THE EFFECT OF COMPETITION LAW AND ABUSE OF DOMINANT POSITION IN THE CIVIL AVIATION SECTOR- A COMPARATIVE STUDY

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

SUBMITTED BY
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UNDER THE GUIDANCE
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(SESSION: 2020-2021)

CERTIFICATE

This is to certify that this Dissertation Thesis titled **"The Effect of Competition Law And Abuse Of Dominant Position On The Civil Aviation Sector- A Comparative Study"** is the work done by **YASHONIDHI SHUKLA** under my guidance and supervision for the partial fulfilment of the requirement for the Degree of **Master of Laws** in School of Legal Studies Babu Banarasi Das University, Lucknow, Uttar Pradesh.

I wish him success in life.

Date 20.07.2021

Place-Lucknow

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DECLARATION

I, YASHONIDHI SHUKLA, do hereby declare that this dissertation on **"The Effect of Competition Law And Abuse Of Dominant Position In The Civil Aviation Sector- A Comparative Study" is** the result of the research undertaken by me in the course of LL.M. Programme at BBD University, under the guidance and supervision of **MS. MUDITA TRIPATHI.**

I, Yashonidhi Shukla declare that:

(a) This dissertation is submitted for assessment in partial fulfilment of the requirement for the award of degree of **Master of Laws.**

(b) I declare that this **DISSERTATION** is an original work. Wherever work from other source has been used i.e., words, data, arguments and ideas have been appropriately acknowledged.

(c) I have not permitted, and will not permit, anybody to copy my work with the purpose of passing it off as his or her own work.

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Date 20.07.2021
Place: Lucknow

Yashonidhi Shukla
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Session 2020-21
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LIST OF ABBREVIATIONS

- AAI-Airport Authority of India
- AERA Airport Economic Regulatory Authority
- ATP- Airline Tarift Publishing Company
- CCI-Competition Commission of India
- CCB-Canadian Competition Board
- CSMIA - Chhatrapati Shivaji Maharaj International Airport
- DGCA -Directorate General of Civil Aviation
- DOJ- Department of Justice
- EC- European Community
- EJ- European Court of Justice
- FIC- Federal Trade Commission
- GBP-Great Britain Pound
- GDP-Gross Domestic Product
- IATA - International Air Transport Association
- LCC-Low Cost Carrier
- MCA - Ministry of Civil Aviation
- MHA- Ministry of Home Affairs
- MRTP- Monopolistic Restrictive Trade Practices Act,1969
- NCLAT National Company Law Tribunal
- O&D-Origin and Destination
- OECD: Organisation for Economic Co-operation and Development
- OFT-Ofice of Fair Trading
- TFEU- Treaty for Functioning of the European Union
- UEFA - Union of European Football Association

1. INTRODUCTION

1.1 INTRODUCTION

The Competition Act. 2002 was the result of the findings which were concluded by the Raghavan Committee. The Raghavan Committee was established because it was deemed necessary to amend the MRTP Act or to legislate a whole new legislation in order to keep up with the globalized economic order. The Competition Act, 2002 has introduced concepts such as anti-competitive agreements, enterprise, combinations, cartels, abuse of dominant position which were previously not mentioned in the MRTP Act. The researcher for the purpose of this dissertation has emphasized upon Section 3 and Section 4 which deals with anti-competitive agreements and the abuse of dominant position respectively.

The Treaty has laid down the provisions on the functioning of the European Union as the name itself suggests. However, for the purpose of this dissertation, the researcher has specifically focussed on Art. 101 and Art.102 which prohibits cartels, and other anti-Competitive agreements amongst enterprises and prohibition of abuse of dominant position respectively. The researcher has relied heavily on these two Articles since they are the bedrock of European Competition policy in the civil aviation sector.

It is common knowledge that airlines constantly alter fares in response to changes in costs, both industry wise and airline specific, and to changes in consumer demand, both for travel generally and travel on particular city pairs. These alterations of the fare rates are subject to scrutiny by the aviation regulators. The purpose of these regulations is that no airline charges an amount for the tickets which is totally out of line from the perspective of the sector.

The civil aviation sector has seen an exponential growth in the past decade, with India being an important market for several leading Western and Eastern airlines. India's geographical location makes it perfect as a hub for connecting flights to South East Asia.

However, the growth of the aviation sector has along with the growth, brought in a lot of competition law issues which need to be resolved. There are many anti-competitive practices which are taking place in the civil aviation sector and the current competition laws are not legislated to bring such practices under its purview. Of the many anti-competitive practices pursued by these airlines, one of the major practices is that of code share agreements amongst two or more airlines. One of the most important aspects for a fledgling airline with a lot of

market potential is the presence of codeshare agreements. Codeshare agreements are contracts which are entered into by two or more airlines in order to ease air travel amongst passengers while at the same time obtaining entry into relevant markets which prohibit direct entry of certain airlines. Generally speaking, code-sharing arrangements have two basic forms: complementary and parallel alliances. Complementary alliances occur when two air carriers link existing flight networks., resulting in a new complementary network to provide Services for connecting passengers (Park, 1997).

1.2 RESEARCH PROBLEM

This means that an airline combines the local segment of one city pair flight on its own planes with the other segment flown by its alliance partner. With code-sharing, alliance airlines can sell air tickets and offer services on some city pairs where they do not directly serve the entire route. On the other hand, parallel (or overlapping) alliances refer to collaboration between two air carriers competing on the same flight routes. Globally as well, the aviation sector has prospered by heaps and bounds especially since the deregulation in the United States of America and Europe in the 1980's and 1990's respectively. Since code share agreements are contracts and fall under the ambit of contract laws in various jurisdictions, it is necessary to study whether these agreements be deemed to be anti-competitive agreements thereby falling under Section 3 of the Competition Act 2002. The researcher has made the assertion that code share agreements are anti- competitive in nature because they amount to price fixing. In a code share agreement, the airlines, who are the parties to the agreement fix a particular fare on a particular flight. These agreements are horizontal in nature since they are on the same level on the production chain. The concept of code share agreements needs to be scrutinized because these agreements fall under the policy of 'anti-trust immunity' which is being afforded to these airlines.

Furthermore. there has been a recent development in the aviation sector, that being of alliances. Alliances are conglomerating wherein many airlines enter into code sharing and handle issues such as baggage transfer, joint purchase of turbo fuel, etc. The prominent alliances operating as of today are Star Alliance, Skyteam and OneWorld. Therefore, it can be analysed that these code share agreements fall under the domain of anti- competitive agreements leading to a resultant abuse of dominant position. These alliances have the potential to develop into a global cartel, the reason being that airline alliances are a bundle of code share agreements. The researcher shall be analysing these alliances through the lens of competition law and attempt

to infer that these alliances are indulging in the process of cartelisation and thus causing harm to the relevant market.

Further, the researcher has suggested some changes which need to be made to the Airport Authority of India Act, 1994 and the Competition Act, 2002. As an addition to the amendments, the researcher has also suggested a change in approach by shifting from the administrative model of enforcement to the prosecutorial model of enforcement.

1.3 AIMS AND OBJECTIVES OF THE STUDY

The reason why this study is significant is because; there has been limited literature on this topic in India. The researcher has added to the pool of knowledge by writing a dissertation on this topic. The objective of the researcher has been to recommend some changes which need to be made to the public institutions in India which deal with the competition law and the civil aviation sector. Primarily, the Competition Commission of India (CC) and the Airport Authority of India (AAI). The objective of the researcher has been to study the impact of anti-competitive agreements in the civil aviation sector, thereby leading to an abuse of dominant position. In the final chapter, the researcher has suggested amendments which need to be made to the AAI Act, 1994 and the Competition Act, 2002.

The aviation sector in India had been thoroughly limited to government control of the airspace through the Air Corporations Act, 1953 which established Indian Airlines as a statutory airline. Private players were prohibited in the aviation sector in order to keep up with the principles of socialism and a closed-market economy. The trend began to change in the late 1980's when the government started granting licenses to private players to operate as air taxi operators. Fast forward to 2018 and India is becoming a major player in the global aviation sector.[1]

In the meantime, the law of competition has evolved from the Monopolistic Restrictive Trade Practices Act, 1969 to the Competition Act, 2002. This evolution of the jurisprudence of competition law in India has not led to the development of a comprehensive competition law policy purely for the civil aviation sector.

Furthermore, air travel has become more convenient due to the advent of code share agreements. The Jet -Etihad deal was a watershed moment in the Indian aviation sector since Etihad Airways was the first foreign player to acquire stake in an Indian airline after the

[1] https://timesofindia.indiatimes.com/busines/india-business/india-fastest-growing-domestic-aviation-market-globally-for-four-years-in-a-row-says-jata/articleshow/67888272.cmslast accessed 07-06-2019.

government had allowed foreign direct investment in the aviation sector. Another example is of Vistara Airlines, which is a joint venture between Tata Sons, Singapore International Airlines and Air Asia.

There are many anti-competitive practices such as price fixing, predatory pricing, cartelization, abuse of dominant position which is prevalent in the civil aviation sector. There are very few cases of alleged anti-competitive behaviour in the civil aviation sector which see the light of the day. The primary reason as to this is the anti-trust immunity which has been provided to airlines both in India and Europe. The United States of America imposes liability on airlines in the civil aviation sector if it is proved that they indulged in anti-competitive behaviour. Therefore, the researcher has chosen India and the European Union as the relevant market for the purpose of this dissertation which can be reflected in the title of the dissertation.

The researcher has further emphasized on the dynamic nature of the relevant market. In the civil aviation sector, the criteria for a broad or a narrow relevant market are extremely microscopic in nature. The reason being that, a city is an individual entity on a geographic scale, however, in the civil aviation sector, the relevant market is defined by the point of destination.

Further, the researcher has suggested some changes which need to be made to the Airport Authority of India Act,1994 and the Competition Act, 2002. As an addition to the amendments, the researcher has also suggested a change in approach by shifting from the administrative model of enforcement to the prosecutorial model of enforcement.

1.4 RESEARCH QUESTIONS

The researcher during the course of this dissertation research has addressed the following research questions:

1. How have the various schools of anti-trust jurisprudence made an impact on the competition policies in the civil aviation sector?
2. How has the evolving concept of the relevant market impacted the growth of the Indian and European civil aviation sector?
3. Which anti-competitive practices are especially prevalent in the civil aviation sector?
4. Whether these anti-competitive practices in the civil aviation sector are resulting in an abuse of dominant position?

5. Is there a scope to give public institutions such as the CCI, DGCA and AAI greater powers when dealing with anti-competitive behaviour in the civil aviation sector?
6. Is there a need to carry out amendments to the Airport Authority of India Act, 1994 and the Competition Act,2002 to make the civil aviation sector more competitive?

1.5 SCOPE AND LIMITATION OF THE STUDY

Scope

The Competition Act. 2002 has been instrumental in deterring anti-competitive behaviour. However, the Act has barely been utilized to apply it to the aviation sector barring a few exceptions. when, in reality, the aviation sector is extremely prone to anti-competitive behaviour.

The scope of this dissertation is to bring out the anti-competitive practices prevalent in the civil aviation sector. The Competition Act provides remedies to an aggrieved party in the form of monetary compensation and other civil remedies. The Act however, has no provisions regarding imposition of criminal liability, while the US and the European Union impose criminal liabilities as well.

Therefore, in the final chapter of the dissertation, the researcher has made certain recommendations which need to be made to the Airport Authority of India Act and the Competition Act. The researcher has focused on code share agreements as an anti-competitive practice which leads to an abuse of dominant position in the global civil aviation sector.

Limitation

Since the study which has been undertaken by the researcher is a first of its kind in India, there is not enough data and evidences available in order to conduct an exhaustive study.

The study which has been undertaken by the researcher is the first step in mapping the issues at hand. Keeping the constraints of time and resources under consideration, the researcher has conducted a doctrinal research by analyzing the various issues at hand.

1.6 LITERATURE REVIEW

BOOKS

1. The authors in their book '*Competition Law in India*'[2] have highlighted several substantive critical issues, which have developed over the course of years. As competition law has witnessed just half a decade of its enforcement. The book has further elaborated upon the various market factors which might lead to anticompetitive tendencies. However, the book does not elucidate the competition policies from the perspective of the civil aviation sector.

2. The author in her book '*Indian Competition Law*'[3] deals with the basics of competition law in the initial chapters. As the book has progressed, the author has provided a comprehensive and complete understanding of competition law. The book has studied the development of competition law jurisprudence in India by tracking down the evolution of Monopolistic and Restrictive Trade Practices Act to the Competition Act. The book has further highlighted the issues and questions relating to competition law that are so far unsolved and unanswered. Further, the book has cogently analysed the competition law jurisdictions in the United States and the European Union. One point missing though, is that the book has not covered competition law vis-à-vis the civil aviation sector in India or US and EU.

3. The authors in their book '*Competition Law*'[4] is a definitive textbook on the subject. The authors have explained the purpose of competition policy and introduced the researcher to several key concepts and techniques of competition law and provided insights into the numerous issues that arise when analysing market behaviour. The book has explained the concepts of distribution agreements, licenses of intellectual property rights, cartels, joint ventures and mergers. The book has further assimilated a wide variety of resources, which include judgments, decisions, guidelines and periodic literature. The book has covered the topic of competition law and its impact on the civil aviation sector in the European Union, which has been extremely resourceful for the researcher.

4. The author in their book '*Competition Law in India (Policy, Issues and Developments)*'[5] traces the evolution of the anti-trust laws in India from MRTP to the Competition Act, 2002. The book has substantially discussed the Competition Act, 2002 and the subsequent

[2] BIR ROY & JAYANT KUMAR (2d ed. 2014 Easter Law House)
[3] VERSHA VAHINI| Edition 2016 Lexis Nexis
[4] RICHARD WHISH, DAVID BAILEY. Oxford University Press Seventh Edition
[5] T. RAMAPPA, Oxford University Press, First Edition.

amendments which were made to it in 2007 and 2009. The author has explained key issues including anti-competitive agreements, abuse of dominant position, and combinations (mergers and acquisitions). The book has further analysed the role of regulatory authorities such as the Competition Commission of India, the Director- General and the Competition Appellate Tribunal in enforcing the provisions of the Act. Further, the book has comparatively analysed the position of competition law in the US, UK, and EU with an emphasis on the important judgments. However, the book has not covered the competition aspect with respect to the civil aviation sector in India or in any other jurisdiction.

5. The author in the book '*EC Competition Law*"[6] has focussed on the evolution of competition law in the European Union. The author has further emphasized on the Ordoliberal School which propagated the competition law jurisprudence in Europe. The author has interlinked the Treaty on the Functioning of the European Union with the Ordoliberal School. Further, the author has comprehensively analysed the British Airways v. Virgin Atlantic case which the researcher has analysed as well.

ARTICLES

1. The article '*Jet Etihad Strategic Aliance: The Road Ahead*'[7] explains the various reasons as to why the Indian aviation sector has proliferated over the years. The main point of contention in this article is regarding the Jet- Etihad deal which was concluded in 2014. The article speaks about the existing circumstances which were prevalent due to which the government opened up Foreign Direct Investment in the Indian aviation sector and how the Jet Etihad deal has affected the Indian market. The article speaks about the various regulatory agencies the deal had to clear so as to obtain the go ahead on the deal.

2. The research study titled '*Competition Issues in the Domestic Segment of the Air Transport Sector in India*'[8] the study entails the issue of competition at two levels – air transport and airports. The two issues have been dealt with separately in the study. Broadly, the study has provided a market overview, discussed any significant anticompetitive practices by various players and their efects, address implications of this study for Competition Policy and Law in India, and outline issues for advocacy for India's Competition Commission.

[6] GIORGIO MONTI, Cambridge University Press

[7] Shalini Talwar & Reena Mehta, K J Somaiya Institute of Management Studies and Research, University of Mumbai

[8] Paramita Dasgupta, Raj Ponnaluri, Ashita Allamraju Administrative Staff College of India

3. The article '*British Airways, Iberia and American Airlines: airline cooperation and consolidation under review by the Commission*'[9] discusses the European Competition Commission's decisions on the code share agreements between British Airways, Iberia Airlines and American Airlines. The article discusses the main issues raised in these investigations and highlights developments in the Commission's approach towards competition analysis and remedies in the passenger air transport sector. The article however has not discussed the issue of cartels being formed due to such code share agreements.

