

**COMPETITION COMMISSION OF INDIA**  
**Case No. 14/2009**

Dated: 31.10.2011

**Information filed by:**

Travel Agents Association of India  
2-D, Lawrence Mayo House,  
Dr. D.N. Road, Mumbai

**Against:**

1. Lufthansa German Airlines  
56- Janpath, New Delhi
2. Air Canada  
Room No.202, 2<sup>nd</sup> Floor  
Ansal Bhawan, K.G. Marg,  
New Delhi
3. Australian Airlines  
Express Towers  
6<sup>th</sup> Floor, Nariman Point  
Mumbai
4. Continental Airlines  
Cyber Greens, DLF Phase – II  
Gurgaon, Haryana
5. Air France  
8<sup>th</sup> Floor, Tower C  
Building No.8,  
DLF Cyber City Phase II  
Gurgaon
6. Northwest Airlines (NWA)  
Indira Gandhi International Airport  
Terminal II  
New Delhi



by

7. KLM Royal Dutch Airlines  
Indira Gandhi International Airport  
Terminal II  
New Delhi
8. Swiss International Airlines Ltd  
Hoechst House, 1<sup>st</sup> Floor  
193, Nariman Point  
Mumbai
9. Singapore Airlines  
"Parkview" , No.17 Curve Road  
Tasker Town  
Bangalore

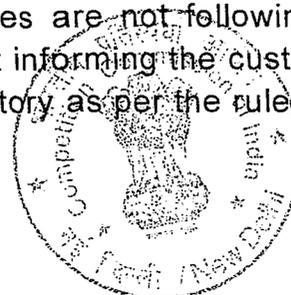
**Order under Section 26(6) of the Competition Act, 2002**

The instant information was filed by the Travel Agents Association of India (hereinafter referred to as Informant) on 14.12.2009 under Section 19 of the Competition Act, 2002 (hereinafter referred to as the Act) against Lufthansa German Airlines, Air Canada, Australian Airlines, Continental Airlines, Air France, Northwest Airlines (NWA), KLM Royal Dutch Airlines, Swiss International Airlines Ltd and Singapore Airlines (hereinafter referred to as Opposite Parties).

2. The facts and allegations, in brief, as stated in the information are as under:

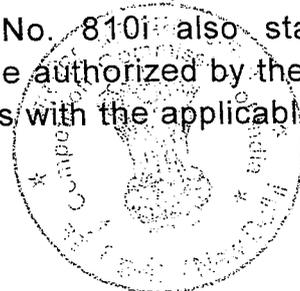
- 2.1 As per the Informant, the Opposite Parties were paying commission on the sale of tickets upto a rate of 5% to the Members of the Informant i.e. travel agents. The cause for filing the instant information is that from 01.11.2008 commission to the travel agents has been denied by the Opposite Parties. In case of Austrian Airlines the Commission was discontinued with effect from 01.01.2009.
- 2.2 It has been alleged by the Informant that the Opposite Parties have formed a cartel and are also abusing their dominant position. Further, it has also been alleged that the Opposite Parties are not following the directives of Aircraft Rules 1937 as they are not informing the customers about the break-up of the fares, which is mandatory as per the rules.

by \_\_\_\_\_



- 2.3 The Informant has also alleged that the Opposite Parties are deliberately and intentionally not enforcing the transaction fee system, a model introduced by them in lieu of prevailing commission system, as a result of which, the members of the Informant association are deprived of their dues.
- 2.4 It has been further alleged by the Informant that the concerted action of the Opposite Parties has virtually created a monopolistic market which is detrimental to the interest of the economy and is adversely affecting the competition in the airline business in the country.
3. The Commission considered the information in its meeting dated 12.05.2010, and having formed an opinion under Section 26(1) of the Act that there exists a prima facie case, referred the matter to the Director General (DG) for conducting investigation vide order dated 12.05.2010.
4. The DG after receiving the directions from the Commission, got the matter investigated by the Addl. Director General and submitted his report dated 27.01.2011 to the Commission.
5. The DG in his report has defined the international flight services provided by the foreign carriers in India as the relevant product market and whole of India as the relevant geographic market.
6. After considering submissions of the Opposite Parties, the Informant and other materials collected during course of investigation, the DG has found that there is no violation of any provisions of Section 3 of the Act in this matter. The reasons, in brief, given by DG to come to the said conclusion are; i) that cartels are generally formed amongst those enterprises which are competitors, but in the present case the Opposite Parties are not competitors as they are serving different destinations; ii) in case of cartels, there has to be some meeting of minds, but in the present case no such evidence has been found. Rather Opposite Parties have taken decisions to reduce the commission at different dates and decision in this regard by some of the Opposite Parties was taken as early as in 2004 and iii) Reduction in travel agents' commission was also effected by Air India and other domestic air operators in India and not only the foreign airlines. Further, International Air Travel Association's (IATA) latest resolution No. 810i also states that remuneration paid to the agent shall be as may be authorized by the member from time to time provided that the agent complies with the applicable rules.

