclosure the most. It has been rightly pointed out that the proportions of this type of alliances have declined.

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<sup>57</sup> *European Commission and US Department of Transport*, Transatlantic Airline Alliances: Competitive Issue and Regulatory Approaches, p. 4.

### **E. Concluding remark: need for robust cooperation**

As the open-skies regime opened the market for foreign airlines in the domestic sector, there are certain bilateral agreements that contain provision of cooperation between the competition authorities. As for the purpose of the present thesis I will be only concerned with the agreements between EU and India.

Considering India as a key target country for a Community-wide agreement in the field of aviation, the Commission issued communication dated 2005, regarding the initiation of the discussion for a comprehensive open-skies market. The communication mandates for cooperation between the competition authorities.<sup>58</sup>

It is already explained in the preceding sub-part, that the global alliance is not limited to the domestic market. The aviation industry is so interrelated that it will be hard for competition authorities to apply the 'effect' based study in an isolated market. Cooperation methods like FFPs, CSAs require complex study of the both domestic and international market at the same time. Thus the open skies regime has opened a new avenue for the competition authorities which must be enchased as it will help to efficiently study the cross border anti-competitive issues in comprehensive manner.

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<sup>58</sup> *Commission of the European Communities*, Developing a Community civil aviation policy towards the Republic of India (2005), para 5.6.

## PART 3

### INTRODUCTION TO THE COMPETITION LAW FRAMEWORK OF EU AND INDIA

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The Competition Law of India is developed more or less in line of the EU Competition law jurisprudence. This part aimed to analyze the basic concepts of the competition law in relation to the air transport sector in both EU and India. Secondly it also analyzed the concept of ‘relevant market’ under both the jurisdictions. The part concluded highlighting a striking difference between both the laws, related to the aim of the competition legislation.

#### **A. Competition policy framework in light to air transport sector in EU and India**

##### ***I. European Union***

One of the key aspirational objectives of the European Union is to promote economic integration. Article 3 TEU states that the EU shall work for ‘highly competitive social market’. The previous formulation found in Article 2 EC, containing the requirement that there should be “*a system ensuring that competition in the internal market is not distorted*”, has been relegated to Protocol No 27 attached to the Treaties.<sup>59</sup> The ECJ in *Konkurrensverket* held that:

*“.. it must be observed at the outset that Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 309), is to include a system ensuring that competition is not distorted.”*<sup>60</sup>

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<sup>59</sup> Nigel Foster, EU Law Directions, p 484.

<sup>60</sup> Judgment of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, ECLI:EU:C:2011:83, para 20.

The EU also has an exclusive competence, as per Article 3(1)(b) TFEU, in establishing competition rules. Furthermore, under Article 105 TFEU read with Regulation 1/2003, the Commission is entrusted with the duty to ensure that competition in the EU is not distorted.

The competition policy of European Union can be classified under 4 major frameworks:<sup>61</sup>

- Collusion and Cartels- Article 101 TFEU (Ex-Article 81 EC Treaty)
- Dominance and Monopoly - Article 102 TFEU (Ex-Article 82 EC Treaty)
- Merger Control – EC Regulation 139/2004
- State Aid – Article 107 TFEU (Ex-Article 87 EC Treaty)

Currently EU does not regulate this control of concentration of undertaking (merger control) through Article 101 TFEU and 102 TFEU which was a norm prior to the enactment of the Regulation 139/2004 (Merger Regulation).<sup>62</sup>

### *1. End of Authorization regime*

On May 2004 a fundamental change was introduced in the procedure for enforcing the EU non-merger antitrust rules. Under the new system *firstly*, EU shares the responsibility jointly with the member states to enforce the EU competition legislation and *secondly*, the enterprises must decide on their own whether the cooperation agreement or practices comply with the EU Competition laws, i.e. self regulation. Under the previous Regulation the EC had the exclusive

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<sup>61</sup> Volodymyr Bilotkach and Kai Hüschelrath, 7 J. Comp. L. & Econ. 2011, p. 367; also refer Rudolf Geiger, Khan and Kotzur, European Union Treaties, p. 490, 491.

<sup>62</sup> Rudolf Geiger, Khan and Kotzur, European Union Treaties, 491.

jurisdiction to grant individual exemption under Article 81(3) EC. This decentralised approach was introduced to encourage enforcement of competition rules through private litigation. The *Council Regulation No 1/2003* replaced the existing authorization regime whether the enterprises had to notify to the Council of any cooperating agreement or model.

## 2. *Alliances and competition law*

The alliances are subjected to the EU competition legislation so as to ensure that the agreement does not impede the market competition. The EU competition law prohibit any form of arrangement that will (or may) restrict/ distort market competition or prohibit abuse of dominant position. The EU competition authorities also ensure that the other participants like the consumers and the new competitors are also benefitted from the arrangement.<sup>63</sup> As I have already discussed above that certain alliances can resemble a merger, therefore in order to establish whether the arrangement is a merger or cooperative agreement, two substantive laws: viz Merger Regulation and Article 101 and 102 of the TFEU gets attracted.<sup>64</sup> Alliance differ from mergers as in alliance the members retain their autonomous status and no transfer of control takes place between the alliance partners unlike that of the merger. For the purpose of the present thesis I will only focus on the competition law aspects dealing with Article 101 and 102 of the TFEU and other complementing Regulations as far as EU is concerned.

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<sup>63</sup>Joos Stragier, Outlook of European Commission's Competition Policy and Enforcement Priorities in Air Transport, p. 3.

<sup>64</sup>Emilie Baronnat, Aviation L. & Pol'y, p. 4253.

### 3. *Form of Competition: Effective competition and workable competition*

Another key aspect of discussion is what form of competition, the EU intends to maintain. It has been clarified by the ECJ that Article 101 and Article 102 is not intended to establish a ‘perfect’ or ‘maximum competition’. Instead the ECJ has regarded the aim of the Article 101 and 102 TFEU is to maintain ‘effective competition’ in the internal market.<sup>65</sup> The ECJ in *Metro SB*<sup>66</sup> went further and prescribed the minimum requirement, as ‘workable competition’, which need to be maintained in all cases.<sup>67</sup>

The EU concept of ‘workable competition’ has been considered in line to that of the ‘Harvard model’<sup>68</sup>.<sup>69</sup> The recent formulation of ‘working competition’ takes Structure, Conduct, Performance all together and this has been considered to afford a useful guide in determining the ‘effectiveness’ of competition within a market.<sup>70</sup>

## II. *India*

### 1. *Evolution of Indian Competition law regime*

The Monopolies and Restrictive Trade Practices Act, 1969 (**MRTP Act**), was enacted with the aim to promote a socialist objective,

<sup>65</sup> Judgment of 21 February 1973, *Continental Can Company v Commission*, Case 6-72, ECLI:EU:C:1973:22, para 25.

<sup>66</sup> Judgment of 25 October 1977, *Metro SB v Commission*, Case 26-76, ECLI:EU:C:1977:167, para 20.

<sup>67</sup> *Kapteyn and VerLoren van Themaat*, The Law of the European Union and European Communities, p. 794.

<sup>68</sup> The ‘Harvard model’ is explained through Structure, Conduct, Performance paradigm, “The  $S \rightarrow C \rightarrow P$  paradigm holds that the structure of the market determines the firm’s conduct and that conduct determines market performance, for example, profitability, efficiency, technical progress, and growth. The model thus sought to establish that certain industry structures lead to certain types of conduct which then lead to certain kinds of economic performance. In particular, highly concentrated industries cause conduct which leads to poor economic performance, especially reduced output and monopoly prices.” Alison Jones and Brenda Sufrin, EU Competition Law: Text, Cases, and Materials p. 21.

<sup>69</sup> Jürgen Wandel, Competition, Market Power and Antimonopoly Policy: A Hayekian Perspective, p. 325.

<sup>70</sup> George W. Stocking, 64 Yale L.J., 1954-1955, p. 1112.



enshrined in the Constitution of India, 1950, and to prohibit any kind of monopolistic or restrictive trade practices in the Indian market. The wave of economic liberalization reached the Indian territory in early 1990s. The liberalization regime demanded a more robust legislation to promote competition amongst market players and not only to control monopoly which was the purpose of MRTP Act. On 27 February 1999 the then Finance Minister, *Yashwant Sinha* in his budget speech stated that:

*“The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions”*<sup>71</sup>

Accordingly, the Government of India appointed a High-Level Committee in 1999 for recommendation on modern anti-trust legislative framework which can be suitable for India.<sup>72</sup> The Committee recommended to replace the existing MRTP Act with a new legislation that will cover anticompetitive agreements, abuse of dominant position, merger control and competition advocacy by a new authority. This promoted the government to replace the MRTP Act with the Competition Act, 2002 (**Act**) and the establishment of its enforcement agency, the Competition Commission of India (**CCI**). With the enactment of the Competition Act, 2002 the market shifted from command and control regime to an open market regime.

The Act prohibits/regulates:

(A) Anticompetitive agreements (section 3 of the Act)

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<sup>71</sup> *Yashwant Sinha*, Budget 1999-2000, p. 8

<sup>72</sup> *CUTS International*, Why India adopted Competition Law, Centre for Competition Investment and Economic Regulation (2006), p. 20.

(B) Abuse of dominant position (u/s 4 of the Act)

(C) Combinations (u/s 5 & 6 of the Act).

Despite the fact that the Act was enacted in 2002, the enforcement under the act only began since 2009, due to a pending judicial proceeding before the Apex court on the validity of the Act. This is one of the reasons that the competition jurisprudence in India is still in its nascent stage.

## 2. Purpose of the Competition Act, 2002

The purpose of the Act can be deduced from the Preamble of the Act. The Preamble clearly highlights the CCI's role in preventing "*adverse effect on competition, to promote...competition...protect the interest of consumers...ensure freedom of trade*".<sup>73</sup> The CCI in 2014 went further and stated that section 18 of the Act<sup>74</sup> gave the wording of the Preamble, the substantive value by imposing the same as the statutory duty of the CCI.<sup>75</sup> Under the India law the concept of 'efficient competition' or 'workable competition' is not a part of statute nor they have been interpreted by the CCI.

## B. Relevant market

In order to arrive at the conclusion that the enterprise holds a dominant position, or an agreement is anti-competitive in nature, it is pertinent to assess the market power in a specific relevant market. As per the *OECD* (2012):

*"the necessity of defining markets has been part of the competition policy of the EU from its inception and pre-condition both to assess dominance under Article 102 TFEU and effect based infringements"*

<sup>73</sup> Preamble attached to the Competition Act, 2002, (12 of 2003).

<sup>74</sup> See Annexure III.

<sup>75</sup> *Ramakant Kini v Dr. L.H Hiranandani Hospital*, (2014) CCI 2, para 8.

*under Article 101(1) and (3) TFEU as well as an essential part of the EU Merger Control Regime”.*<sup>76</sup>

In the present sub-section the concept of relevant market as laid down under EU and Indian jurisdiction will be briefly analyzed.

### ***I. European Union***

The most comprehensive legal document that aimed to define ‘relevant market’ in EU is the *Commissions Notice* (1997). The Commission’s Notice explicitly states that the relevant market has two dimensions: relevant product market and relevant geographic market.<sup>77</sup> The main aim of the notice is to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its on-going enforcement of Community competition law.

The Commission defined the relevant product market as a market comprising “*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use*”<sup>78</sup>. On the other hand the ‘relevant geographic market’ is defined as comprising:

*“the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.*<sup>79</sup>

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<sup>76</sup> *Delegation of the European Union, Roundtable On Market Definition* (2012), p. 2.

<sup>77</sup> Commission Notice on the definition of relevant market (1997), para 2.

<sup>78</sup> See *ibid*, para 7.

<sup>79</sup> See *ibid*, para 8.

Market definition is key to establish the market distortion. As per the *Commissions Notice* (1997), determination of both ‘relevant product market’ and ‘relevant geographic market’ has been done based upon the principle of three constraints that the undertaking involved in a competitive market faces: demand side substitutability, supply side substitutability and potential competition. The ECJ in *Continental Can* case held that both the demand side substitutability, supply side substitutability need to be studied to ascertain the ‘relevant market’.

**(A) Demand substitution:** Demand-side substitutability checks the consumer willingness to switch substitute products in response to relative changes in price.<sup>80</sup> It is pertinent to mention that the respective product characteristics, product use and product prices are usually important factors in such an analysis. In case of ‘relevant product market’ analysis, the principle study rests on the incapability of the enterprises to raise prices easily in case the consumers have the choice of substitute products. On the other hand in case of ‘relevant geographic market’, the assessment is based on the extent to which the customers of a product in question would switch to suppliers located in other territories in response to a increase in price of that given product.<sup>81</sup> As per the Commission this test of analysing the relevant market ‘constitutes the most immediate and effective disciplinary force on the suppliers of a given product’<sup>82</sup>.

**(B) Supply substitution:** Supply side substitution analyses the possibility of customers to switch to alternative

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<sup>80</sup> *Delegation of the European Union*, Roundtable On Market Definition (2012), p. 3, para. 8.

<sup>81</sup> *Delegation of the European Union*, Roundtable On Market Definition (2012), p. 4, para 10.

<sup>82</sup> Commission Notice on the definition of relevant market (1997), para 13.

suppliers. The moot question is not the customers' choice, but the suppliers capability and choice to join the market of different product, in case of increase in price of the new product, with same effectiveness and immediacy of the consumer in demand side substitution analysis. If the suppliers are capable of shifting with such effectiveness and immediacy, then even though the new product is not a substitute of the old one, still the 'relevant product' market is to be treated as one.<sup>83</sup>

**(C) Potential competition:** Once the market has been determined then only the potential competition is analysed.<sup>84</sup> It assesses the conditions of entry for the competitor. It has been explicitly stated in the *Commissions Notice* (1997) that potential competition is usually not taken into account when defining markets, but only when such market position is suspected of creating distortion of competition.<sup>85</sup>

The ECJ way back in 1973 (in *Continental Can case*) dealt with the concept of 'relevant market', before *Commissions Notice* (1997) by addressing the product market definition.<sup>86</sup> The Court of First Instance has held in *Coca Cola case*<sup>87</sup> that the definition of relevant market is to be made on case to case basis and precedence of past dominant position cannot be cited in such situation.

The Commission has used various evidences to establish the interchangeability or substitutability of the products: viz. product

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<sup>83</sup> *Delegation of the European Union*, Roundtable On Market Definition (2012), p. 4, para 11,12

<sup>84</sup> *Delegation of the European Union*, Roundtable On Market Definition (2012), p. 3.

<sup>85</sup> Commission Notice on the definition of relevant market (1997), para 24.

<sup>86</sup> *Thomas E. Kauper*, 20(5) *Fordham International Law Journal*, 1996, p. 1694.

<sup>87</sup> Judgment of 22 March 2000, *Coca-Cola Company v Commission*, Joined cases T-125/97 and T-127/97, ECLI:EU:T:2000:84, para. 82.

characteristics and end uses;<sup>88</sup> consumer Survey Evidence and consumer preference,<sup>89</sup> price information,<sup>90</sup> classification of industrial products,<sup>91</sup> relevance of different categories of customers or channels of distribution.<sup>92</sup> Similarly the Commission has also applied various sources of evidence to ascertain the demand-side and supply-side substitution in different geographic areas: viz. regulatory trade barriers<sup>93</sup>, distribution facilities, transport costs,<sup>94</sup> consumer preferences<sup>95</sup> etc.

## II. India

Section 4 of the Act, corresponding to Article 102 of TFEU, deals with the aspect of what qualifies as an abuse of ‘dominant position’.<sup>96</sup> As per the Explanation (a) attached to the section, Dominant Position is defined as:

*“position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favour”.*

<sup>88</sup> Commission Decision of 23 February 1998 declaring a concentration to be compatible with the common market, Case No IV/M.1094 - *Caterpillar/Perkins Engines*, OJ C 93, 28.3.1998, paras. 9-14.

<sup>89</sup> Commission Decision of 19 July 1991 declaring the compatibility with the common market of a concentration, Case No IV/M068 - *Tetra Pak/Alfa-Laval*, OJ L 290, 22.10.1991, para. IV.B.2.