4. The researcher has made use of the order passed by the Competition Commission of India dated 12-l1-2013. This order essentially gave the final clearance for the finalization of the Jet -Etihad merger deal. The order is a comprehensive order with the panel Members citing various possibilities and also the impact of this merger on the relevant market.[10]

5. The article Market Share and Price Determination in the Contemporary Airline

Industry discusses about airline pricing and market structure determination for domestic airport- pair routes. The article includes variables to control for the effects of congestion, consumer brand preferences, barriers to entry into airports, and multiple airport availability within a city. The results indicate the non-contestability of airline markets, but certain factors can mitigate a carrier's endpoint dominance. Additionally, the need for policies addressing airport congestion is indicated by several aspects of the article.[11]

6. The article 'International Airfares in the Age of Alliance: The Effects of Code sharing and Antitrust Immunity"[12] discusses the empirical evidence showing the effect of airline cooperation on the interline fares pay aid by international passengers. The analysis focuses on two measures of cooperation, code sharing and antitrust immunity, and the results show that their partial effects are both negative.

7. The article "Emerging Patterns in Intercontinental Air Linkages and Implications for International Route Allocation Policy"[13] discusses how the advent of globalization has affected the design of codeshare agreements and how favourable routes are allocated according to

[9] Emmanuelle Mantlik et al.
[10] Combination Registration No.C-2013/05/122).
[11] Amy D. Abramowitz & Stephen M. Brown Review of lndustrial Organization, Vol. 8, No. 4 (August 1993), pp. 419-433.

[12] Jan K. Brueckner, The Review of Economics and Sla tics, Vol. 85, No. I (Feb., 2003), pp. 105-18 Published by The MIT Press https://www.jstor.org/stable/3211626.
[13] Tae Hoon Oum and A.J. Taylor Transportation Journal, Vol. 34, No. 4 (SUMMER 1995), pp. 5-27.

customer preference and customer outreach of any particular airline. The article has further elucidated upon the fast-paced nature of the aviation sector and how the aviation has transformed over the past thirty years and how code share agreements shall tune themselves according to every individual route in the future.

8. The researcher has made use of an actual codeshare agreement between Swiss air[14] and American Airlines[15] dated June 22nd 1999. The agreement deals with aspects such as codeshare service, i.e. as by which code the airline shall identify itself with during a particular flight, further the seat allotment, baggage handlings are some of the factors which constitute a codeshare service clause. Further, there are clauses in the agreement as to marketing and product display in which it is mandated that the parties adhere to the laws relating to advertising and promotions. Further, there is a very important clause which enables the airlines to conduct bookings under their own code as part of codeshare, but when it comes to the operations part, the Operating Carrier's flight number shall be displayed on the board, used by the Air Traffic Control (ATC). There are thirty one clauses in total. The researcher has referred to these clauses for the purposes of this research study.

9. The article 'Strategic Formation of Airline Alliances"[16] discusses about the means of a two-stage game where first airlines decide whether to form an alliance and then fares are determined. The authors have analyzed the effects and the strategic formation of airline alliances when two complementary alliances, following different paths, may be formed to serve a certain city-pair market. Alliances hurt rivals and decrease interlines fares. Most interestingly. and contrary to what might be expected, the formation of alliances may be unprofitable in a competitive context. This is likely to happen when competition is significant and economies of traffic density are low. This research article has been beneficial to the researcher in order to study the aspect of cartelization in particular.

10. The article “Regulating inter-firm agreements: The case of airline code sharing in parallel networks”[17] discusses about the aviation market under conditions of competition, code sharing contracts, anti-trust immune alliances. The authors have conducted an empirical study to show that stronger the code share agreement on overlapping routes, stronger is the producer surplus.

[14] Swiss Air Transport Ltd.
[15] American Airlines Inc.
[16] Ricardo Flores-Fillol & Rafael Moner - Colonques Journal of Transport Economics and Policy, Vol. 41, No. 3(Sep., 2007), 427-449 (Published by: University of Bath).
[17] Nicole Adler, Hebrew University of Jerusalem &Eran Hanany, Tel-Aviv University.

The researcher has referred this article in order to gain an understanding from the economics aspect of code share agreements.

11. The article The Economic Impact of the ATA/Southwest Airlines Code Share Alliance"[18] discusses about the economics of code share agreements by taking the example of the above-mentioned code share alliance. Further, the research article discusses the impact of the 2005 code-sharing agreement between Southwest and ATA on market power, air fares and passenger volumes in the affected markets. The uniqueness about this code share agreement is that it is the first time that Southwest has entered a market in this manner. This raises the question of whether Southwest participation in a code share agreement will have the same impact on fares and competition that Southwest's direct entry has had in other markets. From a policymaker's point of view, code-sharing alliances should be implemented if they have a net positive impact on social welfare. The purpose of this paper is to provide policymakers' additional information on which to assess the effects of this code share agreement are some of the technical points of economics and policy which have been laid down by the authors of this research paper.

12. The article 'Strategic Formation of Airline Alliances'[19] discusses about the means of a two-stage game where first airlines decide whether to form an alliance and then fares are determined. The authors have analyzed the effects and the strategic formation of airline alliances when two complementary alliances, following different paths, may be formed to serve a certain city-pair market. Alliances hurt rivals and decrease interlines fares. Most interestingly. and contrary to what might be expected, the formation of alliances may be unprofitable in a competitive context. This is likely to happen when competition is significant and economies of traffic density are low. This research article has been beneficial to the researcher in order to study the aspect of cartelization in particular.

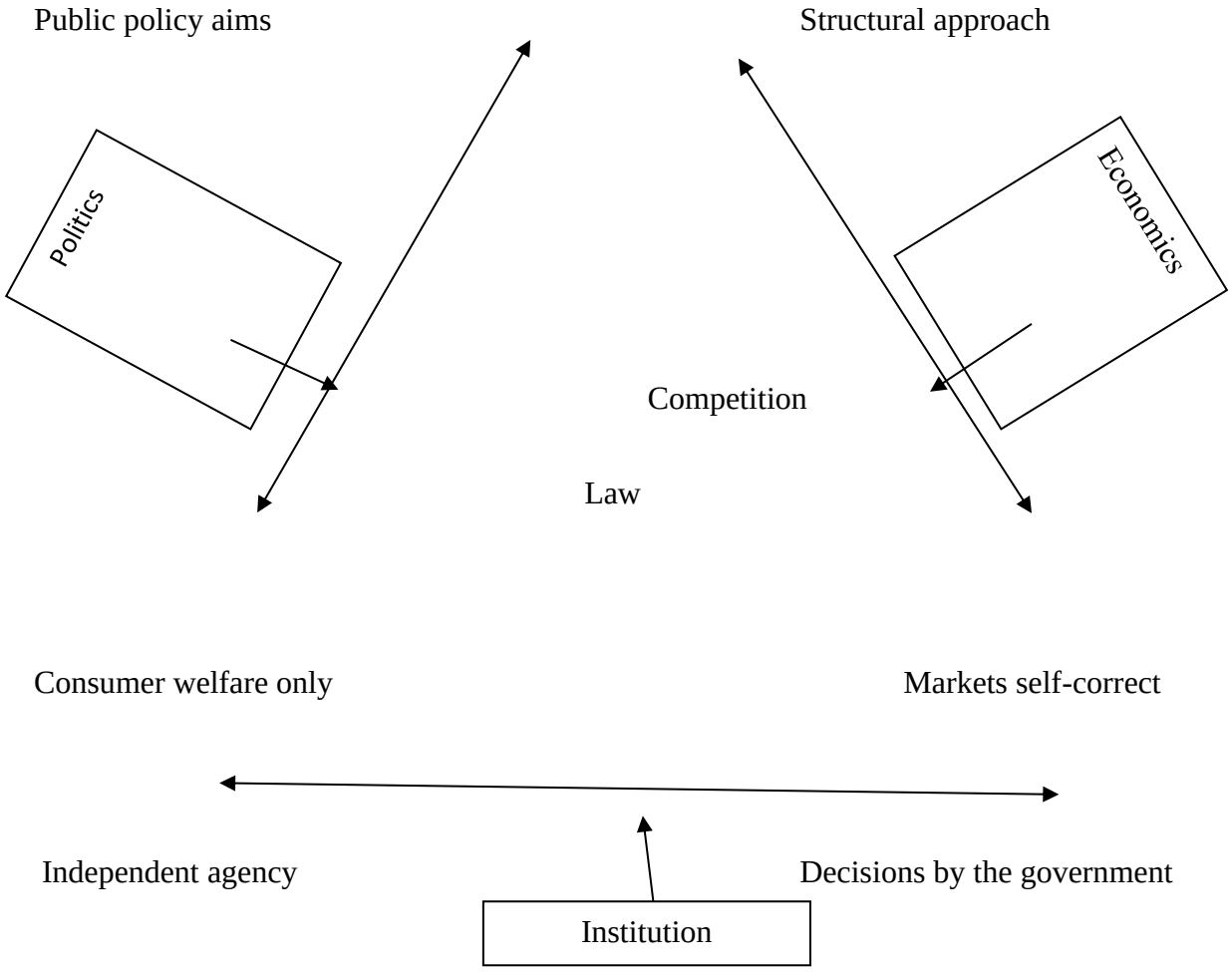
1.7 RESEARCH METHODOLOGY

The nature of this dissertation study is comparative and analytical. The study is doctrinal and based on secondary data gathered from different sources including provisions of the, statutes. judicial precedents on competition / anti-trust cases in the aviation sector, law journals. scholarly articles, books and online data bases.

[18] B, Starr McMullen, Professor of Economics and Agricultural and Resource Economics, Oregon State University & Yan Du Ph.D. Student in Economics, Oregon State University.
[19] Ricardo Flores-Fillol & Rafael Moner - Colonques Journal of Transport Economics and Policy, Vol. 41, No. 3 (Sep, 2007), 427-449 (Published by: University of Bath).

2. THE JURISPRUDENCE OF ANTI-COMPETITIVE AGREEMENTS AND THE ABUSE OF DOMINANT POSITION AND ITS APPLICATION TO THE AVIATION SECTOR

Competition law is one such subject which cannot be studied purely from the bare provisions. Even though the subject matter of competition/antitrust laws are corporates and other enterprises whose profits and turnovers are in the millions and billions of dollars/euros/pounds/rupees the grassroots cannot be ignored whilst studying the jurisprudence of competition laws. Competition law policy is affected by society, economics. consumer welfare, self-correcting markets etc. as described in the figure below:



Thus, the figure on the previous page paints a holistic picture of the entire domain of Competition law. It should however be noted that each word in the above figure has a dissertation capability in its own right. However, the researcher is conducting this research on competition law and each of these factors is crucial for the researcher's dissertation. Therefore, the researcher shall be using a case study to state why the above factors are crucial for drawing up a comprehensive competition policy in the civil aviation sector.

2.1 A CASE STUDY: THE DE HAVILLAND DECISION OF THE EUROPEAN COMMISSION

In the above case, two companies active in the aerospace industry, Aerospatiale (a French firm) and Alenia (an Italian firm), proposed to acquire jointly the assets of de Havilland (a Canadian division of the American aircraft manufacturer, Boeing)[20]. The proposed merger was notified to the European Commission for evaluation. The standard for assessment at the time was set out in Article 2 of the Merger Regulations, whereby a merger was prohibited if it would most likely create a dominant position, and which would likely to impede effective competition in the market.[21] The Commission adjudicated that the merger should be blocked because it would create a dominant position. The Commission through its findings recorded that the said merger would affect the market for regional turbo-propeller aircraft.

Aerospatiale and Alenia jointly controlled ATR which manufactured turbo-propeller aircraft and both ATR and de Havilland were significant players in the market which made it a case of a horizontal combination with an objective to achieve a near monopoly in the turbo propeller aircraft market. The Commission further found that that the effect of the merger would be to create a firm with significant market power and with market shares considerably higher than those of its closest competitors (All over Europe, the proposed merger if cleared had the capacity to capture an overall market share of a whopping 65 per cent.) Furthermore, the new firm which would be created after the proposed merger would have been able to sell the whole range of turbo-propeller aircraft. This level of dominance would have led to an abuse of dominant position and as a result the new firm, not the consumers would be making the economic decisions of what and how much to produce- the resultant effect would be an increase in prices and a reduction in output. As a result, the Commission halted the merger from getting

[20] Aerospatiale -Alenia /de Havilland CaseM.53 [1991] OJ L334/42.

[21] Regulation 4064/89 on the Control of Concentrations between Undertakings [1989] OJ L.257/13

completed. However, this decision of the European Commission has a richer political, economic and institutional narrative as well.

Therefore, this case now being discussed; it is important to move on to the jurisprudence of Union has made great strides competition laws. It is a well-documented fact that the European Union has made great strides in developing a comprehensive and a holistic competition policy. The EC competition policy is constantly undergoing a significant shift in economic theory and political ideology as well as in its institutional enforcement structure.

2.2 COMPETITION AS A MEANS OF ECONOMIC FREEDOM

According to Prof. Whish, "Competition means a struggle or contention for superiority, and in the commercial world, this means a striving for the custom and business of the people in the market place."[22]An essential criterion which must be looked at while trying to determine whether there is a market failure is that it must be ascertained whether the ends are met rather than trying to ascertain whether the firms are rivals. The majority opinion amongst a number of economists support a conception of competition based on the effects of the behaviour of the firms on economic welfare. This conception of competition is highly efficient because of two reasons: first, it provides a realistic-benchmark by which to measure the presence of competition; second, it is more precise, because there can be rivalry but no competition. This second preference is highly beneficial to the purposes of this dissertation since the researcher wants to prove an imminent cartel amongst the airlines. This brings the researcher to the well documented rivalry between Boeing and Airbus who are the leading global manufacturers of civilian aircraft with the former being involved in the manufacture of military aircraft as well.[23]An economic assessment was carried out when in 1997 Boeing merged with a competing aircraft manufacturer, McDonnell Douglas.[24]

McDonnell Douglas was not seen as a major player in the civil aviation market; there is a catch in this fact as displayed by the trend that the prices for an aircraft were higher when Boeing and Airbus competed for an order than if McDonnell Douglas also offered its aircrafts. Thus, a minor player in the market actually played the role of a stabilizing force by keeping the prices

[22] RICHARD WHISH & DAVID BAILEY,COMPETITION LAW (5"ed.) (London, Lexis Nexis,2003)) 2
[23] M LYNN, BIRDS OF PREY THE WAR BETWEEN BOEING AND AIRBUS (London: Mandarin Paperbacks, 1995)
[24] *Boeing McDonnell Douglas Case IV*/M.877 [1997] OJ L336/16.

of airline tickets lower and thus benefitting the consumers. Therefore, the conundrum which was in front of the Commission was that post the merger, the prices of airline tickets would rise even if the rivalry between Boeing and Airbus remained unaffected by a significant shift in the paradigm. Therefore, the question about whether there is competition is not whether the market is characterized by rivalry. rather whether the market in question yields economic welfare. Defining competition by judging the effects on economic welfare is traditionally associated with economic approaches to competition law. Economic freedom is an essential criterion that is required for the growth of any sector. The practices which are followed in the civil aviation sector impose restrictions on the economic freedom of an airline that has just set up its business.

Thus, the researcher by studying competition as a means of economic freedom would like to move on to the Ordoliberal School of jurisprudence on competition law since the researcher is studying a Europe-centric aspect of competition law. Along with the Ordoliberal School, the researcher shall be studying the Harvard and the Chicago School as well, since the American perspective on anti-trust regulations has directly impacted the civil aviation sector.

2.3 THE HARVARD SCHOOL

The Harvard School of thought originated in Harvard University, Boston, when in the 1930's researchers conducted an analysis of specific industries which were contributing in some way or the other to the development of the American economy.[25] The Harvard School advocates state intervention and argues that the limitation of market power should be the central goal of any competition policy.

The characteristics of the Harvard School are as follows:

- Anti-trust public policy includes a wider set of objectives than conventionally defined measures of economic efficiency.
- Judicial and administrative intervention may be necessary in order to achieve a balance between objectives of policy.
- The per se prohibitions which are laid down are valid.

[25] VERSHA VAHINI, INDIAN COMPETITION LAW (IST Ed. 2016) Lexis Nexis 12-13.

- Markets are characterized by persistent market power, and a presumption of market efficiency is unwarranted.
- Mergers and competition policy should aim at ensuring that market structures and a firm's behavior does not create and exploit positions of market power.

The Harvard School was a predominant school of thought before the civil aviation truly kicked in and air transport became the favoured mode of transport. As a result, there are hardly any judicial precedents which have been set having its foundations in the Harvard School.

2.4 THE CHICAGO SCHOOL

The Chicago School was the primary critics of the Harvard School. It was the belief of the scholars of the Chicago School that, in order to achieve the best market efficiency, there should be minimum state intervention. Further, it is the thought process of the Chicago school that industry should not be per se is a target of anti-trust laws and beneficial implications should be checked in accordance with the performance of the firms.

