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**COMPETITION COMMISSION OF INDIA**

Case No. Misc. 1/2010(4/2009)

Date of Order 9.1.2012

**ORDER**

This order is being passed in pursuance of COMPAT's order dated 4th May, 2011 passed under section 53 B of the Competition Act, 2002 wherein the order of the Commission dated 21.10.2010 passed under section 43 of the Act was set aside by the Hon'ble COMPAT with a direction to pass fresh order keeping in view the factual and legal positions as highlighted in the said order.

**Factual Background**

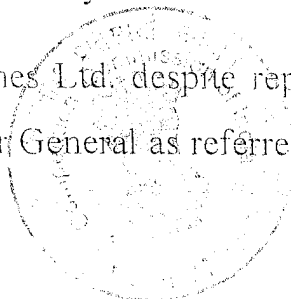
2. In this case an information was filed by the informant Sh. M.P. Mehrotra on 3.8.2009 alleging that the opposite parties, namely, Jet Airways (India) Ltd. and Kingfisher Airlines Ltd. have entered into an anti competitive agreement involving code sharing, joint fuel management, common ground handling, joint network rationalization etc. It has also been alleged that these Airlines are collectively controlling major share of market and by abusing their dominant position, they are adversely affecting the competition in the market. It has further been alleged that the two airlines mentioned above are acting in concert to fix prices and limiting/controlling the supply through route rationalization in violation of Sections 3 and 4 of the Act. The Informant, therefore, prayed for instituting an enquiry against opposite parties under the provisions of

Section 19(1) (a) of the Competition Act, 2002 and also to direct the opposite parties to discontinue and not to re-enter in such cartel like agreements.

- 2.1 The Commission considered this information in its meeting dated 4.8.2009 and after considering the entire material on record and relevant facts and circumstances relating to this matter which were brought to the notice of the Commission in the meeting, and formed an opinion that there exists a prima facie case and referred the matter to the Director General for conducting investigation into the matter and to submit a report within 45 days of the receipt of the order of the Commission.
- 2.2 The Director General vide his note dated 21.7.2010 informed the Commission that on receipt of the case from the Commission, notices were sent to two respondents — Jet Airways India Limited and Kingfisher Airlines Ltd. on 11.8.2009, under section 36 (2) read with section 41(2) of the Act to furnish the certain information in the office of the DG on 19.08.2009 at 12.30 PM either in person or through an authorized representative under section 35 of the Act. In the said notice, the opposite parties were also informed that in case the required information is not submitted they may be liable to pay a fine as per provisions of Section 43 of the Act.
3. The opposite party No. 1, namely, Jet Airways India Limited filed details on 25.8.2009. However, Kingfisher Airlines did not furnish the requisite information and sought an extension of time till 25.8.2009. The required extension was granted vide DG's letter dated 18.8.2009.
4. However, as per record, the Kingfisher Airlines Ltd. did not furnish the required information and instead vide its letter dated 25.8.2009, took the

plea that as the said agreement was entered into in October 2008 i.e. prior to coming into force of the provisions of Section 3 & 4 of the Act, and therefore Commission has no jurisdiction.

5. The record further shows that as the Kingfisher Airlines Ltd. did not comply with the directions of the DG for furnishing the required information it was again requested to furnish the required information/documents vide DG's letters dated 26.8.2009, 10.9.2009, 15.4.2010, 6.5.2010, 19.5.2010, 3.6.2010 and 12.7.2010. But again under pretext of filing a Writ Petition No. 1785/2009 in the Hon'ble High Court of Bombay, the Kingfisher Airlines Ltd. did not furnish the required information though there was no stay of the proceedings by the Hon'ble High Court.
6. The Hon'ble High Court of Bombay vide its order dated 31.3.2010 dismissed the Writ Petition filed by the Kingfisher Airlines Ltd and thereafter again Office of the DG issued letters to Kingfisher Airlines Ltd. on 15.4.2010, 6.5.2010 and 19.5.2010 to furnish details in compliance to the notice dated 11.8.2009. However, Kingfisher Airlines Ltd. instead of complying with the directions of the DG and cooperating in the investigation, took the plea that it has filed a Special Leave Petition in the Supreme Court against the order of the Hon'ble High Court of Bombay though no stay of the proceedings had been ordered by the Hon'ble Supreme Court.
7. Due to non-furnishing of the required information as per directions of the DG, the investigation was delayed.
8. As the Kingfisher Airlines Ltd. despite repeated notices issued to it by the office of the Director General as referred to above did not furnish the



required information/document and investigation was not making any progress DG recommended initiation of proceedings against it under section 43 of the Act.

