ANTI-TRUST ISSUES WITH RESPECT TO FREQUENT FLYER PROGRAMS AND CODE-SHARING AGREEMENTS THAT PERSISIT IN THE AVIATION INDUSTRY: THE INDIAN CONTEXT

"If you are a global company and India is not on your map, then you have missed the bus".

—Dr. Manmohan Singh,
Hon'ble Prime Minister, India

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Abstract

Competition law has grown enormously in recent years, especially since the 1990's. The growth has been both in terms of geographical regions that have adopted competition law, as well as in the range of economic activities now subject to competition law. India's competition law, the Competition Act, 2002, was passed by the Parliament in December, 2002 and received the assent of the President of India on 13 January, 2003 thereby becoming the law of the land from that date.

One of the sectors which has been most effected by anticompetitive practices is the civil aviation industry. Civil Aviation plays an integral role in development of an economy. It helps in realizing the socio-economic objective of providing connectivity to foster travel & trade. There are certain factors intrinsic to the airline industry that are anti-competitive such as 'Frequent Flyer Programs' and 'Code Sharing Agreements' that are operated by various airlines and which tend to restrain competition in the market. Hence, this paper does a careful review of these agreements and alliances in order to ensure that competition in the airline industry may be preserved and enhanced.

I. Introduction

Perfect competition is when there is a market outcome in which all firms sell a homogenous and perfectly divisible product, all producers and consumers are price-takers and all firms have a relatively small market share. It also includes buyers and sellers having all the relevant information about the market including the price and quality of the product and is characterized by the industry having the freedom of entry and exit. Competition ensures freedom of trade and prevents the abuse of economic power and thereby promotes economic

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democracy which in turn leads to political stability and is a driving force for building up the competitiveness of the domestic industry as businesses that do not face competition at home are less likely to be globally competitive.[1]

One of the sectors which has been most effected by anticompetitive practices is the civil aviation industry. Civil Aviation plays an integral role in development of an economy. The air passenger transport industry has been one of the major drivers behind rapid globalization of the world businesses and the consequent shortening of the distances on the planet. With deregulation setting in, there was freedom to choose routes to operate on, set the prices as demanded/ told by the market with no government intervention on the prices. There are certain factors intrinsic to the airline industry that are anti-competitive such as 'Frequent Flyer Programs' and 'Code Sharing Agreements' that are operated by various airlines and which tend to restrain competition in the market.

The efforts to gain efficiency led to formation of hub and spoke networks wherein the "traffic feed" was brought in to a central place (the hub) from other areas in the vicinity of the hub (the spokes). This hub and spoke network is prevalent today all over the world. Globally, New York, London, Amsterdam, Dubai, Singapore and Tokyo are the best examples of the hub wherein passengers flow in from all corners of the region and again take off for their respective destinations. Through FFPs, airlines induce future loyalty amongst it customers which not only strengthens the airlines market position, but also tends to fetter competition in the market by making it difficult for new entrants to enter the market and expand.

II. Concept Of Aviation Alliance

An airline alliance is an agreement between two or more airlines to form an alliance and cooperate together in terms of destinations, airport lounges, baggage handling at airports, frequent flyer programmes, code share flights etc. thereby providing a network of seamless connectivity and connivance for international passengers all over the world. Airline alliances generally provide for a fairly substantial degree of cooperation, including widened networks, code-sharing and cost reductions (via shared back office functions and operational staff, as well as joint purchasing). They can accordingly result in benefits for passengers: lower prices due to reduced costs, a wider choice of flights, destinations and rewards due to reduced costs and more streamlined transfers.[2] At present, three alliances exist in the global aviation industry namely, Star Alliance, One World Alliance and the SkyTeam Alliance.

For example, if Air India and Lufthansa have an alliance, then if a passenger approaches Air India for a ticket from Mumbai to Geneva, then through its alliance with Lufthansa, the passenger can fly to Frankfurt on Air India and then carry his/her onward journey to Frankfurt on Lufthansa. This also results in the passenger earning miles on both the sectors by being a member of the Air India FFP, obtaining his boarding passes of both the sectors in Mumbai itself, using the Air India lounge at Mumbai and then the Lufthansa lounge at Frankfurt, checking his bags for the entire leg of his outbound journey from Mumbai itself among a host of other advantages.