The thought process of the Chicago school is as follows:

- Economic efficiency is measured in terms of the sum of producers and consumer surplus.
- Per se prohibitions on market practices are to be avoided.
- Market prices are to be evaluated in terms of their impact on economic efficiency.
- When the market competition is left untouched by legal restrictions, the better is the economic efficiency of the market.
- The legal restriction should be limited to restricting anti-competitive practices.

The anti-trust judgments in the civil aviation sector which have been passed not only by the US Courts, but also the European Court of Justice have been following the principles of the Chicago School.

The judgments in the *U.S v. Airline Tariff Publishing Co.* and the British Airways price-fixing case are classic Chicago School. The Courts did not interfere in the Business dealings of the respective parties from the point of inception. Only when there was probable cause to believe

that these businesses were anti-competitive in nature and thereby bad in law, the Court stepped in to prevent the further commission of those anti-competitive practices. The Chicago School is the primary school used for applying a certain rationale to alleged anti-competitive behavior in the civil aviation sector.

2.5 THE ORDOLIBERAL SCHOOL

The advent of ideas regarding competition jurisprudence began developing in Europe in around the 18" century. However, the modern-day competition law jurisprudence began to emerge during the Nazi regime when a group of underground lawyers and economists called ‘ordoliberals’ continued to explore the issue of continental and the Austrian ideas on competition law.

The Ordoliberal school of thought insists on the thinking that "markets can fulfil positive functions only if the state establishes a clear institutional framework within which spontaneous market processes can take place."[26] The Ordoliberals particularly Eucken and his colleagues kept the example of the Weimar Republic as the sample and went on to prove that competition is a weapon of self-destruction because firms tend to coagulate in joint power from cartels and/or misuse economic power rather than compete. Therefore, drawing comparisons between the fall of the Weimar Republic and the economy is linked to the fact that firms often achieve a great degree of economic clout which affects political power and retains competition.

Therefore, the ordoliberals stress that if the State does not take active measures to foster and promote competition, then firms with market power shall emerge which shall lead to the subversion of the market economy and undermine democracy itself owing to the theory that economic power can be transformed into political power. Therefore the researcher can deduce that market participants have incentives to incrementally transform the decentralized decision-making of competitive markets into increasingly increased variants. Therefore, the researcher states that the European nations have deviated from a laissez-faire economy to a system wherein the state promotes competition and yet at the same time institutionally regulates the market forces.

This brings the researcher to the two hypotheses upon which the Ordoliberal school is based:

[26] Flavio Felice & Massimiliano Vatiero - Ordo and European Competition Law

i) Only a state independent of economic lobbies can secure the freedom and rights of its Citizens against abuses of market power

ii) Only a state with bounded functions can protect individuals from the arbitrary use of public power"

Hence, it can be seen that the central tenet of the ordoliberal school is the protection of competition.

For the Ordoliberal School, competition is an open form of supply and demand with actions and reactions among agents. One of the important doctrines propounded by the ordoliberals is that of ‘handicap competition'. The aim of handicap competition is to degrade the performance of competitors, thereby relatively improving an enterprise's performance Handicap competition is also called prevention-competition by ordoliberals, is based on “rival other -regarding agents and is directed at preventing competition from other producers, rather than improving one's own performance in the service of consumer interests." As a result of these findings by the ordoliberals, the objective of competition policy was to frustrate handicap competition and, thereby leave no other option to enterprises but to engage in capacity competition.

This objective has been modified over the years and today it is called as the abuse of dominant position. According to the European Court of Justice, “abuse occurs when a dominant form utilizes its economic power, to gain a competitive advantage other than by “Competition on the merits" and which thereby has an adverse effect on the structure of the competition" in the given relevant market at any given time. The conceptualization of the abuse of dominant position now brings us to the chain of supply and demand as eulogized by the ordoliberals. For the ordoliberals "every supplier and demander does exert some small influence. Without individuals being conscious of it, all together determine prices and therefore the whole economic process". (Eucken, 1951:270). As a result, according to the ordoliberals it is imperative that where the competition is weak, the state should intervene and make sure that enterprises conduct business as if they were without the power to coerce other firms in the market.

The product of this jurisprudence is a tripartite contract wherein the enterprise, the state and the regulator are parties to the contract. The principles of the Ordoliberal School form the consideration for each of the parties. The researcher shall now be emphasizing on the concept of impediment abuse which is a practice which excludes an enterprise/competitor from

competing in a given relevant market. The thinking behind the concept of impediment abuse is that by cutting out the viable competitor, the dominant firm can increase its exploitative powers over the suppliers and consumers because the alternative products are now reduced. This leads to greater exploitation and the greater exploitative power has the ability to provide more economic resources to themselves since they are the dominant firm.

This scenario which leads to a polarization of power, the ordoliberals want to limit this excessive power by having a third party in the form of a watchdog which ensures that the economic and political order remains stable. The Ordoliberals witnessed the fall of the Weimar Republic due to the undermining of political and social institutions by private economic powers and saw a tyrannical regime in the form of the Third Reich which would cripple Germany between 1933 -1945 and then into the post war period.

2.5.1 THE IMPACT OF THE ORDOLIBERAL SCHOOL ON THE CIVIL AVIATION SECTOR.

The deregulation of the airline sector started taking place at the turn of the decade of the 1970's, this step was introduced after years of monopoly and oligopoly domination bundled together by a heavy presence of state-backed enterprises in this sector.[27] The initial years of the deregulation were not kind to the new entrants in the aviation sector since they had to compete with the existing airlines that had a strong foothold in the market.[28] This trend changed in the 1980s when the concept of low-cost carriers (LCCs) was introduced when the airlines would offer cheaper airfares, better route networks centering around the smaller hub airports. The advent of the low-cost carriers was dangerously close to harming the existing status quo.

Therefore, the incumbent major carriers in the market adopted many strategies which included matching or undercutting the prices of the new carriers or bringing about an increase in the capacity on the routes where the LCCs operated. This new business model of the incumbent airlines was the approval by the anti-trust regulators since it was considered to be a typical market practice and no concerns were raised at that point in time. However, it should be noted that this practice of undercutting the prices could have been one of the defenses in a possible claim of price discrimination under the Robinson- Patman Act. The U.S. Department of

[27] Andrew R. Goetz, Deregulation, Competition, and Anti-trust Implications In the U.S Airline Industry,103. TRANSP. GEOGRAPHY I, 2-4 (2002).

[28] Christian Ewald, Predatory Pricing in the Airline Industry as a Challenge to Competition Law Enforcement-

Transportation tried to enact new rules and regulations that would limit the ability of an incumbent airline to respond to the entrance of new companies into the market. In Germany, the Bundeskartellamt, the national anti-trust tribunal, reprimanded the activities of Deutsche Lufthansa AG for bringing about an unjustified reduction of prices on the routes where it was competing against Germania, which was a low cost carrier."[29]

The jurisprudence of anti-trust in the aviation sector has developed on similar lines in Australia in the Qantas v. Virgin Blue case and in Canada as well in the Air Canada v. West Jet case. In the Canadian anti-trust system, it was popular opinion that low prices of airline tickets were not anti-competitive in nature.

On the contrary, predatory pricing is a more serious anti-competitive practice as compared to price fixing since the former aims to create an absolute monopoly. The Canadian anti-trust procedure is such that the Commissioner who heads the Competition Bureau has the authority to take civil action against an enterprise's activities if the activities lead to an abuse of dominant position. The provisions of the Canadian Competition Act has given teeth to the Commissioner by giving him the authority to prove that the business in concern was indulging in predatory pricing which was intended to eliminate the competition posed by the low cost carrier airlines.

These cases suggest that to incumbent airline companies have a considerable advantage as compared to the new airlines which have just entered the market, and therefore, practices such as price undercutting, matching reactions would undermine the permanence of LCC's in the market. This approach of the Canadian anti-trust regulators may be seen as a reflection the Chicago School, since this school propagates that the regulators should intervene only if a firm is carrying out anticompetitive practices.

Therefore, the researcher has studied the specific aspects of code share agreements and airline alliances and how they specifically impact the market and the consumer as well. The thought behind introducing a jurisprudential aspect at the very start of this dissertation is that any law, any policy has its source in a school of thought. For eg: the Monopolistic Restrictive and Trade Practices Act ,1969 adhered to the socialist school of thought while the Competition Act 2002 was more in accordance with the principle of a laissez faire economy.

[29] Bundeskartellamt [Federal Cartel Office] Feb. 18, 2002, B9-144/01.

It is essential to study the developed U.S and European jurisprudence of anti trust in respect to the aviation sector because it's a market which is has seen more judicial precedents and policy decisions based on these precedents. The researcher has ingrained these principles in those areas which the Competition Act lacks as compared to its U.S and European counterparts.

3. THE INDIAN & THE EUROPEAN AVIATION SECTOR

The Indian aviation sector has prospered because of its liberalization. Initially, the growth of the aviation sector was slow due to it not being the mode of transport of the masses, however, the 21s century has brought about an exponential growth in the aviation sector due to structural reforms, airport modernization, entry of private airlines, adoption of the budget airlines model and improvements in service standards. The government has also played a large role in supporting growth in the aviation sector by encouraging the private sector to become more involved in the construction of airports through Public Private Partnership Models and by providing state support in terms of concessional land allotment, financing, tax holidays and other incentives.[30]

3.1 THE GROWTH OF THE INDIAN DOMESTIC AVIATION SECTOR

As seen in the previous heading, the Indian aviation sector is in a boom and the phenomenal growth of the aviation sector has presented exciting opportunities and at the same time, posed its own set of challenges. The repeal of the Air Corporations Act, 1953 has played a major role in the development of the Indian aviation sector. S.19 of the erstwhile Air Corporations Act, 1953 ceased the existence of all existing licenses to carry out aviation-based operations and hence there was a stagnancy period for thirty-nine years in the Indian domestic aviation sector when in 1994 the Parliament passed the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994. As of 2008, India was the fourth largest and second fastest growing economy in the world registering a GDP growth of 9.2 percent.[31] These statistics have proved to be extremely fertile when looked at retrospectively in 2019.

The growth of the Indian domestic aviation sector has seen an imperative necessity in the development of related infrastructure. The aspect of infrastructure is important for the purposes of this dissertation, Since the infrastructure decides whether a particular city /airport shall be on the list of code share agreements amongst the various airlines. One of the most crucial

[30] India Brand Equity Foundation. Available at: http://www.ibef. org/industry/indian-aviation.aspx last accessed on 21-05-2021.

[31] S.C. Bansal et al' Economic Liberalisation and Civil Aviation lndustry ‘ECONOMIC AND POLITICAL WEEKLY Vol. 43, No. 34 (Aug. 23 29, 2008) 71-76.

aspects of infrastructure are the airports. The existing infrastructure as of 2008 was not efficient enough in order to make India into a major aviation hub. Certain legal and regulatory issues have to be kept in mind while studying the growth of the domestic aviation sector. The advent of the Competition Act. 2002 has played a dual role in the growth of the Indian aviation sector, both domestic and international. The Competition Act has promoted healthy competition in the aviation sector while at the same time come down heavily on those enterprises which have attempted to foster an anti-competitive environment.

The Competition Act avails to the needs of a liberalized economy. The competition law provisions and the policy decisions must serve the purpose of keeping the customer welfare as the supreme purpose of the law in the first place. This is achieved by curbing exploitative and anti-competitive practices by the dominant players in the aviation sector. An effective competition law regime helps attain efficiencies. which ensure the application of laws, rules, and regulations to ensure market participants compete fairly with each other. The civil aviation industry in India has emerged as one of the fastest growing industries in the past few years.

3.2 THE GROWTH OF THE INDIAN INTERNATIONAL AVIATION SECTOR

The development of airports has taken the public-private partnership route which has played a pivotal role in the growth of the international aviation sector. One of the examples is of the Mumbai International Airport Pvt. Ltd which was a joint venture between the consortium led by the GVK Group (74% shareholding) and Airports Authority of India (26% shareholding) was awarded the tender to modernize and upgrade Mumbai's Chhatrapati Shivaji Maharaj International Airport (CSMIA) in February 2006. The transformation undergone by the CSMIA has been phenomenal and it has led to Mumbai being one of the most important destinations in South Asia along with Bengaluru and Singapore.

One of the major competitions concerns the researcher have understood in the light of these developments is the allocation of slots. It remains to be seen if the development of these new airports shall be beneficial to the new carriers or whether the major carriers which have been the traditional carriers shall be given preferential treatment when the slots are allotted. It is in the wake of these recent developments which has made it important to study the Indian aviation sector through the lens of the Competition Act, 2002.

3.3. THE RELEVANT MARKET

3.3.1. THE RELEVANT MARKET IN THE INDIAN AVIATION SECTOR.

The concept of relevant market is a concept which has been historically been defined in a narrow manner by the competition authorities under the erstwhile MRTP Act and the current Competition Act, 2002. To make the conceptualization of the term 'relevant market' easier, it is necessary to study S.2 (r) (s) and (t) of the Competition Act, 2002 since the sub clauses classifies the term into 'relevant market', relevant geographical market' and relevant product market. The term is extremely nature because it's a narrow term which has been given broader, generic interpretation.

The aviation sector in India also adheres by the narrow interpretation of the relevant market since every departure and every arrival at each and every airport in India is a different relevant geographical and product market. One of the most important systems while determining the relevant market in the civil aviation sector is the hub and spoke system.

3.3.2. HUB AND – SPOKE

This system is primarily adopted by those airports whose cities have a high density of passengers and the airport itself has an excellent infrastructure to handle a humongous passenger load. This system concentrates arrivals and departures in one base and offers flights with connections to passengers of the other routes that will pass by these centers. "*According to the U.S. Department of Justice (DOJ), this creates significant advantages in terms of income and costs to hub carriers and creates a considerable barrier to entry in the market since building a hub is "difficult, time-consuming and costly*."[32]

3.3.3. ORIGIN AND DESTINATION (O&D) RELEVANT MARKET

This aspect of the relevant market has been developed subsequent to the CCI's decision in the Jet Airways - Etihad merger[33] wherein this concept was first brought to light. The CCI while examining the impact of the proposed combination, they first ascertained the relevant market for passenger air transport. It was held that the O&D based approach was going to be the

[32] Memorandum of the United States at 11, United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001) (No. 99-1180-JTM) available at http://www.usdoj.gov/atr/cases/14800/4859.htm

[33] Combination Registration No. C-2013/05/122 dated November 12, 2013.

relevant market wherein each O&D pair constitutes a separate market from the consumers perspective. Further, the CCI opined that consumers may consider direct flights and indirect flights as substitutable. CCI noted that there were several factors at play when it came to determining the substitutability of direct and indirect flights and it was possible that indirect flights offered by competitors could be considered as an alternative for passengers. Furthermore, the CCI found that there was ambiguity while determining the time sensitive and the price sensitive passengers and that it would be important to examine the impact of the combination on both these sets of passengers. Therefore, the CCI arrived at a conclusion that the relevant market was the international air passengers market:

- on the O&D pairs originating from and ending in 9 cities in India (Kochi, Bombay, Thiruvananthapuram. Bangalore, Kozhikode, Ahmedabad, Delhi, Hyderabad and Chennai) 1ofrom United Arab Emirates;

- on the O&D pairs originating from or ending in India to/from international destinations on the overlapping routes of the Parties to the combination.

In arriving at this conclusion, CCI made a distinction between different groups of passengers and observed that Indian passengers on the 9 direct overlapping O&D pairs were generally price sensitive and less time sensitive. Further, it was observed that the passengers living in the catchment areas of two or more airports would consider those airports as possible substitutes. For instance, in UAE, airports at Abu Dhabi, Dubai and Sharjah could be considered as substitutable with each other for the reason that these airports were within 2 hours distance from each other."[34]

The researcher has further quoted para 33 of the order "In arriving at the relevant market definition the Commission made a distinction between different groups of passengers and observed that Indian passengers on the 9 direct Overlapping O&D pairs are generally more price sensitive and less time sensitive. Moreover, passengers living in the catchment areas of two or more airports may consider those airports as possible substitutes when choosing which airport they fly from and which airport they fly to. For instance, it must be stressed that in the case of passengers travelling to Abu Dhabi, there are 3 international airports in UAE that

[34] www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-4http://wsid/2125/html/L.html?no_cache=1 last accessed on 19-05-2021

passengers might consider as substitutable with each other i.e. Abu Dhabi (AUH), Dubai (DXB) and Sharjah (SHJ). Depending on the O&D pair, either DXB or SHJ airport can be considered in the same O&D pair, Abu Dhabi, Dubai and Sharjah airports are within 2 hours distance from each other. Several carriers serve Delhi and Mumbai with direct flights to/from DXB. Etihad and Emirates offer free Shuttle bases between Abu Dhabi and Dubai, and there are other modes of public transport between them as well. The direct horizontal overlap between Jet and Etihad occurs between the UAE and India as origin and destinations points."[35]

The Competition Commission after perusing the facts and the details of the merger, gave its approval for the execution of the merger, since the CCI arrived at a conclusion that the combination would not have had appreciable adverse effect on competition in India.

