Section B

Articles

Counter Point - V: First Economic Study in DG Report to examine two models of fee paid to air travel agents – *Imposition of penalty in Uniglobe Vs. TAFI matter*

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Ever since the time when the powers of enforcement were conferred on the Competition Commission of India (CCI) in May, 2009, there has been a continuous evolution of the competition law in the country in the form of decisions of the CCI in various informations brought before it. Amongst various cases before it, the case No. 3 of 2009, one of the very first cases before the CCI was interesting from many angles. First of all, this was the first instance where the help of economic anlysis was taken by Director General (DG), in his report to arrive a t his findings. Secondly, it was a case where, three associations of travel agents were actively involved in boycott of an airlines wheres the other three associations were not actively involved in the boycott but their names were used by the remaining three associations in the agitation. The 'not active' associations had also not hauled by the three 'active' associations for use of their name in their hoardings but had also not contributed towards the funding of the agitations without any visible resistance from the 'not active' associations.

The author who supervised the preparation of the report of the DG for the Commission also introduced economic analysis in this case for the first time as the very first Director General of the functional Competition Commission of India looks back at the case and the dissenting orders passed by two Members of the CCI.

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If you were looking to book a ticket from Delhi to Kochi or Munich or to any other domestic or international destination, there are two ways in which you could go about doing this job. The first is that you find out a local travel agent, close to the place where you are located and either give a telephonic ring or visit his/her business premises and get the ticket either picked up from the office of travel agent or get it delivered by the staff of travel agent to the place where you are either residing or having an office. In this chain of events you, essentially, are being spared of all the botheration after making a telephonic call or visiting the office of the travel agent, as the case may be, and leaving the rest to travel agent. In today's age of information technology, the other easy option available with you is to go online either on your mobile handset or I-Pad or Laptop or Personal Computer on your desk, find out the different fares from competing airlines after checking their availability and, then, book the ticket online by either paying through Net Banking or Credit Card or any other method acceptable to the payee and technically feasible.

The second option means that the entire transaction is done in the cool confines of your residence or office or any other place where you can use either mobile devices or desktop devices. From making research of the available options, settling for the best one and purchasing the ticket using your Credit Card, Debit Card, Net Banking or ATM Card the entire job is done by you through various online portals or websites of the airlines concerned. The role of ticket agent is zero. You neither intract with one nor know about its existence. The service available in the second option to you ticketing agent is certainly less in comparison to the service given to you by the travel agent in the first option when you get ticket at your door step after telling your preferences.

The difference between two approaches is the difference of the service rendered by ticket booking agents. This is this difference which is at the core of the entire issue in the case of *Uniglobe Modern Travels Pvt. Ltd.* v. *Travel Agent Federation of India and others* (*Uniglobe* v. *TAFI* for short) i.e. case No. 3/2009 dealt with by the Competition Commission of India (CCI).

The reason that this case finds mention in this series of dissenting orders is that the case was one amongst the cases where all the Members of the Commission did not have consensus and dissenting order was passed by the two of the Members of the Commission and, therefore, this case forms part of the series discussing dissent orders wherein the logic of dissenting order and jurisprudence arising from it is being discussed.

In the information received before the Commission, the allegation was that Travel Agents' Federation of India (TAFI) issued directives to all its constituent members, including the information provider (IP), not to act as an agent of Singapore Airlines or sell any ticket of Singapore Airlines. The Informant was an aggrieved party in this case and was expelled from the membership of TAFI for not following these directives

The main issues which arose from information filed by the Informant before the Commission were :

1. Whether the suspension and subsequent expulsion of the Informant from the membership of TAFI for not complying with the directives of TAFI about boycott Singapore Airlines was an outcome of an anti competitive agreement amongst travel agents in terms of the provisions of section 3(3) of the Competition Act, 2002 (the Act); and

2. Whether the existing model of compensating travel agents through a "fixed percentage of commission" is favourable to the end consumer over the proposed model of "transaction fee" and productivity linked bonus and vice versa

Summarising the factual sequence of events, in July/August 2008, different agents the who were members of TAFI received letters from nearly all the airlines conveying their decision to reduce the agency commission from 5% to 0% w.e.f. October 01/Nov, 2008. As an alternative, the airlines offered productivity link bonus to the agents and suggested them to adopt "transaction fee" model. The TAFI along with other travel agents associations started agitation against the decision of these airlines for restoring the old pattern of fixed percentage of commission to travel agents.

