**CODE-SHARING UNDER COMPETITION LAW HAMMER: NEED FOR A RETHINK?[[1]](#footnote-1)**

**Abstract**

The Competition Commission of India recently put an end to the probe into Kingfisher-Jet Airways alliance regarding the violation of provisions of the Competition Act, 2002. It ruled out any abuse of dominant position relating to the code-sharing agreement.

With the adoption of open sky policies and bustling air traffic, agreements between airlines are not infrequent. Code-sharing is a strategic move by two or more airlines where they share flights on the same route. Better connectivity, time saving schedules are some of its major advantages. However, when there is a horizontal agreement between potential competitors, there is a possibility of cartel formation, thus bringing it in conflict with antitrust provisions such as Art.81 of the EC treaty or other national laws. Yet it cannot be presumed that such a code-sharing will lead to anti-competitive practices. Benefits and necessities of a code share are separated by a thin line of difference from abusing excessive power. Code-sharing agreements being heterogeneous in nature should be judged individually, on a case by case basis. This paper seeks to examine the necessity in application of competition laws to code sharing agreements and compare it with practice in major jurisdictions.

**Introduction**

Code-sharing agreements are interline agreements entered into between airlines where the agreeing parties share their codes for the same flight. In a rudimentary sense, it refers to the arrangement where a seat can be purchased on one airline but is actually operated by its code share partner under a different flight number or code. For instance, Kingfisher Airlines has a code sharing agreement with British Airways by which passengers having British Airways’ tickets are flown in Kingfisher Airlines flights in India. Code sharing is a very common practice which has gained wide popularity in India due to the adoption of the open sky policies in the 1990s and the entry of full service carriers into the aviation market. Today, the national carrier Air India has more than ten code sharing arrangements with various international air carriers such as Lufthansa, Singapore Airlines, Air Mauritius etc.[[2]](#footnote-2)

Code share agreements have many potential advantages for passengers as well as airlines such as customer convenience as it happens in case of connecting flights. It also helps airlines who do not operate their own aircraft on a given route to gain exposure in the market through display of their flight numbers. However, in its flip side are anti competitive concerns which can be caused due to such agreements. As per section 3 of the Competition Act, 2002 any agreement which causes or is likely to cause, appreciable adverse effects on competition in markets in India is prohibited. Hence, agreements which directly or indirectly determines purchase or sale prices; limits or controls production, supply, markets, technical development, investment or provision of services will be hit by the competition commission’s hammer and would be void.

The code-sharing agreement between private airlines, Jet Airways and Kingfisher came under the lens of Competition Commission of India on a complaint being filed that the pact could lead to formation of cartel. The scope of the strategic alliance between Jet and kingfisher, announced in October 2008, includes code sharing on both domestic and international flights and joint fuel management with a view to reducing expenses. Besides, common ground-handling, cross-selling of flight inventories using a common global distribution system platform and cross utilisation of crew on similar aircraft types are the other key elements of the agreement. However, the Competition Commission of India did not find anything anti competitive in their agreement. Clearly, it is not always possible to categorize code sharing agreements as anti competitive but the probability of anti competitive practices still remains.

Competition law, almost everywhere, prohibits three kinds of activities, namely anti-competitive agreements, abuse of dominance and anti-competitive mergers.

**Anti-Competitive Agreements**

Anti-Competitive Agreements between enterprises that restrict competition fall into two categories: ‘horizontal agreements’ which are those between enterprises at the same stage of the supply chain e.g., agreements between manufacturers of the same product like tyres or cement; and ‘vertical agreements’ which are between enterprises at different stages of the supply chain e.g., between a manufacturer and a distributor or a retailer. Usually, it is the horizontal agreements that cause the greatest concern to competition authorities.

These can have two kinds of anti-competitive effects, unilateral effects or coordinated effects. A merger may lead to monopoly (in an extreme case) or otherwise create an enterprise with substantial or substantially increased market power. The enterprise can then overcharge, or otherwise unilaterally abuse its dominant position. Or a merger may decrease the number of competing enterprises and make it easier for the remaining enterprises to coordinate their behavior in terms of price, quantity or quality i.e., a cartel-type arrangement. This is likely to be easier in markets for homogeneous products.[[3]](#footnote-3)

Horizontal agreements of the types described in section 3(3) of Competition Act, 2002 are presumed to have an appreciable adverse effect on competition. These are agreements including cartels, which (a) directly or indirectly determine purchase or sale prices; (b) limit or control production, supply, markets, technical development, investment or provision of services; (c) share the market or source of production or provision of services by way of allocation of geographical market, or type of goods or services, or number of customers in the market; and (d) directly or indirectly result in bid rigging or collusive bidding. Thus cartels and similar horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive. This approach is similar, but is not necessarily identical, to the *per se* rule in the US law. Horizontal agreements of the above entered into by way of joint ventures are not presumed to have an appreciable adverse effect on competition and are excluded from the provisions of Section 3(3) of the Act if they increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services.