<sup>90</sup> Commission Decision of December 2008 declaring a concentration to be compatible with the common market and the EEA Agreement, Case COMP/M.5046 *Friesland Foods/Campina*, C (2008) 8459 final, paras. 199-206, 1016-1017.

<sup>91</sup> Commission Decision of 10 June 1991 declaring a concentration to be compatible with the common market, Case IV/M.72, *Sanofi/Sterling Drug*, para. 14.

<sup>92</sup> Commission Decision of January 31, 2002 declaring a concentration to be compatible with the common market, Case COMP/M.2609, *HP/Compaq*, para.13.

<sup>93</sup> Examples are Legal monopolies, price regulation technical standards or specifications, Commission Decision of August 25, 2005, Case COMP/M.3687, *Johnson & Johnson/Guidant*, 2006 O.J. L173/16, para. 68.

<sup>94</sup> Commission decision of December 21, 1993, Case IV/M.358, *Pilkington-Techint/SIV*, para. 19.

<sup>95</sup> Commission decision of June 21, 1994, Case IV/M.430, *Procter & Gamble/VP Schickedanz*, 1994 O.J. L354/32, para. 78.

<sup>96</sup> See Annexure II, Section 4 Competition Act, 2002.

Similar to that of the EU, the Act also requires establishing a 'relevant market' in order to determine the 'dominance'. However, unlike TFEU, the Act has given the statutory guidance to the CCI to determine 'relevant market'. As per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. This means that the product or a service may have either the product market or geographic market or both in order to determine its dominant nature.

The relevant product market has been defined under section 2(t) of the Act as those products or services that are regarded as interchangeable or substitutable by the consumer. This consideration must be based on the characteristics of the product, its prices and intended use. The relevant geographic market on the other hand has been defined under section 2(s) as a market comprising the area in which there exist distinct homogenous competitive conditions in terms of demand and supply of goods or services that can be distinguished from the conditions prevailing in the neighbouring areas. It is interesting to note that the section 19(5) of the Act mandates the CCI to consider and analyze both the relevant product and relevant geographic market.

Now an important question may arise what the CCI need to check in order to determine relevant product and relevant geographic market. In the case of *Sunil Bansal*<sup>97</sup> the CCI held that in order to determine the 'relevant product market', the CCI in terms of section 19(7) of the Act has to give,

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<sup>97</sup> *Sunil Bansal and Ors. v. Jaiprakash Associates Ltd. and Ors.*, CCI Case Nos. 72 of 2011, 16, 34, 53 of 2012 and 45 of 2013, para 78.

*“..due regard to all or any of the following factors viz., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.”*  
[emphasis added]

Similarly the CCI also held that to determine the ‘relevant geographic market’, the CCI, as per section 19(6) of the Act has to give,

*“due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services”.* [emphasis added]

This shows that the competition authorities in India follow a qualitative approach similar to that of the EU.

### **C. Interim Conclusion**

The above analysis clearly shows that the competition legislation in India is in line with the EU legislation in determining the relevant market. But somewhere the influence of the MRTP Act can be seen in the present Act. The Preamble attached to the current Act gives a broad objective to the CCI that gives absolute free run to the authority. The EU case law in this aspect is quite specific and clearly restricts the Commissions outreach. It is high time that the Indian authorities realize that restricting monopoly is not the duty of the CCI. Thus it is concluded that Indian competition authorities need to frame an equivalent concept of ‘workable’ or ‘efficient’ competition, so as to create a perimeter for the CCI which in turn will increase the efficiency of the CCI itself.



## PART 4

### CODE-SHARING AGREEMENT A GREY AREA UNDER COMPETITION LAW

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#### A. Introduction

CSAs are commercial agreements between marketing and operating carriers. Alliances may adopt limited marketing arrangement, such as reciprocal frequent flyer programs, or more complex agreements such as code-sharing to exploit the economies of scale. CSAs first became popular in US. In simple terms this form of agreement allows the airline to sale the tickets for its partner (parties to the agreement) to the consumer.

*European Competition Authority* (2006) tried to define CSA with regard to its strategic role in marketing.<sup>98</sup> However, the Commissions definition of CSA is more concrete and functional:

*“an enhanced form of interlining that includes one airline (the marketing airline) marketing services on flights operated by the other airline (the operating airline) under its own name and under its own designator code, regardless of whether it is construed in form of a free-flow or blocked space agreement or in other form”.*<sup>99</sup>

CSAs have been classified on the basis of two basic forms: complementary and parallel alliances.<sup>100</sup> Complementary alliances occur when contracting air carriers link existing flight networks, resulting in a new complementary network that supplies traffic to each other. On the other hand, in parallel alliances the partners competing

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<sup>98</sup> “agreement between two or more air carriers whereby the carrier operating a given flight allows one or more other carriers to market this flight and issue tickets for it as if they were operating the flight themselves”, *European Competition Authorities*, 2 Eur. Competition J. 265 2006, para. 11.

<sup>99</sup> Commission Decision of 28.8.2009 declaring a concentration to be compatible with the common market and the EEA Agreement, Case No COMP/M.5440, *Lufthansa/ Austrian Airlines*, p. 87.

<sup>100</sup> The author (Yan Du) referred to the classification put forward by *Park* (1997), *Yan Du*, Code-sharing in the U.S. Airline Industry (2008), p. 50.

in the same flight routes agrees to collaboration. The anti-competitive debates mostly revolve around the later model of cooperation.

It is interesting to note that literature in the early 2000s suggests that the CSAs have beneficial effect in reducing market prices. *Park* (1997),<sup>101</sup> *Park and Zhang* (2000)<sup>102</sup>, *Brueckner and Whalen* (2000),<sup>103</sup> *Brueckner* (2001)<sup>104</sup> all these economic studies have agreed the fact that international code-sharing alliances are likely to increase passenger volumes, decrease air fares and improve consumer welfare. However the study conducted at the end of the decade gives somewhat opposite perspective. Study conducted by *Steer Davies Gleave* (2010),<sup>105</sup> showed that both parallel (online code share) and unilateral (network extension) codeshare agreements can affect the competition. The report however claimed that Behind and Beyond-codeshare<sup>106</sup> does not have any negative effect on the competition. The *Steer Davies Gleave* (2010) report based its analysis on both qualitative and quantitative discussion. One significant observation made by *Steer Davies Gleave* (2010) is that any general approach to analyze the impact of code sharing effect will be harmful as each market will have different impact.

The issue of CSAs and the aircraft liability (in case of accident) is a point of discussion amongst the academicians, but as the same does not have any competition law element the same has not been discussed under this thesis. The point of assessment under this part will be *firstly*, whether the CSAs which are horizontal agreements by

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<sup>101</sup> *Jong-Hun Park*, *Strategic Airline Alliance: Modelling and Empirical Analysis* (1997), pp. 151, 152.

<sup>102</sup> *J. Park, Zhang*, 16 *Review of Industrial Organization*, 2000, pp. 367-384

<sup>103</sup> *J. Brueckner and T. Whalen*, 43 *Journal of Law and Economics*, 2000, pp. 503-545.

<sup>104</sup> *J. Brueckner*, 19 *International Journal of Industrial Organization*, 2001, pp. 1475-1498.

<sup>105</sup> *Steer Davies Gleave*, *Competition Impact of Airline Code-Share Agreements-Final report* (2007), p. 79.

<sup>106</sup> Refer Annexure IV.

nature,<sup>107</sup> can be a matter of scrutiny under Article 101 TFEU and corresponding section of the Indian Competition Act. *Secondly*, can CSA restrict the market competition and what are laws that deal with it under both the jurisdictions? *Thirdly*, the activeness of the Competition authorities in analyzing the CSA in light of Article 101 of TFEU and section 3 of the Act will be analyzed. *Fourthly*, the defenses the CSA partners can take to outweigh the anti-competitive effect in both jurisdiction and lastly what is the interim conclusion on this issue.

### **B. Types of code sharing agreements and their effects**

It is virtually impossible for all the airlines to serve all around the world. With the successive deregulation directives, the airlines increased their networks by entering into alliances. Code sharing agreement gives the airlines such leverage to increase their market presence. The Commission categorically held in *SAS/Maersk Air case* that code-sharing agreements qualify as an ‘agreement’ concluded between ‘undertakings’ within the meaning of Article 101 TFEU.<sup>108</sup> Even interpreting section 3 of the Act, it may be concluded that the same falls under the scope of the said provision. The CSAs can be also be classified on the basis of its structural arrangement:

**Individual Code sharing agreement:** whether this form of agreements will fall under the scrutiny of Article 101(1) TFEU and the India counterpart, depends on the facts and the circumstances of the case, e.g. the size of the airlines involved,

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<sup>107</sup> India submitted before the OECD that the code-sharing agreement is considered as an horizontal agreement, *India*, Airline Competition (2014), para 42.

<sup>108</sup> Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area, Case COMP.D.2 37.44, *SAS Maersk Air* and Case COMP.D.2 37.386, *Sun-Air versus SAS and Maersk Air*, OJ L 265, 5.10.2001, paras. 61, 69; European Competition Authorities, 2 Eur. Competition J. 265 2006, paras. 32, 33.

the thickness of the route or the presence of market entry etc.<sup>109</sup>

**Code sharing agreement as a part of the alliance agreement:** This form of agreement are ‘almost always’ considered to be under the purview of Article 101 TFEU due its far reaching impact in various markets.<sup>110</sup>

### C. Anti-competitive agreements – comparative law

Section 3(1) of the Act dealing with anti-competitive agreement is largely based on the structural model of Article 101 of TFEU. Though the decisions under Article 101 TFEU are not binding on Indian authorities, but they are useful guides in understanding the holistic view of the legislation. Moreover, similar to Article 101 TFEU, the core principle of competition law applicable on cartel is also mentioned in section 3 of the Act.

#### I. Scope

The Article 101 of the TFEU prohibits any agreement (both horizontal and vertical) or concerted practice between the undertakings, or decision of an association of undertakings, which has an object effect on its object or effect the prevention, restriction or distortion of competition and which has an effect on trade between EU member states. This prohibition is applicable on all 28 member states of EU and on any agreement, having similar nature, implemented within EU.<sup>111</sup> Similarly the Indian Competition Act also addresses both horizontal and vertical agreements under section 3(1) of the Competition Act.<sup>112</sup> However, the main object of section 3 of the Act is to prevent “*appreciable adverse effect on competition*”.<sup>113</sup> It is also

<sup>109</sup> *European Competition Authorities*, 2 Eur. Competition J. 265 2006, para. 41.

<sup>110</sup> See *Ibid.*

<sup>111</sup> *Euan Burrows, Irene Antypas & Ruth Allen* (Ashurst LLP), p. 98.

<sup>112</sup> *Sajjan Khaitan vs Eastern India Motion Picture*, CCI Case No.16/2011, para 11.

<sup>113</sup> See *Ibid.*

relevant to mention that the Indian competition authorities usually consider the anti-competitive effect of the vertical agreement leniently than the horizontal one, thereby imposing stricter analysis on horizontal agreements.<sup>114</sup>

In order to apply Article 101(1) TFEU, two conditions must be fulfilled: the agreement or arrangement must affect trade between the Member States and it must have a distortive effect on competition.<sup>115</sup> Thus an agreement that solely affects the Member States market would be a subject to the national competition rules of that territory.<sup>116</sup> This is quite unique for the Indian competition law, as India being a quasi-federal State, the Act is applicable to the whole of the territory of India.<sup>117</sup>

## **II. Objects**

As per *Article 81(3) Guidelines* (2004) issued by the Commissions, the object of the Article 101 TFEU is to protect competition on the market as a means of enhancing consumer welfare and to ensure an efficient allocation of resources.<sup>118</sup> The *GlaxoSmithKline case* further elaborated this principle wherein the Court of First Instance were of the view that to analyse anti-competitive nature of an agreement the restriction on economic freedom of the parties must be considered along with the consumer harm and more so the detrimental effect on the final consumer also need to be demonstrated.<sup>119</sup>

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<sup>114</sup> Report of High Level Committee on Competition Policy and Law (2000), paras. 3.4, 4.3-1.

<sup>115</sup> *Philippe Ruttle and Leandro*, in: *Pablo Mendes Leon* (ed.), *From Lowlands to High Skies – A multi-level jurisdictional Approach towards Air Law*, p. 149.

<sup>116</sup> See *Ibid.*

<sup>117</sup> Except the territory of Jammu and Kashmir, Section 1(2), Competition Act, 2002.

<sup>118</sup> Commission Notice, *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004, para. 13.

<sup>119</sup> Judgment of 27 September 2006, *GlaxoSmithKline Services v Commission*, Case T-168/01, ECLI:EU:T:2006:265, para. 171.

Article 101(1) TFEU prohibits any agreements (both written and by conduct) which have as their ‘object’ or ‘effect’ the restriction of competition. ‘Restriction of competition’ includes the prevention and distortion of competition.<sup>120</sup> The Guidelines suggest that even if the horizontal co-operation agreement does not restrict competition by object, the actual and potential effects need to be analyzed in determining the appreciable restrictive effects on competition. The EU law recognizes that the restrictive effects on competition must have, or likely to have an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality and variety, or innovation.<sup>121</sup>

Under the Indian law the objects can be deduced from the duties of the CCI. Section 18 of the Act prescribes that the CCI has the duty to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India.<sup>122</sup> As far as the restriction is concerned, the Act explicitly mentioned the following four kinds of horizontal agreements (written and practice<sup>123</sup>) which are presumed to be anticompetitive:<sup>124</sup> agreements that directly/indirectly fix purchase/sale price; aimed at limiting or controlling production, supply, markets, technical development and investment; concluded for sharing of markets; and are termed as collusive tendering and bid rigging. Apart for the bid rigging document, all other documents have been explicitly considered anti-competitive under the Article 101 TFEU.

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<sup>120</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [Official Journal C 11 of 14.1.2011].

<sup>121</sup> Comparative analysis of section 3(3) of the Act and Article 101

<sup>122</sup> Refer Annexure III.

<sup>123</sup> Cement and tyre case

<sup>124</sup> Section 3(3) of the Act

### III. *De-minimis rule*

Both under the EU law and the Indian law the competition authorities were careful while drafting Article 101 TFEU and section 3 of the Act to consider that only agreements having ‘appreciable adverse effect’ of competition in the common market and in the territory of India respectively, is targeted.

#### 1. *European Union*

Under EU law, the prohibition under Article 101 TFEU only targets such conduct which significantly affects competition between the parties and the competitors.<sup>125</sup> This *de minimis* interpretation laid down by the EU Court has been acknowledged and established by the Commission in its *Notices on Minor Agreements* (2001).<sup>126</sup> In 2014, the Commission adopted new notice on Minor Agreements (*de minimis*) subsequent to the *Expedia case*,<sup>127</sup> wherein the CJEU held that in case the agreement is anti-competitive by its ‘object’, the *de minimis* interpretation cannot be applied. Hence the current legal regime in EU states that safe harbour threshold is applicable to agreements that are anti-competitive by ‘effect’.<sup>128</sup>

As per the *de minimis* notice if the contracting parties does not hold more than 10% market share, the effect based analysis will not be used as there is hardly any chance of appreciable restriction of competition by ‘effect’.

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<sup>125</sup> “An agreement falls outside the prohibition in Article 85 [now Article 101 TFEU] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question”, Judgment of 9 July 1969, *Franz Völk v S.P.R.L. Ets J. Vervaecke*, Case 5-69, ECLI:EU:C:1969:35, para. 5&7; Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, Case C-226/11, ECLI:EU:C:2012:795, para. 37.

<sup>126</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001.

<sup>127</sup> Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, Case C-226/11, ECLI:EU:C:2012:795, para. 38.

<sup>128</sup> *Maria Gaia Pazzi*, The Review of the De Minimis Notice (2014), p. 247.