Major domestic airlines, namely Air India (then NACIL), Jet Airways, and (then existing) Kingfisher Airlines relented and, on a sustained pressure from these associations, agreed for a 3% commission to the travel agents. However, sixteen foreign airlines including Singapore Airlines, did not accede to the demand of travel agents' associations to revert to the old model of "commission payment". TAFI and other associations, in retaliation, gave the boycott call against the Singapore Airlines.

This call of boycott, against Singapore Airlines, given by TAFI and other travel agency associations, was monitored by respective associations. There were a number of meetings to ensure that the call of boycott against Singapore Airlines is successful. The consequence of not following the collective boycott call against Singapore Airlines was suspension/ possible expulsion from the membership of the respective associations. Membership of any of the three recognised associations ensures a number of privileges which were mentioned in the information as well as highlighted in the report of the DG. Therefore, the threat of suspension/ expulsion is a sufficient deterrent to make all the members fall in line. After the IP continued to have business relationship with Singapore Airlines, it was served with a show-cause notice for suspension. On not receiving any reply, the IP was actually suspended.

Against the suspension decision, the IP approached Hon'ble Delhi High Court. Hon'ble Delhi High Court asked TAFI to submit an affidavit in reply. In this affidavit, the TAFI admitted that a directive not to issue tickets of Singapore Airlines, was indeed issued to all the members of TAFI. In this affidavit, filed before the Hon'ble Delhi High, TAFI has admitted that a show-cause notice for suspension was served on the IP. It has also been admitted, the affidavit, filed by TAFI before the Hon'ble High Court, that the IP continued to book tickets of Singapore Airlines despite the directives of TAFI not to issue and this non-compliance amounted to misconduct. **Thus, it was proved on the record that the suspension/expulsion was because of not following the directive of TAFI not to deal with Singapore Airlines by IP.**

To examine which of the two models – "transaction fee" model or "fixed commission" model – is more pro-competitive, an economic analysis was got done by Director General (DG). As could be seen from the economic analysis, there was a trend towards a more transparent system of compensating the travel agents across the world. In the old system, a "fixed commission" is paid to the travel agents irrespective of the service given to the customer. This fixed commission burden would finally be passed on to the consumer in the form of a component of overall expenditure of the airlines and, therefore, the air fare. If this was not there, the fares would be expected to be slightly lower as this fixed outgo burden would not be there on airlines. If all the airlines were to switch over from 'fixed commission ' model to 'transaction fee' model, the customers still wanting to avail the services of the travel agents will do so for a fee and benefit from it. This also means that those not wanting those services, would benefit from a cheaper air ticket in lieu of the services of the travel

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agents which they are foregoing by vbooking tickets online. This will allow price discrimination amongst customers and permit the tickets being available at a lesser price to those consumers who do not value the services of travel agents. However, it will also motivate the travel agents to offer extra services so that customers still come to them. Thus, this transition from "fixed commission" to "transaction based fee" was likely to be pro-competitive as per the economic analysis done by DG.

Howsoever pro-competitive the new model may be but it also involved the possibility of market 'shake out' on the old principle of "survival of the fittest". In the then existing model, existence of travel agency was good enough to ensure livelihood of the owners. In the new "transaction fee" model, this will not be the case. Those not providing any value added services to the customers may not get business and be forced to leave the market. This is the fear of losing out on business and, in some cases, even closing the business, which was being capitalized by the associations to raise a bogey of survival.