9. The Commission in its meeting held on 24.08.2010 considered the matter and after carefully examining the facts and circumstances of the case, took a view that prima facie there has been non compliance, without any reasonable cause, of the directions given to Kingfisher Airlines Ltd. by the DG. Accordingly, a notice dated 16.09.2010 was issued to the Kingfisher Airlines Ltd. under section 43 of the Act to show cause within 15 days from the date of receipt of the notice as to why penalty for the above mentioned violation should not be imposed upon it with effect from 26.08.2009. Kingfisher Airlines was also given an opportunity of oral hearing on 12.10.2010.
10. The Kingfisher Airlines Ltd. did not avail the opportunity of oral hearing but submitted its reply on 4.10.2010 in response to the notice of the Commission stated as above. It was submitted that Kingfisher Airlines Ltd. had filed a Writ Petition No. 1785 of 2009 in the Bombay High Court challenging, inter alia, the order passed by the Commission on 04.08.2009 directing the DG to cause an investigation to be made in Case No. 4/2009 which was eventually dismissed by the High Court by its order dated 31.03.2010. However, during the pendency of the Writ Petition the Competition Commission as well as the Director General did not proceed with the matter till the order was pronounced by the High Court of Bombay.
11. Further, the said order of the Bombay High Court was challenged by the Kingfisher Airlines Ltd. before the Hon'ble Supreme Court of India by

way of Special Leave Petition (Civil) No. 16877 of 2010 which was subsequently withdrawn by it on 24.09.2010. During the pendency of the Special Leave Petition, Kingfisher Airlines Ltd. had requested the Additional Director General not to proceed with the matter until the decision of the Supreme Court as it had challenged the jurisdiction of the Competition Commission to investigate into the matter and once the SLP was withdrawn, the Kingfisher Airlines Ltd. filed a detailed reply before the Commission on 27.09.2010. Additionally, it has also complied with the notice dated 11.08.2009 issued by the Additional Director General and has furnished relevant documents/information available with it to the ADG, Competition Commission of India vide its letter dated 28.09.2010.

12. The Commission duly considered the replies filed by the Kingfisher Airlines. However, not being convinced with their submission, the Commission imposed on Kingfisher Airlines Ltd. vide its order dated 21.10.2010 a fine of rupees one crore the maximum penalty provided under section 43 of the Act for the aforesaid violation, being "rupees one lakh per day for each day during which such failure continues subject to a maximum of rupees one crore".
13. M/s Kingfisher Airlines filed appeal before the COMPAT against the above penalty order. The COMPAT, after due consideration of the rival submission, set-aside the impugned order on the ground that the relevant aspects and materials have not been considered in the proper perspective and the 'reasonable cause' aspect has also not been considered by the CCI in the proper perspective. It held that the imposition of penalty cannot be a matter of routine. The statute itself has provided for imposition of penalty when the failure is "without reasonable cause". The CCI also failed to distinguish the conceptual

difference between "failure to comply" and "belated compliance". In the former case, it is non-compliance and in the latter case, it is belated compliance.

14. The COMPAT finally remitted the matter to the CCI to pass fresh order keeping in view the factual and legal position as highlighted in its order. To avoid unnecessary delay it also directed the parties to appear before the CCI without further notice on 18.05.2011, for detailed examination of the issues involved afresh. So, this order is being passed afresh in pursuance of the COMPAT's order dated 4th of May, 2011.
15. Accordingly, the matter was listed for hearing before the Commission on 03.08.2011. However, the counsel of M/s Kingfisher Airlines expressed its inability to appear on the said date and requested the Commission to allow them to appear on 24.8.2011. The Commission re fixed the matter for hearing on 24.8.2011. M/s Kingfisher Airlines appeared before the Commission on 24.8.2011 and submitted oral arguments in support of their earlier contention. The matter was adjourned till 22.9.2011 for further hearing. Meanwhile on 26<sup>th</sup> of August, 2011 a letter was received in the Commission from Kingfisher Airlines stating therein that "pursuant to the hearing on 24<sup>th</sup> August, 2011 in the above mentioned matter, it is most humbly submitted that the Hon'ble Commission treat all the pleadings in the Appeal No.10 of 2010 and our response dated 4<sup>th</sup> October, 2010 to the show cause notice dated 16<sup>th</sup> September, 2010 as part of our submissions made on 24<sup>th</sup> August, 2011."
16. Thus, it is clear from the reply of M/s Kingfisher Airlines that they have nothing to add in the fresh proceedings except whatever has been

reiterated by them in the earlier proceedings. They have already taken the stand that since the matter was pending before Bombay High Court and Supreme Court, they were not obliged to file replies before the DG. Now, the issue in question is whether mere filing of Writ petition or for that matter SLP challenging the jurisdiction of the Commission entitles the party not to file replies in a pending proceeding and can it be treated as reasonable cause for non-compliance? Merely filing of a SLP does not mean that a person would not comply to Summons issued under the Act. It shows scant disregard to a valid Summons and cannot be a reasonable cause for non-compliance.