## 2. India

Section 3(1) of the Act prohibits ‘any’ agreement that has an “*appreciable adverse effect on competition*”. In India there is a *de-minimis* rule under section 5 of the competition act dealing with mergers and acquisitions.<sup>129</sup> However, there is no explicit *de-minimis* rule for the horizontal anti-competitive act falling under section 3 of the Act.<sup>130</sup>

As the CSA is a horizontal agreement, the same falls under the scrutiny of section 3(1) and 3(3) of the Act which is quite strict. Though section 3(1) of the Act prohibits “*appreciable adverse effect on competition*”, the Act does not define “*appreciable adverse effect on competition*” which gives a broad leverage to the CCI to interpret the term within the objectives of the Act. Therefore it is for the competition authorities to see whether the agreement falls under the categories mentioned under section 3(3) of the Act or not. The section 19(3) of the Act, however, specifies a number of factors which the CCI should take into account when determining whether an agreement has an appreciable adverse effect on competition, including whether the agreement creates barriers or forecloses competition by creating impediments to entry, or drives existing competitors out of the market.

Therefore the Indian competition authorities have a huge leverage to analyze the effect or the intended effect of anti-competition. This absence of *de minimis* rule in horizontal agreement segment will

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<sup>129</sup> For detailed discussion on this topic please refer to *Tony Reeves and Dan Harrison*, India’s New Merger Control Regime: When Do You Need to File? (2011).

<sup>130</sup> *Abir Roy*, Adoption of rule of reason in Resale Price Maintenance under the Indian competition law: Rule of reason (2016); *Ghanshyam Das Vij v M/s Bajaj Corp. Ltd. & Others*, CCI Case no. 68/2013.



pose a threat upon the airlines despite the fact how small share of market they cover.

#### ***IV. ‘Rule of reason’ or per se prohibition—which one is applicable for anti-competitive agreement?***

This sub-sections aims to study the two approach of interpretation of the anti-competitive agreements both under Article 101 TFEU and section 3 of the Act. In EU while one approach says that certain agreements are *per se* void, the other states that the prohibition is only applicable if the negative effect of competition outruns the positive aspect. It is univocally accepted by the Indian courts that India follows the later approach, i.e. ‘rule of reason’ approach, which imposed the duty to consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.<sup>131</sup>

##### *1. European Union*

According to the *per se* approach, Article 101(1) TFEU has the capacity of prohibiting certain agreements by considering its object only. The case of *Société Technique Minière* established a two pronged approach to find that the agreement falls under this category of competition hindrance. Firstly, the ‘*object and the purpose*’ of the agreement is to be checked and where the same is not clear to establish that the agreement is an anti-competitive, it must be checked that whether there is an ‘*effect*’ of preventing, restricting or distorting the competition.<sup>132</sup> In both *Métropole*,<sup>133</sup> and *Van den Bergh*

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<sup>131</sup> Arndt Christiansen and Wolfgang Kerber, Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs. Rule of Reason" (2006), p. 4.

<sup>132</sup> Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm GmbH*, Case 56-65, ECLI:EU:C:1966:38, para. 249.

<sup>133</sup> Judgment of 18 September 2001, *Métropole télévision v Commission*, Case T-112/99, ECLI:EU:T:2001:215, para. 72.

*Foods*,<sup>134</sup> the Court of First Instance rejected the ‘rule of reason’ argument of the applicant and held that the *per se* approach is applicable as far as Article 81(1) EC is concerned. The court held in *Métropole* that balancing of negative and positive approach of restriction of competition, the inherent for ‘rule of reason’, comes under the very nature of Article 81(3) EC (now 101(3) TFEU).<sup>135</sup> In 2012, the CJEU re-affirmed this position in the case of *Expedia Inc.*<sup>136</sup> by stating that “*there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition*”. Though in this decision, Court shied from using the term *per se*, still the wording of the decision reflects its biasness towards *per se* approach.

Thus according to *Paul/ de Búrca* (2015), if any agreement or understanding is found to be heinous, the same qualifies as anti-competitive by ‘object’, the ‘effect’ test (rule of reason) in that case need not be applied for such anti-competitive agreements or understanding.<sup>137</sup>

## 2. India

At the outset I would like state that Indian competition act follows the ‘rule of reason’ approach for vertical agreements whereas *per se* prohibition approach for horizontal agreement.<sup>138</sup> In terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution,

<sup>134</sup> Judgment of 23 October 2003, *Van den Bergh Foods Ltd v Commission*, Case T-65/98, ECLI:EU:T:2003:281, para. 106.

<sup>135</sup> *Kapteyn and VerLoren van Themaat*, The Law of the European Union and European Communities, p. 794.

<sup>136</sup> Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, Case C-226/11, ECLI:EU:C:2012:795, para. 35.

<sup>137</sup> *Paul/ de Búrca*, EU Law, p. 1017, 1018; Judgment of 4 October 2011, *Football Association Premier League Ltd v QC Leisure*, Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, para. 135.

<sup>138</sup> *Amarchand Mangaldas*, Sections 3 and 4 of the Competition Act, 2002 Come into Force, p. 2.

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. The parliamentary standing committee considered such agreements as illegal *per se* and opined that such agreements do not need a rule of reason approach to establish its anti-competitive nature.<sup>139</sup> Section 3(1) of the Act corresponds to Article 101(1) TFEU. However unlike 101(1) TFEU, to understand the applicability of the *per se* approach or rule of reason approach in the Indian competition act, it will be pertinent to analyze the other provision of section 3 of the Act and the concept of burden of proof developed by the CCI. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in section 3(1) of the Act shall be void.

As already mentioned that sub section 3(3) of the Act, that certain horizontal agreements are considered anti-competitive, they are considered to be illegal *per se*. In case of horizontal agreement the burden of proof to deny any the ‘*appreciable adverse effect to competition*’ of an agreement lies on the accused.<sup>140</sup> Interestingly, this presumptive rule is not applicable on vertical agreements, covered under section 3(4) of the Act. This burden of proof to establish ‘*appreciable adverse effect to competition*’ in case of vertical agreements rests on the informant and CCI.<sup>141</sup> In the case of *Re: Ghanshyam*, the CCI has adopted *de minimis test* and held that vertical agreements provided under Section 3(4) can only be void if such agreements cause an AAEC in the market based upon the factors listed in Section 19(3) of the Act.<sup>142</sup> CCI went on to observe that vertical agreements “*can be objectively justified on certain grounds*

<sup>139</sup> Parliamentary Standing Committee on Home Affairs, Ninety-Third Report on the Competition Bill, 2001 (2002), para. 4.3.3.

<sup>140</sup> *FICCI-Multiplex Association of India vs United Producers*, CCI Case No. 1 of 2009, para. 23.51.

<sup>141</sup> *Re: Ghanshyam Dass Vij and Bajaj Corp. Ltd.*, [2015] CCI, para. 81-83.

<sup>142</sup> *Abir Roy*, Adoption of rule of reason in Resale Price Maintenance under the Indian competition law: Rule of reason (2016).

*like protection from free riding, efficient management of sales of product, economic efficiency, etc”*.<sup>143</sup>

### 3. Code-sharing agreements

Applying the above principle in case of CSAs, the competition authorities would need to establish that the agreement is capable of restricting competition by ‘object’ in order to make it *per se* void under EU law. To establish ‘effects’, contents of the CSA, the number of parties involved to it, their joint market position need to analyze, relevant market, need to be considered. *Barents* (2008)<sup>144</sup> observed that in order to establish a restriction on competition two requirements are to be fulfilled. *Firstly*, the agreement needs to restrict the free market behaviour and *secondly*, if the agreement is not violative *per se*, either an intended ‘effect’ or an actual ‘effect’ on the third party (competitors, suppliers or buyers) need to be established.<sup>145</sup> In order to assess the intended effect of CSAs all markets actually and potentially affected by the agreement need to be considered.<sup>146</sup> The other factors that help to ascertain the actual or intended effect of code sharing agreements are: allocation of commercial risk between the parties, extent of network overlap, likelihood of spill-over effect.<sup>147</sup> This EU principle will be more or less applicable under the Indian legal context as well to ascertain the anti-competitive nature of the CSAs under section 3 of the Act.

<sup>143</sup> *Re: Ghanshyam Dass Vij and Bajaj Corp. Ltd.*, [2015] CCI, para. 75.

<sup>144</sup> *R. Barents*, in: Kapteyn and VerLoren van Themaat (ed.), *The Law of the European Union and European Communities*, p. 802.

<sup>145</sup> See *Ibid.*

<sup>146</sup> *European Competition Authorities*, 2 *European Competition Journal*, 2006, para 48.

<sup>147</sup> See *Ibid.*

## **D. Code-sharing agreements interference by competition authorities in EU and India**

### ***I. European Union***

The first case in which the Commission considered the validity of the CSAs was the arrangement between *SAS and Maersk Air*.<sup>148</sup> Commission found that the nature of the market-sharing agreements, objectively restricted the competition and the same is caught under Article 81 EC.<sup>149</sup> Though the Commission imposed fine on both the airlines, they did not condemn the market distortion effect of CSAs as such.<sup>150</sup> It is to be clarified that the Commission has generally looked into CSA aspects in the context of wider airline alliance. Some of the major decisions in which the Commission gave approval to overlapping CSA includes:<sup>151</sup> *Air France/ KLM*<sup>152</sup>; *Lufthansa/SN Air holdings*<sup>153</sup>; *Lufthansa/Swiss*<sup>154</sup>.

Though the Commission did not deal with the CSA are directly under Article 101 TFEU, the Italian competition authorities have dealt with CSAs in two judgments as per the Italian law,<sup>155</sup> equivalent to 101 TFEU.<sup>156</sup> In 2002, the *Consiglio di Stato* (highest court of Italy) upheld the view taken by the Competition Authority (*Autorità*

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<sup>148</sup> Commission Decision of 18 July 2001 relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area, Case COMP.D.2 37.44, *SAS Maersk Air* and Case COMP.D.2 37.386, *Sun-Air versus SAS and Maersk Air*, OJ L 265, 5.10.2001.

<sup>149</sup> See *Ibid*, paras. 71, 72.

<sup>150</sup> *Philippe Ruttley and Leandro*, in: *Pablo Mendes Leon* (ed.), *From Lowlands to High Skies*, p. 153.

<sup>151</sup> *Steer Davies Gleave*, *Competition Impact of Airline Code-Share Agreements-Final report* (2007), p. 21.

<sup>152</sup> Commission decisions of 11 February 2004, *Air France/ KLM*, Case COMP/M.3280, para. 158(f).

<sup>153</sup> Commission decision of 22 June 2009, *Lufthansa/SN Air holdings*, Case COMP/M.5335, para. 441.

<sup>154</sup> Commission decision of 4 July 2005, *Lufthansa/Swiss*, Case COMP/M.3770, para. 197(e).

<sup>155</sup> Article 2 of Law No 287 of 10 October 1990.

<sup>156</sup> *Philippe Ruttley and Leandro*, in: *Pablo Mendes Leon* (ed.), *From Lowlands to High Skies*, p. 153.

*Garante della Concorrenza e del Mercato*) that the code sharing agreement between Alitalia and a regional domestic airline infringes the Italian competition law. In the second instance, in 2004, the *Tribunale Amministrativo Regionale dell Lazio* referring to the dictum of *Consiglio di Stato* quashed the prohibition decision of the Italian competition authority.<sup>157</sup> The decision of the Italian competition authority has specific relevance and importance under EU law as the competition authority conducted a detailed analysis on code-sharing agreement in EU. Pursuant to Article 6 of the *Council Regulation 1/2003*, the decision forms a part of *acquis communautaire*, since national courts have competence to deal with EU competition rules.<sup>158</sup>

In 2011 the Commission initiated formal investigation against the code sharing agreement entered between *Lufthansa* and *Turkish Airlines* and between *Brussels Airlines* and *TAP Air Portugal*.<sup>159</sup> The Commission claimed that the free-flow, ‘parallel, hub-to-hub code share’ agreements may distort competition leading to higher prices and less consumer welfare on routes between Germany and Turkey and between Belgium and Portugal, respectively. As the agreement is parallel in nature, the Commission suspected that such an agreement will restrict competition between two major airlines in the inspected routes.<sup>160</sup> In 2013, Lufthansa announced to drop code share agreement with Turkish Airlines on the plea that the current set-up no longer ‘makes financial sense’ and not profitable anymore after Turkish Airlines built its own route network from its Istanbul base to regional airports in Germany and Austria.<sup>161</sup>

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<sup>157</sup> See *Ibid* at p. 154.

<sup>158</sup> See *Ibid* at p. 155.

<sup>159</sup> In the Munich – Istanbul and Frankfurt – Istanbul routes; *Herden, Attorneys, Examination Of Code-Share Agreements Under Competition Law* (2015).

<sup>160</sup> See *Ibid*.

<sup>161</sup> *CH-aviation, News Austrian, Lufthansa drop codeshare agreement with Turkish Airlines* (2013).

The above situation suggests that there is lack of any concrete policy in EU with regard to CSAs. The enterprises have to follow self-assessment with greater uncertainties. As Article 101(1) TFEU established that the effect based step need to be undertaken to scrutinize the anti-competitive nature of an agreement if by object it was not found to restrict the competition.<sup>162</sup> The competition authorities need to be considered the following as a relevant information: allocation of commercial risk, extent of network overlap (in both parallel and complementary code-sharing model), likelihood a negative spill over effect along with other traditional requirements. The *European Competition Authorities* (2006) has also highlighted that in case CSAs that forms a part of airline alliance, other factors like elements of cooperation beyond the code-sharing agreement, duration of the agreement, kind of information which is exchanges, may also be examined.<sup>163</sup>

## ***II. India***

The hard time faced by the Indian aviation sector forced Jet airways and Kingfisher, jointly having a market share of around 60%,<sup>164</sup> to enter into alliance which included code sharing on both domestic and international route, joint network deployment of aircraft, joint ground handling etc. Though DG found that the CSA is anti-competitive and in violation of section 3, 4 of the Act. The CCI overruled the decision of the DG stating that there is nothing to show that CSAs amounts to determining the airfares or limiting the supply or allocating the market.<sup>165</sup>

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<sup>162</sup> Moritz Lorenz, An introduction to EU Competition Law, p. 95; European Competition Authorities, 2 Eur. Competition J. 2006, p. 265, para. 46.

<sup>163</sup> *European Competition Authorities*, 2 Eur. Competition J. 2006, p. 265, para. 48.

<sup>164</sup> *Press Trust of India*, CCI finds no competition issue in Jet-Kingfisher alliance (2011).

<sup>165</sup> *India*, Airline Competition (2014) p. 10.

## **E. Defences available under Article 101 TFEU and Competition Act with reference to CSA**

### ***I. European Union***

Under the EU law if an agreement is not considered as a hard core-restriction and is not exempted under *de-minimis* rule or block exemption, four conditions laid down under Article 101(3) TFEU can be used as a defense to validate the legality of the agreement.<sup>166</sup> As the block exemption regime with regard to the air transport sector is no more applicable in EU the same is not relevant for the current discussion.

Considering the above legal position, in case any CSA is found to be anti-competitive under the Article 101(1) TFEU, and all the exemption clauses prescribed under Article 101(3) TFEU is fulfilled,<sup>167</sup> then only CSA will not be void.<sup>168</sup> This exemption is based on the ground that the positive contributions that any cooperative agreement generates must not only restrict amongst the members of the agreement but must also distribute among other parties which includes, but not limited to the consumers.<sup>169</sup> As there is no notification regime under Article 101 TFEU, the enterprise bears the risk of self-assessing on the application of Article 101(3) TFEU and the burden of proof to establish that they fulfilled all requirements.<sup>170</sup>

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<sup>166</sup> Xavier Vives, Competition Policy in the EU Fifty Years on from the Treaty of Rome, p. 51.

<sup>167</sup> It is a settled principle that in order to seek exemption under 101(3) TFEU, all the 4 exemptions need to be fulfilled, Judgment of 23 November 2006, *Asnef-Equifax v Asociación de Usuarios (Ausbanc)*, Case C-238/05, ECLI:EU:C:2006:734, para. 65.

<sup>168</sup> Volodymyr Bilotkach and Kai Hüschelrath, 7(2) J. Comp. L. & Econ. 2011, p 367.

<sup>169</sup> Jeffrey Goh, European Air Transport Law and Policy, p. 46.

<sup>170</sup> Rudolf Geiger, Khan and Kotzur, European Union Treaties, p. 499; Philippe Ruttle and Leandro, in: Pablo Mendes Leon (ed.), From Lowlands to High Skies, p. 150.



