

## ABOUT THE JET-ETIHAD DEAL

Etihad Airways, the national carrier of the United Arab Emirates and Jet Airways have announced a transaction for the subscription of a 24 per cent equity stake by Etihad Airways in Jet Airways. Jet Airways has, on November 20<sup>th</sup>, 2013, issued and allotted 27,263,372 equity shares of a face value of ₹10 each at a price of ₹754.7361607 per equity share on a preferential basis to Etihad Airways.

Consequent to the above allotment, the paid up share capital of Jet Airways stands increased to 113,597,383 equity shares of ₹10 each. Following this issue and allotment of the said equity shares on a preferential basis to Etihad Airways, Etihad Airways holds 24 per cent of the post issue paid up share capital of Jet Airways. Additionally, Mr. James Hogan and Mr. James Rigney, being nominee Directors of Etihad Airways, have been appointed as additional directors on the board of directors of Jet Airways as from November 20<sup>th</sup>, 2013.

Please refer to our [earlier report on the deal](#) for detailed analysis.

## DECISION BY COMPETITION COMMISSION OF INDIA

Recent decision of Competition commission of India has brought the deal between promoters of Jet Airways (“promoters”), the company Jet Airways (“Jet”), and Etihad Airways (“Etihad”) back in the news. CCI has concluded that post acquisition of 24% stake in Jet by Etihad, Etihad and the promoters are in joint control of Jet. It should be noted that this is in contrast to views of securities market regulator SEBI, which had held that the present promoters and Etihad are not in Joint control of Jet.

Key excerpts of the [CCI order](#) are as follows:

*In the instant case, both the Parties are engaged in the business of providing international air transportation services. The background of the IA pursuant to which 24% equity interest in Jet is proposed to be acquired categorically states that the Parties wish to enhance their airline business through a number of **joint initiatives**. In such a case, Etihad’s acquisition of 24% equity stake and the right to nominate two (2) directors, out of the six (6) shareholder directors, including the Vice-Chairman, in the Board of Directors of Jet, is considered as **significant in terms of Etihad’s ability to participate in the managerial affairs of Jet**. - Para 14, CCI Order dated 12th Nov 2013*

*With a view to achieve the purported objective of enhancing their airline business through joint initiatives, the Parties have also entered into the CCA. Under the CCA, the Parties have inter alia agreed that: (A) they would frame co-operative procedure in relation to (i) joint route and schedule coordination; (ii) joint pricing; (iii) joint marketing, distribution, sales representation and cooperation; (iv) joint/reciprocal airport representation and handling; (v) joint/reciprocal technical handling and belly-hold cargo and dedicated freight capacity on services (into and out of Abu Dhabi and India and beyond); (B) the Parties intend to establish centres of excellence either in India or Abu Dhabi; (C) Etihad would recommend candidates for the senior management of Jet; (D) Jet would use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, North and South America and UAE; and (E) Jet would refrain from entering into any code sharing agreement with any other airline that has the effect of: (i) bypassing Abu Dhabi as the hub for traffic to and from the above said locations, or (ii) is detrimental to the co-operation contemplated by the CCA. - Para 15, CCI Order dated 12th Nov 2013*

*It is observed that the Parties have entered into a composite combination comprising inter alia the IA, SHA and the CCA, with the common/ultimate objective of enhancing their airline business through joint initiatives. The effect of these agreements including the governance structure envisaged in the CCA establishes **Etihad’s joint control over Jet**, more particularly over the assets and operations of Jet. – Para 16, CCI Order dated 12th Nov 2013*

This indicates that CCI while passing the order has taken into account all factors governing the deal including revised Shareholders Agreement (SHA), Commercial cooperation agreement (CCA), Subscription Agreement and other relevant documents and still concluded that Etihad and the promoters had joint control over Jet.



Both Jet and Etihad differed with the finding of CCI and made an application to CCI to modify the order.

*Vide letter dated 13th November 2013, the Parties made a request to rectify paragraph 14 and paragraph 16 of the Commission's Order to a limited extent to reflect the factual position of board size, power of Chairman and that Etihad is not acquiring control over the operations and assets of Jet and is therefore not in joint control. It has also been stated that the 24% equity stake being acquired by Etihad in Jet is purely a non-controlling equity investment.*

The [CCI in its order dated 26<sup>th</sup> November, 2013](#) held that

*After hearing the Parties, it is considered that there is no mistake or factual error in the statements/observations made in paragraph 14 of the Order as it neither speaks about the total board size of Jet nor the number of independent directors' therein. Therefore, it is not possible to accept the Parties' contention that there is an incorrect statement regarding the total board size of Jet in the Order.*