However, a minority view was held in this case, wherein the approval of the combination came with a rider. i.e. the CCI made it clear that the approval did not in any way provide any immunity from subsequent proceedings for violations of other provisions of the Competition Act.2002. The onus was shifted to Jet Airways and Etihad Airways to make sure that the ex ante approval would not lead to ex-post violation of the provisions of the Act.[36] The Commission further held that, the approval would be revoked if it came to the notice of the Commission that the information supplied by the parties was found to be incorrect.[37]

For eg: 1) Vistara has a daily flight from Mumbai (BOM)[38] Bengaluru (BLR)[39]which returns to Mumbai on the same day. Vistara has another flight after ten minutes between Mumbai (BOM) - New Delhi (DEL)[40]. This means that there are four relevant markets in play in the above scenario, passengers flying from Mumbai to Bengaluru and Mumbai – New Delhi. This states that on every flight there are, at the very least two relevant geographical and product markets.

[35] Para 33 the Combination Registration No. C-20 13/05/122 dated November 12, 2013.

[36] Para 58 the Combination Registration No. C-20 13/05/122 dated November 12, 2013.
[37] Para 59 the Combination Registration No. C-20 13/05/122 dated November 12, 2013.
[38] IATA Code for Chattrapati Shivaji International Airport.
[39] IATA Code for Kempegowda International Airport.
[40] IATA Code for Indira Gandhi International Airport

3.4. THE RELEVANT MARKET IN THE EUROPEAN AVIATION SECTOR

3.4.1 THE BROAD CONSENSUS OF THE RELEVANT MARKET IN EUROPE

Since 1993 when the Maastricht Treaty came into effect and the European Union was established, it began operating as a single market i.e a product manufactured in France and being transported to Germany would receive the same status as it the product was getting transported within France. Thus, Competition law in the European Union plays a hugely important role towards achieving single market integration.[41]

The European Union under Art. 101 and 102 of the Treaty for the Functioning of the European Union (TFEU) defines relevant market and when it is necessary to define a relevant market is as follows:

a) Under Art. l01(1) when considering whether an agrecment has the effect of restricting competition[42]

b) Under Art.101 (1) when considering whether an agreement appreciably restricts competition. In particular there are market share tests in the *Notice on Agreements of Minor Importance*: a horizontal agreement, that is one between competitors, will usually be *de minimis* where their market share is 15 per cent or less[43]

c) Under the Commission's guidelines on the application of Article 101(1) to horizontal cooperation agreements, where various market share thresholds will be found.

d) Under Art.101(1), when considering whether an agreement has an appreciable effect on trade between Member States.[44]

e) Under Art. 101(3)(b), when considering whether an agreement would substantially eliminate competition.

[41] See Ehlermann "The Contribution of EC Competition Policy to the Single Market' (1992) 29 CML Rev 257.
[42] Delimitis v Henninger Brau Case C-234/89 [1991] ECR 1-935,[1992] 5 CMLR 210.
[43] OJ [2001] C368/13, para 7.
[44] OJ [2004||C 101/97, para 55

f) Under numerous block exemptions containing market share tests for example Regulation 330/2010 on vertical agreements, Regulation 1217/2010 on research and development agreements and Regulation 1218/2010 on specialization agreement.

g) Under Art.102, when considering whether an undertaking has a dominant position

h) Under the European Union Merger Regulations (EUMR) when determining whether a merger would significantly impede effective competition, in particular by creating or strengthening a dominant position.

The civil aviation sector in the European Union makes a very crucial contribution to the European economy. As of 2005, more than 130 airlines were operating within a network of more than 450 airports and about 60 service suppliers. The aviation sector employs around 3 million people and it accounts for almost 1.5% of the European Gross Domestic Product[45]

This significant development is mainly incidental to the fact that the liberalization of air transport took place in 1990's which led to the creation of an internal open market.[46] This increase in the number of airlines is a clear sign of the dynamic nature of the sector. To put it in a narrative from the consumer's viewpoint, the European transport policy has led the consumers to be beneficiaries of better routes, greater choice and an increased overall quality of service. A key element in identifying, whether a merger, an alliance or a codeshare agreement will give rise to competition concerns is the definition of the relevant market. Taking course of the relevant market is a crucial step necessary for any antitrust evaluation. However. The definition of the relevant market as seen in the Indian scenario changes in the European scenario from case to case.[47]

Passengers purchase a ticket for a flight is between a point of origin and a point of destination as the basic product.[48] However, the airlines who form heterogenous groups which significantly differ between each other's, mainly in relation to i) the operating model and ii) the level of service offered to passengers. In order to deduce the point of departure for market definition in

[45] Between 1992 and 2003, the number of Intra-community routes incresed by more than 40%, which enabled citizen's better access to more destinations, the number of companies increased by 25%

[46] In Europe, traffic rights were liberalized between 1992 (international flights) and 1997 (national flights). The liberalisation extended to the Nordic countries of Norway, lceland, Liechtenstein and Switzerland

[47] OJ 97/C 373/03 of the European Commission states " Notice on the definition of the relevant market for the purposes of Community Competition Law

[48] It is not useful to identify the distinction between the service dimension and the geographical dimension when defining the relevant market in the aviation sector, since the service has an inherent geographical dimension in it.

air transport is the "point of origin/ point of destination" (O&D) approach. As per the norms of this approach, every combination of city pairs should be considered a separate market from the passenger's point of view. In the case of airlines operating on a hub-and-spoke system have placed a theory that the network effect should be taken into account in defining the relevant market.[49] Network effect means that a significant proportion of passengers would use the hub for connecting flights and therefore number of routes available from one airport at one particular instance should be taken into account.[50] The European Competition Commission has acknowledged the fact that in the business model of hub-and

Spoke carriers' network competition is relevant from the perspective of the supply Side.[51] However, it is important to note that in the *United Airlines/ US Airways* decision, the Commission held that the existence of network effect is insufficient to modify its demand-side approach. [52] The commission was further appropriate to argue that passengers are primarily concerned with getting from Point A to point B and if an incident such as a price increase on a given route is conducted by the dominant carrier, it is irrelevant to them whether the opponent had an extensive network of connections where it competes with the other airlines. This is because the Commission in the Air France/KLM case implicitly indicated that demand for air services can also be generated by the existence of network effect

especially in the case of corporate customers.[53] Whenever, the Commission defines the relevant market in the aviation sector, it takes into account the profile of the passengers. Passengers can be divided into two kinds of categories; firstly as time-sensitive passengers and secondly as non-time-sensitive passengers. The essential requirements of a time sensitive passenger when they check the tickets of an airline are the number of daily flights the airline has, the location of the airport, convenience of departure and arrival timings, and last but not the least the opportunity to reschedule the ticket at a short notice. Thus, for a time sensitive passenger. who generally belongs to the corporate sector and travels either business or first class, the price of the ticket is not what such a passenger is worried about; it is about the flexibility of the flight.[54] On the other hand, the non-time-sensitive passengers are more price oriented since they shall be booking a ticket for a vacation or for reasons wherein the time required is not a significant

[49] Negenman, Jaspers *et al* 1581-1582.
[50] *Ibid*
[51] *Ibid*
[52] United Airlines /US Airways (Case M. 2041) |2001| OJ C270/131
[53] Air France / KLM (Case M. 3280) | 2004| OJ C60/5, paras 10-16 and 130-135
[54] KLM/Alitalia (COMP/A.38284/D2) Commission Decision 2004/841/EC [2004] OJ L362/17, para 11

issue and hence, they are willing to accept a longer journey time. This classification thus largely coincides with the distinction between business and leisure travellers.[55]

The researcher at this stage shall now lay down the groundwork for the succeeding chapters.The researcher has focused on the concept of the relevant market and how the codeshare agreements are affecting the relevant market. The aviation sector is an extremely conservative sector at its heart with hardly any sympathy for a new player in the market. The aviation sector is an extremely conservative sector at its heart with hardly any sympathy for a new player in the market.

Thus, the airlines which already enjoy a significant market share are either merging or entering into code share agreements with other airlines so that a grip is held on the profitable routes within the code share thereby leading to a horizontal concentration of the market, while on the other hand, the vertical concentration of the market goes into a duopoly or an oligopoly. Airline Alliances are an example of how an oligopoly is created with several code share agreements within the alliance thus enabling the alliance to obtain a firm foothold globally. At this stage, the researcher has interlinked the relevant market and how the airlines engage in anti-competitive behaviour. The researcher has studied this phenomenon in the next chapter.

[55] KLM/Alitalia Case JV.19) [1999] OJ C184. para 21; SAS Maersk (Case COMP.D.2.37.444) [2001] OJ L265/15, Para 30; Air France/Alitalia (n 51) paras 41, 44-46; United Airlines/US Airvays (n 48) para 18.

4. THE CONCEPT OF ANTI-COMPETITIVE AGREEMENTS IN THE CIVIL AVIATION SECTOR

4.1 INTRODUCTION

The Wealth of Nations, which was written by Adam Smith in 1776 developed the first modern school of economic thought, has accurately described the most likely outcome of competitors' meeting. The point which Adam Smith was referring to, are today known as anti-competitive agreements. These anti-competitive agreements were ones which involved actions such as price fixing, racketeering, cartelization and other unfair trade practices. There are two kinds of agreements, i.e. Horizontal and vertical agreements. The vertical agreements rarely pose a threat to competition since the parties to the agreement are in different businesses without being in direct competition with one another. Horizontal agreements on the other hand, as a rule, are the prime target of competition laws across countries, because these agreements, according to economists, waste society's resources, create inefficiency and injure consumer welfare.[56] Anti-competitive agreements may have other harmful economic effects as well. The primary effect being that there is a lack of a viable competition in the market with one enterprise establishing a monopoly by way of such anti-competitive agreements. Agreements are deemed to be anti-competitive in nature if the said agreements affect the competition adversely.[57] Taking for instance, in the European Union, if the object' or effect of an agreement is prevention, restriction or distortion of competition, it may be held anti-competitive. In India, the phrase used is 'appreciable adverse effect on competition'.[58]

4.1.1 POSITION IN INDIA

4.1.1.1 Appreciable Adverse Effect: De Minimus Rule

Section 3 of the Competition Act, 2002 provides that an agreement that 'causes or likely to cause appreciable adverse effect on competition in India is prohibited and declares such agreements as void. The 2002 Act does not define either anti-competitive agreement or

[56] Report by the CLP, " New Initiatives, Old Problems: A Report on Implementing the Hard Core Cartel Recommendation and Improving Co-operation" in OECD Report Hard Core Cartels at 11. Available at http://oecd.org/daf/competition/cartels/2752129.pdf

[57] VERSHA VAHINI , INDIAN COMPETITION LAW(1st Ed. 2016) Lexis Nexis

[58] Ibid

appreciable adverse effect on competition. The phraseology of this section has been largely influenced by the development of the competition law jurisprudence in the European Union.[59]

4.1.1.2 Rules for determining Appreciable Adverse Effect

It must be kept in mind that every kind of restraint is not necessarily baneful. Section 3 of the Competition Act declares void those agreements which shall have an appreciable adverse effect on the competition in any particular market. The determination of appreciable adverse effect differs from case to case and no particular straight jacket formula can be applied while determining the AAEC of any agreement.

When adjudicating, the CCI looks into the factors which are listed in Section 19(3) of the Act. This list is not exhaustive and the CCI can look into factors and issues which are not mentioned under this subsection. The CCI has the authority to look into various macroeconomic as well as microeconomic factors while adjudicating an agreement being anti-competitive in nature.

4.1.2 THE EUROPEAN POSITION

The European Economic Community (EEC) law is in a stark contrast as compared to the Indian and the US anti-trust law. In the European Union, the per se rule holds more water which is applicable to both, vertical and horizontal agreements. Therefore, it is necessary to bring code share agreements with in the purview of this rule since code share agreements affect the market competition at both the vertical, as well as the horizontal level.

4.2 ANTI-COMPETITIVE PRACTICES IN THE CIVIL AVIATION SECTOR WHICH AMOUNT TO CARTELIZATION ALONG WITH CASE LAWS.

Before the researcher proceeds further towards the kinds of practices which are synonymous with cartels it is important to understand the concept of third-party facilitators. These entities are the ones who permit the cartel members to conduct their meetings at their premises, reimbursement of travel and other expenses in order to avoid showing the minutes of meetings in order to prevent creation of evidence. There have been cases wherein the Commission has held firms guilty of being a cartel member for acting as a third-party facilitator.[60]

[59] Art 101 of the Treaty for Formation of European Union
[60] Commission Decision COMP/E-2/37.857-Organic Peroxides

The primary anti-competitive practice is that of price fixing. Price fixing amongst airlines has always been a concern of the competition regulators. In the paragraphs below, the researcher has elucidated upon the concept of price fixing and further how the concept of price fixing has evolved into code share agreements.

4.2.1 Case 1: The Freight forwarders Cartel[61]

This case is a reflection of the *Express Industry Council of India v. Jet Airways & Ors*[62] wherein certain group of air cargo freighters determined the prices of freight according to their own whims and fancies

Facts:

1) Deutsche Post along with 14 other carriers who were into the freight business colluded in Order to form four distinct cartels on the Europe -US and China/Hong Kong- Europe routes.

2) Two of these cartels operated between Europe and the United States and the rest of the world respectively. The activities they indulged in during the course of this cartel were as follows:

- The cartel introduced a surcharge on an order placed to them by a customer. Then, these cartels determined the amount of surcharge depending upon the size of the customer. Therefore, the surcharge levied by these carriers were not determined by the market forces but by the customer's ability to pay a particular amount. This behaviour was the first indicator of a cartel being in operation.

- These airlines further introduced a surcharge for administrative costs on purchases whose purchase orders came from the United States of America.

- The cartel adjusted the currency rates which resulted in the appreciation of Chinese currency against the US Dollar. This was an irregular as well as an illegal act since adjusting the foreign exchange market is a sovereign activity.

[61] Commission Decision of 28 March 2012 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39.462- Freight forwarding; largely upheld on appeal by the General Court, Case T-267/12, Deutsche Bahn et ors v. Commission 29th February 2016.
[62] Supra note 61

4.2.1.1 Price Fixing

It is a principal tenet of competition law that, any agreements or practices whose objective is to agree to fix prices are prohibited.[63] The researcher would like to make a claim that code share agreements are in fact an example of price fixing agreements which have been given legitimacy by anti-trust immunity. The researcher has backed this statement with a certain chain of events.

Step 1: Two airlines compete in the same relevant market.

Step 2: The resultant competition leads to profits which can be maximized if code share agreements were put in place.

Step 3: The airlines enter into a code share agreement (hub-and-spoke, unilateral, behind and beyond). The clauses of the agreement are such that the prices of the tickets shall fluctuate as according to the demand.

This final step wherein a free market itself is conducive to price fixing amongst cartels.

4.2.2 Case law: *United States of America v. Airline Tariff Publishing Co. et. al*[64]

This case was a civil anti-trust case which was filed by the United States Government against Alaska Airlines, American Airlines, Continental Airlines, Delta Airlines, Northwest Airlines, Trans World Airlines, United Airlines and USAir, the Airline Tariff Publishing Company for allegedly conspiring to restrain competition and thereby in violation of S.I of the Sherman Act. The first cause of action in this case was that the defendants and co-conspirators engaged in various combinations and conspiracies which included agreements, understandings, and concerted actions to fix prices by increasing the fares, elimination of the discounted fares, and settling fare restrictions for tickets purchased for travel between cities in the United States. These agreements and concerted acts were executed through the computerized fare dissemination of the Airline Tariff Publishing amounted to (ATP) Company. These practices which price fixing were as follows:

[63] Article 101(1)(a).
[64] *US District Court for the District of Columbia - 836 F. Supp. 9 (D.D.C 1993).*

Proposals were exchanged on how to negotiate fare changes;

- Trade fare changes in certain markets were recommended which acted as a quid pro quo for fare changes in other markets;
- There was an exchange of mutual assurances concerning the level, scope, and timing of fare changes.