17. Coming to the COMPAT's finding that relevant materials of the case have not been considered by the Commission in proper perspective; the Commission examined this aspect afresh. In this regard, the DG's Report filed on 11.05.2010 which gives the chronological sequence of events in the case was considered by the Commission. The details are given as under:-

S.N.	Date of Notice	Due Date of Compliance	Date of Reply	Nature of Response
1	11.08.2009	19.08.2009	17.08.2009	Time of four weeks sought
2	18.08.2009	25.08.2009	25.08.2009	Letter received challenging jurisdiction
3	26.08.2009	Request to comply with notice dated 11.08.2009		No compliance
4	10.09.2009	Reminder to submit information by	Writ Petition filed on 08.09.2009.	No compliance

**Investigation kept in abeyance till Judgment of Mumbai High Court known on 31.03 2010. Investigation resumed after the decision of writ petition before the Mumbai High Court.**

5	15.04.2010	05.05.2010	05.05.2010	No information filed on the grounds of SLP.
6	06.05.2010	19.05.2010	18.05.2010	Do
7	19.05.2010	26.05.2010	26.05.2010	Do
8	03.06.2010	16.06.2010	16.06.2010	Do
9	12.07.2010	16.07.2010	16.07.2010	Do
10.	06.08.2010	17.08.2010	19.08.2010	Do
11.	26.08.2010	06.09.2010	03.09.2010	Do
12.	10.09.2010	17.09.2010	21.09.2010	Do
13.	21.09.2010	28 or 27.09.2010	28.09.2010	Details Filed

18. The Commission has noted the reasons recorded by Hon'ble COMPAT for setting aside order dated 21.10.2010 of the Commission and remitting the matter to the CCI to pass fresh orders. The three key issues that relate to the observations of the Hon'ble COMPAT are that i) reminders issued by DG should have been duly factored in, (ii) the "reasonable cause" aspect not been considered by the CCI in the proper perspective, and (iii) CCI has failed to distinguish the conceptual difference between "failure to comply" and "belated compliance".
19. One of the issues to be considered is as to whether the subsequent notices issued by the DG / Addl. D.G. amount to an extension of time. If a person does not comply, then what can the D.G. do? If he issues a reminder or letter subsequently does it amount to extension of time or



a fresh notice? In our view sending of a subsequent letter does not amount to extension of time or waiver of the earlier violation. It is only an effort to get the relevant information and till the time the information is given, violation continues. Otherwise, the only option left before the DG will be to stop the investigation and start proceeding, under Section 43 for non compliance. This will unduly delay the investigation. Thus the Commission is of the view that merely because of sending reminders by the DG, the violation does not get condoned.

20. The Commission has once again considered the provisions of section 43 of the Act, which is reproduced below, in the context of the observations of the Hon'ble COMPAT:

**“Penalty for failure to comply with directions of Commission and Director General**

[43. If any person fails to comply, without reasonable cause, with a direction given by -

- (a) the Commission under sub-sections (2) and (4) of section 36; or
- (b) the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission]

21. The above provision provides for penalty “for each day during which such failure continues”. This construction of the said provision indicates that the Act also recognizes the fact that the concerned party may comply with

the directions of the Commission after the last date by which compliance is due, which in other words could be called "belated compliance".

Having recognized this, the section then provides for penalty for each day during which such failure continues, which means that this period is treated as the period for which there is "failure to comply" on the part of the party. As such, the period of non-compliance and the delay in compliance both amount to the same thing as far as computation of period for levying penalty for each day is concerned.