ky

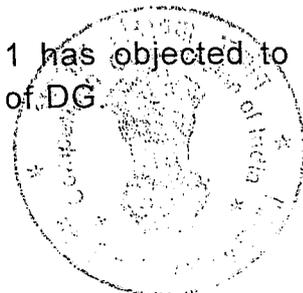


7. On the allegations of the Informant that Opposite Parties having 90% market share are in the dominant position in the relevant market and are abusing their dominant position by imposing unfair and discriminatory conditions on sale of their air tickets, the DG has submitted in his report that Opposite Parties are not a group as per the meaning of group in the Act and none of the Opposite Parties individually is in a dominant position in the relevant market. According to DG, as per the information available on the website of DGCA, individually, none of the Opposite Parties has a market share of more than 5% - 6% of the international traffic. As per the study conducted by Centre of Asia Pacific Aviation (CAPA), most of the Opposite Parties do not have any meaningful share in the international flying market based on the seat strength. In 2010, the share of Indian carriers in the International traffic was 50% which shows that the Opposite Parties taken together cannot have more than 50% of international traffic. Therefore, according to DG, none of the Opposite Parties is individually in a dominant position in the relevant market and therefore the question of abuse of dominance by them does not arise.
8. On the allegations that because of the concerted action and abuse of dominant position by Opposite Parties, travel agents' business in India is badly affected and a large number of travel agent employees have become jobless, DG has arrived at the conclusion that the business of booking of tickets through travel agents has not gone down after the Opposite Parties resorted to the practice of abolition/reduction of commission. On the contrary, the number of travel agents has gone up after the implementation of decision of reduction of commission.
9. Having considered the investigation report of the DG in its meeting dated 08.02.2011, the Commission decided to send a copy of the investigation report to the parties for filing their reply /objections.
10. The replies, in brief, submitted on different dates by various parties in course of proceedings are as under:

### **11. Reply of Informant**

- 11.1 The Informant in its reply dated 21.02.2011 has objected to each and every finding of the investigation report of DG.

uy

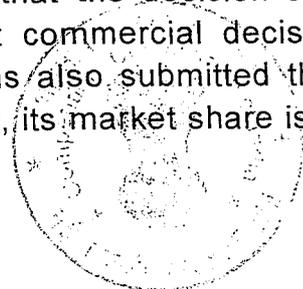


- 11.2 As per the Informant, the DG has incorrectly given a clean chit to the Opposite Parties without any justification of the alleged anti-competitive conduct of the Opposite Parties. The Informant has further stated that the process of investigation adopted by the DG is devoid of procedure discipline.
- 11.3 It has also been contended that there is an appreciable adverse effect on competition in India and the decision of the Opposite Parties cannot be justified on the basis of International Practice as the economic and social conditions of a country like India are different from the other countries. Further, the majority of the companies across the world airlines do pay commission to the travel agents.
- 11.4 The Informant has further contended that the DG has determined the relevant market erroneously as the market share of the airlines determined by the DG based upon the news article published in a magazine cannot be believed on its face.
- 11.5 As per the informant, the market share of the airlines is increasing in India and the Opposite Parties are becoming dominant day by day and together they are much bigger than the Indian National Carrier.
- 11.6 The Informant has also stated that this is an issue of commission between a principal and its agent and the airline being the principal is always in a dominant position as compared to its agent.