As a result of these mutual agreements, the consumers were deprived of scheduled air passenger transportation services which were being provided due to the presence of free and open competition in the sale of such services.

The second cause of action in this complaint was that during the year 1988-1992, the airlines and the ATP entered into agreements wherein the airlines would participate in the fare dissemination system of the ATP. This agreement was a blatant violation of antitrust rules since the airlines now had the power to make decisions on how to manipulate the fares with the help of the ATP. The fare dissemination system was now formulated in such a manner that there was interference by the airlines which enabled the airlines to engage in the following activities:

- There was more effective communication amongst the airlines as to future increase in regard to fares, future changes to fare restrictions, and future elimination of discounted fares;
- To establish links between proposed fare changes in one or more city-pair markets and proposed changes in other city-pair markets:
- To monitor each other's changes, including changes in fares that were not available for sale;
- To lessen the uncertainty concerning each other's pricing intentions

These actions of the airlines were classic cartelization activities, wherein the combination and the conspiracy made coordinated interactions amongst the airlines more likely, Successful, and complete, and had deprived consumers of air passenger transportation services of the benefits of free and open competition in the sale of such services.

The US Supreme Court through its proposed Final Judgment held:

- That the airlines should cease to use the ATP fare dissemination program in a manner that unnecessarily facilitates fare coordination or that enables the airline to reach specific price fixing agreements.

- Section IV (B) contains one of the key provisions of the proposed Final Judgment. It prohibits the settling defendants from "disseminating any first ticket dates, last ticket dates. or any other information concerning the defendant airline's planned or contemplated fares or changes to fares."

- The Court further held that, the defendants could not indulge in price fixing on the last ticket dates. Further, it was held by the Court that the airlines should inform the consumers regarding the price rise in the fare, but should not act in collusion with the other airlines as to affect the price rise.

- The Court also held that, the airlines should develop an anti-trust compliance program. This program would also involve these airlines appointing an Anti-trust Compliance Officer as well.

The impact this judgment had was manifold. The US Supreme Court for the first time gave a ruling on anti-trust violations in the civil aviation sector. This ruling prohibited the artificial restraints which the airlines were imposing on a free market. Post this case, it was the belief of the Department of Justice that the proposed Final Judgment contained sufficient provisions to prevent further violations by United and USAir and the other airlines who were the party to this complaint.

Now that the concept of price fixing has been well studied about, the researcher has no moved on to the concept of code share agreements and how the impact the competition on a horizontal level thereby adversely affecting the competitive market.

4.2.3 THE HORIZONTAL NATURE OF CODE SHARE AGREEMENTS

In order to develop a finding that code share agreements are in fact anti-competitive, it is important to study how code share agreements affect the competition in a given relevant market. A code share agreement can significantly reduce competition on overlapping non stop routes and overlapping connecting routes where the members of the alliance prior to coming

together were the primary competitors on that route. This agreement thereby creates a horizontal concentration of the market which jurisprudentially is a major blow to the concept of a free market. Furthermore, code share agreements between airlines operating hub -and spoke networks shall normally enhance demand for the network as a whole and increase the market power of the network, especially at is hub airports. This creates an entry barrier to a potential new player in the relevant market. The European Union as a result of historical reasons has a competition policy even though if not a comprehensive one on airline alliances.

The European Community as it was known then brought Regulations 3975/87 and 3976/87 in order to liberalize the European aviation sector. [65] These two Regulations gave the European Competition Commission the power to apply Article 81 and 82 EC of the basic Community competition rules to the aviation sector. Therefore, in order to arrive at a certain conclusion pertaining to the competitiveness of a code share agreement, it is important to study the kinds of code share agreements. Code sharing agreements can be classified into three main categories:

a) Parallel code sharing,

b) Unilateral code sharing,

c) Behind and beyond code sharing.

4.2.3.1 Parallel code sharing

Parallel code share agreements are based on a commissioned basis. In this kind of agreement, two airlines operate on its own code as well the code of the party to the said code share agreement. For eg: Spice Jet and Indigo both have flights to Delhi and Mumbai respectively and these two airlines have entered into a code share agreement, then a person who books his flight from Mumbai to Delhi on a SpiceJet ticket can in a certain contingency fly in an Indigo aircraft albeit on a SpiceJet code. This model of business is a highly convenient one for the persons who have to travel frequently for business purposes. However, this kind of arrangement

[65] Opean Air Law Association , 11th Annual Conference, Panel Discussion: Current issues arising with airline alliances, Lisbon, 5-11-1999.

between airlines is a cause of concern for the competition regulators as well since this kind of arrangements prevents entry of new players into the market.[66]

4.2.3.2 Unilateral code sharing

This kind of code sharing is one where one airline advertises the other airline. In a unilateral Code share, one airline shall simply offer the services to destination without actually prating the particular route. In this arrangement, the carrier put its own code on a flight which operated network extension code share agreement. For e.g.: Air India can puts its code on a Delhi-Frankfurt flight which is being operated by Lufthansa. This kind of arrangement does not yield tremendous revenue, but still revenue is earned without any costs, therefore yielding a profit. However, the unilateral arrangement of code share agreement creates a bubble in in the aviation sector. When an airline earns revenue on a flight without incurring costs leads to a person to believe that the aviation sector is being bloated up in numbers and to show how are airlines are in theory operating flights when in reality, the number is quite less.

4.2.3.3 Behind and beyond code share

This arrangement is a result or two carriers entering into an agreement wherein one carrier put its own code on sectors operated by another carrier to provide connections with its own operated services. "An example of this sort of code-sharing is when British Airways sells a journey from London Heathrow to Chicago via Washington, with the US domestic sector operated by United Airlines due to the existence of a code-sharing agreement, behind and beyond code sharing arrangements can nevertheless be distinguished from a traditional interline journey, on which passengers simply take connecting flights designated only by the code of the operating carrier. Unlike for the previous wo, revenue is set up through various mechanisms for the division of revenues known as proration. [67]

[66] E-SHARING AGREEMENTS AND COMPETITION PROTECTION IN THE EUROPEAN UNION- Cacic& Partners
, Law Firm.
[67] Ibid

4.2.4 THE HORIZONTAL IMPACT OF CODE SHARE AGREEMENTS ON A FREE MARKET ECONOMY.

Code share agreements impact the competition at the same level of the market chain. Code Share agreements primarily affect the distribution of routes amongst the parties to the agreement. An overlap which leads to pay a higher price for the ticket and decrease the provided capacity on a route thereby disturbing the supply demand balance on a particular route. This pricing tendency, leads the researcher to assert that there is a scope for collusion primarily through price fixing. There is a major loophole in the European Union when it comes to dealing with the anti-competitive effects of code share agreements. The researcher is making this statement due to the existence of the Block Exemption Regulation (BER)[68]

As the researcher reaches this stage of his dissertation, it is very much evident that code share agreements have the potential to significantly reduce competition. As discussed in the previous paragraph. there is a probability of price adjustment amongst the competitors thereby adversely affecting the consumers, "When two airlines cooperate in the form of code-sharing, they may not engage in a price battle over the tickets they are selling for the seats on the operating carrier's aircraft. In order to promote better relations, it is more convenient to offer the same prices as the competitor for the seals on his aircraft, as this service may be returned by the operating carrier on another code-sharing line - this situation benefits both undertakings.[69]

It is important to understand the concept of price fixing when it comes to dealing with anticompetitive agreements.

4.2.5 CASE LAWS ON THE ANTI-COMPETITIVE EFFECTS OF CODE SHARE AGREEMENTS.

In the year 2011, the Commission opened two separate anti-trust investigations into code share agreements in case AT.39794 Lufthansa/ Turkish Airlines and case AT.39860 Brussels Airlines/ TAP Air Portugal. The main bone of contention in both of these investigations was the hub-to-hub code share agreements which were being entered into by these airlines in order

[68] Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 374, 31.12.1981, p. 9-11; Council Regulation (EC) 487/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 148, 11.6.2009, p. 1-4.
[69] Harris, H. S.; Kirban E. (1998), op. cit, n. 45, at p. T69.

to obtain the premier position in their given relevant market. During the course of the investigations, it came to light that Lufthansa and Turkish Airlines on the Germany – Turkey route had agreed upon to sell seats on each other's flights where both the airlines had actual flight operations under their own code and their own hubs. In an ideal situation, these two airlines should have been competing against one another. However, by entering into a code Share agreement, Lufthansa and Turkish Airlines created a horizontal concentration in the market which led to the Commission opening investigations into the alleged anti-competitive behaviour. The purpose of this investigation according to the Commission was that such an agreement would lead to higher prices and less service quality for the passengers.[70]

A Similar case emerged regarding a code share agreement between Brussels Airlines- TAP Ar Portugal investigation was unilateral code. conducted on the grounds of a share agreement. The legal provisions under both these cases were dealt with was 10 of TFEU. The Commission initiated the proceedings under Article 11(6) and 16(1) of the Council Regulation (EC) and Article 2(1) of the Commission Regulation No. 773/2004[71] On completion of five years since the initiation of investigation, the Commission issued a press release in the Brussels Airlines TAP Air Portugal case in which the Commission raised its statement of objections which were related to the Brussels-Lisbon route. The Commission found the following anti-competitive infringements in the code share agreement:

1. Discussing a capacity reduction (number of seats) and an alignment of the their pricing policy on the route:

2. Granting each other unlimited rights to sell seats on each other's flights on the route (where they had previously competed);

3. Implementing these arrangements by actually reducing capacity, completely aligning their fare structures, as well as their ticket prices on the route.[72]

The researcher at this stage would like to state a very recent case of passenger inconvenience. The 2019 UEFA Europa League Final, which is an annual club football tournament was held in Baku, Azerbaijan. Azerbaijan is a country in the Middle East near the Caspian Sea. Since. it

[70] Lufthansa/Turkish Airlines, COMP/39.794, European Commission.

[71] Luftansa/Turkish Airlines, COMP/39.794, Opening of Proceedings, [2011]; Brussels Airlines/TAP Air Portugal, COMP/39.860, Opening of Proceedings [2011]

[72] Brussels Airlines/TAP Air Portugal, COMP/39.860, Press release, [2016], IP/16/3563.

is not a prime location for mainland Europe, direct flights are not available from London and mainland Europe. In the earlier case of Lufthansa-Turkish airlines, the researcher emphasizes how two direct competitors entered into an agreement leading to a market concentration. If there were better clauses in the code share agreement regarding the operation of flights to areas normally unventured into, the prices for a direct flight from London to Baku could have been much lower than the steep amount of 900 GBP per person.[73]

Thus, the researcher has studied how code -share agreements have a detrimental effect on the market when two direct competitors enter into an agreement. In the next chapter, they shall be studying how these airlines through code share agreements form an airline alliance which is a group of many airlines with multiple code shares amongst one another.

The researcher shall be proving as to how these airline alliances are actually a cartel as per the definitions of the European and Indian competition laws.

4.3 CREATION OF CARTELS THROUGH CODE SHARE AGREEMENTS

4.3.1 Definition of Cartel

When analyzing any particular situation and attributing a particular adjective to such a situation. it is important to first understand the grass roots of that particular situation. Similarly. when it comes to analyzing competition law, it is important to understand the economic activity to which the competition law has been applied. When this understanding has been achieved then only can one give relevant definitions. For e.g.: An agreement among manufacturers of elevators to allocate customers and coordinate bids on construction projects[74] will be dealt differently before a Competition Tribunal as compared to a similar agreement in the aviation sector. Therefore, it must be noted that competition law is a very flexible law and what is illegal in one industry may be perfectly legal in another industry. Therefore. the researcher shall be stating his own definition of what construes a cartel as a result of code share agreements in the aviation sector.

"Article 101(1) provides: The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and

[73] https://www.iittvv.. com/news/2019-05-28/Chelsea-supporters-travels-3-500-miles-through-three-countries-to-landn-baku-for-europa-but-most-british-fans-stay-away/
[74] Elevators and Escalators (Case COMP/E-1/38.823).

concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.[75]

Section 2(c) of the Competition Act,2002 defines cartel as "an association of producers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions of services.[76]

Art. 101 of the TFEU prescribes five activities viz. price fixing, controlling output, market sharing, the imposition of dissimilar trading conditions to affect a competitive disadvantage and tying.

At this stage, the researcher has now covered the legal definition of the term cartel in India and the European Union and one similarity can be drawn between the two definitions when applying to the aviation sector is that one can chalk out the controlling output aspect.

Cartel- A cartel formed as a result of code share agreements can be defined as a situation wherein airlines serving on different routes, or same routes, enter into an agreement wherein it is decided by the said airlines as to the type of codeshare agreement they shall enter into.

[75] European Union Competition Law in the Airline Industry Kluwer Competition Law

[76] Section 2(c), Competition Act, 2002.

Furthermore. a cartel is deemed to be formed when the parties (i.e airlines) to these code share agreements decide to form an alliance which consists of multiple airlines having multiple code share agreements amongst them.

4.3.2 The modus operandi of a cartel

Traditionally, cartels are known to be covert in nature and the parties to the cartel take numerous steps in order to preserve secrecy regarding the nature of their activities. Cartels are by nature, agreements which includes concerted practices which aim at coordinating the Competitive behavior amongst various firms. Studies have been able to prove that cartels tend to form in times of economic turmoil since the demand for a particular commodity is high and the supply is low, this tendency enables them to fix the prices on that commodity, thereby taking advantage of the economic instability. As a result, cartels are punishable by fines on entities that partook in the said activity with a fine of up to 10 per cent of the group worldwide turnover and may be made parties to class action law suits initiated by the victims of the said cartels.[77]

A code sharing agreement does follow the modus operandi as to what constitutes a cartel and an analysis as to how these agreements be termed as a cartel is necessary. There have been previous scholars who tried to give the cartel aspect of code share agreements, but their ideas were refuted by the scholars who thought otherwise on the ground that code share agreements have been beneficial for passengers. At this stage, the researcher emphasizes that “Whatever that doesn't kill you need not make you stronger”

The following conditions are deemed as conducive to cartels

- High market concentration consisting of very few players
- High entry and exit barriers
- Homogeneity of services
- Similar production costs

[77] https://www.internationalcompetitionnetwork.org/working-groups/

- Excess capacity
- High dependence of consumers on the product
- History of collusion
- Active trade association

Therefore. as a part of this chapter and in order to successfully assert that code share agreements contribute to cartelization in the aviation sector, the researcher has now emphasized on the concept of airline alliances.

4.4 THE CONCEPT OF AIRLINE ALLIANCES

The aviation sector has developed by leaps and bounds especially since the deregulation of the Indian and European industry in the 1990's. The 21st century brought the advent of low-cost carriers into the aviation market. As a result, the major carriers decided to enter into airline alliances in order to maintain the hub- and - spoke networks. This essentially was a ploy in order to exclude the new carriers from the benefits of a market economy and keep the aviation sector a domain of the major carriers. Therefore, it can be said that the airline alliances are detrimental to the general consumer.

The problem when it comes to tackling these alliances is that the competition regimes have given these said alliances anti-trust immunity. Therefore, it is the researcher's objective through this dissertation to make airline alliances liable in cases of cartelization which are far too many. One of the major aspects which goes into consideration while forming an airline alliance is the route allocation policy which would come into effect once the alliance is formed.[78] It is the belief in the aviation sector that global airline networks shall be formed through alliances between major carriers.

Star Alliance one of the major alliances in the global aviation sector was founded on 14 May 1997 when five airlines from three continents came together. These airlines were:

- United Airlines

[78] TAE HOON OUM and A.J. TAYLOR Patterns in Intercontinental Air Linkages and Implications for International Route Allocation Policy Transportation Journal, Vol. 34, No. 4 (SUMMER 1995), pp. 5-27

- Scandinavian Airlines
- Thai Airways
- Air Canada
- Lufthansa

lt should be noted that the founders of the Star Alliance were the national carriers of their respective countries. This blatant merger was a horizontal merger since these airlines had codeshare agreements in place prior to formation of the alliance. This move was aimed at achieving a higher market concentration and therefore create a cartel. The advent of airline alliances has impacted domestic aviation policy in India and the European Union. The domestic flights have to be scheduled according to the economic advantage of the international alliances. This has a long-term adverse effect on the interests of the consumers, carriers, and the related economic activities associated with the commercial airline industry.