However, these alliances may also result in a bane for the passengers as they may result in creating a monopoly thereby leading to increase in prices and deficiency of services The ability of an airline to join a global alliance is often restricted by regulations and laws of the country of origin of that airline which may delay its joining the alliance. It is not necessary that the landing rights are owned by the airlines itself, instead these rights may be owned by the government of the country in which their head office is situated. Hence, if an airline merges with a foreign airline, it loses its national identity and thus existing agreements may be declared void by the country which objects to the merger.

With the concept of code-sharing becoming popular among Indian carriers especially now that the domestic private carriers can fly overseas once they complete five years of domestic operations in addition to other mandatory requirements, legal liabilities are bound to increase and become complicated. In order to identify the proper defendant claim arising from a code-shared flight, the Guadalajara Convention, which was adopted in 1961, applies to which India is a party. It ensures that a carrier performing carriage without having entered into a contract with the passenger will be liable according to the Warsaw Convention as modified by the Guadalajara Convention. This convention has formally introduced the distinction between a contracting and an actual carrier.

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. Code-Share agreements enable airlines to increase their traffic and revenues thereby profits, network size, service frequency, offering more destinations through its frequent flyer programmes and coordination of operations. For example, in India, Jet Airways already has a code-share agreement with Brussels Airlines among others in order to give its passengers wider destinations in Europe to choose from. Similarly, national air carrier Air India has code-share agreements with several airlines like Aeroflot, Lufthansa and Singapore Airlines to offer their passengers more destinations to choose from. Thus the role of the Guadalajara Convention will increase and become more important with a steadily growing number of flights under Code-Sharing agreements.

Frequent flyer programmes on the other hand, is a loyalty programme offered by almost all airlines in the world today. Under this, members earn frequent flyer miles or points depending on the distance and class of travel flown. These credited miles may then be redeemed for free air travel or even on partner airlines of the FFP of which the flyer is a member or on free stays with partner hotels, free car rentals with car rental partners among other several benefits like discount vouchers for dining.etc. depending on the points available in the member's account and points required for redemption. These miles may be redeemed.

III. Competition Or Antitrust Issues That Fetter These Alliances

(1) Anti-Competitive Agreements

Section 3(3) of the Competition Act, 2002 talks about prohibition of anticompetitive horizontal agreements. It states that horizontal agreement is any agreement[3] entered into between enterprises[4] or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on or any decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade[5] of goods or provisions of services which

- Directly or indirectly determines purchases or sale prices.
- Limits or controls production, supply, markets, technical development, investment or provision of services.
- Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way.
- Directly or indirectly results in bid rigging or collusive bidding.

shall have an appreciable adverse effect on competition is prohibited by law.

Hence, cartelization is one of the horizontal agreements that shall be presumed to have an appreciable effect on competition under Section 3 of the Competition Act, 2002. Cartel has been defined in Section 2(c) as an agreement between enterprises (including a person, a government department and association of persons/enterprises) not to compete on price, product (including goods and services) or customers. The object of a cartel is to raise prices above competitive levels, resulting in injury to consumers and to the economy. A cartel is set to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market shares or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets. An important dimension in the definition of a cartel is that it requires an agreement between competing enterprises not to compete or to restrict competition.

Cartel busting requires certain specialized skills which differ from the skills required for investigation and prosecution of other infringements of competition law. 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.[6] 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.

This section is almost identical to Article 81 of the EC Treaty. The purpose of Article 81of the EC Treaty is to preclude restrictive agreements between independent market operators, whether horizontal (between parties operating at the same level of the economy, often actual or potential competitors) or vertical (between parties operating at different levels, for example, an agreement between a manufacturer and its distributor.[7] Article 81 sets out the prohibition and prohibits collusion between undertakings which have as its objects or effect the prevention, restriction, or distortion of competition within the common market and which may affect trade between Member states.

In *European Night Services v. Commission*,[8] the CFI held that agreements containing obvious restrictions of competition will automatically be held to restrict competition within the meaning of Article 81(1). In that case, the CFI took the view that provisions fixing prices or sharing markets in horizontal agreements would be obvious restrictions of competition. Thus hard-core cartel activities, where competitors agree or otherwise conspire to fix prices, share markets, impose quotas or otherwise limit output have as their object the restriction of competition. The assessment of whether or not an agreement has as its object the restriction of competition is based upon a number of factors which include, in particular, the context of the agreement and the objective aims pursued by it. In many cases it is the detection of cartels, rather than the legal intricacies of Article 81, which presents the main difficulty.