*Wish & Bailey* (2012) interpreting Article 101(3) TFEU were of the opinion that Commission's *Guidelines* (2004) intends that the said Article must be applied according to the narrow approach based on economic efficiency.<sup>171</sup> It is relevant to mention that the Guidelines state that Article 101(3) TFEU allows the 'pro- competitive benefits' to outweigh any 'anti- competitive effects' under Article 101(1).<sup>172</sup> Therefore, in Article 101(3) TFEU along with the economic efficiency, other facts will also be analyzed.

## ***II. India***

Under the Act the exception clause can be traced under section 3(3) and section 19(3)(d)-(f) of the Act. Unlike EU law where all the four conditions under Article 101(3) are 'mandatory' to validate an anti-competitive agreement, under section 19(3)(d)-(f) of the Act, the conditions prescribed are 'permissive'.<sup>173</sup>

## ***III. Comparative analysis***

The provision of Article 3 TFEU has substantially influenced section 3 and section 19 of the Act. This allows me to give an analytical approach in applying the defenses available for CSAs under both the jurisdictions. Under EU law and Indian law for a CSA to seek exemption under 101(3) or section 3 of the Act, following 4 tests must be fulfilled by the undertaking either mandatorily or permissively, based upon the discussion in the preceding paragraph:

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<sup>171</sup> *Richard Wish, David Bailey*, Competition Law (2012), p. 160.

<sup>172</sup> Commission Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, para. 11.

<sup>173</sup> *Aditya Bhattacharjea*, 4(3) Journal of Competition Law & Economics, 2008, p. 629.

(A) The ‘**efficiency gain test**’, i.e. the CSAs contributed to operational cost saving (cost efficiency)<sup>174</sup>, high load factors, wider service coverage (qualitative efficiencies)<sup>175</sup>.

Under Section 3(3) of the Act, the Indian competition authorities exempts Joint ventures that result in increased efficiency or are otherwise beneficial to competition.<sup>176</sup> Thus CSAs which may aim to establish common service arrangement (like sales and buying agency) are likely to receive considerable leniency. In case the CSAs does not qualify as a Joint Venture agreement, section 19(3)(e) and 19(3)(f) of the Act can be interpreted to claim the ‘efficiency’ defence for the same.

(B) The ‘**consumer gain test**’: i.e. though lower prices may be an indication of consumer gain but it is not a required criteria.<sup>177</sup> Other benefits like increased in frequency of services, better customer service, improved customer facilities, integrated services providing the customer higher level of satisfaction which qualifies as adequate importance<sup>178</sup> are also considered to determine this test.

Under the India law, section 19(3)(d) of the Act deals with increased consumer benefits as a ground of defence. It is relevant to highlight that the dissenting view of the CCI in

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<sup>174</sup> Commission Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, paras. 64 to 68.

<sup>175</sup> Commission Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, paras. 69 to 72.

<sup>176</sup> As per the current law EU law classifies the Joint Venture as concentrative and cooperative joint venture. The concentrative element to be dealt under the Merger regulation but if there is any cooperative element the same will form a part of Article 101 TFEU but within merger proceeding; *Erja Askola*, Joint Ventures At The Intersection Of Collaboration And Consolidation (2012), p. 90.

<sup>177</sup> *Philippe Ruttle and Leandro*, in: *Pablo Mendes Leon* (ed.), From Lowlands to High Skies, p. 150.

<sup>178</sup> *Rudolf Geiger, Khan and Kotzur*, European Union Treaties, p. 500.

*Deutsche Post Bank case*<sup>179</sup> imposed the obligation of CCI not only to supervise and maintain competition but also to protect consumer, referring to the Supreme Court's judgment.<sup>180</sup> This increased the burden on the CSA partners in India to establish the consumer benefits and not merely establishing the economic concept of increasing market welfare.

- The '**indispensability test**': i.e. the parties must establish that the restrictions under the CSAs are indispensable.<sup>181</sup> For this reason the clauses dealing with practical issues like length of notice period for termination of the agreement, financial penalties for early exit, post agreement non-competition obligation, obligations under the agreement. Under this head the undertaking must establish that the nature and obligation under CSA is economically practicable, less restrictive, and reasonably necessary to attain the economic efficiency.<sup>182</sup>

Under the Indian law this concept does not have any statutory validation. Even the CCI deliberately kept silent on the applicability of this concept when this defence was raised in *MCX Stock Exchange case*.<sup>183</sup>

- The '**competitive impact test**': i.e. the effective competition remains in the market even after CSA or effective potential competition can enter the market irrespective of CSA.<sup>184</sup>

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<sup>179</sup> *Neeraj Malhotra v Deutsche Post Bank Home Finance*, [2010] CCI 31 para. 18.

<sup>180</sup> *Competition Commission of India v. Steel Authority of India Ltd.*, Supreme Court, Civil Appeal No.7779 of 2010.

<sup>181</sup> *Philippe Ruttle and Leandro*, in: *Pablo Mendes Leon* (ed.), *From Lowlands to High Skies*, p. 150.

<sup>182</sup> *Richard Wish, David Bailey*, *Competition Law* (2012), p. 162.

<sup>183</sup> *MCX Stock Exchange Ltd. v. national stock exchange of India ltd*, [2011] CCI 52, para. 7.49.

<sup>184</sup> *Philippe Ruttle and Leandro*, in: *Pablo Mendes Leon* (ed.), *From Lowlands to High Skies*, p. 150.

Under the Indian Act this analysis is laid down under section 19(3)(a)-(c) of the Act. The test includes analysis of creation of barriers, eliminating existing competitors, foreclosure of competition by hindering market access. The main purpose under this provision is to determine whether agreement has any appreciable adverse effect on competition.<sup>185</sup>

#### **F. Concluding note on crucial competitive issues in both India and EU with regarding to the code-sharing agreements**

Scholars have apprehended that Code sharing agreements have the capability of reducing the competition to a significant extent in overlapping non-stop routes and over lapping connecting routes where the airlines were once a competitor and holds significant market share. Recent studies have found that network airlines (Lufthansa, Air India etc) are facing increasing competition from the low cost airlines (Ryanair, Easyjet etc) in the hubs in which once the network airlines used to dominate.<sup>186</sup>

On the other hand the competition amongst the alliance members is weakening. This encourages the network airlines to form alliances with other network airlines. By entering into alliance airlines (in form of code sharing) on one hand the network airlines increase their market reach and on the other hand they also concentrate the market and dominate the available slots<sup>187</sup> in the airport, resulting in restricting entry to new market players. Old airports are located in the heart of the major cities and have very limited slots and by forming an alliance the slots are being dominated by the network airlines who were once the flag carriers and holds significant amount of the slots

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<sup>185</sup> Aditya Bhattacharjea, 4(3) Journal of Competition Law & Economics, 2008, p. 628.

<sup>186</sup> Xavier Fageda, What hurts the dominant airlines at hub airports? (2014), p. 20, 21.

<sup>187</sup> Nancy Shah, Competition Issues in the Civil Aviation Sector (2007), pp. 35, 40.

and also have several competitive advantages due to established hanger areas, service desks etc.

Faced by the competitive disadvantages the low cost airlines have to locate itself to an alternate airports away from the main cities and establish their hub over there (like Gatwick). These airports may be a choice for the price sensitive consumers but usually they are not chosen by the time-sensitive consumers as they want to eliminate time lapse in travelling. Thus for the time-sensitive passengers the market competition is less and due to the CSA, alliance agreement, most of the interline airlines, previous competitors, are now partners. In Europe the low cost airlines also face a competitive disadvantage from the high speed trains.<sup>188</sup>

In India the consumers face much more welfare loss due to the lack of any alternatives, as in India the railways are not that developed as compared to EU. This makes the network airlines capable of targeting larger share of time sensitive consumers in India.<sup>189</sup> Thereby, the Indian network airlines have a more capacity to exploiting the market by the anti-competitive code sharing agreement.

Thus there is a possibility that alliance partners (partners of CSA) may fix higher prices, less frequency, thereby decreasing the consumer welfare in both the jurisdictions. This leads me to the conclusion that the competition authorities instead of dealing with CSAs as a part of the merger regulation should deal it under Article 101 TFEU and section 3 of the Act. Moreover to understand the effects of CSAs both the competition authorities in India and in EU must exchange

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<sup>188</sup> For example a passenger wants to go from city A to city B. However, the low cost airlines only operates from city A to city C. The cost of going to city B from C may not be too much but the aggregate cost from A to C and from C to B may be expensive than the superfast train that operates between A to B. Therefore despite the fact that the cost of network airlines may be expensive than cost from A to C and from C to B with Low cost airlines, the consumer may choose superfast trains.

<sup>189</sup> *Rediff*, India's airports are already jammed, authorities must wake up (2015).

information's and may also establish joint investigation team if necessary. This will not only ensure workable competition but will also protect the market from competition distortion.

## PART 5

### FREQUENT FLYER PROGRAM- PARADOX OF LOYALTY IN COMPETITION LAW REGIME

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*“O, it is excellent to have a giant’s strength: but it is tyrannous to use it as a giant”*

*William Shakespeare (Measure for Measure)*

#### A. Introduction

Though *Shakespeare* may not have said the same referring to the Competition law but the quotation is very relevant when we discuss the prohibition of abusive conduct by a dominant enterprise laid down under the competition law jurisprudence. While both Article 101 TFEU and section 3 of the Act, discussed in the preceding Part, prohibits restriction of competition by coordinated efforts; Article 102 TFEU and its corresponding Indian provision, section 4 of the Act targets the unilateral measure.<sup>190</sup> The basic contour of Article 101 TFEU is that it can be made applicable irrespective of market power of the concerned undertaking, whereas Article 102 TFEU shall entail the market control by undertaking whose commercial practice is found to be abusive.<sup>191</sup>

*Pietro Manzini* (2014) argued that the goals of 102 TFEU has been palpably aligned with the goals of Article 101 TFEU over the period starting from the *Continental Can* (1972) case and further pushed by *Hoffman La Roche* (1979), *British Airways* (2007), *Post Danmark I* (2012).<sup>192</sup>

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<sup>190</sup> *Rudolf Geiger, Khan and Kotzur*, European Union Treaties, pp. 490, 499, 500.

<sup>191</sup> *Pietro Manzini*, in: *Bernardo Cortese* (ed.), Wolters Kluwer, 2014, p. 26; *Continental Can Company v Commission*, Case 6-72, ECLI:EU:C:1973:22, para. 25.

<sup>192</sup> *Pietro Manzini*, in: *Bernardo Cortese* (ed.), Wolters Kluwer, 2014, p. 23.

Section 4 of the Act corresponds to Article 102 TFEU. Both the provisions establish trident pre-requisite to ascertain abuse of dominant position of an ‘enterprise’ or to that of a ‘group’:

- relevant market need to be ascertained analysing both relevant product and geographic market;
- Market position need to be evaluated to ascertain its dominant nature;
- ‘Abuse’ of dominant position need to be established.

This chapter of the thesis is aimed to analyze the FFPs in light of the Article 102 TFEU and section 4 of the Act. The aim of the study is to analyze whether the FFP arrangements are an abusive behaviour of the dominant airlines in the market.

## **B. Frequent flyer program**

FFP arrangement allows the airlines customers to accumulate (or ‘earn’) points for flights taken or services bought from the airlines or its commercial partners and thereafter they can redeem it for various benefits.<sup>193</sup> Higher fares tickets will often entitle a customer to additional miles than the miles usually offered for a normal fare ticket in the same route. Recently even the ‘miles’ are also granted in case the customers stay in certain hotels recommended by the FFP.<sup>194</sup> The FFP are arranged in such a way that a minimum number of miles must be earned to qualify for certain benefits. Traditionally it was a marketing tool for an individual airline. However, recently, this model

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<sup>193</sup> “To fall under the case law on rebates, an FFP must display the main characteristics of a “rebate”. A rebate is normally a deduction or cash payment made retrospectively to a customer in accordance with the latter's purchases over a period of time.<sup>7</sup> An FFP entitles a customer to a free flight and/or other perks for acquiring a sufficient number of miles which can be obtained through the purchase of air tickets. Although not directly giving a price reduction or cash payment to customers, the benefits granted by the FFP have an economic value and can be expressed in monetary terms. Accordingly, an FFP can be considered as a rebate.” Adrian Emch, 30(4), World Competition, 2007, p. 647.

<sup>194</sup> Miles & More, Earn 1,500 miles for your stay in Europe (2016).



has been adopted by the alliance members and this increased the concern of FFP on free market competition.

The FFPs<sup>195</sup> are like corporate discounts,<sup>196</sup> floated by an airline or an airline alliance, having a loyalty inducing structure that can significantly increase market restriction for the new competitors, thereby preventing the market share or increasing the market share in the relevant market. The FFP gives the qualified passengers the rights to access airport lounges, upgrades, baggage allowances (free or discounted), bonus miles, preferred check-in (even on economic ticket), priority boarding, seat preferences, dedicated customer services and many more. According to Prospect Theory, this forces the consumers to refrain from switching to a different supplier due to loss aversion.<sup>197</sup> FFPs have been considered to have resulted in increasing psychological switching cost and thereby having detrimental effects on both competition<sup>198</sup> and consumers.<sup>199</sup> Empirical study established that an airline dominating a hub airport often use FFPs as a tool to foreclose smaller competitors from accessing the market by inducing the consumers, specially the lucrative business class travellers to choose the dominating airline.<sup>200</sup>

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<sup>195</sup> “The term frequent flyer programme (FFP) is used throughout the report to denote bonus or discount programmes in civil aviation that reward frequent flyers with free travel or other benefits of a similar nature. FFPs form an integral part of loyalty programmes established by the airlines”, European Competition Authorities, 2 European Competition Journal, 2006, p 4; “A Frequent Flyer Program is a loyalty program offered by many airlines to customers allowing them to accumulate (or “earn”) points for flights taken or services bought from the airlines commercial partners. Members may redeem (or “burn”) their accrued points for free air travel tickets or for other products and services available through a network of commercial partners”, Ernst & Young, Frequent Flyer Program (2015), p. 3.

<sup>196</sup> “Corporate discount schemes (CDS) are agreements by which large airline customers are able to negotiate lower (net) fares on all or on certain parts of an airline’s network”, European Competition Authorities, 2 European Competition Journal, 2006, p. 4.

<sup>197</sup> Alexander Morell, A. Glöckner & E. Towfigh, 11(2) Journal of Competition Law & Economics, Oxford, 2015, p. 432.

<sup>198</sup> Mara Lederman, 38 (4) RAND J. Econ., 2007, 1134.

<sup>199</sup> Alexander Morell, A. Glöckner & E. Towfigh, 11(2) Journal of Competition Law & Economics, Oxford, 2015, p. 457.

<sup>200</sup> Mara Lederman, 17(1), Journal of Economics & Management Strategy, 2008, p. 41.

For the purpose of present discussion, I will only focus on FFP structure which an alliance employs, also referred to as the coalition program,<sup>201</sup> and thereby facilitates market coordination amongst the alliance partners. FFP program like *Miles & More*, *Flying Returns* have far reaching impact than what it seems the bare perusal of its offerings. Though in short run this may look competitive but in long run there is a risk of establishing an oligopolistic market. The competition effects of FFPs under Article 102 TFEU and section 4 of the Act can be dealt analyzing rebate scheme jurisprudence and courts dictum on bundling and tying. However, in this case I would restrict my argument only with regard to the ‘rebate scheme’ jurisprudence of both EU and India.

In order to understand the impact of FFPs under the legal doctrine of ‘abuse of dominant position’, firstly, the relevant market will be analyzed in the subsequent sub-parts. Analysis of relevant market has already been discussed therefore only the relevant market applicable for airlines will be elaborated in the subsequent section. Secondly, it will be analyzed whether there is a dominant position enjoyed by the FFP program coordinators in the relevant market and how it need to be analyzed and thirdly, what are the ways to ascertain the abusive behavior of the FFPs in both EU and in India.

### **C. Determining the relevant market vis-à-vis Frequent Flyer Program in European Union and in India**

The comparative legal analysis on examining the ‘relevant market’ both under the EU law and the Indian law has been explained in Part 2. The network complexity of airline industry has made it difficult to define the ‘relevant market’ based upon a simple normative approach

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<sup>201</sup> ““coalition” program (see the diagram opposite) allowing members to accrue and redeem points with many commercial partners affiliated to the network”, Ernst & Young, Frequent Flyer Program (2015), p. 3.

in the air transport sector. This sub-part analyses how to define the relevant market which is influenced by the FFPs.