This also points to another dimension of the issue. In Section 19(4) of the Act, there are factors which the Commission is supposed to keep in mind while determining whether an enterprise enjoys a dominant position or not under Section 4 of the Act. These include factors such as 'social obligations and social costs' and 'relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition. The Section 19(3) of the Act enumerates the factors which the Commission shall have due regard to while determining under section 3 of the Act. No such factors having a social dimension are given in Section 19(3) of the Act. Therefore, whether the Commission need to take a view on the probable concerns of a market 'shake out' as well was another question. This may be appropriate as any 'shake out' involves social costs. Further, there are precedents, in some instances, where the old model survives because of governmental intervention.

A representation was made by different travel agents association before Director General of Civil Aviation (DGCA) in 2004 requesting DGCA to take necessary action for restoring the agents commission of 9% of the purchase value of the air tickets. The DGCA replied to different associations that as the airlines had decided to change the rate of commission under authorisation of IATA Resolution 810(i) and was notified to the travel agents in advance in accordance with IATA resolution and this being an issue between airlines and its appointed agents there was no room for DGCA to intervene. The decision of DGCA was communicated to different associations in August 2004. However some of the agents agitated the issues in Karnataka and Kerala High Courts. In all such instances where the issue was agitated before different high courts, a direction was given to DGCA to look into the petition of the travel agents and take a decision according to law.

To recapitulate the system of Commission based on service charges or simply ticket based Commission it is to be stated that IATA (International Air Transports Association) is an industrial trade group of airline which defines and sets

standards for many operational aspects of airlines business on behalf of its members. The reduction in commission rate to travel agents has been a distinct possibility for last several years. And the changeover to services based fee in comparison to transaction base fee was in pursuance to IATA Resolution 810(i) and this was notified to different travel agents in advance. IATA resolution "016a" provided for a 9% commission however on expiry of this resolution on 31.07.2000 the airlines reduced to commission to 7 % from Jan 2002 and thereafter to 5% May/June 2004. Therefore the changeover of commission to travel agents from "transaction fee" based model to service based model is not something which has from all of a sudden. It was in this background that when different travel agent associations raised the issue before Director General of Civil Aviation (DGCA) in 2004 for intervening in the matter for restoring the agents commission of 9% of the purchase value of the air ticket, DGCA informed them that there was hardly for intervention.

It is in the above background that the boycott to its members against the sale of tickets of Singapore Airlines by TAFI has to be seen. In this connection, the evidences in the form of emails sent by TAFI to its members, advertisements issued in various news papers and hoardings put up in Bombay and Bangalore were significant pieces of evidence of concerted efforts of TAFI. In the investigation, DG, after considering different facts and issues, found out that not only was threat of expulsion given to the different members but for those who defied the directive of TAFI, it was also executed. The IP in this case was the victim of the execution of this threat. The show cause letter of suspending the membership of IP as well as the final suspension and expulsion of IP was direct result of not heeding to a powerful lobby. After investigation, the Director general, CCI reached the finding that the action of TAFI and two other IATA accreted travel agents association namely TAI and IAAI, violate the provisions of section3(3) read with 3(1) of the Act.

It may be mentioned that the information was brought against six trade associations of travel agents namely Travel Agents federation of India (TAFI), Travel Agents Association of India (TAAI), IATA Agents Association of India (IAAI), India Association of Tour Operators (IATO), Association of Domestic Tour Operators of India (ADTOI) and Enterprising Travel Agents' Association (ETAA). Out of these, TAFI, TAAI and IAAI were associated with International Air Transport Association (IATA).