(II) Abuse of Dominance

Section 4 of the Competition Act describes what is meant by abuse of dominant position. Dominance relates to a position of economic strength enjoyed by an enterprise,[9] which enables it to prevent effective competition in the relevant market by giving the undertaking, the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[10] This provision of abuse of dominance is almost identical to Article 82 of the EC Treaty which prohibits undertakings from committing an abuse of dominant position held within a substantial part of the common market where that abuse has an effect on trade between Member States. In the case of *United States v. E.I. du Pont de Nemours & Co.*[11] it has been observed that in order to be considered dominant, a firm must be in a position of such economic strength that it can behave, to an appreciable extent, independently of its competitors. Abuse of this dominance occurs when[12]:

- The enterprise shall directly or indirectly, impose unfair or discriminatory conditions in the purchase or sale of goods or services or impose unfair or discriminatory prices in the price in the purchase or sales (including predatory price[13]) of goods or service. However, there is an exception which is that in case such discriminatory prices or conditions are adopted to meet adoption, then provisions of S.4 shall not be attracted.

- The enterprise limits or restricts the production of goods or provision of services[14] or market thereof or limits or restricts or limits technical or scientific development relating to goods or services to the prejudice of consumers.
- The enterprise indulges in practice[15] or practices resulting in denial of market access in any manner.
- The enterprise makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature according to commercial usage, have no connection with the subject of such contracts.
- The enterprise uses its dominant position in one relevant market to enter into or protect the relevant market.

Now the question in the last factor mentioned above is what is meant by relevant market. The relevant market is defined with reference to the competitive constraints that exist between products and regions. It is based on the "relevant product market" and "relevant geographic market". Relevant product market is defined in terms of substitutability of products.[16] It means a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and the intended use.[17] It is possible for enterprises to gain dominant position through entering into agreements with other enterprises who are competitors in the relevant market.

A high profile example of an enterprise found abusing its dominant position is the *Microsoft case*.[18] Microsoft was fined 497 million pounds for infringing the EC Treaty rules on abuse of a dominant market position (Article 82) by leveraging its near monopoly in the market for PC operating systems onto the markets for work-group server operating systems and for media players. This conduct hindered innovation in the markets concerned to the detriment of consumers. To put an end to this abusive behaviour, the Commission ordered Microsoft to disclose interoperability information, which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers and to offer a version of its Windows operating system without Windows Media Player. The Court's ruling confirmed that the Commission was right to prohibit Microsoft's anti-competitive conduct which harmed competition to the detriment of consumers.

In *Hoffmann-La Roche & Co. Ag, Basle v. Commission of the European Communities in Brussels*[19] the European Commission held that Roche, with a dominant position within the common market, on the markets for certain vitamins, abused that position by concluding with 22 purchasers of these vitamins, agreements which contained an obligation upon them, or the grant of fidelity rebates offering an incentive, to buy all or most of their requirements of vitamins exclusively, or in preference from Roche. On the principles on which a dominant position is to be determined, the Court stated that a number of factors would show the existence of a dominant position, a highly important factor among them being the existence of a very large market share such as:

- The relationship between market shares of the undertaking concerned and of its competitors especially those of the next largest.
- The technological led of an undertaking over its competitors.
- The existence of a highly developed sales network.
- Absence of potential competition.

IV. Concept Of Anti-Trust Immunity In The Airline Industry

In the United States, the DOT[20] has the authority not only for approving airline alliances, but also for granting those alliances immunity from the anti-trust laws. In determining whether to grant approval and anti-trust immunity for an airline alliance, DOT must find that the alliance is not adverse to the pubic interest. DOT cannot approve an agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or that cannot be achieved by reasonably available alternatives that are materially less anti-competitive.[21]

(1) The American Airlines/British Airways proposal

The proposed alliance of American Airlines and British Airways-the two largest carriers in the U.S.-U.K. markets raised significant competition issues. The two airlines accounted for nearly 58 percent of the available seats on scheduled U.S. and British airlines between the United States and London. In addition, they provided over 70 percent and in some cases, all of the available seats on scheduled U.S. and British Airlines between Heathrow and several key U.S. airports, including Chicago, Boston and Miami among other routes.[22] The process for reviewing the proposed alliance was complicated by the fact that it was new and untested and some European laws had not been previously been applied to airline alliances. [23]