According to *Adrian Emch* (2007), the product purchased by the airline customers are the 'routes', i.e. from the point of origin to the point of destination (also called as O&D approach).<sup>202</sup> This analysis is based on the Commission's traditional method of defining the relevant market for scheduled passenger air transport service on the basis of city pair approach.<sup>203</sup> The O&D approach derives its relevance from the demand side perspective.<sup>204</sup> This approach of defining the 'relevant market' has often been criticized on the ground that it fails to appreciate the extent of network competition, market dominance of airlines in slot restricted airports, diverse preference of the customers.<sup>205</sup> The Commission considering this criticism has agreed to address the abovementioned issue as a part of competitive assessment: airport congestion, potential entry and exit barrier, issue of strengthening market position.<sup>206</sup> Thus as per the current EU law, classification of routes having higher traffic volume and lower traffic volume will be a relevant factor to determine the dominant status and not the relevant market. However, the Commission agreed to consider the relevant market based upon the consumer groups: time-sensitive passengers and time-insensitive passengers (price sensitive).<sup>207</sup>

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<sup>202</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 646.

<sup>203</sup> Commission's decision of 26 January 2011, Case No COMP/M.5830, *Olympic/Aegean Airlines*; Commission's decision of 27 July 2010, Case No COMP/M.5889, *United Air Lines/Continental*; Judgment of 6 July 2010, *Ryanair Holdings plc v Commission*, Case T-342/07, ECLI:EU:T:2010:280, para. 53.

<sup>204</sup> Commission decision on 30 March 2012, Case No COMP/M.6447, *IAG/ BMI*, C(2012) 2320, para. 31.

<sup>205</sup> Commission decision on 30 March 2012, Case No COMP/M.6447, *IAG/ BMI*, C(2012) 2320, para. 33.

<sup>206</sup> Commission decision on 30 March 2012, Case No COMP/M.6447, *IAG/ BMI*, C(2012) 2320, para. 35.

<sup>207</sup> Commission decision dated 04 July 2007, Case No COMP/M.3770, *LUFTHANSA / SWISS*, SG-Greffe(2005) D/202898, para 15; See general for analysis of relevant market in Commission decision on 30 March 2012, Case No COMP/M.6447, *IAG/ BMI*.

The time-sensitive customers are mostly the persons who travel for business purposes, whereas the price-sensitive customers usually travel for leisure activities, meeting friends and family. The FFP programs usually target the business travellers both in EU and in India either through piecemeal booking or corporate contracts.<sup>208</sup> Referring to the statistical analysis in Annexure I, which states that the fares in business class transport sector is same despite the fact that the oil price has reduced significantly, I would like to bring to the attention of the Commission's investigation in 2012.<sup>209</sup> The commissions statement that "*Commission has concerns that this may result in higher prices on the Frankfurt – New York route for time-sensitive and flexibility-focussed passengers (so-called "premium passengers")*", clearly shows that there is an apprehension that the business class consumers are facing the repercussions of abuse of dominance of alliance through FFPs. Pertinent to mention that *Frankfurt–New York* route is dominated by the network airlines with extensive FFPs and is mostly in demand amongst the time-sensitive consumers. Thus along with O&D approach of market definition, I will also center my discussion in the subsequent sections based upon time-sensitive relevant market.

The market can further be classified as per the relevant geographic market analysis. Both in EU and in India, this analysis can suggest two markets for FFP programs: Domestic market and International market. Here it is pertinent to refer to the action taken by Norway<sup>210</sup> against domestic application of FFP program since 2002.<sup>211</sup> Until 2013, the FFPs were impermissible in Norway's domestic airline market. The Norwegian authority was under the impression that this

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<sup>208</sup> Adrian Emch, 30(4), World Competition, 2007, p. 667.

<sup>209</sup> Commission market tests commitments from *Star alliance members Lufthansa, United and Air Canada* concerning transatlantic cooperation, Commission Press Release, Fiscal compact enters into force, 18019/12 PRESSE 551, Brussels, 21 December 2012.

<sup>210</sup> Though Norway is not a part of the EU but is part of the European Economic Area (EEA), in the context of being a European Free Trade Association (EFTA) member.

<sup>211</sup> Norway, Airline Competition (2014), para. 43.

loyalty scheme creates lock-in effects and constitutes a significant barrier in the aviation market. Thus I would like to conclude this section stating that the competition authorities must consider the time sensitive consumers in both domestic and international airline services as the relevant market to analyze the effect of FFPs.

## **D. Dominant position**

This section aims to analyze the analytical approach of the competition authorities in both EU and India in determining the dominant position.

### ***I. European Union***

The case law analysis suggests that the EU legal jurisprudence on establishing the dominant position not only consider a set of factor but variety of factors to establish a dominant position.<sup>212</sup> The traditional analysis is the market share analysis, wherein the thumb rule is that more than 50% market share leads to dominant position.<sup>213</sup> However, in *Virgin/British Airways case*, the *British Airways* was considered to have dominant position in the UK air travel agency service market despite the fact that it has a market share of 39.7%.<sup>214</sup> This case established that market share does not directly establish the dominance but establishment of dominance also depends upon the barrier it creates for the other market players to enter the relevant market.<sup>215</sup> Moreover, the *British Airways* dominance over the airport

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<sup>212</sup> Judgment of 7 October 1999, *Irish Sugar plc v Commission*, Case T-228/97, ECLI:EU:T:1999:246, para. 70; *Kapteyn and VerLoren van Themaat*, The Law of the European Union and European Communities, p. 814.

<sup>213</sup> Judgment of 3 July 1991, *AKZO Chemie BV v Commission*, Case C-62/86, ECLI:EU:C:1991:286, para. 60.

<sup>214</sup> Commission Decision of 14 July 1999, Case No. IV/D-2/34.780, *Virgin/British Airways*, OJ L 30, 4.2.2000, para. 91, 93.

<sup>215</sup> See *Ibid* at para. 102.

slots also gave it a dominant position over its competitors.<sup>216</sup> The other facts which are also considered to ascertain the dominant position are: technological and economic strength<sup>217</sup>; absence or existence of potential competition. However, in case the enterprise enjoys a *de facto* monopoly, then these varieties of analysis become superfluous and less relevant.<sup>218</sup>

## II. India

Under the Indian law also the principle of determining ‘dominant position’ is not statutorily mentioned. The same can be determined from the case laws and historical analysis. As per the principle of purposive interpretation of Act, I would refer to the *Raghavan Committee Report* (2000), which recommended the enactment of the present Act. The *Raghavan Committee Report* (2000) deliberately left any arithmetic threshold to ascertain a dominant position of an enterprise and gave an open-ended definition.<sup>219</sup>

The CCI has linked dominant position to the concept of market power which allows an enterprise to act independently of competitive constraints.<sup>220</sup> CCI arrived to this decision guided by the definition of ‘dominant position’ under the Act, wherein the “dominant position” is defined as:

*“a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—*

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<sup>216</sup> “In winter 1998 BA held 38 % of the weekly slots available at Heathrow. Its nearest competitor accounted for only 14 % of the total. BA's five nearest competitors together totalled only 27,4 %”. See *Ibid* at para. 91.

<sup>217</sup> Judgment of 30 January 2007, *France Télécom SA v Commission*, Case T-340/03, ECLI:EU:T:2007:22, para 99.

<sup>218</sup> Judgment of 6 April 1995, *Radio Telefis Eireann (RTE) v Commission*, Joined cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98, para. 47.

<sup>219</sup> *Report submitted to the Government of India*, Report of High Level Committee on Competition Policy and Law (2000), p. 37, para. 4.4.5.

<sup>220</sup> *Re Shri Shamsher Kataria v. Honda Sael Cars India Ltd. & Ors.* CCI Case No. 03 of 2011, para. 8.1.6.

- (i) *operate independently of competitive forces prevailing in the relevant market; or*
- (ii) *affect its competitors or consumers or the relevant market in its favour*<sup>221</sup>

A number of relevant factors listed under section 19(4) of the Act need to be taken into account for determining dominance as per the definition.<sup>222</sup> Furthermore, the traditional notion of market share, dependent on the yardstick is no more the only significant factor in India.<sup>223</sup> In the recent case of *Re M/s ESYS Information Technologies*, the CCI established that ‘relevant market’ share, revenue data submitted by Intel, brand reputation, technological advantage will be referred in order to analyze *Intel’s* dominant position.<sup>224</sup>

### ***III. Analysis with reference to FFP***

From the above analysis it can be deduced that both EU and Indian competition authorities consider the fact that mere market holding does not create a dominant position. Thus in order to establish whether the market holding of an airline employing FFP is dominant following

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<sup>221</sup> Explanation to section 4 of the Competition Act, 2002. (refer to Annexure III)

<sup>222</sup> (a) actual and potential level of competition through imports in the market (b) extent of barriers to entry into the market; (c) level of combination in the market; (d) degree of countervailing power in the market; (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins; (f) extent of effective competition likely to sustain in a market; (g) extent to which substitutes are available or are likely to be available in the market; (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination; (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market; (j) nature and extent of vertical integration in the market; (k) possibility of a failing business; (l) nature and extent of innovation; (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any, Refer to section 19(4) of the Act. (Annexure III)

<sup>223</sup> “only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance”, *RamakantKini v Dr L H Hiranandani Hospital*, CCI Case No. 39 of 2012.

<sup>224</sup> *Re M/s ESYS Information Technologies*, Case No. 48 of 2011, para. 5.13.

criteria's need to be considered in addition to the previously mentioned criteria's, as per the applicability and necessity:

- i. **Competitors' access to frequent flyer programs:** Recent commitment decisions<sup>225</sup> regarding relaxation of slots have also witnessed airlines commitment to allow third parties accessibility of FFP arrangements. Thus it can be stated that FFPs at times may act as a market barrier crucial to maintain the dominance, similar to that of the slots arrangement. This aspect needs to be analysed to assess the dominant position of an airline.
- ii. **Relevant connection between domestic and international market:** As already mentioned that the Norwegian authorities analysing the FFPs adverse effect on domestic market banned the FFPs in Norway from 2009-2013. The competition authorities despite the fact have allowed the airlines to use FFPs in Norway but they are kept under strict scrutiny. This leads me to the conclusion that the relevant domestic and international connection available with the domestic market, need to be analysed to assess the dominant position.
- iii. **Switching cost:** It has been observed that switching cost is inversely proportional to

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<sup>225</sup> Commission decision of 22 June 2009, Case No COMP/M.5335, *Lufthansa/ SN Airholding*, C (2009) 4608 final, para. 435; commission's decision of 28 August 2009, Case No COMP/M.5440, *Lufthansa/ Austrian Airlines*, paras. 329, 330.



market access.<sup>226</sup> In light of the *Google* (2008),<sup>227</sup> the competition authority should give this issue relevant weightage while assessing the dominant position of an airline.

## E. Abuses

The holding of Dominant position is *per se* not illegal both under the EU Competition law and the Indian competition Act,<sup>228</sup> as long as the same is not abusive.<sup>229</sup> This part aimed to discuss the comparative study of both India and EU in determining which acts of a dominant enterprise or groups are considered abusive with specific focus on the FFPs.

### I. *Comparative analysis of the scope of Article 102 TFEU and section 4 of the Act*

The normative framework of section 4 of the Act, prohibiting abusive conduct of a dominant enterprise, suggests that the same is exhaustive and only those acts specified under section 4(2)(a) to (e) of the Act are considered as an abuse of dominant position.<sup>230</sup> As per section 4(2) of the Act, an “enterprise” or “group” would be abusing its ‘dominant position’ if it imposes discriminatory condition or price in sale or purchase of goods or services, limits production of goods, indulges in practices that results in denial of market access in any manner or uses its dominant position in one relevant market to enter into another relevant market.<sup>231</sup> The Article 102 TFEU on the other hand states that “any abuse” which will be “incompatible with the internal market in

<sup>226</sup> *European Competition Authorities*, 2 European Competition Journal, 2006, p. 26.

<sup>227</sup> Summary of Commission Decision of 11 March 2008, Case COMP/M.4731, *Google/Double Click*, OJ C 184, 22.7.2008.

<sup>228</sup> T. Ramappa, Competition Law in India, p. 161.

<sup>229</sup> Judgment of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, ECLI:EU:C:2011:83, para. 24.

<sup>230</sup> T. Ramappa, Competition Law in India, p. 162.

<sup>231</sup> PRS Legislative, Legislative Brief The Competition (Amendment) Bill, 2006 (2007), p. 2.

*so far as it may affect trade between Member States*” is prohibited. This makes the scope of Article 102 TFEU non-exhaustive<sup>232</sup> and wider as compared to its Indian counterpart.

Though no specific exclusionary clause is mentioned under Article 102 TFEU, following two types of conducts are excluded from the scrutiny of Article 102 TFEU:

- Conduct resulting in market concentration to be dealt according to the *EC Merger Control Regulation 139/2004*. Article 21(1) of the *Merger Control Regulation 139/2004* excludes applicability of Article 101 and 102 TFEU on market concentration through mergers or acquisition.<sup>233</sup>
- Conduct carried out by the public body or undertakings entrusted with the operation of services of general economic interest. Such immunity is granted by virtue of Article 106(1) TFEU.<sup>234</sup>

Under Indian law only the conduct that results in market concentration are dealt under section 5 of the Act as a part of the merger control regime and not under section 4 of the Act.

Both EU and Indian competition law recognizes that an abusive act conducted by a dominant firm of one market in another market in which it is not dominant is also prohibited under Article 102 TFEU and section 4 respectively.<sup>235</sup> In EU this principle was developed in

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<sup>232</sup> Judgment of 14 November 1996, *Tetra Pak International SA v Commission*, Case C-333/94 P, ECLI:EU:C:1996:436, para 37; *Rudolf Geiger, Khan and Kotzur*, *European Union Treaties*, p. 504.

<sup>233</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004.

<sup>234</sup> *Ariel Ezrachi*, *EU Competition Law*, p. 4.

<sup>235</sup> *T. Ramappa*, *Competition Law in India*, pp. 174, 175.

the *Tetra Pak case*<sup>236</sup>. *Tetra Pak* had dominance in aseptic sector but was alleged of abusing non-aseptic sector in which it was not dominant. Tetra Pak argued that acts alleged to constitute an abuse under Article 86 Treaty of Rome (now 102 TFEU) should either take place within a market where the enterprise is dominant or where the abuse was conducted in a market in which it is not dominant but the abusive acts leads to strengthening of the existing dominant position.<sup>237</sup> If neither were the case the Article 86 Treaty of Rome should not be attracted. The ECJ clarified this position by stating that the Article 86 Treaty of Rome does not guide on its applicability based upon where on product market the abuse took place.<sup>238</sup> The relevant position under the EU law can be best explained the by quoting ECJ:

*“An undertaking which enjoys a quasi-monopoly on certain markets and a leading position on distinct, though closely associated, markets is placed in a situation comparable to that of holding a dominant position on those markets as a whole. Conduct by such an undertaking on those distinct markets which is alleged to be abusive may therefore be covered by Article 86 of the Treaty without any need to show that it is dominant on them.”*<sup>239</sup>

Under Indian law this principle is statutorily enshrined under section 4(2)(e) of the Act.

## ***II. Normative framework***

To analyze in details what constitutes ‘abusive conduct’ as per Article 102 TFEU and section 4 of the Act, the normative framework of both EU and India, guiding the determination of an abuse is relevant to mention.

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<sup>236</sup> Judgment of 14 November 1996, *Tetra Pak International SA v Commission*, Case C-333/94 P, ECLI:EU:C:1996:436.

<sup>237</sup> See *Ibid*, para. 23.

<sup>238</sup> See *Ibid*, para. 27.

<sup>239</sup> See *Ibid*, para. 2 (Summary).