## **12. Replies of Opposite Parties**

- 12.1 Lufthansa German Airlines filed its reply/comments dated 28.02.2011 to the DG report as well as rejoinder dated 25.03.2011 to the objections filed by the Informant. Lufthansa Airlines has concurred with the findings of the DG and has denied each and every allegation levelled against it by the Informant. Further, it has also been stated that the Aircraft Act, 1934 and the Aircraft Rules, 1937 do not mandate that the commission should be paid to the travel agents but only prescribe that any commission paid to the travel agent should be included in the tariff published by an airline. Lufthansa Airlines has further contended that the decision of zero percent commission was its independent commercial decision in compliance with all applicable laws. It has also submitted that as per the data of DGCA for the year 2009-10, its market share is 3.5%

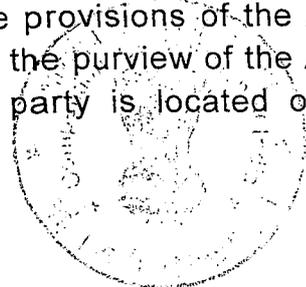
by



as compared to 4.2% in the year 2008-09 and it is not in a dominant position in the relevant market. The airline has concluded that the allegations of the Informant are baseless and devoid of any merit.

- 12.2 Air Canada filed its reply dated 23.03.2011 in which it has been contended that since the allegations are based on the events occurred prior to the date of enforcement of the Act, they are not maintainable. The Air Canada has also concurred with the findings of the DG and denied the allegations of cartelization and anti-competitive conduct.
- 12.3 Austrian Airlines submitted its replies on 28.02.2011 and filed its rejoinder on 25.03.2011 on the same lines as that of Lufthansa Airlines.
- 12.4 Continental Airline vide its letter dated 21.02.2011 has submitted that it agrees with the conclusion of DG report and has contended that no further action is warranted against it and the case should be closed.
- 12.5 Air France vide its reply dated 29.03.2011 has contended that there has been no violation of any of the provisions of Act in the case. Further, it has also been submitted that there was no cartel formed by it with any other airlines. Air France has submitted that the entire enquiry is being conducted without any jurisdiction as Sec.3 & 4 of the Act came into force w.e.f. 20.05.2009 and if there had been a cartel or agreement prior to that it cannot be enquired. Air France has further submitted that there is nothing in the information which can establish any agreement between the various airlines which can actually cause appreciable adverse effect on competition within India. It has also submitted that the allegation of abuse of dominant position is not made out in the mater since the airlines named in the information do not enjoy a dominant position in the relevant market.
- 12.6 North-West Airlines (Delta Airlines) in its reply dated 29.03.2011 has also concurred with the conclusions in the DG report. North-West Airlines has also challenged the jurisdiction of the Commission on the ground that the alleged events had happened prior to the date of the enforcement of the provisions of the Act. It has further been contended that it is out of the purview of the Act as the Commission has no power where a party is located outside

by



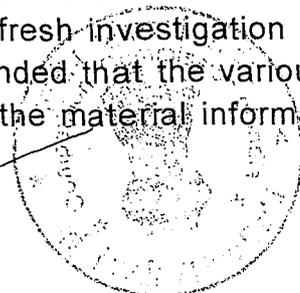
India. It was also submitted that North-West Airlines ceased to exist from 31.12.2009 when the Delta Airlines acquired interest in it. It has further been argued that prior to 31.12.2009 it had a *de-minimus* presence in India as according to the data from *Amadeus* (Marketing Information Data Transfer), it had a market share of only 0.25% in International market to and from India.

- 12.7 KLM Royal Dutch Airlines filed its comments on 29.03.2011 and concurred with the conclusions drawn by the DG in the investigation report. KLM Airline has contended that the DG report should be accepted as there is no violation of either Sec. 3 or 4 of the Act in the matter. At the same time, it has also disputed the jurisdiction of the Commission stating that the matter pertains to a period prior to May 2009, when the enforcement provisions of Section 3 and 4 of the Act were notified.
- 12.8 Swiss Airlines filed its comments on 29.03.2011 and submitted that since DG has found no violation of provisions of Section 3 and 4 of the Act, a detailed reply was not necessary. It has also been submitted that its market share is too low in the Indian Air space and therefore no case is made out for alleged violations.
- 12.9 Singapore Airline in its reply dated 13.04.2011 also concurred with the findings of the DG. It has also contended that its decision to implement zero commission was an independent decision based on the recommendations and policy of its head office. Further, such an independent behaviour cannot constitute an agreement under the provisions of the Act. It has also contended that it is not a dominant player in the market and its decision to implement policy of zero commission has not caused any negative effects on competition in India.