5. THE ABUSE OF DOMINANT POSITION IN THE CIVIL AVIATION SECTOR

5.1 INTRODUCTION

The concept of dominant position has two aspects. First, the dominant enterprise's position is such that it enables the said enterprise to operate independent of competitive forces generated by its rivals. This is important to understand because healthy competition among competitors promotes productive measures. Therefore, when an enterprise behaves in a manner with an intention to create entry barriers, drive out existing rivals, control output or price, it is a concern for healthy competition in the market. For instance, an enterprise may be in a position to not only act independently of the competitive forces, but actually in a position to influence its direct competitors, or the relevant market. In a sense, this is a higher degree of strength where an enterprise may be freely able to adopt price or non - price strategy to overcome downward pressures on its profit from its competitor, or to capture or bind consumer or to create a market environment that would deter newer competition, both in terms of competing enterprises or rival products[79]

5.1.1 THE INDIAN PERSPECTIVE

Section 4 of the Competition Act, 2002 defines abuse of dominant position as an activity pursued by an enterprise which directly or indirectly imposes unfair or discriminatory prices and other anticompetitive practices are dealt with. In the Explanation clause of S.4 (a) dominant position means a position of strength enjoyed by an enterprise in the relevant market, in India which enables it to :

- operate independently of competitive forces prevailing in the relevant market,
- affect its competitors or consumers or the relevant market in its favour.

Therefore, a wide spectrum of factors which are mentioned in S. 19(4) of the Competition Act, 2002 indicates that the Competition Commission of India is required to take a very holistic and

[79] Belaire Owner's Association v. DLF Ltd. [2011] 104 CL A398 (CC).

pragmatic approach while enquiring whether an enterprise enjoys a dominant position before arriving at conclusion based on such an enquiry.

To understand what abuse of dominant position means, it is important to understand how an enterprise achieves a dominant position in a given relevant market. Dominant position has two aspects, Firstly, a dominant enterprise's position is such as it enables it to operate independent of competitive forces generated by its rivals. This theory can be vindicated by the act that Jet Airways prior to its grounding by the aviation regulators controlled a significant market share owing to its direct flights to Europe and North America. The Competition generated by budget carriers on international routes was in no way an incursion into Jet Airway's market.

5.1.2 THE EUROPEAN UNION PERSPECTIVE

Art. 102 of the Treaty for the European Union states "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States,"[80]

It is important to note that Art.102 lays down the core principles of the European regulations on the abuse of dominant position. In order to prove an anti-competitive practice contrary to Art. 102 it is important to establish the alleged abuse of dominant position.[81] The test for dominance which has been established by the CJEU relies on the concept of the alleged dominant undertaking's independence of the other participants in the market. In the United v. Commission judgment, the Commission ruled that dominance relates to a position of economic and financial strength which enables the undertaking "*to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its Consumers*"[82]

The European Commission defines market power as 'the power to influence market prices, innovation, the variety or quality of goods and services, or other parameters of Competition in the market.'[83]

[80] The Consolidated version of the Treaty on the Functioning of the European Union [2012] OJC 326/47 (TFEU),Art 102

[81] ABUSE OF DOMINANT POSITION IN THE ICT SECTOR: A EUROPEAN PERSPECTIVE

[82] Case 27/76 United Brands v Commission EU:C:1978:22, [1978] ECR 207, para 65

[83] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses [2005]

There are certain factors which contribute to the dominant position of an enterprise which are applicable to the aviation sector as well. They are:

5.1.3 THE MARKET POSITION OF THE DOMINANT UNDERTAKING AND ITS COMPETITORS

When it comes to determining whether an undertaking or a contractual undertaking (i.e. an undertaking which is the result of a contract entered into by two parties) holds a dominant the competitive constraints imposed by the undertaking's competitors in position is subject to the competitive constraints imposed by the undertaking's competitors in the market. The most essential indicator of the market structure in this assessment is the market share of the airline. The regular course of the Commission's procedure is that the market shares of an enterprise shall be considered, in some cases, even historic market shares are considered while determining the dominant position, when the markets are in turmoil and the health of the market depends upon the smallest of margins.[84] This aspect has a much more practical utility in the aviation sector since the traditional airlines enjoy a higher market share than the low cost carriers. According to many scholars market shares are considered 'an useful first indication' rather than the beginning and the end of the analysis. Generally, the principle is that when an enterprise controls 50% of the market share, that enterprise is said to be in a dominant position.[85] However, this position of law has changed and now a market share of 40% is also sufficient reason to believe that the enterprise enjoying such 40% market share is in a dominant position. There is only one case in which the Commission has held a market share of less than 40% as well to be a position of dominant position. That case was the British Airways case.[86] This case shall be discussed further in detail in this chapter itself.

5.1.4 PREDATORY PRICING

Predatory pricing refers to strategies adopted by a dominant undertaking whereby it offers a low prices to consumers which are lower than the cost of production and the enterprises are able to do so because of the economies of scale. The Competition Act, defines predatory in Section 4 as "the sale of goods or provisions of services, at a price which is below the cost, as

[84] Discussion Paper (n 93), para 30
[85] COMMISSION DECISION of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty 30.698-ECS/AKZO.
[86] British Airways PLC V Commsision of the European Communities European Court Reports 2007-02331

may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors."[87] It is pertinent to note that the Indian definition of predatory pricing focuses on both on cost based approach combined with the intention on behalf of the dominant enterprise to reduce competition or elimination of competitors.

The notification which was issued by the Competition Commission of India in 2009 clarifies that the default cost benchmark for determining whether the dominant undertaking is pricing below cost is the average variable cost (AVC). Even though the CCI may deviate from the default cost benchmark of AVC and use cost concepts such as avoidable cost, long run average incremental cost, cost prevailing at market value, depending upon the nature of industry, market and technology.[88]

Predatory pricing is a classic activity which takes place as a result of a dominant position. The act thereby leads to an abuse of such dominance. This leads the researcher to a point that when the market is not able to reign in a firm's dominant status, the dominant firm resorts to measures such as creating entry barriers, drive out existing rivals through predatory pricing, control output or the price. This can further lead to anti-competitive practices such as cartelization, bid rigging and price fixing. The researcher's scope of research is cartelization in the aviation sector. It is important to note that position of strength is not an objective attribute which can be measured along the lines of a mathematical equation.

Instead, it has to be a fair analysis of the economy, relevant facts, a holistic linking together of seemingly insignificant statistics, once these factors are studied comprehensively, and then the enterprise's position of strength can be determined. The modus operandi of ascertaining an enterprise' s market share differs in each jurisdiction. In some jurisdictions, dominant position is established on the basis of the market share, whereas in some jurisdictions, many other actors such as sales, turnover etc are analyzed while ascertaining the market share.

The determination of a code share agreement leading to a dominant position can be made by the existing market share or the entry conditions which are considered to be the indirect method. The direct method which is employed on a time to time basis is the economic route. Economic

[87] Sub Clause (b) of explanation to S. 4(2)

[88] Competition Commission of India (Determination of Cost of Production) Regulations 2009 (Notitication No. 6 of 2009), Competition Commission of India , 20th August 2009.

route consists of determining the balance sheets, the accounting methods used by the enterprise in order to arrive at a certain income from all sources of income. When evaluating a code share agreement, the following factors must be taken into account while determining a probable dominant position being created as a result of the said codeshare agreement:

- The number of passengers flying on a particular route prior to the inception of a code share agreement.
- The fleet profile of the airline, i.e the number of aircraft at the disposal of an airline, leased and/or owned. A more diverse Neet leads to a broader market since the airline can commence both short distance and long-haul international flights. Usuall,y an Airbus A320 is utilized for short distance international flights while an Airbus A330 is utilized for a long haul international flight. Thus, the number of A330's in particular is a highly influential factor in determining the contents of a code share agreement.
- The airlines' ability to cover intensive risks.
- The price of the aviation turbine fuel.

5.2 THE PRINCIPAL FACTORS WHICH CONTRIBUTE TO A MAJOR CARRIER'S DOMINANT POSITION

5.2.1 Slots (Landing Rights)

These are basically the landing rights which are allocated to an airline company to schedule a landing or a departure during a specific time period. Thus, the capacity of an airport to receive flights and passengers is directly proportional on the availability and allocation of the slots. Since the incumbent airlines, owing to their size and the period they have been in the market, are as a result in a position of controlling these slots. As a result, these traditional / incumbent airlines are in a dominant position and therefore there is a probability that this dominant position may be abused by these airlines by forming a cartel and indulging in anti- competitive practices such as price fixing, bid rigging and creating entry barriers to a new airline who wishes to acquire the landing rights. It further must be noted that monopoly in slot allocation creates a tremendous logistical nightmare when the airline enjoying the dominant position has to undergo insolvency owing to various debt defaults and other causes stated in the insolvency laws in that country.

"In India, a recent case study is of Jet Airways who once enjoyed a market share of around 15% as back as December 2018 is now on the verge of insolvency. As a result, the Directorate General of Civil Aviation has begun to distribute flight slots which were being left used by Jet Airways. It must be noted that even at 15 %, Jet controlled the domestic and international market since after the national carrier i.e Air India, only Jet Airways had the capacity to fly on long haul flights which included f1ights to London, Brussels, Paris, San Francisco and New York.

It was also noted through a poll held with the managers of the airline companies that slots were perceived as a main and most effective barrier to entry in the airline industry thereby leading to the enjoyment of a dominant position by the incumbent airlines.[89]

5.2.2 Boarding Gates

Another entry barrier for a new airline are the leasing rules of boarding gates which are many a times reserved for the incumbent airlines in the same way the slots are controlled. The gate leasing agreements allow one airline to have exclusive rights to use a gate for an extraordinarily long time (20years). Therefore as a result, the exclusive control of these gates leads to the creation of a dominant position for such airlines who have been the traditional players in the market. The control over the gates is one of the major factors which is looked into while entering into a code share agreement.

5.2.3 Marketing

The incumbent airlines resort to marketing strategies which makes them a dominant player. This is because; these marketing strategies are another barrier to entry in the market. One of the most important marketing strategies is of the frequent flyer programs wherein the airline customers accrue points corresponding to the distance flown on the airline. These points can be redeemed for the purposes of free air travel or other goods and services. Also, the airlines could pay travel agents increased commissions to encourage them to book passengers on their company' s flights. However, this strategy is slowly and almost out of use since the role of travel agents has now been occupied by online ticket booking websites.

[89] Mirko Schnell, Investigating Airlines Managers' Perception of Route Entry Barriers A Questionnaire-Based Approach in COMPETITION VERSUS PREDATION IN AVIATION MARKETS-A SURVEY OF EXPERIENCE IN NORTH AMERICA, EUROPE AND AUSTRALIA 259 (Peter Forsyth et al. eds., 2005).

5.2.4 Brand

There are certain sections of the population who are reluctant to travel by air and hence the airlines reputation and brand encourages a person to travel on that particular airline. Therefore, an incumbent airline that has developed its brand and reputation over the years stands at a natural position of dominance owing to their resultant increase in market share. As a result of its brand, the incumbent airlines attract passengers even at higher prices. In essence the brand value of the airline has a very good chance of making that airline the most dominant player which might lead to abuse of the said dominant position.

5.2.5 Asset Mobility

This factor is not specific to incumbent airlines, yet the mobility of its assets is indeed a peculiar characteristic of the airline industry that facilitates strategic predatory behavior. The aircrafts are one of the most flexible mobile assets, which makes it very easy for incumbent companies to expand offers in reaction to new entrants. This mobility of assets is another factor which leads to the creation of a dominant position. The case law below, has been studied by the researcher because the Appellants (Original Defendants) were engaging in anti-competitive prices as a result of their dominant position in the market. The primary factor which the Original Defendants made use of, was their brand which put them in a dominant position and hence they engaged in anti-competitive practices which have been discussed in the case.

5.3 CASE LAWS

A.) *British Airways PLC vs. Commission of European Communities*

Forum: The European Court of Justice, The Third Chamber

Composition: A. Rosas (Rapporteur). President of the Chamber, A. Borg Barthet and J. Malenovský. Judges,

Advocate General: J. Kokott

Note: The researcher shall be analyzing the facts of the case and the ruling of the Court of First Instance since the European Court of Justice handles only the questions of law and not the merits of the case. On the other hand, the Court of First Instance laid down their ruling on merits and points of law.

Facts of the Case

1. British Airways, was the largest airlines in the United Kingdom. They concluded agreements with travel agents established in the United Kingdom and accredited by the International Air Transport Association (IATA) , which included not only a basic commission system for sales by those agents of tickets on BA flights but also they were provided with three distinct systems of financial incentives: marketing agreements; global agreements and a subsequent 'performance reward scheme which became applicable from 1st January 1998.

2. These marketing agreements enabled the certain travel agents, mainly those with at least annual sales worth 500,000 Great Britain Pounds, to receive payments in addition to their basic commission. The particular addition was the performance reward which was essentially calculated on a sliding scale, based on the extent to which a travel agent increased the value of its sales of BA tickets, and subject to the agents increasing its sales of such tickets from one year to the next.

3. On 9th July 1993, Virgin Atlantic Airways Ltd lodged a complaint with the Commission, directed in particular against those marketing agreements.

4. The Commission reached a decision to initiate a proceeding in relation to those agreements and adopted a statement of objections against British Airways on 20th December 1996. British Airways presented its oral observation at a hearing on 12th November 1997.

5. It should be noted that under the performance reward scheme, the basic commission rate was reduced to 7%% for all British Airway tickets (which was lower than the previous rate of 9% for international tickets and 7.5% for domestic tickets), but each agent could can an additional commission of up to 3% for international tickets and up to 1% for domestic tickets. The size of the additional variable element depended on the travel agents performance in selling BA tickets. The agents performance was measured by comparing the total revenue arising from the sale of BA tickets issued by an agent in a particular calendar month with that achieved during the corresponding month in the previous year. It must be therefore noted that in case even months were used as a potential relevant market.

6. On 9 January 1998, Virgin Atlantic lodged a supplementary complaint against this new performance reward scheme. On 12th March 1998, the Commission adopted a supplementary statement of objections in relation to that new system.

7. On 14th luly 1999, the Commission adopted the contested decision, holding that by applying the marketing agreements and the new performance reward scheme to travel agents established in the United Kingdom position in the , British Airways had abused its dominant United Kingdom market for air travel agency services. This abusive conduct by rewarding loyalty from travel agents and by discriminating between travel agents, had the object and effect of excluding BA's competitors from the United Kingdom markets for air transport.

HELD:

The Court of First Instance upheld its apprehensions concerning Art 82 of the EC, the Court held that this Article would be applicable to a system of discounts which was being used by British Airways in order to incentivize its travel agents. The Court has referred to the Michelin judgment wherein it was held that in prohibiting the abuse of a dominant market position in so far as trade between Member States is capable of being affected shall be disallowed completely.

Art 82 refers to a conduct which is as such 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 already very weak and which , through adopting a modus operandi different from those which govern 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 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 of the growth of that competition.

The Court held that British Airways was abusing its dominant position after analyzing the following factors:

- The system of discounts which were discriminatory in nature.
- The system which incentivized the travel agents was essentially to block other airlines from dealing with these agents and thereby creating entry barriers for the new players in the market.
- Court reiterated upon the fact that during the course of the investigation and the case British Airways was unable to justify that their exclusionary practice was economically justifiable.

- The Courts arrived at one of their conclusions that the bonus schemes at issue gave rise to a situation wherein the dominant firm has the opportunity to keep a pulse on the market. The Court further realized that the attainment of the sales progression objectives gave rise to an increase in the commission paid on all BA tickets sold by the various travel agents. Therefore, it was of decisive importance for the commission income of a travel agent as ahole was dependent upon the number of British Airways tickets he sold. As a result, the progressive nature of the increased commission rates had a very noticeable effect on the ticket prices.

- Therefore, to put the entire judgment of the Court of First Instance in a nutshell, the Court reached to a conclusion that British Airways had a higher market share than that of its five competitors in the United Kingdom. The Court further held that the rival airlines did not have the recourse to the economies of scale which were being enjoyed by British Airways and therefore they did not have the financial base in order to match the incentives provided by British Airways to the travel agents. Therefore, British Airways did abuse its dominant position in the market.

- On appeal, the European Court of Justice has dismissed these appeals filed by British Airways and upheld the findings of the Court of First Instance.

Analysis:

Thus, the researcher has been able to reach a conclusion that the verdict passed by the Court of First Instance and the Appellate Court are sound in law. The verdict is in consonance of Art 82 of the EC Treaty which prohibits abuse of dominant position by a firm in a given relevant market. British Airways is one of the traditional airlines and the flag carrier of the United Kingdom, this stature places them on a higher scale over its rivals in terms of slots, gates available, better marketing strategies, higher revenues and turnovers. All these factors formed an essential base for creating economies of scale and therefore they were able to afford to incentivize the travel agents through the various financial schemes propagated by the airline.