### 1. *European Union*

The wording of Article 102 TFEU entrusts the responsibility on dominant firm to preserve competition and to allow other market players to join the market so as to ensure that the dominant firm does not abuse their market position. Scholars have argued that the introduction of this provision aimed to tear down the protectionist regime that was prevalent at the time when the Treaty of Rome was adopted.<sup>240</sup> Unlike Article 101 TFEU, legal transactions violating Article 102 are not explicitly void.<sup>241</sup>

The Article 102 para. 1, suggests that the any abuse by a dominant enterprise within the internal market shall be prohibited. Article 102 para. 2 lists certain acts by a dominant enterprise which may be treated as an abuse<sup>242</sup>: para 2, (a) and (b) prohibits trade practices detrimental to consumers; para 2, (c) and (d) prohibit practices that undermine the position of the ‘other trading parties’ of the dominant enterprise. The abuses under this provision have been classified into exclusionary abuses, exploitative abuses.<sup>243</sup>

### 2. *India*

Section 4(1) of the Act prohibits the abuse of the dominant position by an enterprise and section 4(2)(a)(e) established the conduct which will be termed as abusive under the Act. The Indian law has also classified abuse under two categories following the footstep of Article 102 TFEU: exclusionary abuse and exploitative abuse.<sup>244</sup>

<sup>240</sup> *Eleanor M. Fox*, 59 Antitrust Bull., 2014, p. 132.

<sup>241</sup> *Rudolf Geiger, Khan and Kotzur*, European Union Treaties, p. 506.

<sup>242</sup> *Pietro Manzini*, in: *Bernardo Cortese* (ed.), Wolters Kluwer, 2014, p. 25.

<sup>243</sup> The Commission’s *Guidance on Article 102 Enforcement Priorities* recognises the distinction between exploitative and exclusionary abuses, Communication from the Commission-Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009.

<sup>244</sup> The classification is acknowledged on the official document of CCI, *Competition Commission of India*, Provisions Relating to Abuse of Dominance, pp. 7, 8; *M/s Jupiter Gaming Solutions Private Limited*, [2011] CCI 22 para. 18.

## ***II. Comparative analysis***

Section 4(2)(a), (b), and (d) bear significant resemblance with the corresponding sections of Article 102 TFEU.<sup>245</sup> However, there are certain striking differences also. Unlike Article 102 TFEU, Indian act does not distinguish between unfair and discriminatory prices.

*Aditya Bhattacharjea* (2008) have argued that the section 4 of the Act is not only limited to the abusive act of dominate enterprise, but also to a number of business practices in terms of predatory pricing.<sup>246</sup> *Aditya Bhattacharjea* (2008) was of the opinion because of the wider definition of the term ‘dominant position’ given in the Explanation to section 4 and also because of the influence of the erstwhile MRTP Act. This is quite contrasting with regard to Article 102 TFEU where only the abusive conduct by the dominant enterprise is dealt with.

Another striking comparison between Article 102 TFEU and section 4 of the Act lies in the fact that section 4(2)(c) prohibits all sort of dissimilar condition to equivalent transaction, *per se*. Whereas, Article 102 para. 2, (c) TFEU explicitly states that dissimilar condition to equivalent transaction can be justified, if it does not put the competitor in competitive disadvantage.

## ***III. Exclusionary abuse***

The central concern of Article 102 while analyzing ‘exclusionary abuse’ is the protection of the competition in the market.<sup>247</sup> Article

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<sup>245</sup> For comparative viewing and reference to corresponding section kindly refer to Annexure V.

<sup>246</sup> *Aditya Bhattacharjea*, 4(3) *Journal of Competition Law & Economics*, 2008, p. 632.

<sup>247</sup> “*The concern is to prevent exclusionary conduct of the dominant firm which is likely to limit the remaining competitive constraints on the dominant company, including entry of newcomers, so as to avoid that consumers are harmed. This means that it is competition, and not competitors as such, that is to be protected*”, *European Commission*, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), p. 17; “*An objective concept*

102 prohibits exclusionary conduct which can harm consumers in a direct or indirect way.<sup>248</sup> According to Commission Exclusionary is defined as:

an abusive “behaviour by dominant firms which are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers.”<sup>249</sup>

Under the Indian law, the term has not been defined by the Act nor by the CCI. However, the CCI interprets the term ‘exclusionary abuse’ as “denial of market access”.<sup>250</sup>

### 1. Open ended concept?

The term ‘exclusionary abuse’ has not been defined both by the EU legislator nor by the Indian legislator. However, as per the ECJ:

“dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers”<sup>251</sup>.

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relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition” Judgment of 13 February 1979, Hoffmann-La Roche & Co. AG v Commission, Case 85/76, ECLI:EU:C:1979:36, para. 6.

<sup>248</sup> Judgment of 21 February 1973, *Continental Can Company v Commission*, Case 6-72, ECLI:EU:C:1973:22, para. 26.

<sup>249</sup> *European Commission*, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), p. 4.

<sup>250</sup> *Bijay Poddar v Coal India Ltd.*, CCI Case No. 59 of 2013, para. 60.

<sup>251</sup> Judgment of 14 October 2010, *Deutsche Telekom AG v Commission*, Case C-280/08 P, ECLI:EU:C:2010:603, para. 170; ECJ has tried to explain the concept of

In 2005, the Commission published a Discussion Paper which was followed by a 2009<sup>252</sup> Guidance Notice on Commissions enforcement priorities to abuse exclusionary conduct. Under the Guidance Note the Commission has adopted the concept of ‘anti-competitive foreclosure’ as the normal standard for intervention.<sup>253</sup> The Guidance note is a soft law<sup>254</sup> issued by the Commission with an aim to set up the priorities of enforcement.<sup>255</sup>

Section 4(2)(b) and 4(2)(c) of the Act are usually interpreted to understand the ‘exclusionary abuse’. Possession of economic strength and the ability to exclude may be inferred from the conduct but cannot be considered as an abuse. To conclude the abusive nature of a dominant enterprise the Indian authorities require establishing actual exclusionary conduct. If the ability exists and the firm is indeed dominant, it is only then that the effect of the conduct has to be analyzed extending the effects based approach to competition law.<sup>256</sup> Hence under both the law it is not an open ended concept.

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abusive dominance “The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”, Judgment of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, ECLI:EU:C:1979:36, para. 91.

<sup>252</sup> Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para 19, 20.

<sup>253</sup> *Alison Jones and Brenda Sufrin*, EU Competition Law, p. 382.

<sup>254</sup> “In the Commission’s view, the legal basis of communications which are part of the soft-law it creates - such as the Guidance, lies in Article 4(3)TEU (ex Article 10EC) and Article 17(1)TEU (ex Article 211EC)”, Pinar Akman, *The Modern Law Review*, (2010) 73(4), p. 625.

<sup>255</sup> *John Temple Lang*, After Fifty Years-What Is Needed for a Unified European Competition Policy? (2014), para. E.

<sup>256</sup> *M/s HNG Float Glass India Ltd. v M/s Saint Gobain Glass India Ltd.*, [2013] CCI 71 para. 7.

## 2. Approaches to define exclusionary abuse – EU and India

As per *Jon Temple Lang* (2014), the ‘exclusionary abuse’ can be defined by four approaches under the EU law.<sup>257</sup> This part aims to compare the Indian legal position keeping the analysis under Article 102 TFEU as a reference and focusing on FFPs.

- a) Rebates arrangement approach laid down under *Hoffmann-LaRoche, Michelin, Post Danmark II*

*George Fletcher* (1993) has observed that:

*“some of the strongest moral epithets in the English language are reserved for the weak who cannot meet the threshold of loyalty: They commit adultery, betrayal, treason.”*<sup>258</sup>

However, the competition law treats loyalty on different footing as this field of law values rivalry between the competitors. Both EU law and Indian law consider loyalty incentives provided by the dominant sellers to its customers, to keep them loyal towards their products/services, may stifle competition<sup>259</sup> and harm the very customers. For a rebates arrangement to have exclusionary effects, the dominant undertaking must hold a substantial market power over a significant part of the customer’s demand.<sup>260</sup>

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<sup>257</sup> *John Temple Lang*, After Fifty Years-What Is Needed for a Unified European Competition Policy? (2014), para. E1.

<sup>258</sup> *George P. Fletcher*, Loyalty: An Essay on the Morality of Relationships, p. 8.

<sup>259</sup> “In the EU, the tendency to induce loyalty, if not a mere intent to exclude rivals, is deemed sufficient to justify the prohibition of the practice, on the ground that the special responsibility of dominant undertakings requires them not to make it more difficult for rivals to access the market”, *Gianluca Faella*, 4(2) *Journal of Competition Law & Economics*, 2008, p. 384.

<sup>260</sup> See *Ibid*, p. 379.



aa) ‘Quantity rebate’ or ‘loyalty rebate’ which one is permissible?

Under EU jurisdiction the approach stems from *Hoffmann-La Roche*, wherein the ECJ was of the opinion that the rebate scheme at dispute give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position and that distorts the competition.<sup>261</sup> Following *Hoffmann-La Roche* the rebates were classified into ‘loyalty rebates’<sup>262</sup> and ‘quantity rebates’<sup>263</sup>. The *Hoffmann-La Roche*’s approach was confirmed again in *Michelin II*<sup>264</sup>; confirming the position that the rebate granted for purchases made in different relevant markets falls under Article 102 TFEU (Ex art 82 EC).<sup>265</sup> As per the *Michelin II* the seller reaches the threshold of dominance it will not be allowed to maintain rebates, unless it provides an economic justification.<sup>266</sup> The *Michelin II* case declared that the ‘quantity rebate’ which is based on economic justification complies with Article 102. According to various authors this *per se* makes all loyalty-inducing discounts by dominant firms in the European Union anticompetitive under Article 102 TFEU.<sup>267</sup>

<sup>261</sup> *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, ECLI:EU:C:1979:36, para. 110.

<sup>262</sup> “loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position”, Judgment of 30 September 2003, *Michelin v Commission*, Case T-203/01, ECLI:EU:T:2003:250, para. 56.

<sup>263</sup> “exclusively linked with the volume of purchase from the producer concerned”, *Hoffmann-La Roche & Co. AG v Commission*, Case 85/76, ECLI:EU:C:1979:36, para. 90.

<sup>264</sup> Judgment of 30 September 2003, *Michelin v Commission*, Case T-203/01, ECLI:EU:T:2003:250, para. 141. [*Michelin II*]

<sup>265</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 656.

<sup>266</sup> *John Temple Lang*, *After Fifty Years-What Is Needed for a Unified European Competition Policy?* (2014), para. E1; *Nicholas Economides, Ioannis Lianos*, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases* (2009), p. 498; *Denis Waelbroeck*, 1(1) *Journal of Competition Law and Economics*, 2005, p. 152.

<sup>267</sup> *Nicholas Economides, Ioannis Lianos*, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases* (2009), 499; See general, *Denis Waelbroeck*, 1(1) *Journal of Competition Law and Economics*, 2005.

ab) ‘As efficient competitor’ test- in  
light of *Post Danmark II*

In 2007 the ECJ in *British Airways*, found that the ‘loyalty rebates’ on economically justified reasons are permissible under 102 TFEU.<sup>268</sup> It was however argued that the court however did not cite evidence of actual anticompetitive effects in the sense of higher consumer prices or diminished output in deciding the exclusionary behaviour of British Airways.<sup>269</sup> In 2014 the CJEU pronounced the *Intel* judgment wherein the ECJ gave upper hand to the traditional ‘form’ based approach rather than the ‘effect’ based approach.<sup>270</sup> The Court explicitly rejected the need for the ‘as efficient competitor’ test<sup>271</sup> (**AEC test**) used by the Commission in line with its 2008 Guidance. The basic principle of ‘as efficient competitor’ test is that competitor to the dominant seller, claiming protection under the competition law, must be as efficient as the dominant seller. In simple words if the competitor is less efficient than that of the dominant seller, the competitor cannot claim protection as protecting such competitor would not protect the consumers. In 2015, the CJEU was again requested to clarify the relevance that is to be attached to the AEC test for the evaluation of rebates. The CJEU unequivocally held that this economic test of comparing cost price and the selling price is not a legal prerequisite in order to find a rebate scheme abusive under Article 102 TFEU.<sup>272</sup> The CJEU considered the AEC test is not applicable in the instant case<sup>273</sup> and moreover the AEC test must be

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<sup>268</sup> Judgment of 15 March 2007, *British Airways PLC v Commission*, Case C-95/04 P, ECLI:EU:C:2007:166, para. 69, 86.

<sup>269</sup> Daniel A. Crane, *Bargaining over Loyalty* (2013), p. 267.

<sup>270</sup> The Court categorically stated that even a positive AEC test result would not be capable of ruling out the potential foreclosure effect, Judgment of 12 June 2014, *Intel Corp. v European Commission*, Case T-286/09, ECLI:EU:T:2014:547, 142-166.

<sup>271</sup> See *Ibid*, para. 151.

<sup>272</sup> Judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerådet*, Case C-23/14, ECLI:EU:C:2015:651, para. 56. [*Post Danmark II*]

<sup>273</sup> See *Ibid*, para. 59.

considered one test amongst the other in determining the abuse of a dominant position in the context of a rebate scheme.<sup>274</sup> The CJEU was also asked by the referring court whether a rebate scheme must generate probable and/or appreciable exclusionary effects in order for it to fall within the scope of Article 102 TFEU. In this regard the CJEU established that although it is a pre-requisite that the likelihood of an anticompetitive effect is shown, there is no need to demonstrate the serious or appreciable nature of these effects for a practice to fall within the scope of Article 102 TFEU.<sup>275</sup> The CJEU in *Post Danmark II* clearly stated that all facts and circumstances must be taken into consideration in order to establish that a rebate scheme is exclusionary under Article 102 TFEU.<sup>276</sup>

#### ac) Indian perspective

The Indian competition law effectively got implemented from 2009 due to the long standing legal dispute before Supreme Court. Thus in most of the areas of competition law, especially with regard to the targeted rebates or loyalty rebates; the law is still at a very nascent stage. In 2011, CCI held that rebate which is typically designed to either entrench an existing dominant position or assist the dominant enterprise to gradually increasing market shares will be treated as ‘loyalty rebate’.<sup>277</sup> Therefore only the loyalty rebates that restrict the competitor to enter the market and enhance the dominant position can be considered anti-competitive. However, whether an FFP is a ‘loyalty rebate’ or not is not decided by the CCI. The CCI in 2014 dealt with the issue of FFP under the merger notification submitted under section 6 of the Act.<sup>278</sup> The CCI stated that the acquisition of the FFP must be

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<sup>274</sup> See *Ibid*, para. 61.

<sup>275</sup> See *Ibid*, para. 66,67.

<sup>276</sup> See *Ibid*, para. 50.

<sup>277</sup> *M/s HT Media Limited v M/s Super Cassettes Industries Limited*, [2014] CCI 109 at para. 83.

<sup>278</sup> Order of 5 February 2014 under of CCI under Section 29 (1) of the Competition Act, 2002, *Etihad Airways/Jet*, Combination Registration No. C-2013/12/144.

dealt under a separate agreement and the same must be submitted to the CCI for scrutiny.<sup>279</sup> The CCI observed that:

*“Integration of FFPs of different airlines may have the potential of reducing competition ..... Therefore, it is more appropriate to consider the market for air travel services between O&D pair(s) as relevant market(s) for the purpose of assessment of integration of FFPs of different airlines”*<sup>280</sup>

Now coming on to the legal significance of this order; the CCI considered the FFP under question has the potential of reduction of competition and thereby it can be stated that the CCI may treat FFP as a loyalty rebates.<sup>281</sup>

#### ad) FFP vis-à-vis loyalty rebate

Although the FFP does not give price reductions or cash payment to consumers; benefits that the FFP gives to their customers have an economic value and is thus treated as a rebate.<sup>282</sup> FFP have not been considered as fidelity rebates as they do not formally demand exclusivity like that of the fidelity rebates discussed under Hoffman case.<sup>283</sup> Some scholars have considered FFPs as targeted rebates.<sup>284</sup> However, they have been considered more comparable with the ‘loyalty rebate’ (target rebate system) considered in both *Michelin II* and *British Airways* judgments.<sup>285</sup> The *OECD* (2003) highlighted that Airlines having extensive networks (possible through alliance formations) may enjoy several advantages over other competitors having less or no network coverage.<sup>286</sup> FFPs are considered as created strategic advantages as they are created by the airline institutions as compared to the natural advantages that the airlines receives due to its

<sup>279</sup> See *Ibid*, para. 11.