### **13. Additional Submissions by Informant**

- 13.1 The Informant filed additional submissions on 06.03.2011 & 03.04.2011. In these rejoinders, it has basically been submitted that the findings of DG are incorrect and therefore the investigation report of DG must be rejected and a fresh investigation should be conducted. Further, it has been contended that the various airlines involved in this case have concealed the material information from

uy



the Commission. The informant also sought to seek response of the Opposite Parties on an open questionnaire.

13.2 On 28.04.2011, Travel Agents Federation of India (TAFI) sent a letter stating that being one of the leading and largest Federations of Travel Agents, they should be heard before any decision is taken in the case of information filed by TAAI. The said letter was considered by the Commission in its meeting dated 18.05.2011 and it was decided that since hearings had proceeded at a great length, it might not be possible to accede to the request of TAFI at such a belated stage.

13.3 On 29.04.2011, the Commission heard the oral submissions of the counsels representing Informant and different respondent airlines.

14. The Informant, thereafter, filed additional written submissions on 03.05.2011. The written submissions of the Informant, in brief, were as under:

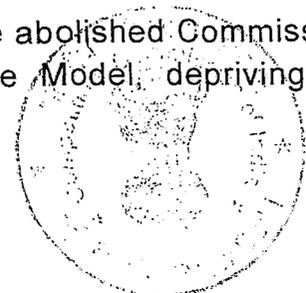
14.1 The Informant has argued that the airlines have abolished the travel agents' commission without any authority or directive from the M/o Civil Aviation, DGCA, IATA, ICAO (International Civil Aviation Organization) or any other authority. Further, the airlines have also not passed the benefit of abolished commission to the end users.

14.2 The Informant has also submitted that the 'Relevant Market' in the present case ought to have been taken as the routes on which these airlines operate independently and not the entire Indian air space. As per the Informant, foreign airlines do not operate on domestic routes in India except for stop over flights to foreign destination or vice versa and therefore the entire Indian air space cannot be treated as 'Relevant Market'.

14.3 The Informant has further contended that the data available on the website of DGCA depicts that the various airlines cater to more than 50%-90% passenger on the routes where they operate and this clearly establishes their dominant position.

14.4 As per the Informant, while the airlines have abolished Commission, they have also not implemented Net Fare Model, depriving the

llh



agents of their earnings. The Informant has also contended that the abolition of the commission of the travel agents by the various airlines is a step to the monopolization and later on these airlines may increase the airfare in-tandem for generating more profits.

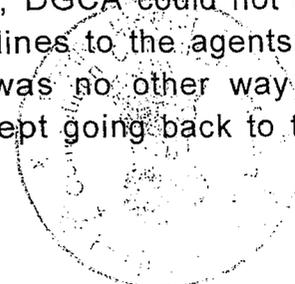
14.5 By abolishing commission and by not implementing Net Fare Model, in a way, airlines have created such a situation in which a travel agent is not to be remunerated for his services of sale of air tickets of these airlines and certainly it has resulted in restricted availability of air tickets of these airlines in India, since in the absence of reasonable remuneration, no travel agent would like to sell air tickets of these airlines.

14.6 The Informant has also contended that the conduct of airlines is also an attempt by respondent airlines to drive travel agents in India out of the business.

15 In response to the additional submissions of the Informant, Lufthansa German Airlines and Austrian Airlines filed their comments on 17.05.2011 denying all the allegations levelled against them. These airlines reiterated their earlier version in their respective replies. It has also been submitted by the airlines that the zero commission model allows airlines to resist increasing airline fares on account of increase in other overheads and thereby ensures that the final consumer gets cheaper tickets. Further, it has also been submitted that under the productivity linked bonus scheme (PLB), travel agents are rewarded based upon their performance. Therefore, the zero-commission model is not only beneficial to the consumers but also rewards the travel agents on the basis of their performance, thereby, promoting competition amongst travel agents. Lufthansa Airlines has also contended that it has shifted from commission based model to Net Fare Model in over 75 aviation markets and the contention of the Informant that the Net Fare Model is not healthy for competition is erroneous and incorrect.