Code sharing involves one airline advertising and selling the services of another airline as its own and the transportation of passengers and cargo on an airline other than the one identified in the travel documents. The carrier performing the flight is usually referred to as the operating carrier while the other airline is typically identified as the marketing or contracting carrier.

Section 3(i), Competition Act, 2002 prohibits any agreement with respect to production, supply, distribution, storage, acquisition, or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition within India. Further, section 3(2) provides that any agreement in contravention of this provision shall be void.

The term ‘appreciable adverse effect on competition’, used in section 3(1) has not been defined in the Act. However, section 19(3) states that while determining whether an agreement has an appreciable adverse effect on competition under section 3, the Commission shall have due regard to all or any of the following factors:

(a) Creation of barriers to new entrants in the market;

(b) Driving existing competitors out of the market;

(c) Foreclosure of competition by hindering entry into the market;

(d) Accrual of benefits to consumer to consumers;

(e) Improvements in production or distribution of goods or provision of services; and

(f) Promotion of technical, scientific and economic and development by means of production or distribution of goods or provision off services.[[4]](#footnote-4)

**Abuse of Dominant Position**

Section 4(1) prohibits any enterprise from abusing its dominant position. The term ‘dominant position’ has been defined in the explanation (a) below section 4(e) which states that dominant position ‘means a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favor.’[[5]](#footnote-5)

**Application of Anti-trust laws on code shares in foreign jurisdictions**

The EU treaty is the governing law under which the European Commission evaluates anti-competitive practices of organizations. With the new competition regime in force since 1 May 2004, it is no longer possible for parties to code-share agreements to apply to the Commission for exemption unlike jurisdictions such as the United States, where exemptions are granted from antitrust laws.

The most recent case where the commission decided to probe airline agreements was in February 2011, when investigations were commenced by the commission on its own initiative against Lufthansa and Turkish Airlines, and between Brussels Airlines and Air Portugal. These investigations focus on a particular type of code-sharing arrangement where these airlines had agreed to sell seats on each others' flights on the Germany-Turkey routes and on the Belgium-Portugal routes. The Commission also noted that While code-share agreements can provide substantial benefits to passengers, some types of such agreements may also produce anti-competitive effects, thus sparking off the debate as to whether such agreements can be prima facie assumed to be competitive.[[6]](#footnote-6) [change] These investigations are still underway, with raids being conducted at the offices of Brussels Airlines and TAP Portugal in the second week of December 2011, with the suspicion that the parties may have illegally colluded. Companies can be fined up to 10 percent of their global turnover if found to have breached EU rules.[[7]](#footnote-7)

Art. 81(3) provides exemptions to such agreements, and therefore, the following factors can be considered:

* Scheduling benefits (so that services are operated at regular intervals during the
* day);
* More convenient connecting times and arrangements for making connections
* Giving greater financial strength and security to small airlines;
* Assisting the development of new routes

The European Commission has never decided on the anti competitiveness of code sharing agreement between airlines so far. However, it has looked at the competitive impact of code-sharing arrangements in the context of wider airline alliances, and this provides a key as to the factors which the commission considers. The factors which are generally considered are: underlying geography of the agreement (the kind of code share), the features of the agreement (and importantly of associated agreements), the market definition and market characteristics.[[8]](#footnote-8)

The definition of the market is critical for any assessment, because an agreement which contains apparently anti-competitive provisions might not have any significant effect on competition if the two parties to it have only a small share of the market. The Commission’s approach to defining relevant markets for competition purposes in the air transport sector is now well-evolved. Once the market has been identified, the next step is to identify the key players in the market and to determine their market shares. The size and type of airlines operating in the market may also be significant. The commission has also identified barriers to entry at the particular market.