The proposed AA/BA alliance had network benefits and could increase competition in markets between the United States and the European continent, the Middle East, and Africa because of the number of alliances competing in these markets would increase from three to four. However, it raised serious competition issues in the U.S.-U.K. markets. Competition issues arose because, under the alliance rather than competing with each other, the two largest airlines in the U.S.-U.K. markets would in essence be operating as if they were one airline. Restrictions on access to slots and gates at Heathrow Airport were the most significant barriers to competition in the U.S.-U.K. markets, but sales and marketing practices which included frequent flyer programs and corporate incentive programs among others could also reduce competition by reinforcing market dominance at hubs and impeding successful entry by new carriers and existing carriers into new markets, which could lead to higher fares. It was felt that if an airline was already dominant in a given market, these programs would serve to reinforce this dominance.

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. In 2007, however, the two sides agreed to open up the skies so that any U.S. airline could fly to any city within the European Union, including those in the United Kingdom, and any carrier from a European Union country could fly to any city in the U.S.

(2) KLM/Alitalia proposal

The European Commission under the provisions of the EC Merger Regulation cleared the alliance between KLM & Alitalia. The Commission considered that the alliance was globally pro-competitive, in particular in view of the largely complementary nature of the parties' activities. Nevertheless, the Commission found that the operation would have led to monopoly positions on two markets: Amsterdam-Milan and Amsterdam Rome.[24] The parties had therefore to accept undertakings with a view to attract potential new entrants on these markets and to exercise a competitive pressure on the parties. The remedies included *inter alia* the release of a significant number of slots at the congested airports in question and the reduction of the parties' frequencies (up to 40% of the frequencies actually operated when a new entrant starts operating the problematic routes. The European Commission stated in paragraph 33 of the decision in COMP/M.5181 *Delta Airlines/Northwest Airlines* that depending on their respective market shares, a merger between two alliance partners can still significantly affect competition.

"33. Depending on the market position of the merging parties on the routes concerned, it cannot be excluded that a merger between two alliance partners could significantly affect the competitive situation on some routes, in particular on hub-to-hub routes. The Commission therefore analyzes below on a route by route basis the specific effects of the creation of a permanent structural link between the two merging parties in order to assess the extent to which competition may be affected post merger."

(3) Delta and Northwest Airlines proposal

The European Commission approved the merger between Delta Airlines and Northwest Airlines under Regulation 139/2004 ("EC Regulation") by its decision of 6th August 2008.[25] An important factor while deciding the case was the extensive cooperation that was already in place between Delta Airlines and Northwestern Airlines within the framework of the SkyTeam alliance which also included amongst others Air France/KLM and Alitalia.[26] The cooperation within alliances of this kind ranged from plain code-sharing on a single route to worldwide network and fare-coordination. The European Commission concluded that airlines within the SkyTeam alliance are not effective competitors. Para 32 and 103 of the decision in COMP/M.5181 *Delta Airlines/Northwest Airlines* conveyed the said decision.

"32. *The only change brought about by the merger as regards competition between Delta and Northwest is that the absence of effective competition between the will no longer result from cooperation agreements but from their integration into a single economic unit. The merger will create a permanent structural link between Delta and Northwest that replaces the extensive cooperation on transatlantic routes that currently takes place within the framework of SkyTeam."*

and:

"103. *In light of the relevant counterfactual for the assessment of the present case, the parties and other Sky Team 6 members cannot be considered as effective competitors on transatlantic routes. Accordingly, the present transaction does not eliminate actual or potential competition. The only effect this merger has is it changes the nature of the parties' relationship form cooperation and coordination of their activities to a structural integration."*

(4) Lufthana/SAS/United

On 28 October 2002, the EU Commission decided to close its investigations under Article 85 of the Treaty into two transatlantic aviation alliances, that is the alliance between Lufthansa, SAS and United Airlines (Star Alliance) on the one hand and the alliance between KLM and NorthWest (Wings) on the other hand. The cases were important in particular for two reasons. They were the first cases in which the Commission took a formal position under the EC competition rules on a transatlantic aviation alliance agreement.[27] In these two cases, the Commission further developed its approach to transatlantic air alliances under EC competition rules, notably in terms of market definition and the identification of affected markets. In particular, the Commission concluded that on long haul routes a certain degree of substitutability between indirect services (e.g. a flight from Frankfurt, via Amsterdam to Washington) and non-stop services could be accepted, depending on a number of factors such as overall additional flight duration, airline preference, price, schedule and the availability of indirect flights.