<sup>280</sup> See *Ibid*, para. 14.

<sup>281</sup> See *Ibid*, para. 13(f).

<sup>282</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 647.

<sup>283</sup> *European Competition Authorities*, 2 *Eur. Competition J.* 265 2006, para. 24.

<sup>284</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 648.

<sup>285</sup> *European Competition Authorities*, 2 *Eur. Competition J.* 265 2006, para. 24.

<sup>286</sup> *OECD*, *Loyalty And Fidelity Discounts And Rebates* (2003), p. 8.

good will or market dominance. Moreover economics study conducted by *Mara Lederman* (2008) established that the FFPs increase the fare of the tickets by a considerable percentage.<sup>287</sup>

Not only the FFP creates hindrance in competition and imposes a switching cost,<sup>288</sup> it also exploits the unique relationship of agents and the principles. Needless to say, most frequent travellers in both domestic and international arena are business travellers or time-sensitive passengers. Usually they do not pay for their flights but their organization does.<sup>289</sup> However, the benefits of FFP are transferred in the personal account of the employee. This motivates the agent to opt for the expensive airlines in order to receive the FFP benefits even if it means that the price paid by the employer is above the competitive price. This in-turn distorts the market competition whereby an equally efficient competitor can be restricted from or in a market.<sup>290</sup> Thus if we consider the discussions hereinabove on the characteristics laid down by competition authorities, FFP may be qualified as a loyalty rebate, and thereby may be considered as an exclusionary abuse under the competition law.

#### b) Price based exclusionary abuse in light of Post Danmark

The *Post Danmark I*<sup>291</sup> case followed the ‘effect’ based approach unlike ‘form’ based approach discussed in *Hoffmann-LaRoche* and *Michelin*. The *Post Danmark I* case aimed to complete the framework

<sup>287</sup> *Mara Lederman*, 17(1), *Journal of Economics & Management Strategy*, 2008, p. 63.

<sup>288</sup> It was found that the SAS had higher switching cost as compared to its competitors when the Eurobonus program (FFP) could have been used without any restrictions, *Fredrik Carlsson, Åsa Löfgren*, *Airline choice, switching costs and frequent flyer programs*, Gothenburg University (2004), p. 8, 9.

<sup>289</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 668.

<sup>290</sup> In this Article the concept of principal – agent has merely been explained in a brief manner, *Mara Lederman*, 38(4) *RAND Journal of Economics*, 2007, pp. 1135, 1138; *Adrian Emch*, 30(4), *World Competition*, 2007, p. 673.

<sup>291</sup> Judgment of 7 October 1999, *Post Danmark A/S v Konkurrencerådet*, Case C- 209/10, ECLI:EU:C:2012:172. [*Post Danmark I*]

established by *Azko* for assessing prices falling below average total cost (**ATC**). The seminal case of *Azko* established a two test rule for assessing the predatory pricing under Article 102 TFEU. *Firstly*, pricing below average variable cost (**AVC**) is presumptively abusive because “a dominant undertaking has no interest in applying such prices except that of eliminating a competitor so as to enable it to subsequently raise its prices by taking advantage of its monopolist position”.<sup>292</sup> The second test targets the prices below ATC but above AVC; they are considered abusive only if it is shown such as conduct is to eliminating a competitor.<sup>293</sup>

The issue in *Post Danmark I* was whether a dominant enterprise committed an abuse when it selectively reduced its prices to a level below its total costs, but above its average incremental costs. The Court held that the fact that a rebate was discriminatory and prices to specific customers were below ATC (but above average incremental cost) was not sufficient to establish that the rebate scheme constituted an abuse. The Court held that pricing above Average Incremental cannot exclude equally efficient competitors and therefore such a pricing practice, as a general rule would be outside the scope of Article 102 TFEU.<sup>294</sup> It has been argued by the scholars that the two tier position of the *Azko* has not been distorted totally but has been slightly modified.<sup>295</sup> Firstly the lower benchmark is the Average Avoidable Cost (**AAC**), reflecting the average incremental cost.

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<sup>292</sup> Judgment of 3 July 1991, *AKZO Chemie BV v Commission*, Case C-62/86, ECLI:EU:C:1991:286, para. 71.

<sup>293</sup> “Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them”, Judgment of 3 July 1991, *AKZO Chemie BV v Commission*, Case C-62/86, ECLI:EU:C:1991:286, para. 72.

<sup>294</sup> Ekaterina Rousseva, *Mel Marquis*, Journal of European Competition Law & Practice, Oxford, 2012, p. 5.

<sup>295</sup> “*Post Danmark* extends the grounds for intervention against below-cost pricing, effectively completing a framework which *Akzo* had left unfinished” See *Ibid*.

Pricing below AAC has been considered as abusive as it indicates sacrifice of the profits by the undertaking. Secondly, the upper cost benchmark is the ATC, representing the average of all the (variable and fixed) costs which the undertaking incurs to produce a particular product.<sup>296</sup> Where the prices are below ATC but above AAC and have no predatory intent, then such price differences cannot be considered abusive. However, in absence of such predatory intent, if it is found that such pricing has actual or likelihood of anti-competitive effect, then such pricing is abusive.<sup>297</sup>

Under the Indian law the concept of predatory pricing finds its mention under section 4(2)(a)(ii) read with Explanation (b) to section 4 of the Act.<sup>298</sup> In *MCX Stock Exchange case*<sup>299</sup> the CCI defined predatory pricing as the conduct, “*where a dominant undertaking incurs losses or foregoes profits in the short term, with the aim of foreclosing its competitors.*” India’s legal position in determining the predatory pricing conforms to the *Azko* dictum.<sup>300</sup>

FPP creates a market barrier in addition to other barriers like slots restriction for which the efficient competitor cannot enter the market easily. As this thesis does not talk about the predatory pricing effect of FPP, FPPs’ pricing below the AVC or ATC is not relevant for the present discussion.

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<sup>296</sup> Long-run incremental cost (LRAIC), represents the average of all the (variable and fixed) costs, “*LRAIC is the same as ATC in the case of single product undertakings, but it is below ATC in a case of multiproduct undertakings with economies of scope*”, See *Ibid*, p. 6.

<sup>297</sup> “*..where the price is between ATC and average incremental cost, an abuse can be established if intent is shown. Proof of adverse effects becomes an alternative to the condition of intent...*”, see *Ibid*, p. 5.

<sup>298</sup> Kumar Harshvardhan, An Analysis Of The Law Relating To Predatory Pricing In India.

<sup>299</sup> *MCX Stock Exchange Ltd. v. national stock exchange of India ltd*, [2011] CCI 52, para. 8.4.2.

<sup>300</sup> *H.L.S Asia Limited v Schlumberger Asia Services & ors.* [2013] CCI 38.

c) Concept of anti-competitive foreclosure  
laid down under the Commissions  
Guidance note

On February, 2009 the Commission published its *Guidance on Article 102 Enforcement Priorities*. The Commissions approach in the Guidance paper that determines the exclusionary abuse by a dominant entity is not a set of guidelines that describe the existing law. The Guidance is only meant to guide the Commission's enforcement priorities in applying Article 82 EC to Abusive Exclusionary Conduct by 'dominant undertaking'.<sup>301</sup> However, it has been argued that the Guidance is not complete and creates a lot of inconsistencies in itself. Despite this shortcoming, it has been observed that the Guidance has aimed to introduce 'effect' based analysis deviating from the traditional form based analysis in determining the exclusionary abuse. The traditional concept of EU competition policy under Article 102 TFEU is to protect the competition by protecting the competitor.<sup>302</sup> The Guidance paper in consonance to the EU case laws<sup>303</sup> have also aimed to change this traditional notion of protecting the competitors and therefore shifted to the concept of AEC test.<sup>304</sup> The Guidance paper also aimed to establish the yardsticks (both general and specific factors) to analyze whether a foreclosure is 'anti-competitive foreclosure' or 'mere foreclosure'.<sup>305</sup> Anti-competitive foreclosure<sup>306</sup>

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<sup>301</sup> Communication from the Commission-Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para. 2.

<sup>302</sup> Richard Whish and David Bailey, Competition Law (2012), p. 208.

<sup>303</sup> See *Ibid.*

<sup>304</sup> "The Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market", Communication from the Commission-Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para. 6.

<sup>305</sup> Richard Whish and David Bailey, Competition Law (2015), pp. 219, 220.

<sup>306</sup> Communication from the Commission-Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para. 19, 20.



has an adverse effect on the consumer welfare and the Guidance paper has more specifically addressed the welfare of the end consumer and not the intermediate consumers who are also a competitor with the dominant enterprise in certain situation.<sup>307</sup>

The *Tomra case*, can be a classic example which applied this concept of ‘anti-competitive foreclosure’. The General Court accepted the Commission’s argument of anti-competitive foreclosure as the conduct of *Tomra* reduces the number of competitors potentially active in a market.<sup>308</sup> The claim of *Tomra* that the rebate scheme is not abusive owing to the fact that the resulting prices is above ATC and therefore not predatory in terms of *AZKO* dictum was rejected by the ECJ on the ground that rebate scheme has an exclusionary or ‘suction’ effect resulting in restricting competition.<sup>309</sup> The *Tomra case* established an open-ended test for anti-competitive behaviour, by stating that any conduct that materially restricts the availability of market share to competitors may be deemed as anti-competitive.<sup>310</sup>

Unlike the Commission, the CCI does not have the power to issue soft laws like guidance note. The strict principle of separation of power followed by the Indian legislature in competition law gives only the Parliament to enact laws and not the CCI.

#### d) Statutory interpretation

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<sup>307</sup> *Alison Jones and Brenda Sufrin*, EU Competition Law: Text, Cases, and Materials, p. 385.

<sup>308</sup> *Giulio Federico*, 3 European Competition Law Review Issue, Sweet & Maxwell, 2011, p. 140.

<sup>309</sup> Judgment of 19 April 2012, *Tomra v Commission*, Case C-549/10 P, ECLI:EU:C:2012:221, para. 78; *Moritz Lorenz*, An Introduction to EU Competition Law, p. 232.

<sup>310</sup> *Giulio Federico*, 3 European Competition Law Review Issue, Sweet & Maxwell, 2011, p. 140.

Though Article 102 TFEU does not specifically state that the offering discounts and rebates to customer is abusive<sup>311</sup> but academicians have traced the restriction on loyalty rebates under Article 102(b) TFEU.<sup>312</sup> *John Temple Lang* (2014) observed that this provision prohibits only conduct restricting/obstructing the competitor, if harm to consumers is likely to result.<sup>313</sup> He also opined that this form of interpretation is the most efficient one as compared to the previous three modes of discussion. Under the India law the loyalty rebates are considered under section 4(2)(a) of the Act.<sup>314</sup>

#### ***IV. Exploitative abuse***

The best way to explain the position of this thesis on exploitative abuse and FFP is to start by referring to the statement of *Luc Peeperkorn* (DG Competition, EC) given at the 35<sup>th</sup> Fordham Competition Law Conference. According to the *Peeperkorn* (2006) Article 82 EC (now 102 TFEU) has to be used both for preventing anti-competitive structure that may harm the consumer, through the principle of exclusionary abuse, and also to cure the result of anti-competitive structure through the principle of exploitative abuse.<sup>315</sup> Due to lack of study on the effects of the FFP on pricing, in both EU and India, the result based study or the study on exploitative abuse is kept untouched in this thesis.

#### **F. Defences**

Unlike Article 101(3) TFEU, Article 102 TFEU does not have any statutory equivalent provision justifying the abusive conduct of a dominant enterprise. However, the Commission and the Court have

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<sup>311</sup> *Philip Marsden* (ed.), *Handbook of Research in Trans-Atlantic Anti-trust*, p. 217.

<sup>312</sup> *John Temple Lang*, *After Fifty Years-What Is Needed for a Unified European Competition Policy?* (2014), para. E1.

<sup>313</sup> See *Ibid.*

<sup>314</sup> *India*, *Roundtable on Fidelity Rebates* (2016), p. 3, para. 10.

<sup>315</sup> *Philip Marsden* (ed.), *Handbook of Research in Trans-Atlantic Anti-trust*, p. 679.

recognized the validity of objective justification in certain abusive cases.<sup>316</sup> In India, the Explanation attached to section 4(2)(a) of the Act justifies any unfair or dissimilar price or sale purchase condition, if the enterprise can establish that the practice is “*adopted to meet competition*” and does not cause prejudice to the consumer and nor exclude the competitors. This section aims to analyze the defenses that can be claimed by the FFP partners in both EU and India if it is found to be abusive by the respective Competition authorities.<sup>317</sup>

### ***I. Objective justification***

As the linguistics suggest, objective justification must encompass the objective aspect of maintaining the competition than the subjective aspect put forward by the dominant enterprise. The *Post Danmark I* case has clarified to certain extent the applicability of the objective justification in cases falling under Article 102 TFEU. The probable defenses available for FFP in light of *Post Danmark I* is analyzed on the basis of two grounds:

- (i) **Objective necessity:** Initially this concept was acknowledged in *Télémarketing case* which was referred to in the *Post Danmark I*. In *Télémarketing case*<sup>318</sup> it was acknowledged that technical and commercial reasons can offer ‘objective necessity’ in case of ‘prima facie’ abusive conduct.<sup>319</sup> However, the *Post Danmark I* did not elaborate

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<sup>316</sup> Commission's decision of 29 March 2006, Case COMP/E-1/38.113, *Prokent-Tomra*, C(2006)734, paras. 347–390; *Richard Whish and David Bailey*, Competition Law (2012), p. 211.

<sup>317</sup> The Court of First Instance in Microsoft case held that “*it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence*” Judgment of 17 September 2007, *Microsoft Corp. v Commission*, Case T-201/04, ECLI:EU:T:2007:289, para. 688; *Alison Jones and Brenda Sufrin*, EU Competition Law: Text, Cases, and Materials, p. 386.

<sup>318</sup> Judgment of 3 October 1985, *Télémarketing (CBEM) v SA Compagnie*, Case 311/84, ECLI:EU:C:1985:394, para. 26.

<sup>319</sup> *Tjarda Desiderius Oscar van der Vijver*, Objective justification and Prima Facie anti-competitive unilateral conduct (2014), p. 119.

on the concept of Objective necessity. The Guidance Paper conceptualises objective necessity as a justified ground to outweigh anti-competitive effects on the consumer.<sup>320</sup> In India the law is unclear, neither the CCI and nor the Supreme Court has issued any case of merits rejecting or accepting this defence. In *Jindal Steel Power case* though the Ministry raised this argument as defence in justifying the tender given to Steel Authority of India,<sup>321</sup> the CCI kept quiet on the issue.

As FFP is a rebate scheme, hence if the airlines can show that the creation of alliance has increased in efficiency and the same is transferred to the consumers through the FFP rebates, then the same may be justified.<sup>322</sup> For example even if a customer travels in domestic airlines as a frequent flyer, s(he) can still redeem the benefits in an international flight of different airlines because of the alliance network. However, it must be proved that the competitors are not excluded or restricted in the market.

- (ii) **Efficiencies:** As per CJEU “*Exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers*”.<sup>323</sup> It is for the first time in *Post Danmark I*, the CJEU explicitly held that a dominant undertaking can justify the anti-competitive conduct with ‘objective justifications’ as well

<sup>320</sup> Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para. 28.

<sup>321</sup> *Jindal Steel & Power*, [2011] CCI 86, para 66

<sup>322</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 663.

<sup>323</sup> Judgment of 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, Case C-209/10, ECLI:EU:C:2012:172, para. 41.

as ‘efficiencies’.<sup>324</sup> In *Post Danmark I*, the CJEU referred to the previous dictum of *British Airways*,<sup>325</sup> and *TeliaSonera Sverige*<sup>326</sup>. The *Post Danmark I* also established the conditions that are necessary for the dominant undertaking to prove that the anti-competitive behaviour is justified: the efficiency gains counteract any likely negative effects on competition and consumer welfare; the gains have been, or are likely to be, brought about as a result of the conduct; the conduct is necessary for the achievement of the efficiency gains; and the conduct does not eliminate effective competition.<sup>327</sup> The view of the CJEU is in line with the Guidance Paper as the same also provides for justification to an exclusionary behaviour on the ‘ground of efficiency’.<sup>328</sup>

Invoking the above laid grounds of justification, the FFP partners may claim that the FFP programs have reduced the cost of the airlines to a considerable level by offering an efficient way of retaining existing customers and providing them better services.<sup>329</sup> However, *Adrian Emch* (2007) has argued that in order to ascertain this efficiency, the cost of maintenance of FFPs must be added with the cost of operating the flights so as to ascertain the clear picture.