The next step is to delineate the characteristics and the type of the agreement in question. As a general rule, the deeper and more like an alliance the relationship, the more likely it is that competition issues may arise. On the other hand, the more a code-share agreement resembles a traditional interline agreement; the less likely it is to have any negative impact on competition. If the agreement provides for common pricing, agreement on pricing, or revenue sharing arrangements beyond the normal commission/pro-ration arrangements, then there is a strong possibility of anticompetitive effects. Similarly, mutual recognition of FFPs will be another important factor.[[9]](#footnote-9) Other factors which can be considered are: Potential negative effects on competition such as collusion or implicit collusion on price levels, and discriminatory provisions; Potential positive effects on competition such as widening available routes, or flight times. It has also been opined in the study that code-share agreements are not, in general, stand-alone documents, and need to be considered in the light of related agreements concerning access to capacity such as Special Prorate Agreements and Frequent Flyer Programme agreements. Although SPAs and FFP agreements can and do exist outside code-shares, where code-sharing takes place, these agreements must also be considered to achieve a realistic picture of the likely effect on demand.

Thus, it can be concluded that the regime in place to evaluate code sharing agreements is very well balanced.

***United States:***

The practice of code sharing in the United States has proliferated in recent times after deregulation in the 1908s. Internationally, dozens of code share agreements now exist between U.S. airlines and their foreign counterparts covering hundreds of city pairs throughout the world. Code sharing has been used for various reasons, ranging from allowing another airline to use its code to comprehensive integration that involves joint decisions on price, capacity, schedule and other competitively sensitive matters.

The antitrust laws fully apply to all domestic code sharing agreements, and, absent a grant of express statutory antitrust immunity by the Department of Transportation, the antitrust laws fully apply to the international code shares as well. Yet nearly all existing code shares have gone into effect without objection from the Department of Justice. In assessing the effect on competition, the first question asked is whether code sharing partners are actual or potential horizontal competitors, and if so, in what city pairs. Most code sharing agreements, whether domestic or international, have raised relatively few such horizontal concerns.[[10]](#footnote-10)

Thus in the US, international airline alliances apply to the department of transportation (DOT) for immunity from antitrust litigation, which DOT has the sole authority to confer or withhold. DOT considers several broadly defined factors such as the “public interest” and “foreign policy” and also relies on the department of justice to complement its qualitative approach with a more quantitative analysis of the proposed alliance similar to the approach DOJ utilizes for domestic airline mergers.[[11]](#footnote-11) The Department of Justice reviews each new code-share application and provides the DOT with its views as to whether the proposed arrangement would compromise competition in the markets involved in a manner that would be contrary to those laws. In making immunity decisions in alliance cases, the DOT's focus is on the effect of the alliance on competition.[[12]](#footnote-12)

Department of Transportation's has requirements to ensure that the code-share services of U.S. carriers using foreign carriers' aircraft meet international standards for safety. Safety considerations are part of the Department's public interest determination in reviewing code-share applications. Specifically, to meet the public interest test prescribed under DOT's regulations, a U.S. carrier will need to show that its code share service provided by a foreign carrier meets ICAO safety standards. An audit program is also in place to establish conformity with ICAO standards.[[13]](#footnote-13)

**Code share alliances**

***The American Airlines/British Airways proposal***

In August 2001, AA and BA applied to the U.S. Department of Transportation (DOT) and the relevant U.K. and European regulators for antitrust immunity and for rights to code share on specified routes.

The AA/BA alliance has proposed to share some revenues on operations between London and nine U.S. cities: Boston, Chicago, Dallas/Fort Worth, Los Angeles, Miami, New York, Raleigh-Durham, San Francisco, and St. Louis. The alliance also proposes to code share on flights between U.S. and U.K. gateway airports and substantial numbers of smaller markets connecting U.S. cities with those in Europe, Africa, Asia, and the Middle East. In the airline industry, the relevant market has been defined as scheduled airline service between a point of origin and a point of destination.[[14]](#footnote-14)

Without some regulatory remedy, the AA/BA alliance could dominate markets between major U.S. cities and London, especially in those that originate or terminate at London's Heathrow airport—the preeminent airport in the United Kingdom. That is, they have the ability to raise fares and limit service.

The American-British Airways alliance was rejected by the DOT since it felt that the two carriers simply controlled too much traffic between the United States and the United Kingdom, the largest segment of trans-Atlantic traffic and that there uncertainty about the viability of new entry of a competitive airline service between the United States and the United Kingdom.