Moreover, the Commission applied a more economic approach when identifying affected markets, by considering alliance partner A only as potential competitor of alliance partner B already operating services out of the route concerned) where carrier A had a real commercial possibility of entry. This revised approach allowed the Commission to take a more positive view on the LH/SAS/UA alliance and its initial concerns from a competition point of view could be reduced to five hub-to-hub O&D routes. the commission concluded that there was, without appropriate remedies, a risk of elimination of competition on four of the affected routes (the routes from Frankfurt to the US), given the existence of substantial market entry barriers. These entry barriers were both of a structural nature (slot shortage at Frankfurt airport) and of a regulatory nature (a possibility of price control by the German Government with regard to the fares of indirect services). In order to meet the identified competition concerns, the parties offered to surrender slots at Frankfurt airport to allow either direct or indirect) new air services on the four routes concerned.[28]

The parties offered to surrender sufficient slots to allow two additional daily competing air services on the Frankfurt-Washington route and one additional daily competing air service on each of the three other routes. In addition, new entrants using the slots, if they operate a non-stop service, would be admitted to the parties' frequent flyer programme and offered interlining facilities. Moreover, the parties would not participate in that part of the IATA tariff conference concerning services on the routes in question. The Commission's revised approach had also consequences for its examination of the transatlantic alliance between KLM and NorthWest (KLM.NW), where its initial competition concerns were reduced to two hub-to-hub O&D routes, where both parties were competitors prior to the alliance.

V. Conclusion

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. In *British Midland v. Aer Lingus*[29] dominance was found as each airline's share was in excess of 50 percent and there existed both regulatory and practical (lack of slots at congested airport) barriers to entry. When frequent flyer programmes, override commissions, and excessive capacity or frequency, are practiced by a dominant airline without persuasive business justification and if they have a significant adverse effect on the development or maintenance of competition, they are liable to constitute an abuse in the sense of Article 86.

According to the so-called "point of origin/point of destination" (O&D) city pair approach,[30] every combination of a point of origin and a point of destination is considered to be a separate market from the customer's viewpoint. This includes the direct and indirect flights between the two airports concerned, alternative transport modes (rail, road and sea), and flights between other airports whose respective catchment areas significantly overlap with those of the airports concerned (airport substitution). The key test used is whether the scheduled flight on a given route can be distinguished from the possible alternatives "by virtue of specific characteristics as a result of which is not interchangeable with those alternatives and is affected only to an insignificant degree by competition from them.[31]

For instance, on the market London-Frankfurt, passengers have the choice between direct flights offered by British Airways and Lufthansa from Heathrow to Frankfurt airport, a direct flight offered by Ryan Air between London-Stansted and Frankfurt-Han, and indirect flights offered for instance by Air France/KLM via Amsterdam and Paris. They may also travel by train or coach. Depending on the type pf passenger, the overall traveling time, the quality of service, and the frequency of services offered, some of these services may be considered substitutes while others may not.

Strategic alliances fall short of outright mergers and in particular, preserve the participant's identity and autonomy. They constitute a framework within which the participating airlines are committed to developing extensive cooperation in technical, commercial and operational areas. Typically the alliance will endeavour to attain economies of scale by joint equipment purchasing and maintaining, insurance, personnel training etc. Often the alliance is supported by small shareholdings by each of the parties in the others. Difficulties would arise where the cooperation eliminates competition on a route or where the partners control access to essential facilities. Suggestions which I would like to incorporate regarding the same include:

- Having an "open skies" agreements which are less restrictive in regard to the number and identity of airlines and routes or capacities that can be flown rather than bilateral air agreements which restrict the number of airlines as seen in the proposed BA/AA alliance.
- Clearly an effective enforcement of the Competition Act, 2002 is an essential part of such a coordinated air transport policy. Accordingly, the need for an effective enforcement of the competition rules to international transport has become yet more important. This includes adding the concept of antitrust immunity to the Act by defining it so that it may easily be applied to the various provisions of the Competition Act in a more transparent manner.
- 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 as seen in the proposed AA/BA alliance which I have mentioned in one of the earlier chapters of my report where there was coordination among the DOT, DOJ, EU Commission and the UK Office of Fair Trade and hence effective investigation.