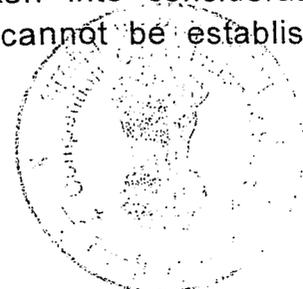
16 Lufthansa Airlines vide its replies dated 17.08.2011 has further submitted that DG has rightly noted that the DGCA in its order dated 05.03.2010 had come to the conclusion that as per the relevant rules, DGCA could not lay down the quantum of commission payable by the airlines to the agents. It was followed by letters to the Airlines that there was no other way to implement the Order dated 05.03.2010 of DGCA except going back to the

leg

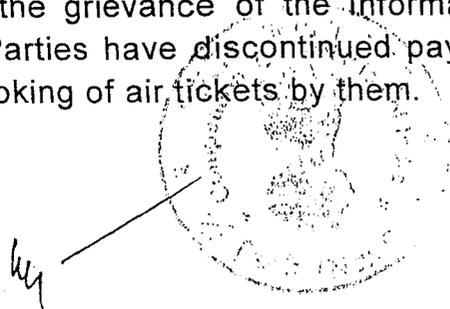


Commission system. On the intervention of Airlines, the Ministry of Civil Aviation vide letter dated 12.08.2010 has clarified that there is no violation of any provision of the Aircraft Rules by the foreign airlines if they do not pay commission to the travel agents. The Commission will form part of tariff only if it is paid and not otherwise. Subsequently, travel agents on 24.05.2010 made certain representations to DGCA requesting it to implement its order of 05.03.2010. The Hon'ble High Court of Kerala directed the DGCA to take necessary action on those representations.

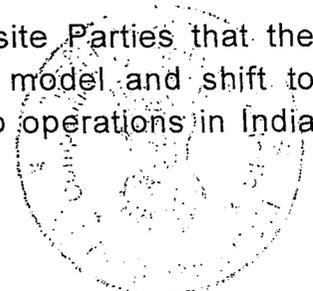
- 17 Lufthansa has further submitted that after hearing airlines and the travel agents, DGCA on 28.07.2011 passed the order that the role of DGCA is that of regulator and intervention in the commercial agreements between the two private parties is beyond its jurisdiction. Thus, according to Lufthansa, it is abundantly clear that the payment of commission is entirely a commercial arrangement between the relevant airlines and its agents, there is no express provision in the Aircraft Rules making it mandatory for the airlines to pay commission to agents and the airlines cannot be asked to pay commission on the ground that the commission figures in the definition of "tariff".
- 18 In light of its arguments, Lufthansa Airlines has submitted that there is no contravention on its part in terms of provisions of Section 3 and 4 of the Competition Act, 2002.
- 19 In its reply dated 23.05.2011, KLM Royal Dutch Airlines (KLM) has submitted that the informant has tried to re-define the market in terms of city-pair routes. Although there is no basis for filing fresh information based upon a new definition of market, even if the new definition is accepted, no case is made out against it. It is also wrong to say that the airlines earn profits because of zero percent commission since the informant has failed to provide any basis for that. It has also been brought out that the decision to reduce commissions to Indian travel agents has been its independent commercial decision implementing its global policy.
- 20 Delta Airlines in its reply dated 19.05.2011 and Air France in its reply dated 23.05.2011 have also given their submissions along the same lines, bringing out that even if redefined market is taken into consideration, contraventions of provisions of Section 3 and 4 cannot be established against them.