The main grievance of the information was that the entire agitation and the boycott called emerged from the fact that shift from "the commission basis" fee structure to "transaction fee" structure was not appreciated by the travel agents in general and their association in particular. However at this stage it may be appropriate realise that the "commission based" fee structure, like indirect taxes, affects all the persons who are buying a ticket for any particular sector. It does not differentiate between buyer of a ticket is looking for some additional services such as dropping of ticket at his door step and also saving time on online booking and ticket buyer who actually spares time to go online and pick up a ticket of his choice. To this extent this pricing slightly discriminating towards the person who are buying their ticket online. This is the simple reason for that the for the total expenditure of the airlines including the commission charges payable to different to travel agents get spread out in the total expenditure spread sheet of the airline and this accordingly enhances the average price of the ait ticket available in any sector. This increase in price hits both the parties equally. Both the parties mean-the party which are buying the ticket online and the parties buying the

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ticket through airline ticket booking agents. This is also discriminating from the point of view that out of the same expenditure debited in the books of account as expenditure of business some people who are buying their tickets through travel agents are indeed getting some service but considerable fraction of people booking ticket online are still paying to the airline in the form of enhanced fare despite not having taken full services of travel agents. The "transaction cost" of a ticket purchased online is drastically cheaper than the transaction cost of a ticket purchase from a travel agent.

Maybe it was with this in mind that IATA resolution was passed to ensure that this kind of uneven spread of the expenditure of airline does not happen amongst ticket buyers who are buying the their tickets online and the buyers who are buying their tickets offline. If it is allowed to move towards "transaction fee" model, those who are getting the services from the travel agents would have to pay to the travel agents for the services availed and others would be spared of it. Therefore, this appears to be more equitable model.

On a prima facia basis, the Competition Commission of India (CCI) found merit in the information and, as discussed in the preceding paragraphs, the information was forwarded to DG for detailed investigation into the matter. DG in his report stated that non IATA association namely IATO, ADTOI and ETAA did not actively participate in the issue of boycott although their names were mention in the hoardings.

After submission of the report of DG, the CCI came with a split judgement. Chairman plus two Member (Majority) as well as the minority of two Members (Minority) both concluded that by forcing the members to boycott the tickets of Singapore Airlines, all the three IATA associations (TAFI, TAAI and IAAI) had violated Section 3 (1) read with Section 3(3)(b) (limits or controls production, supply, markets, technical development, investment or provision of services) of the Act and a fine of Rs. 1,00,000 was imposed on each of the three associations. With regards to the conduct of the three non IATA associations, there was a difference in the opinion of the Majority and Minority. This difference of opinion was the main cause of dissent order in the present case. The Majority concluded that the three non IATA associations, as they did not object to the use of their names in the emails, directives, etc. directing the boycott of sale of tickets of Singapore Airlines, are also responsible for the anticompetitive conduct. The Majority held thus-

> *"On the role of three other non-IATA travel agents associations namely, IATO, ADTOI and ETAA in the alleged anti-competitive decision to boycott the sale of Singapore Airlines tickets, the Commission having examined the arguments put forward by the DG and having heard the other non-IATA travel agents, were also in conformity with the boycott call. While these associations were not involved as directly and actively as the IATA accredited Associations, their tacit compliance is seen from the fact that no attempt was made to deny the usage of their logo, etc., and there is also evidence of attendance of some meetings where these matters were discussed. Instead, they preferred to 'swim with the tide'. The strength and significance of their logo needs to be understood and appreciated. These three associations were, and are, required to ensure that associations act as facilitators of travel and must desist*

from the use of their logo or allowing such use, in the event of there being anti-competitive effects of actions of other Associations. Even small associations and players are important and can play a significant role in promoting / protecting competition in the market." (paragraph 68.9.8 of the majority order).