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<sup>324</sup> Howard Rosenblatt, *Armengod and Scordamaglia-Tousis*, *Post Danmark: predatory pricing in the European Union*, (2013), p. 24.

<sup>325</sup> Judgment of 15 March 2007, *British Airways plc v Commission*, Case C-95/04 P, ECLI:EU:C:2007:166, para. 86.

<sup>326</sup> Judgment of 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, Case C-209/10, ECLI:EU:C:2012:172, para. 76.

<sup>327</sup> See *Ibid*, para. 42.

<sup>328</sup> Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, para. 30.

<sup>329</sup> *Adrian Emch*, 30(4), *World Competition*, 2007, p. 663.

## II. Meeting competition defence

This form of defense entails the dominant enterprise to compete on merits with the competitor, thereby enabling them to align its prices with those of competitors.<sup>330</sup> This defense is often pleaded in pricing cases where the dominant undertaking's prices are alleged to be predatory and/or exclusionary to equally efficient competitors.<sup>331</sup> The ECJ held that meeting competition defense allows an implicated undertaking to show that "*the purpose of those practices is reasonably to protect its commercial interests in the face of action taken by certain third parties*",<sup>332</sup>.

As most of the FFP partners are well networked airlines and they focus on consumer comfort and luxury their cost of running an aircraft is high as compared to the low cost airlines which focuses less on customer hospitality. This may give the FFP partners the leverage to argue based on this principle that in order to justify their high price in the competitive market, they need to provide the customers the incentive of hassle free travel, personalized service, high frequency of air traffic, etc.

The Discussion paper issued by the Commission in 2005<sup>333</sup> suggested that in order to invoke this defense, the proportionality test must be invoked. However the Guidance paper issued in 2009 has omitted this concept. Moreover in 2009, the European Court has rejected this

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<sup>330</sup> Moritz Lorenz, An introduction to EU Competition Law, p. 216.

<sup>331</sup> Alison Jones and Brenda Sufrin, EU Competition Law: Text, Cases, and Materials, p. 392.

<sup>332</sup> Judgment of 30 September 2003, *Atlantic Container Line AB and Others v Commission*, Joined cases T-191/98, T-212/98 to T-214/98, ECLI:EU:T:2003:245, para. 1114; Moritz Lorenz, An introduction to EU Competition Law, p. 217.

<sup>333</sup> European Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), p. 25.

defense in the case of *France Télécom*.<sup>334</sup> However, under the Indian competition law jurisprudence this defense is provided under Explanation attached to section 4(2)(a) of the Act.

### **G. Recommendation and Interim conclusion**

The traditional notion of economics that high prices will attract more competitors to the market and it will eventually reduce the price is hard to apply in the aviation sector because of high market barriers (both organic and created). Aviation industry is one of the most cost intensive sectors. The infrastructure cost is so high that only business entities with high capital backing can enter the market. Even if they have the capital backing it is very hard to buy slots in the prime airports, owing to the scarcity of available slots, due to the domination of interline carriers.

Along with this organic barrier there are other barriers which are effectively raised by the interline carriers. On the apparent understanding of FFP it may seem that the same provides benefits to the customers. But the foregoing analysis can help me conclude that FFPs can be treated as a ‘loyalty rebates’ and the same has the characteristics of eliminating the market competition and enhancing the dominant enterprise’s market dominance. More so, the partners target their market in such a way that they exploit the unique relationship of paying consumer (principal) and the end consumer (agent). As already discussed, the FFP benefit is directed towards the end consumer and not the paying consumer, thus the traditional notion that if the end consumer is benefited, then the rebate scheme can be permitted should be modified in terms of FFP. As the end consumer is not paying, the existing idea of competition on merits (i.e. lower price)

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<sup>334</sup> “[47]...WIN cannot rely on any absolute right to align its prices on those of its competitors in order to justify its conduct where that conduct constitutes an abuse of its dominant position” Judgment of 2 April 2009, *France Télécom SA v Commission*, Case C-202/07 P, ECLI:EU:C:2009:214, paras. 39, 47.

is rendered ineffective. Furthermore, to make the situation worse some airlines even does not allow the companies or institutions to opt for the FFP benefits thereby leaving the choice on the end consumers to decide the buying option of paying consumer. This forecloses the market even for the efficient competitor.

Thus only an 'effect' based study can answer to the problem that whether the FFP can be conclusively termed as a 'loyalty rebate'. From the preceding analysis it can be said that the competition authorities need to analyze the aspect of anti-competitive foreclosure, in light of the fact that whether the airlines allows the paying consumers (principal) to opt for the loyalty privileges. If the paying consumers are given the benefit of FFPs, the end consumers influence on buying the interline tickets will reduce significantly. This in-turn will establish whether the 'as efficient consumer' is foreclosed from entering the market or not.



## **PART 6**

### **CONCLUSION**

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In both EU and India, three major alliances are controlling the majority market share. This gives the members of the alliances more leverage to coordinate various aspects of joint operations. Although the consumer benefit of the alliances is undeniable, similarly the recent developments in competition law issues in the aviation sector are unavoidable. Against this backdrop, this thesis analyzed two key cooperation modes i.e. CSAs and FFPs in light of two fundamental pillars of the competition law: Anti-competitive agreements and Abuse of Dominant position.

Global airline alliances exploit a voluminous market which makes the task of competition authorities complicated to ascertain the anti-competitive foreclosure. As EU and India are soon going to be the largest market players in the field of aviation transport. It can be concluded that competition authorities in both these jurisdictions need to coordinate amongst themselves to understand the market foreclosure of the global aviation alliances in an efficient manner.

It has been also observed that the competition legislation in India is in line with the EU legislation in determining the relevant market. But the wider connotation of the Preamble to the Act, has made the task of the CCI more difficult in determining the target pursued by the competition authorities. The EU case law jurisprudence at least attempted to structure the competition, the Commission aims to maintain which is absent in the present Indian legislative structure. Thus it is concluded that Indian competition authorities need to frame an equivalent concept of 'workable' or 'efficient' competition, so as to create a perimeter for the CCI which in turn will increase the efficiency of the CCI itself.

In the part dealing with the CSA my assertion is that the CSA in overlapping market reduces the market competition amongst existing competitors. The anti-competitive effect of such CSAs is more severe when it forms a part of the alliance cooperation. The reason of this assertion is based on the following understanding: *firstly*, it is hard to analyze the competitive effect of CSAs by ‘object’ based analysis. Only when the ‘effect’ based analysis is made based upon the intensity of the alliance cooperation, duration of the agreement, information exchanged between the alliance partners, the characteristic of the CSA may be analyzed. *Secondly*, in Europe CSAs are most common amongst the network airlines which also holds significant share of slots in major airports. By dominating the prime airport hubs and by coordinating amongst the competitors the CSA partners significantly reduce competition from low budget airlines in the prime airports. It has also been taken into consideration that the anti-competitive effects of CSA may be different in India than that of EU, due to lack of substitution option. Lastly, it is also discussed that in case the CSA is found to attract Article 101(1) TFEU or section 3(1) of the Act, some possible defenses which can be claimed under Article 101(3) TFEU and the equivalent provision of the Indian Act.

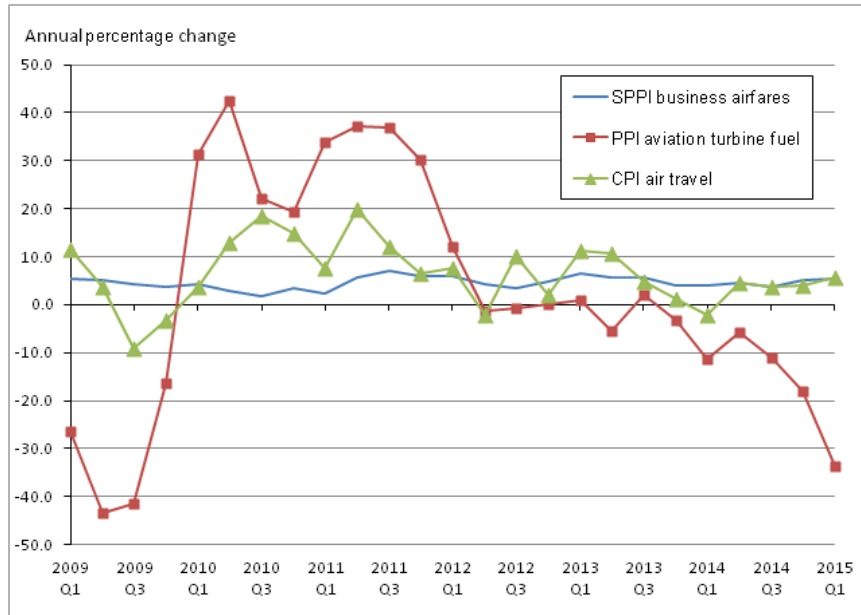
In this thesis the FFPs characteristics have been analyzed with the existing case law jurisprudence of ‘exclusionary abuse’ available under Article 102 TFEU and section 4 of the Act. The result of the analysis suggests that the FFPs conflict with the existing cannon of law of rebates. My assertion is based on the fact that: *firstly*, the FFP targets time-sensitive passengers, therefore the ‘relevant market’ to be determined not only by analyzing the traditional O&D approach. *Secondly*, as per the current law in India and in EU, the FFPs may qualify as a ‘loyalty rebate’ as they create additional market barrier for ‘as efficient competitors’. Therefore, the competition authorities in

both the jurisdiction must analyze the law with reference to Article 102 TFEU and the corresponding Indian provision. *Thirdly*, the FFP programs exploit the unique relationship of principal-agent. Thus the competition authorities must not apply the consumer welfare of the agent as an effect based study but must consider the fact that whether the principal has the liberty to opt for the benefits of the FFP. This brings me to my conclusion that time sensitive customers and the efficient competitors are at the losing end both because of FFPs and CSAs in overlapping routes.

In this globalized market economy, this kind of global alliance and their effects on market competition can be well studied by analyzing interlinked markets. Alliances undeniable provide significant benefits to the consumers and the market efficiency, but this should not make the competition authorities shy away from analyzing the anti-competitive effects of some of their cooperation structure.

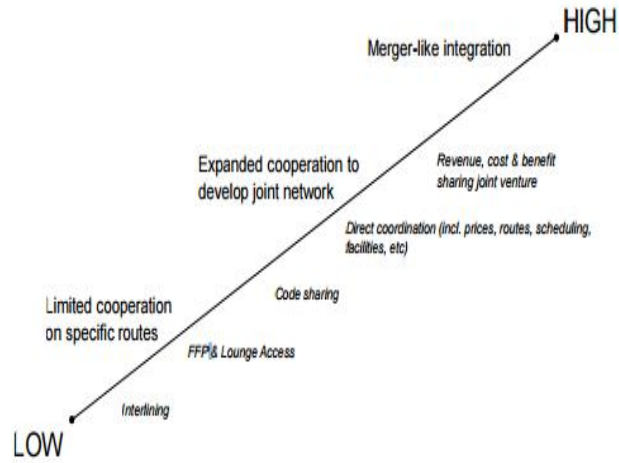
## APPENDICES

### Annexure I



**Source:** Office of National Statistics, Business Airfares - A Detailed Analysis, 27 May 2015, available at <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/ppi2/services-producer-price-index/quarter-1-2015/business-airfares---a-detailed-comparison.html> (08.06.2016).

Annexure II



**Source:** *European Commission and US Department of Transport, Transatlantic Airline Alliances: Competitive Issue and Regulatory Approaches* (2010), p. 5.

Annexure III

***Relevant sections of Competition Act, 2002***

**3. Anti-competitive agreements.—**

(1) 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.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) 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;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;

(d) refusal to deal;  
(e) resale price maintenance,  
shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

- (a) “tie-in arrangements” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) “exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

- (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:
  - (a) the Copyright Act, 1957 (14 of 1957);
  - (b) the Patents Act, 1970 (39 of 1970);
  - (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
  - (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
  - (e) the Designs Act, 2000 (16 of 2000);
  - (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
- (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

#### **4. Abuse of dominant position.—**

- (1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service;

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

## **Section 18 in the Competition Act, 2002**

Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions



under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country.

**19. Inquiry into certain agreements and dominant position of enterprise.—**

(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

- (a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
- (b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

- (a) creation of barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

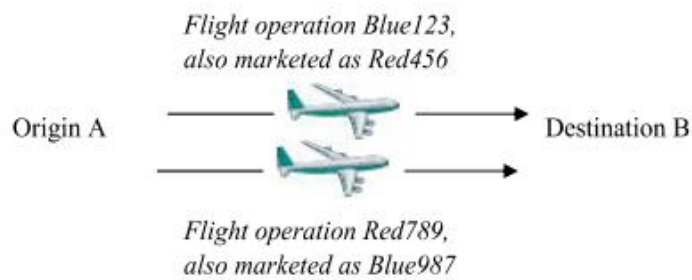
(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

- (a) market share of the enterprise;
- (b) size and resources of the enterprise;
- (c) size and importance of the competitors;
- (d) economic power of the enterprise including commercial advantages over competitors;
- (e) vertical integration of the enterprises or sale or service network of such enterprises;
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

- (i) countervailing buying power;
  - (j) market structure and size of market;
  - (k) social obligations and social costs;
  - (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition;
  - (m) any other factor which the Commission may consider relevant for the inquiry.
- (5) For determining whether a market constitutes a “relevant market” for the purposes of this Act, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”.
- (6) The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely:—
- (a) regulatory trade barriers;
  - (b) local specification requirements;
  - (c) national procurement policies;
  - (d) adequate distribution facilities;
  - (e) transport costs;
  - (f) language;
  - (g) consumer preferences;
  - (h) need for secure or regular supplies or rapid after-sales services.
- (7) The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely:—
- (a) physical characteristics or end-use of goods;
  - (b) price of goods or service;
  - (c) consumer preferences;
  - (d) exclusion of in-house production;
  - (e) existence of specialised producers;
  - (f) classification of industrial products.

**Source:** Competition Act, 2002, available at [http://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf) (08.06.2016)

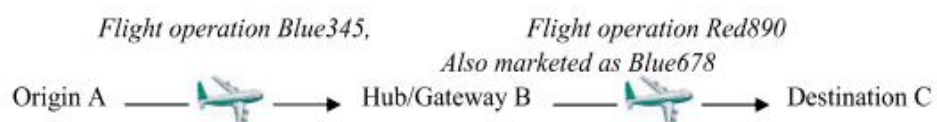
### Annexure IV



#### **Unilateral trunk route code-share operation**



#### **Behind and beyond code-share operation**



**Source:** *Steer Davies Gleave*, Competition Impact of Airline Code-Share Agreements- Final report, Appendix.

Annexure V

<b>Section 4(2), Competition Act, 2002</b>	<b>Article 102 TFEU</b>
<p>There shall be an abuse of dominance under subsection (1), if an enterprise—</p> <p>(a) directly or indirectly, imposes unfair or discriminatory –</p> <p>(i) condition in purchase or sale of goods trading conditions; or service; or</p> <p>(ii) price in purchase or sale (including predatory price) of goods or service...</p>	<p>Such abuse may, in particular, consist of:</p> <p>(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;</p>
<p>(b) limits or restricts—</p> <p>(i) production of goods or provision of services or market therefore; or</p> <p>(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or</p>	<p>(b) limiting production, markets, or technical development to the prejudice of consumers;</p>
<p>(c) indulges in practice or practices resulting in denial of market access in any manner; or</p>	<p>(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;</p>
<p>(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to</p>	<p>(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to</p>

commercial usage, have no connection with the subject of such contracts; or	commercial usage, have no connection with the subject of such contracts.
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant markets.	..... [the case law analysis of <i>Tetra Pak International SA v Commission</i> , Case C-333/94 P, ECLI:EU:C:1996:436]

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