These practices, however innovative they might be extremely unfair to the rival airlines since they did not have the financial resources to incentivise the travel agents as a result of which they were getting excluded from the domestic as well as the international market. Another crucial factor which must be kept in mind while analyzing this case, is that Virgin Atlantic

Airlines did accept the fact that the British Airways' actions were economically justified, however, the Court held that this was a standard case of abuse of dominant position.

B) Express Industry Council of India v. Jet Airways & Ors.

Forum: Competition Commission of India

Members:

Ashok Chawla, Chairperson

S.L. Bunker, Member

Sudhir Mittal, Member

Augustine Peter, Member

U.C. Nahta, Member

M.S Sahoo, Member

GP Mittal, Member

Relevant sections of the case: Complaint filed under S. 19 (1) (a) of the Competition Act; Section 3 of the Act

Facts:

1. The informant was a non-profit company established with the purpose of providing courier services and which included a group of around 29 express companies.

2. The informant alleged that in the year 2008, certain domestic airlines introduced a fuel surcharge of Rs.5/kg when providing the air courier services. The informant alleged that airlines primarily included Jet Airways (India) Ltd, Indigo Airlines, SpiceJet Ltd,Air India Ltd and Go Airlines (India) Ltd.

3. Informant further alleged that there was no legal basis upon which these airlines were levying the additional surcharge. The informant further alleged that these surcharge rates had uniformity in them which leads to an inference that these airlines were in contravention of S.3

of the Act and by levying the fuel surcharge were actually involved in the anti-competitive practice of cartelization which was incidental to their dominant position in the market.

4. The in formant further alleged that the airlines attributed the levy of the fuel surcharge on the inflating prices of the aviation turbine fuel. However, it must be noted that the airlines kept the fuel surcharge at the same rate even after the international prices went down. The airlines were abusing their dominant position since the rates of the fuel surcharge had no hearing whatsoever on the inflation/deflation of oil prices in the international market.

The informant further alleged that the airlines were acting in collusion when they started increasing the freight charges under the garb of levying fuel surcharge. This practice was detrimental to the final consumers since they had to pay a higher amount for availing the services of these courier enterprises.

Held

1. After a thorough investigation and after perusing the replies filed by the opponents, the CCI adjudicated that the activities of the airlines by levying the additional fuel surcharge were anti-competitive in nature and thus there activities were in contravention of Section 3(1) read with Section 3(3)(a) of the Act. Further it was held that the airlines were abusing their dominant position in the market.

2. The CCI held that the practices adopted by the airlines were detrimental to the economy of a developing country and hence they deemed it important to break up this cartel which was existent in the domestic air cargo industry.

3. The CCI held that the cartel was levying the fuel surcharge in order to mitigate the fuel price volatility.

4. Therefore, the CCI imposed a penalty of 1% of average turnover which was earned during the Financial Years (2010-11 ,2011-12 ,2012-13)

Penalty imposed on Jet Airways: Rs 151.69 crores

Penalty imposed on IndiGo Airlines: Rs 53.74 crores

Penalty imposed on SpiceJet: Rs. 42.48 crores

Analysis:

1. The CCI was justified when it passed this order since the practices resorted to by the airlines were anti-competitive resulting from a position of dominance in the market.

2. The levy of fuel surcharge was totally unjustified since the airlines were earning good margins from the original freight charge. The researcher is of the opinion that the airlines wanted to cartelize in order to lobby in the Ministry of Petroleum and Natural Gas in order to Subsidize the aviation turbine fuel. This they did by imposing higher costs of service on the express companies and the final consumer.

3. Anti-competitive behaviour in any sector is an unethical and illegal activity. The burden of this anti-competitive behaviour is borne by the consumers who have to pay a higher sum because the entities chose to indulge in anti-competitive behaviour.

4. The Competition Act, 2002 as of today has provisions for monetary penalties in proven cases of anti-competitive behaviour. The principle that every corporate entity is a legal individual and hence only the entity can be made liable. But, given the severity of such anti-competitive behaviour and the impact it has on the economy as a whole, it is necessary that necessary amendments are introduced to the Competition Act, 2002 which shall empower the CCI to pierce the corporate veil.

In the light of these two judgments, it can be said without a doubt that, in order to lay down a strong foundation for the development of the competition policies in the civil aviation sector, the presence of uncompromising regulatory agencies is essential. In the next chapter. the researcher has studied the impact public institutions in order to maintain a comprehensive competition policy in the civil aviation sector.

5.4 THE IMPACT OF PUBLIC INSTITUTIONS IN MAINTAINING A COMPREHENSIVE COMPETITION POLICY IN THE CIVIL AVIATION SECTOR

The role played by public institutions and authorities in cultivating and maintaining and aim equality in the market is unparalleled. In India, the Ministry of Civil Aviation (MCA) is the primary Ministry Which is responsible for the formulation of policies and regulations in the civil aviation sector. The MCA oversees the planning and implementation of schemes which are critical to the growth and expansion of civil air transport. Airport facilities, air traffic

services and carriage of passengers and goods by air. The following are the principal regulatory authorities which are established under the authority of the MCA:

1. The Directorate General of Civil Aviation (DGCA) enforces civil air regulations, regulates air transport services, air safety and airworthiness standards. The DGCA has been established under the Aircraft Act and Rules and performs functions like issuance of licenses, approvals, certificated and permits.

2 The Airports Authority of India (AAI) creates, upgrades, maintains and manages civil aviation infrastructure both on the ground and in the air space in India. Section 12 of the Airport Authority of India Act, 1994 lays down the functions of the AAI.

The functions of the AAI are as follows:

a) Managing the airports, the civil enclaves and the aeronautical communication stations effectively;

b) To provide air traffic service and air transport service at all the airport and civil enclaves;

c) To plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves

d) The AAI Amendment Act, 2003, provided for an additional function of establishing airports, or assisting in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government thought fit for the purpose;

e) To plan. procure, install and maintain navigational aids, communication equipment, beacons and ground aids at the airports and at such locations as may be considered necessary for safe navigation and operation of aircrafts:

f) To provide air safety services and search and rescue facilities in co-ordination with other agencies;

g) To establish schools or institutions or centers for the training of its officers and employees in regard to any matter connected with the purpose of the Airport Authority of India Act, 1994;

h) To construct residential buildings for its employees;

i) To establish and maintain hotels, restaurants and restrooms at or near the airports;

j) To establish warehouses and cargo complexes at the airports for the storage or processing of goods;

k) To arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;

1)To make appropriate arrangements for watch and ward at the airports and civil Enclaves;

m) To regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports and civil enclaves3 with due regards to the security and protocol functions of the Government of lndia;

n) develop and provide consultancy, construction or management services, and undertake operations in India and abroad in relation to airports, air navigations Services, ground aids and safety services or any facilities;

o) To establish and manage heliports and airstrips;

p) To provide such transport facilities which are necessary to the passengers travelling by air;

q) To form one or more companies under the Companies Act, 1956 or under any other law relating to companies to further the efficient discharge of the functions imposed by the Act:

r) To perform any other function considered necessary for ensuring the safe and efficient operation of the aircraft;

s) To establish training institutes and workshops;

t) To handle any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the authority.

3)The Airport Economic Regulatory Authority (AERA) which was established under the Airport Economic Regulatory Authority Act, 2008 determines the tariff for aeronautical services and Passenger Service Fees to monitor performance standards relating to quality, continuity and reliability of the service.

The statutory functions of the AERA are as follows:

a. To determine the tariff for the aeronautical services taking into consideration:

b. The capital expenditure incurred and timely investment in improvement of airport facilities.

c. The service provided, its quality and other relevant factors.

d. The cost for improving efficiency.

e. Economic and viable operation of major airports.

f. Revenue received from services other than the aeronautical services.

g. The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise.

h. Any other factor which may be relevant for the purposes of this Act.

i. To determine the amount of the Development Fees in respect of major airports.

j. To determine the amount of the Passengers Service Fee levied under rule 88 of the Aircraft Rules, 1937 made under the Aircraft Act. 1934.

k. To monitor the set Performance Standards relating to quality, continuity and reliability of services as may be specified by the Central Government or any authority authorized by it in this behalf.

l. To call for such information as may be necessary to determine the tariff under clause(a).

m. Such other functions relating to tariff, as may be entrusted to it by the Central government or as may be necessary to carry out the provisions of this Act.

It is crucial that integrity is maintained during the course of their duty since even a slight error in terms of implementing policy would lead to a domino effect of catastrophic results that may lead to unmatched and unwarranted advantage for a very few market players at the cost of others. This would further result to an abysmal failure in achieving fairness in the market's competition would be defeated at the very beginning, India has benefited tremendously by repealing the Air Corporations Act and liberalizing the aviation sector as a result. One of the latest trends in the global aviation industry are open skies bilateral agreements.[90]

The National Civil Aviation Policy, 2016 has brought into force the model of the Open Skies Agreement, wherein unlimited flights would be allowed to operate to and from major international airports within the territory of India. This being a liberal move on the face of it, faces some fundamental anti-competitive issues. The more prevalent school of thought is that the Open Skies Agreement enhances competition wherein the truth of the matter is that this policy is beneficial to the airlines already having a significant market share. This is because, the agreement applies only to the six major airports in India namely, Indira Gandhi International Airport (New Delhi), Chatrapati Shivaji Maharaj International Airport(Mumbai), Chennai International Airport (Chennai), Netaji Subhash Chandra Bose International Airport (Kolkata), Rajiv Gandhi International Airport (Hyderabad) and Kempegowda International Airport (Bangalore).

The anti-competitive nature of this 'open skies policy' lies in the fat that these operations are legally permissible only at the six abovementioned airports, where the existing airlines already enjoy a huge market share owing to their regional and national connectivity.

Meanwhile, the airlines having a significantly lesser market share and those who operate more on a regional level are denied access to this government policy. As a result, the airlines which have access to more routes and who have slots at the six abovementioned airports, which all of them do form a cartel through agreements and thus create a number of exemplary barriers for a new player to enter the market whose entry might damage the existing status quo.

Therefore, in light of these developments, wherein the policies are formulated on the compatibility of airports to implement the policy. the Airport Authority of India has an important role to play in the formulation of competition policy. The DGCA which primarily

[90] Ghanshyam Singh, Aviation Industry Emerging Legal Challenges in CURRENT DEVELOPMENTS IN AIR AND SPACE LAW 13 (Ranbir Singh et al. ed. 2012

formulates the rules and regulations on civil aviation policies also plays a crucial role by acting in as an advisory to the CCI..

Following is a case which took place in the United Kingdom. This case is relevant for the purpose of this chapter. The reason being, in the case below, the Office of Fair Trading, which is the competition regulator in the United Kingdom took a proactive interest in curbing anti-competitive practices which were being undertaken by the UK's national carrier. This case showed the impact of a public institution which took a proactive stand against what would have been termed as 'anti-trust immunity'.

- The British Airways Price fixing case

In 2008, British Airways, which is the national carrier of the United Kingdom, was fined 270 million GBP by the UK and the US competition authorities for indulging in activities of price fixing on fuel surcharges on their long haul flights. This investigation was a joint effort of the US Department of Justice and the Office of Fair Trading (OFT), which is the competition regulator in the United Kingdom. Th FT levied a penalty of 121 million GBP on British Airways. The amount of penalty was unprecedented since it was the first time the OFT had imposed such a heavy penalty. The other party in this case was Virgin Atlantic Airlines who had colluded with British Airways to raise the surcharges from 5 GBP to 60 GBP per ticket on long haul return flights.

The resultant impact of this anti-competitive behaviour was that consumers had to pay higher amounts than the prevalent market situation. The researcher has studied this case from the perspective of the regulatory authorities. This case emboldened the cause for pursuing criminal litigation against those entities who would indulge in anti-competitive behavior. The whole investigation and the verdict thereby was a result of Virgin Atlantic coming forward and providing details on the activities which took place between them and British Airways. Therefore, Virgin Atlantic was shown leniency under the leniency provisions of the Office of Fair Trade.

Thereby, this chapter has concluded. In the next and final chapter, the researcher has given his own inputs on the way forward in order to further strengthen the public institutions i.e., the CCI, and the Airport Authority of India by way of legislation passed by the Parliament. Or through an Executive Regulation; wherein an amendment must be carried out to S. 3(2) of the Airport Authority of India Act, 1994 wherein the AAI shall have the authority to act as a quasi-

judicial body/ or a provision making it mandatory to establish an independent quasi-judicial authority which shall adjudicate upon the disputes amongst airlines, any competition issues which arise in the civil aviation sector; thereby acting as a Court of First Instance.

CONCLUSION AND SUGGESTIONS

CONCLUSION

The Indian judicial system is different as compared to the United States of America, the primary difference being the presence of federal and state laws which are enforced by the federal and the state courts. The nature of anti-trust cases is such that, the Federal Government or a State Government may bring a civil or criminal action against a private individual or a corporation. In the United States, it is the prerogative of the Federal government to bring criminal actions against anti-trust violators, while civil actions are the prerogative of the federal and the state governments. The United Kingdom when passing is Competition Act, 1998 has emphasized only on pursuing civil remedies.[91] In India, the Competition Commission exercises its jurisdiction boldly and it has penalized enterprises which indulge in anti-competitive behaviour. However, the claims which are brought forth before the CCl are private in nature. The Government of India and the State Governments have not been taking a proactive interest in making sure that the provisions of the Competition Act are not violated. Furthermore, in the United States, the Department of Justice has a separate Anti-Trust Division which works in collaboration with the Federal Bureau of Investigation (FBI) in order to investigate the cases of anti-trust violations. Similarly, the CCI can work in collaboration with the Ministry of Corporate Affairs, Securities Exchange Board of India (SEBI)[92] and the Central Bureau of Investigation (CBI) in order to establish a competition governance based on the US model.

The researcher has thereby arrived to a conclusion that, the civil aviation sector is an extremely dynamic sector, with changes occurring on a daily basis. The civil aviation sector has been subject to practices which one normally associates with, which amount to, anti-competitive behaviour. The Airport Authority of India Act, 1994 does not specifically deal with competition issues in the civil aviation sector. Thus, there is a necessity for the concept of code share agreements to be incorporated in the Airport Authority of India Act, 1994 as well. The rationale behind incorporating the concept of code share agreements is that, since airlines operate in a manner as agreed upon in the code share agreement, and the operations of airlines is the AAI's

[91] T RAMAPPA COMPETITION LAW IN INDIA (Policy, Issues and Developments) 263

[92] in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

responsibility; hence these code share agreements need to be explained in the Airport Authority of India Act, 1994 as well

The researcher has been able to establish the link between code share agreements and anti-competitive behaviour. The code-share agreements and anti- researcher has recommended that the anti-trust immunity which has been provided to airlines must be taken away. It can be seen that the Indian civil aviation and the competition regulators would do well if they followed the European and the US models of regulating their respective civil aviation sectors. The European Union and the US models of regulating their respective civil aviation sectors. The researcher has the sanguine hope that, if the researcher's recommendations are implemented, a small step shall be taken towards reaching that ideal destination i.e. a total absence of anti-competitive agreements and the absence of abuse of dominant position in the Indian civil aviation sector.

SUGGESTIONS

When sectoral regulation and competition law have the same goal, competition law may be facilitated in the sense that the competition authority may not have to intervene because the regulation alleviates potential competition problems.[93] This school of thought has suffered severe lacunae; one of the major concerns as regarding competition is the anti-trust immunity which has been provided to the airlines by the civil aviation regulators. This policy has created a clear dichotomy between the sectoral regulation and competition law. The sectoral regulation is handing out a blank cheque to the airlines to indulge in anti-competitive activities whereas the competition law has to keep a vigilant watch on these airlines so that they do not indulge in anti-competitive behavior. One of the major concerns is that the grant of anti-trust immunity to airlines eliminates competition between the participants on the routes where they offer competing flights, thereby adversely affecting consumers on these routes.[94] One of the ways to bring about this change is by restricting airline alliances from colluding on prices and the civil aviation regulators must ensure that the agreement only results in pro-competitive agreements. In other words, there should be a greater due diligence on the part of the regulators. If the members of an alliance retain the independence to determine their price structure, rather than reducing incentive to compete on the routes they both serve, consumer welfare shall be

[93] CASE AT. 3994- Air France/KLM/Alitalia/Delta, European Commission, 4, (Jun. 23, 2018). http://ec.europa.eu/competition/antitrust/cases/dec_docs/39964/39964_1755_5.pdf.