22. The next important issue is whether the party had a reasonable cause for non-compliance, and how the acts of commission and omission of the party are to be interpreted for arriving at the date from which non-compliance commences. The entire period of non-compliance, as mentioned in Commission's order dated 21.10.2010 may be divided in two parts in the light of the tabular statement given in para 17 above:-

(A) The Period from 18.8.2009 to 14.4.2010, and

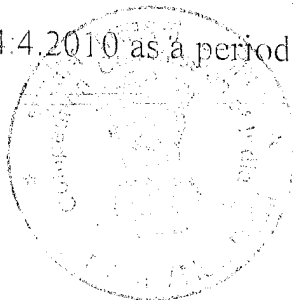
(B) The Period from 15.4.2010 to 28.9.2010

(A) The Period from 18.8.2009 to 14.4.2010

As seen from the para 17, the party (Kingfisher Airlines) had been originally asked by DG vide notice dated 11.8.2009 to furnish the information by 17.8.2009. However, instead of complying with the directions, the party first chose in response to challenge the CCI's jurisdiction and then went in writ petition on 8.9.2009 before the Hon'ble High Court, Bombay. At that time, CCI decided to keep the investigation in abeyance till the judgement of Hon'ble High Court. After the dismissal of writ petition on 31.3.2010, the DG issued another notice on 15.4.2010 to the party to furnish the requisite information.

A "reasonable cause" as required under section 43 of the Act implies that there are causes which actually incapacitate the concerned party from furnishing the requisite information, because of circumstances beyond its control. Such a cause is to be submitted by the party before the Commission and demonstrated to be palpably reasonable. The Commission can take a view about such a cause being reasonable only on receiving a specific submission, and cannot presume it on the basis of some general statements. In this case, the only submission made by the party was initially that CCI had no jurisdiction, and later that they had filed a writ petition before the Hon'ble High Court, Bombay and the matter was subjudice. It was not claimed that the Hon'ble High Court had issued a stay order, nor was any interim order issued in fact. As such, the party failed to satisfy the "reasonable cause" requirement laid down under Section 43.

However, there is one additional factor which caused certain ambiguity in the situation. As pointed out in para 17, CCI did decide to keep investigation in abeyance till the judgement of Hon'ble High Court, Bombay was received. This decision could have reasonably, even though unintentionally, caused the party to think that the Commission had indeed kept the DG notices in abeyance, and it was not required to furnish the information till the judgement in the writ petition. Since this judgement was delivered only on 31.3.2010 and no notice was issued by the DG till 14.4.2010, and keeping in view the observations of Hon'ble COMPAT, the Commission gives the benefit of doubt to the party and does not treat the period from 18.8.2009 to 14.4.2010 as a period of non-compliance.

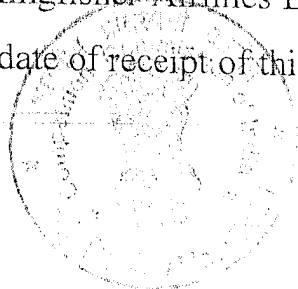


(B) The period from 15.4.2010 to 28.9.2010

The DG issued a notice on 15.4.2010 to the party to furnish the information by 5.5.2010. However, the party stated that it had filed a SLP before the Hon'ble Supreme Court and, therefore, it would not comply with the requirements of the notice. Subsequently, the DG issued 7 reminder notices to the party but the party chose not to comply. The SLP was filed on 4.5.2010, and it was neither admitted nor was a stay granted by the Apex Court. As such, there was no reasonable cause for non-compliance in terms of the notice dated 15.4.2010 and subsequent 7 notices and the provisions of Section 43 of the Act. It is further noted that, unlike for the period upto 14.4.2010, there was no mitigating circumstances whatsoever. The party on its own chose to withdraw the SLP on 24.9.2010, and requisite information in compliance of notice dated 15.4.2010 was furnished on 27.9.2010.

### **Conclusion**

23. In view of the above, the Commission is of the view that Kingfisher Airlines had no 'reasonable cause' for non compliance from 5.5.2010 to 27.9.2010 and is consequently liable to levying of a penalty. The period of non compliance was 145 days. The maximum penalty prescribed under Section 43 of the Act is Rs.1 lakh for each day of default subject to a maximum of Rs. 1 crore. Keeping the facts of the case, and the observations of Hon'ble Competition Appellate Tribunal in view, a penalty of Rs.50,000/- (Rupees Fifty Thousand only) per day totalling to Rs.72.50 lakhs is levied on Kingfisher Airlines Ltd. under Section 43 of the Act, within 60 days of the date of receipt of this Order.



24. Secretary is directed to send a copy of this order to M/s Kingfisher Airlines Ltd. for compliance immediately.

Sd/-  
Member (C)

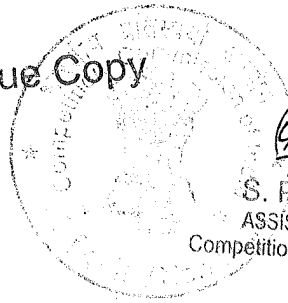
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Certified True Copy



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