On the other hand, the Minority held that as the three non IATA associations are not involved in selling of tickets, they could not boycott the sale of tickets of Singapore airlines either and accordingly, their conduct could not attract the provisions of Section 3 of the Act. The Minority held thus:

"Before proceeding further it is pertinent to mention that on the direction of Commission the DG also investigated the role of three other non-IATA travel agents associations, namely Indian Association of Tour Operators (IATO), Association of Domestic Tour Operators of India (ADTOI) and Enterprising Travel Agents Association (ETAA) in the alleged anticompetitive decision to boycott the sale of Singapore Airlines tickets. The DG after making thorough investigation has come to the conclusion that no evidence other than appearance of names and logos of ETAA, ADTOI and IATO on various emails issued by TAFI, TAAI and IAAI and other advertisements was found which could establish the involvement of these non-IATA travel agents associations in the alleged anti competitive conduct. On the basis of responses filed by these associations before the DG as well as the statements of President of ETAA, Shri Karl Dantas, President of ADTOI, Shri Rakesh Lamba and President of IATO, Shri Rajesh Mudgil, DG has given the finding that members of these associations are not engaged in issuing tickets of any airlines and therefore, are incapable boycotting the sale of Singapore Airlines tickets. The DG has also concluded that none of these associations participated in the meetings held with Singapore Airlines or in the proceedings before DGCA or any Court.... Therefore, we dissent with the main order of the Commission dated 4.10.2011 finding ETAA, ATDOI and IATO in contravention of the provisions of the Act."

As the Majority did only hold the three non IATA associations responsible for violations of some of the provisions of the Act but did not impose any monetary penalty upon these associations and only passed a simple direction of cease and desist from boycotting the sale of the tickets of the Singapore Airlines, the Minority judgment of absolving the three non IATA association from any liability for contravention of the Act does not have any significant impact for practical purposes.

However, the split orders indeed raise a very important question - can an association whose members are not actively involved in a particular trade of good or provision of services be held liable for limiting or controlling production, supply, markets, technical development or provision of services in the market of that particular good or service. At this juncture, let us visit Section 3 (3) of the Act which reads thus-

"3(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any ***association of enterprises*** *or* ***association of persons****, including cartels, engaged in* ***identical or similar*** *trade of goods or provision of services, which—*

...
..."

As Section 3 (3) of the Act uses the words 'similar' and 'identical', it could be inferred that only when the players are active in the market in which the abuse is being reported, could the provisions of Section 3 (3) of the Act be applied. Hence for these reasons, the conclusions

reached by the Minority appears to be more based on reality than that reached by the Majority. However, it must be noted that a cartel acts in a very secretive manner. At times, a cartel may try to get indirect gains by impacting a market in which its members do not operate. However, let us admit that no hidden nexus between the two sets of associations has been brought of record. In absence of any such evidence coming on record, it would remain in the realm of speculation whether, without overtly being a part of this boycott, the three non IATA associations also stood to gain and had some complicity in the whole matter. Though the DG has noted that the three non IATA associations did not take part in the anticompetitive conduct of boycott nut there is no investigation on record to establish such a possibility.

In most of the jurisdictions, it has been seen that trade associations could easily facilitate anticompetitive conduct. It could do so by either imposing such rules on its members which would limit, restrict or control the market in any manner, determine prices, etc. or provide an opportunity to its members to indulge in collusive conduct through various meetings or discussions. As an example, in the case of *United States* v. *Association of Retail Travel Agents (ARTA)*,[1] ARTA (an association of retail travel agents) was charged in connection with its efforts to orchestrate a boycott of travel providers that did not conform to ARTA's vision of an appropriate travel agent compensation system. ARTA's Board of Directors had adopted a written policy calling for a minimum ten percent commission on hotel and car rental sales by travel agents, the elimination of all distribution outlets for airline tickets other than travel agents, and the payment of commissions based on full fares rather than the actual discounted prices. A few days later, ARTA hosted a press conference where it announced the content of this policy, and shortly thereafter, one of ARTA's board members announced that his travel agency would cease doing business with certain travel providers whose commission and sales practices did not comport with the policy, and invited other travel agents to do likewise. Thereafter, at least one other board member made a similar announcement.