[94] William Gillespie and Oliver M. Richard,, Antitrust Immunity and International Airline Alliances, The United States Department of Justice, (Jun. 28, 2018), https://www.justice.gov/atr/antitrust-immunity-and international-airline-alliances.

ensured.[95] Another outcome of code-share agreements is that they might restrict or dis-incentivize the addition of physical capacity to the routes. If theese schemes are put to use by a dominant airline, these agreements shall have an exclusionary effect in favour of the dominant airline, thereby amounting to abuse of dominance.

"Government policy should reflect changes in the aviation sector such as the development of alliances, code-sharing agreements, and loyalty programs. These horizontal agreements have aided the airlines in having a stronghold in the market by consolidation of operations. Before long, issues in the regional connectivity will also crop up. The government 's UDAN-RCSscheme[96] will be a new challenge since the airlines will be competing with railways on the regional route for the business of price-sensitive passengers."[97]

Anti-competitive behaviour in any sector is an unethical and illegal activity. The burden of this anti-competitive behaviour is borne by the consumers who have to pay a higher sum because the entities chose to indulge in anti-competitive behaviour.

The Competition Act, 2002 as of today has provisions for monetary penalties in proven cases of anti-competitive behaviour. The principle that every corporate entity is a legal individual, and hence only the entity can be made liable. But, given the severity of such anti-competitive behaviour and the impact it has on the economy as a whole, it is necessary that necessary amendments are introduced to the Competition Act, 2002 which shall empower the CCI to pierce the corporate veil.

India has only one law i.e. the Competition Act, 2002 which deals with anti-competitive behaviour amongst firms. On the other hand, the United States of America has three anti-trust laws, i.e. the Sherman Act, 1890; the Federal Trade Commission Act and the Clayton Act.

The civil and the criminal penalties for violation of the Sherman Act are quite severe. Criminal prosecution is limited to intentional and clear violations wherein the enterprises engage in price fixing and bid rigging.[98] The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with 10 years in prison. The policy is such

[95] *Ibid.*
[96] Udeesh Ka Aam Naagrik: Civil Aviation Ministry's Regional Connectivity Scheme "UDAN" Launched Today, Press Information Bureau, (Jun. 28, 2018), http://pib.nic.in/newsite/PrintRelease.aspx?relid=151850.
[97] *Ibid.*
[98] https://.www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws last accessed on 17-06-2019.

that, if the gain or the loss due to an anti-trust violation is more than $100 million, under federal law, the maximum fine in an anti-trust violation may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims.[99]

Further, the Federal Trade Commission bans unfair methods of competition. The United States Supreme Court has held that any violation of the Sherman Act is an automatic violation of the Federal Trade Commission Act. The impact of this stand is that, although the FTC does not technically enforce the Sherman Act, it can bring actions under the FTC Act against the same kind of activities that violate the Sherman Act. Moving ahead, the Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (i.e. the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions wherein the effect of the transaction may substantially decrease the competition, or tend to create a monopoly. The amendment to the Clayton Act, which was brought by the Robinson- Patman Act of 1936, the amended Act has also banned discriminatory pricing, services, and allowances in dealings between merchants. There was a further amendment to the Clayton Act, by way of the Hart-Scott-Rodino Antitrust Improvement Act wherein it was stated that companies which were planning large mergers or acquisitions were required to notify the Government well in advance. The Clayton Act has further emboldened claimants in by authorizing private parties to sue for triple damages when they have been harmed by a conduct that violates the Sherman or Clayton Act and to obtain a court order prohibiting the anti-competitive practices in the future.[100]

The researcher has shed some light on the evolving dynamics of EU Competition Law as well. The US and the EU approach with regard to individual liability for anti-trust violations has been notoriously contrasting.[101] The Sherman Act in the US empowers the courts to sentence an individual found guilty of anti-competitive behaviour up to ten years in prison. On the other hand, EU competition law exclusively focuses on infringements of competition law by "undertakings".[102] However, on an encouraging note. this contrast is diminishing due to the fact that, even the EU competition system has begun to incorporate criminal liabilities for proven anti-competitive behaviour. In nineteen of the twenty-seven Member States of the

[99] *Ibid.*
[100] *Ibid.*
[101] http://competitonlawblog.kluwercompetitionlaw.com/2013/04/25/individual-liability-for-cartel-infringeements-in-the-eu-an-increasingly-dangerous-minelield/ last accessed on 18-06-2019.
[102] *Ibid.*

European Union, individuals can be sanctioned for infringements of competition law. Fourteen Member States have introduced criminal penalties for competition law infringements.

German and Austria have started imposing prison sentences for individuals that have been involved in bid rigging. And in instances of other anti-competitive behaviour, the fine has been set at a maximum limit of 1 million Euros.

In the Netherlands. the Dutch competition authority may line individuals up to four hundred and fifty thousand Euros.

In France, individuals indulging in anti-competitive behaviour face a fine of up to seventy-five thousand Euros and four years in prison.[103]

Therefore, the researcher has recommended certain amendments which must be made to the existing Airport Authority of India Act, 1994 and the Competition Act, 2002.

- **Amendments which need to be made to the Airport Authority of India Act, 1994**

i. An amendment must be carried out to S.3(2) wherein the AAI shall have the authority to act as a quasi-judicial body/ or a provision making it mandatory to establish an independent quasi-judicial authority which shall adjudicate upon the disputes amongst airlines, any competition issues which arise in the civil aviation sector; thereby acting as a Court of First Instance.

ii. Section 12 of the Act needs to be amended which shall include the above foresaid functions in Chapter III of the Act, under the Functions clause.[104]

iii. Slots, i.e. the landing rights at an airport, which are allocated to the major carriers acts as a hindrance to fair competition. The allocation of these slots is the function of the AAI. Traditionally, the concept of 'grandfathering of slots'[105] has been prevalent in the civil aviation sector. This makes it extremely difficult for the new airline carriers to compete on a level playing field. Therefore, the concept of grandfathering of slots has to be done away with. This has to be replaced by an annual filing for slots wherein the newer carriers can

[103] *Ibid.*

[104] Chapter III of Airport Authority of India, Act, 1994

[105] Grandfather rights means slots allocated to a particular carrier in the previous season and which were used to a significant extent, are reverted to the same carrier.

apply. Similarly, the notice of allocation has to be given through public notice wherein interested airlines may apply. The allocation of these slots should be done by an independent regulator thereby reducing the bureaucratic barriers in the process.

iv. "The Ministry of Civil Aviation has divided all aviation routes in the country into three categories. Category I routes comprise Metros, Category II routes consist of North Eastern region, Jammu & Kashmir, Andaman & Nicobar and Lakshadweep whereas Category Ill routes comprise all routes other than those in Category I and II. According to the policy, any operator which operates scheduled air transport services on one or more than one routes under Category I, will be required to deploy on Category II routes at least 10% of the capacity it deploys on Category I routes. Moreover, the operator has to deploy on Category III routes at least 50% of the capacity he deploys on Category I routes."[106] The impact of this policy is that the major carriers are able to operate these flights as well which is anti-competitive nature because, this policy shall prevent the new entrants from competing. Instead, some of the routes on Category II and the entirety of Category III routes should be allocated to the new entrants in the civil aviation sector, thereby leading to an equitable distribution of economic justice.

v. The Ministry of Civil Aviation must incorporate a Cartel Investigation Office, which shall work in coherence with the Competition Commission of India.[107] This is because, the detection of cartels is a very difficult task and many times, the cartel is detected because one of the cartel members acts as a whistle blower.

The Competition Commission of India already has its hands full, since it is a pan-sectoral regulator. Instead, having a specialized department within the AAI for detecting cartels seems a more prudent approach towards punishing cartels in the civil aviation sector. The anti-trust immunity provided to the airline alliances is already an obstacle in starting cartel related investigations. A Cartel Investigation Office within the AAI shall go a long way in detecting and penalizing cartels.

[106] Competition and Regulatory Deficit in Civil Aviation Sector in India- Mukesh Kacker (lAS) Director General

[107] This concept was derived from the Serious Fraud Investigation Office, which comes under the jurisdiction of Ministry of Corporate Affairs.

- **Amendments which need to be made to the Competition Act, 2002.**

Through the case laws the researcher has studied, the primary anti-competitive practice which stands out in the civil aviation sector is that of price fixing. Code share agreements are an offshoot of price fixing agreements; hence the definition of agreements needs to be broadened under the Competition Act, 2002. Code share agreements are anti-competitive due to its tendency to indulge in price fixing behaviour; therefore, code share agreements need to be defined under Section 2, i.e., the Definitions Clause. The nature of code share agreements is such that, the airlines who are a party to the agreement maintain their individual identity while functioning in such a manner which is synonymous with combination of merger/ amalgamation. Therefore, code share agreements are dual in nature which makes it essential that code share agreements are given a special mention under Section 3, under Section 4, Section 5 and under Section 6 of the Competition Act, 2002. Furthermore, since airline alliances are code share agreements bundled together, they have to be mentioned by their name under the definition of cartels.

The Competition Commission of India has adopted an administrative model of competition enforcement.[108] The CCI has the power to issue cease and desist orders and impose monetary penalties. Under the administrative model, the investigative and adjudicatory powers are vested in a single agency (or a group of agencies. However, a party against whom an adverse order has been passed by such an agency has the recourse to challenge the agency's decision before the judiciary.[109] The countries who have adopted the administrative model include Brazil, Japan, the U.S (the Federal Trade Commission), Mexico, the European Union and many other European countries.[110]

Secondly, criminal liability needs to be imposed on parties who indulge in anti-competitive practices, and abuse their dominant position in the market. Hence, the researcher has suggested a change in approach by shifting from the administrative model of adjudication to the prosecutorial model of investigation. Under the prosecutorial model, an enforcement agency is primarily an executive body that investigates and prosecutes breaches of the law before an

[108] Comparative Competition Law - Ed. John Duns, Arlen Duke, Brendan Sweeny.

[109]Donald I Baker, 'Private and Public Enforcement: Complements, Substitutes and Conflicts - A Global Perspective' in Ariel Ezrachi, *Research Handbook on International Competition Law* (Edward Elgar 2012) 255.

[110] Bulgaria, Czech Republic, Denmark, Germany, Estonia, Greece, ltaly, Cyprus, Latvia, Lithuania, Hungary, Netherlands, Poland, Portugal, Romania, Slovenia, Slovekia, Finland, Sweden and the United Kingdom: Commission Staff Working Paper, 'Report on the Functioning of Regulation 1/2003' (COM(2009) 206, European Commission 2009).

independent authority. These authorities ranges from a generalist Court to a specialized Tribunal. Countries such as Canada, Chile, China, Denmark. Israel, South Africa, UK and the United States of America. Generally, civil and criminal actions are brought forward by different agencies. For e.g. : In Canada, the Competition Bureau (CCB) is responsible for investigating and enforcing civil breaches and the Director of Public Prosecutions enforces the criminal prohibitions with investigative assistance from the CCB. A similar arrangement exists in Australia and Japan as well. However, the best example of an agency which has adopted the prosecutorial model is the Antitrust Division of the Department of Justice (DoJ) of the United States of America. The DoJ has the authority to open investigations and have extensive investigative powers. When the DoJ forms a view that an enterprise is engaging in anti-competitive behaviour, they file civil or criminal action in a generalist Federal District Court. Any decision passed by the Federal District Court is appealable, purely on significant points of law, to the District Court of Appeal from where a further appeal lies before the Supreme Court. The *United States of America v. Airline Tariff Publishing Co. et al*, case was a very distinctive case in which the administrative as well as the prosecutorial models were reflected. In support of the prosecutorial model, Mr. Terry Calvani, who is a practicing lawyer in the United States and also served as one time Chairman of the Federal Trade Commission has opined that, "Companies are often the target of private litigation and the arrival of a demand letter, or a service of summons in a civil litigation is common routine. These companies have counsellors and economic advisors on retainer agreements and hence the aspect of private litigation does not cause any real reason for worry."[111] He has further opined that, on the other hand, a criminal investigation into alleged anti-trust violations sets off alarm bells within corporate headquarters.[112] Another important deterrent when it comes to reducing anti-competitive behaviour is a custodial sentence upon conviction. A recent Working Paper published by the Competition Committee of the Organisation for Economic Co-Operation and Development (OECD) stated that *"The prospect of spending time in jail will be the most powerful deterrent for business executives considering entering into a cartel arrangement."*[113] The view of the OECD is extremely consistent with the U.S as well. Although the Sherman Act had provisions for criminal sanctions[114], it is only a recent phenomenon wherein custodial sentences have been

[111] Criminalization of Competition Law Enforcement, Terry Calvani 275.
[112] *Ibid.*
[113] OECD Committee Working Party No.3 Discussion Paper, Sanctions Against Individuals, Including Criminal Sanctions in Prosecuting Cartels.
[114] On 24th June 2004, President Bush signed into a law a further amendment that increased the custodial sentence to a maximum of ten years. U.S. Department of Justice Press Release, 24-06-2004.

passed routinely. The belief is that having custodial sentences in place is that the incidences of domestic price fixing have declined since courts began to routinely impose non-trivial custodial sentences. This statement is backed by facts wherein in 2002, persons convicted of price fixing in the United States spent more than 10,000 days in prison. While in 2003, the sentences were on an average of twenty one months, which is 630 days. Thus, there is a significant decline in both the length and frequency of custodial sentences. Therefore, there is substantial evidence to corroborate the statement that 'criminal liability shall reduce anti-trust violations.' Further, India is a country wherein the Directive Principles of State Policy[115] are kept in mind while formulating a law or policy and therefore criminal sanctions based upon the prosecutorial model are possible to implement.

It is interesting to note that the Irish stand on price fixing and related hard core cartel behaviour, such acts are termed as 'theft' and punishable as such. The maximum sentence upon conviction in Ireland is 4 Million GBP and five years of imprisonment. Secondly, the Act creates a private right of action to compensate those injured by the cartel conduct.[116] Thus, the Irish position emphasizes on both deterrence and compensation. The Competition Act, 2002 (Irish) and competition law in general treats horizontal conduct, vertical restraints, the abuse of dominant positions on a criminal scale. One of the important aspects which must be kept in mind while suggesting criminal liability is the deterrent effect which shall reduce the conduct of such anti-competitive behaviour. There is a scope to inculcate this provision in the Competition Act, 2002 because it has the potential to create a deterrent effect. One of the interesting constitutional law points is that, the Directive Principles of State Policy were adopted from the Irish Constitution.

Therefore, under Section 27 of the Competition Act, which deals with the Director General's findings on the matters of alleged anti-competitive behaviour by an enterprise, the DG should have the authority to imprison the persons who are indulging in anticompetitive behaviour through the enterprise. If the enterprise in question is a partnership firm; a trust; a co-operative society, then criminal liability can directly be imposed on the partners, or the trustees. However, when it comes to imposing criminal liability on an enterprise which is a body corporate registered under the Companies Act, 1956 or 2013, then the CCI must be given the authority to pierce the corporate veil since a company is a legal person having a distinct legal

[115] Part IV of the Constitution of India.
[116] Section 14 of Competition Act, 2002 (Republic of Ireland)

personality. The CCI has an unique opportunity of making human individuals liable for anti-competitive behaviour in civil actions by piercing the corporate veil. In the European Union, under Art.102 of the TFEU, the settled position of law is that the courts have the authority to hold a parent company liable for the anti-competitive behaviour of its subsidiary company, unless the parent company is able to introduce evidence that the subsidiary company acts independently in the market, without any influence of the parent company.[117] The US position is the opposite when it comes to piercing the corporate veil in a civil action. The courts tend to uphold the doctrine of a separate corporate identity when distinguishing a subsidiary company from its parent company.[118]

The CCI can work in collaboration with the Ministry of Corporate Affairs, Securities Exchange Board of India (SEB1)[119] and the Central Bureau of Investigation (CBI) in order to establish a competition governance based on the US model.

[117] Akzo Nobel and Others v. Commission C-97/08, ECLI:EU:C:2009:536

[118] Far more frequently, however, have courts denied to pierce the corporate veil in antitrust cases, see e.g. National Gear & Piston, Inc. V. Cummins Power Systems, LLC, 975 F.Supp.2d 392 (2013); In re Digital Music Antitrust Litigation, 812 F.Supp.2d 390 (2011); In re Currency Conversion Fee Antitrust Litigation, 265 F. Supp.2d 385, 425-428 (2008); see also In re Vitamin C Antitrust Litigation, Not reported in F. Supp.2d, 2013 WL 635740.

[119] In accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

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