In my opinion, the system works best, however, when all airlines have an equal stake: at the time when all participating airlines had a strong influence over the allocation of slots at their home base, the slot allocation exercise was unlikely to leave any significant participants strongly dissatisfied. Now that there are ore 'new entrant' airlines which cannot rely on a strong position at their home base in order to reciprocate possible unfavourable treatment at other airports, it becomes more difficult to ensure a satisfactory outcome of the allocation process. Since airport scheduling and slot allocation rely on agreements between airlines and reduce access to essential infrastructures, to the possible disadvantage of competitors, they restrict competitors.

Endnotes

1. This article is part of a research undertaken by the author on this topic for the Competition Commission of India and would like to thank them for their assistance.
2. *"Proposed Domestic Airline Alliances Raise Serious Issues"*, GAO/T-RCED-98-215, June 4, 1998.
3. Section 2(b) defines agreement and says that it includes any arrangement, understanding or action in concert whether or not such an agreement, understanding or action is formal or in writing or whether or not such an agreement, understanding or action is intended to be enforceable by legal proceedings.
4. Section 2(h) defines 'enterprise' as a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.
5. Section 2(x) defines trade as any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services.

6. Hussain Abdullah, Bhatia G.R. & Nair Ravishekhar, "*Competition Law in India: A Legal Quagmire*, Volume 1, The Indian Journal of International Economic Law, 2008.
7. Bhatia G.R, "*Combating Cartel in Markets Issues and Challenges*", January, Competition Law Reports, 2008.
8. Cases T-374, 375, 384 and 388/94 [1998] ECR II-3141, [1998] 5 CMLR 718.
9. Section 2(h) defines 'enterprise' as a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.
10. Roy Abir & Ganapathy Kartik, "*Abuse of Dominance: Intel's Insides?*", Jul.-Sept., Competition Law Reorts, 2009 at p. A-288.
11. 351 U.S. 37.
12. Section 4, Competition Act, 2002.
13. Explanation (b) of S.4 defines 'Predatory Price' as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competition.
14. S. 2(u) defines 'services' as service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.
15. S. 2(m) defines 'practice' as any practice relating to carrying on of any trade by a person or an enterprise. Trade in furtherance to this is defined as any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provisions of any services.

16. Bhatia G.R, "*Assessment of Dominance: Issues and Challenges under the Indian Competition Act, 2002*", April-June, Competition Law Reports, 2009.
17. Section 1(t), Competition Act, 2002.
18. Judgement of the Court of First Instance (Grand Chamber) in *Microsoft Corp. v. European Commission*, Case T-201/04 (2007), affirming the Commission's Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty.
19. Case 85/76.
20. Department of Transportation.
21. "*Aviation Competition: International Aviation Alliances and the Influence of Airline Marketing Practices*", GAO/T-RCED-98-131, March 19, 1998.
22. *Ibid.*
23. *Ibid.*
24. "*Airline Competition: Issues Raised by Consolidation Proposals*", GAO-01-370T, February 1, 2001.
25. Partsch Phillippe-Emmanuel Partsch & Wellens Vincent, "*The Delta Airlines and Northwest Airlines Merger: Potentially anti-competitive co-operation as a counterfactual to assess a significant impediment to effective competition under the EC Merger Regulation?*", [2009] E.C.L.R. at p.491.
26. Decision of 6 August 2008 declaring a concentration to be compatible with the common market according to Regulation 139/2004 (COMP/M.5181-*Delta Airlines/Northwest Airlines*).
27. Negenman Monique, Directorate General Competition, unit D-2, Number 1, Spring 2003, Competition Policy Newsletter.
28. *Ibid.*
29. OJ 1992, L 96.
30. See in particular C-66/86 Ahmed Saeed Flugreisen [1989] ECR 803 and the Court of First Instance in C-2/93 Air France/Commission (TAT) (1994), ECR 323.
31. C-66/86 Ahmed Saeed Flugreisen [1989] ECR 803.

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3. Drauz Gotz & Jones Christopher W. (edited by them), "*EU Competition Law: Volume II Mergers and Acquisitions*", Claeys & Casteels, 2006.
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