The Comisión Nacional de los Mercados y la Competencia (CNMC), the Spanish Competition Authority, adopted a decision in which it found that ASTRACO (Asociación Provincial de Auto-Patronos y Empresarios de Transporte de Contenedores por Carretera de la Provincia de Alicante) (Association in Market for Transport of Freight by Road in Port of Alicante), an association of self-employed and entrepreneurs active in road transport of freight in the Port of Alicante, infringed Articles 1 of the Spanish LDC and 101 TFEU by collectively recommending prices and other trading conditions for freight by road originating in the Port of Alicante as well as by limiting and controlling the provision of such services. The CNMC Council imposed a € 200 000 fine on ASTRACO. Following its investigation, the CNMC established that these practices were implemented from 2003 to at least 2011 and that they were capable of appreciably affecting trade between Members States, as road transport of freight could have another EU Member State as final destination. This case was triggered by an investigation carried out by the CNMC in case S/0314/10. During the inspections in that case, the CNMC became aware of possible anti-competitive practices carried out by ASTRACO, which allowed

1 *United States* v. *Ass'n of Retail Travel Agents,* 1995-1 Trade Cas. (CCH) ¶70,957 (D.D.C. Mar. 16, 1995).

the CNMC to open an investigation against this association and carry out inspections.[2]

Six recruitment agencies were fined a total of £39m by the Office of Fair Trading (OFT) of the UK.[3] Their group, known as the Construction Recruitment Forum, agreed to boycott an intermediary company for the supply of candidates to UK construction companies and co-operated to fix fees charged to intermediaries and construction companies.

In Ireland, the Irish Dental Association (IDA) agreed settlement terms with the Competition Authority in advance of a full hearing in the High Court. Legal proceedings had been initiated following allegations of a collective boycott of a private dental insurance scheme being introduced in Ireland by Vhi DeCare. The Competition Authority alleged that the IDA had brokered an agreement, decision or concerted practice that had as its object and or effect to prevent the development of a new market for dental health insurance.

In the case law of the Turkish Competition Board, there are many instances involving associations complicating the activities of competing undertakings or excluding firms operating in the market by boycotts or other behaviour or preventing potential new entrants to the market.[4] In these cases, it is observed that the role of associations of undertakings changes in a wide range, from enabling the member undertakings to convene and act in concert through facilitating communication among them to taking an anti-competitive decision itself. The Competition Board, in most of these cases, prohibited the anticompetitive practices and decisions by the associations of undertakings together with imposition of fines.

Above discussion shows, it is indeed true that Associations can really be a fertile ground for anti-competitive practices and collusion. It was in the early days of competition law enforcement that this case came to be decided by the Commission. It would be pertinent to note that in India alone out of the 70 orders passed under Section 27 of the Competition Act, 2002 ("the Act"), around 40 percent or 23 orders, or around 40 percent, relate to the anti-competitive conduct by trade associations. However, we see that it is not an uncommon experience across many jurisdictions, including highly developed competoton law jurisdictions, that trade associations not only act as a hotbed for anticompetitive activities, they often indulge in boycott activities to gain unfair competitive advantage.

2 S/0463/13 http://www.cnmc.es/es-es/competencia/buscadorde/resoluciones.aspx?num=S/0463/13&ambito=Conductas&b=astraco&p=0&ambitos=Concentraciones,Recursos,Sancionadores%20CCAA,Sancionadores%20Ley%2030,Vigilancia,Medidas%20cautelares,Conductas&estado=0&sector=0&av=0

3 Office of Fair Trading press release 119/09, 30 September 2009.

4 *See*, BIAK (4.3.1999; 99-13/99-40), TÜRSAB (17.12.2003; 03-80/967-397), Association of Industrialists of Friction Equipments (4.10.2005; 05-64/925-248), Association of Dubbing Artists (15.6.2006; 06- 44/566-152), Þanlýurfa Goldsmiths' Association (28.3.2007; 07-28/256-89).