- 21 Singapore Airlines vide letter dated 06.06.2011 has brought out that the new submissions of the informant do not contain any new and material information which refutes the conclusion arrived at by the DG i.e. none of the airlines had violated the provisions of the Act. It has also been stated that decision to reduce commissions to Indian travel agents was an independent commercial decision implementing its global policy. It has also been submitted that tickets of majority of its airlines are still sold through the travel agents and therefore Singapore Airlines cannot risk alienating them and "driving them out of business". Stating that zero percent commission or Net Fare Model (NFM) is a pro-competitive and transparent system, it has been brought out that there is no information which would lead the DG to reconsider any aspect of his report. According to Singapore Airlines, the informant is attempting to raise frivolous issues as a "last ditch" effort to salvage the matter, considering the DG's report and the volume and quality of evidence produced by Singapore Airlines in response to the allegations of the informant.
- 22 The advocate of the informant filed a letter dated 26.09.2011 stating that since additional submissions dated 17.08.2011 have been filed by Lufthansa German Airlines without opportunity being given to them by the Commission to do the same, they must not be taken on record.
- 23 The Commission vide order dated 04.10.2011 gave two weeks time to the informant to submit its response on the submissions dated 17.08.2011 of Lufthansa German Airlines. The order was communicated by Secretary vide his letter dated 11.10.2011. It was also mentioned in the said order that if no reply is received within the given time, the Commission will decide the case on the basis of materials available on record. However, no response has been received from the informant. The Commission, therefore, presumes that the informant has nothing further to submit and the case may be decided on the basis of available materials on record.
- 24 The Commission has carefully considered the information, the report of DG, oral/written submissions of various parties and other materials available on record. The Commission observes that the grievance of the Informant is centered on the fact that the Opposite Parties have discontinued payment of Commission to travel agents on the booking of air tickets by them.



- 25 On careful consideration of the investigation report, the Commission observes that the DG has determined the relevant market after doing extensive research in the instant case. It is seen that the Opposite Parties provide international flight services to consumers in India for travel to various international destinations. For the consumers, the different routings offered by various competing airlines are all substitutable as long the airline selected transports them to the destination of their choice. For instance, it is immaterial for the consumer whether an airline transports them from Delhi to London via Frankfurt or via Paris. The consumer would select the airline on basis of the airfare offered, the quality of service or the duration taken. Therefore, the objection of the Informant that the relevant market should be taken as "the routes on which these airlines operate independently" is not tenable. Accordingly, the Commission feels that the relevant market defined by the DG in the instant case needs no interference.
- 26 The Commission is of view that based on the available evidence and other relevant materials, as DG has concluded in his investigation report, the allegations of the informant that the Opposite Parties hold about 90% market share in the relevant market of International flying to and from India remain unsubstantiated. None of 9 foreign airlines appears to have substantial market share in the relevant market of international flight services in India. The Commission feels that in the absence of availability of any evidence to the contrary there is no reason to disagree with the findings given by the DG.
- 27 The Commission also notes that the provisions of section 4 of the Act are explicitly limited to the dominance of a single enterprise or group of enterprises as defined in the Act. In this case, no enterprise either alone or in group in terms of provisions of the Act, enjoys a position of dominance.
- 28 The Commission holds that once the dominance of any particular airline is not established, question of abuse of dominance also does not arise in the case.
- 29 The Commission is also in agreement with the findings of DG that since all the airlines had taken independent decisions to abolish the system of commission and there is no evidence of the meeting of minds, it cannot be said that the airlines have acted like cartels or have acted in violation of the provisions of Sec.3 (3) of the Act in this particular case.
- 30 The Commission notes from the submission of Opposite Parties that the decisions by the airlines to abolish the commission model and shift to transaction fee or Net Fare Model were not specific to operations in India but they were implemented in other countries also.



- 31 The Commission also notes that the investigation by the DG has shown that number of IATA travel agents has also increased post impugned decision of the airlines. Only on the basis of the fact that the airlines have chosen to discontinue the commission based model, it cannot be presumed that they have done it in concert to fix the price of their air tickets. There is no material on record to show that subsequent to the abolition of the commission, the prices of the air tickets of Opposite Parties have gone up. Thus it cannot be said that harm has been caused to the end consumers by abolishing the system of payment of commission to the travel agents by the Opposite Parties.
- 32 In view of the foregoing and after considering the entire material, the Commission is of the view that there is no reason to disagree with the findings in the investigation report of the DG. The Commission, therefore, holds that the proceeding relating to instant information should be closed forthwith under Section 26 (6) of the Act.
- 33 In view of the above, the matter relating to this information is hereby closed under Section 26(6) of the Competition Act.
- 34 The Secretary is directed to inform the parties accordingly.

Sd/-  
Member (R)

Sd/-  
Member (GG)

Sd/-  
Member (AG)

Sd/-  
Member (T)

Sd/-  
Member (G)

Certified True Copy