*As regards Paragraph 16 of the Order, it is observed that the said paragraph presents the views/observations of the Commission regarding Etihad's joint control over Jet which are based on certain facts discussed in the Order. While mistakes apparent on the record could be rectified under Section 38 of the Act, observation(s)/decision(s) of the Commission cannot be a subject matter of rectification.*

*In view of the foregoing, the Parties request for rectification is declined.*

This makes it clear that CCI, a regulatory organisation, considers that Etihad is in joint control over Jet with its current promoters. It should be noted that observations of CCI and the arguments behind the observations were echoed by SES in its [report released in April 2013](#). Since the announcement of the deal, SES has maintained that the deal puts Etihad in joint control of Jet in view of provisions of SHA, CCA, Proposed Articles of Association (AoA) and various announcements made by Jet. SES continues to hold that view and the same have been validated by CCI order.

## OBSERVATIONS MADE BY SEBI

At variance with the observations of CCI and conclusions of SES, are the observations of SEBI, which concluded that there is no change in control at Jet and Etihad has no control on Jet. SEBI vide letter dated September 25, 2013 informed DEA, inter-alia, as under:

- a) *It is observed from (a) proposed Articles of Association of Jet Airways (India) Limited (herein after referred as "Jet"), (b) shareholder agreement dated September 19, 2013, (c) investment agreement dated September 19, 2013 and (d) corporate governance code, that the rights proposed to be acquired Etihad do not, prime facie, appear to result in change in control and consequently, do not attract the provisions of regulation 2(1)(e) read with regulation 4 of Takeover regulations, 2011. Consequently, Etihad would not be deemed as person acting in concert (PAC) with the current promoter group object in terms of regulation 2(1)(q) of Takeover Regulation, 2011.*
- b) *As regards commercial co-operation agreement (CCA), as stated by SEBI earlier, **SEBI would be guided by the decision take by the government or other regulatory agencies regarding change in management/control. In the event, such regulatory agencies decide that Etihad would be acquiring control over Jet Consequently , they would be deemed as PAC along with the current promoter group of Jet, notwithstanding the views express at Para-(a) above.***
- c) *Further, in the interest of corporate governance and to ensure dispersed public shareholding, it would be desirable that the disinvestment of 6% of the post allotment shareholding by the current promoter group of Jet is made prior to the preferential allotment to Etihad.*

Para b of the letter referred above is explicitly pointing out that if any other regulatory agency decides that Etihad would be acquiring control, Etihad would be treated as PAC. With CCI (another regulatory agency) deciding that Etihad is in control of Jet, there is no doubt (and there is absolutely no room for any other interpretation) that SEBI would have to treat Etihad as



PAC and all the consequences associated with Etihad being a PAC would follow and all the responsibilities would attach to Etihad under SEBI SAST Regulations.

## **NEXT STEPS**

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The deal has been approved by all the agencies involved. In approving the deal, these agencies have taken into account all the relevant agreement including the CCA, SHA, IA etc. Shareholders may recall that a set of revised Articles of Association (AoA) was proposed to be placed for approval of shareholders in EGM dated 24th May 2013. However, on the date of meeting the resolution was withdrawn. This indicates that till date shareholders have not approved any changes to revised/proposed AoA of the company. Since the company has moved ahead with all the allotment etc. without taking shareholders' approval for the revised AoA, it can be concluded that the company feels that such approval can be taken for granted, taking into account 75% holding of promoters and Etihad. Shareholders are in dark about the agreements as no authentic source has brought it to their notice.

SES has been of the opinion since announcement of the deal that both Etihad and Jet are in joint control and were PAC as per SAST regulations. Now that the same has been established by the CCI order, provisions of SAST in this regard have been triggered and Etihad and its PAC are legally bound to make an open offer. An important issue to consider is whether they will be treated in default of SAST or not. What is the trigger point, the date of deal (24<sup>th</sup> April 2013) or the date on which CCI held them in joint control?

SES believes that this is a very difficult situation for SEBI to decide. Having ruled that Jet and Etihad are not in joint control, SEBI made it clear that there was no violation of SAST in their eyes. Now with findings of CCI order read with SEBI letter of 25th September 2013, Etihad is a PAC with existing promoter and is bound to make open offer. If SEBI takes the date of CCI order as date for open offer obligation, inadvertently it finds itself in a position of having acted against the interest of investor whose protection is its mandate and against its own regulations. If SEBI takes deal announcement date as date of obligation to announce open offer, it has to go back on its decision conveyed to Etihad/Jet and current promoters.

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