***Kingfisher/Jet Airways Alliance***

The Competition Commission had in August 2009 restarted the investigations to examine the two-year-old alliance between the two leading private airlines as it felt the code-sharing and ground handling agreement would create a monopoly in the aviation industry. Following this Kingfisher had approached the Bombay High Court. It argued that the alliance pre-dated the Competition Act. It also said CCI couldn’t conduct an investigation as the previous anti-trust regulator, Monopolies and Restrictive Trade Practices Commission, had ruled earlier this month that there was no cause for an inquiry. But the Bombay High Court refused to stay the inquiry. In *A.P. Mehrotra* v. *Jet Airways (India) Limited & Ors.[[15]](#footnote-15)* the commission finally settled the matter ruling out any anti-competitive practice or abuse of dominant position on part of the airlines.

The commission noted that such kind of agreements/arrangements have not only been entered between Kingfisher and Jet Airways but they have also separately entered into agreements with large number of domestic as well as international airlines and most of these agreements have been entered into with NACIL(Air India). It was also noted that market share of both the parties had remained the same even after two years of passing of announcement. It was also concluded that none of the airline is in dominant position. So there is no abuse of dominant position as per section 4 of the Competition Act, 2002.

**Conclusion**

Such alliances could be treated as either a merger or as an anti-competitive agreement, or as both, depending upon the facts of the case. An increasing number of Competition Authorities operate leniency programmes as a key tool to detect cartel infringements. The law now empowers the CCI to extend the benefit of lesser penalty to more than on party and that the disclosure can be made at any time before the submission of investigation report by the DG with the CCI. Incidentally, it may be stated that Japan has evolved a graded system of imposing reduced surcharge linked with timings of disclosures by parties and also subject to compliance of conditions prescribed in the Rules on Reporting and submission of Materials Regarding Immunity from or Reduction of Surcharges.[[16]](#footnote-16)

The CCI should also enter into MOUs with competition authorities in other countries such as the Federal Trade Commission, EU Competition Commission among others to ensure better coordination and more effective investigation.

Open skies policy should also be give serious consideration.

Hence, Code sharing generates both pro as well as anti competitive effects. Code sharing is a bane as the potential loss to the consumers exceeds the benefit when the share of overlapping routes is extensively large. But this can be judged only on a case to case basis.

1. Pankhi Harmilapi and Varun Natarajan, Students 3rd Year, National Law University, Jodhpur, India E-mail-pankhi27@gmail.com [↑](#footnote-ref-1)
2. <http://home.airindia.in/SBCMS/Webpages/Code-Share-Partners.aspx?mid=31>, last visited on January 13, 2012 [↑](#footnote-ref-2)
3. Vinod Dhall, *Competition Law Today: Concepts, Issues, and the Law in Practice*, Oxford University Press, New Delhi, 2007 [↑](#footnote-ref-3)
4. *Ibid* [↑](#footnote-ref-4)
5. *ibid* [↑](#footnote-ref-5)
6. <http://news.airwise.com/story/view/1297468185.html> , last visited on January 13, 2012 [↑](#footnote-ref-6)
7. <http://www.reuters.com/article/2011/12/19/tap-brusselsairlines-eu-idUSL6E7NJ2KD20111219>, last visited on January 13, 2012 [↑](#footnote-ref-7)
8. <http://ec.europa.eu/competition/sectors/transport/reports/airlinecodeshare.pdf>, last visited on January 13, 2012 [↑](#footnote-ref-8)
9. *Ibid* [↑](#footnote-ref-9)
10. <http://www.justice.gov/atr/public/speeches/speech.akb.htm> , last visited on January 10, 2012 [↑](#footnote-ref-10)
11. Lu, *International Airline Alliances*: *EC Competition Law*, *US Antitrust Law and International Air Transport*, The Hague, Kluwer Law International, 2003, at p. 26 [↑](#footnote-ref-11)
12. [www.apec-tptwg.org.cn/new/Steering.../air.../coop/coop-usa.doc](http://www.apec-tptwg.org.cn/new/Steering.../air.../coop/coop-usa.doc), last visited on January 11, 2012 [↑](#footnote-ref-12)
13. <http://www.faa.gov/air_traffic/international_aviation/media/code_share_guidelines.pdf>, last visited on January 10, 2012 [↑](#footnote-ref-13)
14. <http://www.cci.gov.in/images/media/ResearchReports/AntiTrust_20100119155755.pdf>, last visited on January 10, 2012

    [↑](#footnote-ref-14)
15. Case No.  04/2009, Competition Commission of India [↑](#footnote-ref-15)
16. *Supra* at page 8 [↑](#footnote-ref-16)