

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (SEBI Act) read with regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 - in the matter of acquisition of shares of Jet Airways (India) Limited.

In respect of Tailwinds Limited, Mr. Naresh Goyal, Ms. Anita Naresh Goyal and Etihad Airways PJSC.

For Tail Winds Limited(Noticee 1), Mr. Naresh Goyal (Noticee 2), and Ms. Anita Naresh Goyal (Noticee 3):

1. Shri Janak Dwarkadas- Senior Advocate
2. Shri Ankit Lohia- Advocate
3. Shri Rustom Gagrath- Solicitor
4. Ms. Sheetal Sabnis- Advocate
5. Ms. Ipshita Sen- Advocate
6. Shri Gautam Acharya- Senior General Manager, Jet Airways (India) Limited
7. Shri Ashok Barimar- Senior Vice President, Jet Airways (India) Limited

For Etihad Airways PJSC (Noticee 4):

1. Shri Ravi Kadam- Senior Advocate
2. Shri Vijayendra Pratap Singh- Advocate
3. Ms Nisha Kaur Uberoi- Advocate
4. Shri Ankoosh Mehta- Advocate
5. Shri Abhijan Jha- Associate
6. Shri James J. Callaghan- General Counsel, Etihad Airways PJSC
7. Shri Vijay Poonoosamy- Vice President, International and Public Affairs- Etihad Airways PJSC

For SEBI:

1. Shri V. S. Sundaresan, Chief General Manager
2. Ms. V. Divya Veda, Deputy General Manager
3. Shri Susanta Kumar Das, Assistant General Manager

1. Jet Airways (India) Limited (hereinafter referred to as "Jet") is a company incorporated in India having its registered office at Siroya Centre, Sahar Airport Road, Andheri (East),

Mumbai, Pin- 400099 and its shares are listed on Bombay Stock Exchange (BSE) and the National Stock Exchange of India Limited (NSE). Tail Winds Limited ('Noticee 1' or 'TWL'), Shri Naresh Goyal ('Noticee 2') and Ms. Anita Naresh Goyal ('Noticee 3') were promoters of Jet at the relevant time.

2. On April 24, 2013, Etihad Airways PJSC (hereinafter referred to as 'Etihad' or 'Noticee 4') entered into an Investment Agreement with Jet and its existing promoters to subscribe to 24% equity shares in Jet for USD 379 million (price per share of INR 754.74). The following documents were executed/drawn (collectively termed as "the Transaction Documents") :-

- a. Investment Agreement (IA) between Jet, Etihad and existing promoters;
- b. Shareholders' Agreement (SHA) between Jet, Etihad and existing promoters;
- c. Commercial Cooperation Agreement (CCA) between Jet and Etihad;
- d. Corporate Governance Code (Code)

3. The Central Government, Ministry of Finance (MoF), vide email dated September 23, 2013 sought comments of SEBI on the above Transaction Documents. SEBI, vide letter dated September 25, 2013, *inter-alia*, informed the MoF as following :

" 2 a. The documents forwarded by you with the aforesaid e-mail have been perused in the light of the provisions of SEBI (SAST) Regulations, 2011 and applicable provisions of Companies Act, 1956. It is observed from (a) Proposed Articles of Association of Jet Airways (India) Limited (hereinafter 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 by Etihad do not, prima 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 of Jet in terms of regulation 2(1)(q) of Takeover Regulations, 2011.

b. As regards Commercial Co-operation Agreement (CCA), as stated by SEBI earlier, SEBI would be guided by the decision taken 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 expressed at para-(a) above.

c. " "

4. On October 10, 2013, the Foreign Investment Promotion Board (FIPB) accorded its approval with regard to the aforesaid investment of Etihad in Jet and pursuant to the said approval, on November 20, 2013, Jet issued and allotted 2,72,63,372 equity shares (24% of its paid up equity capital) of the face value of ₹ 10/- each on a preferential basis to Etihad at a price of ₹754.74 per equity share. Consequently, the Promoter and Promoter Group of

Jet and Etihad, respectively held 51% and 24% shareholding in Jet as on November 20, 2013.

5. With regard to the above transaction/deal between Jet and Etihad, the Competition Commission of India (hereinafter referred to as the "Competition Commission") passed an order on November 12, 2013 and *inter-alia* held that the combination proposed in the transaction/deal was not likely to have '*appreciable adverse effect*' on competition in India and approved the said transaction/deal. While examining the deal in light of the Transaction Documents to determine acquisition of 'combination' under the Competition Act, 2002, the Competition Commission also observed that :-

" 14. In the instant case, both the Parties are engaged in the business of providing international air transportation services. The background of the LA pursuant to which 24 percent 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 twenty-four (24) percent 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.

15. 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.

16. It is observed that the Parties have entered into a composite combination comprising inter alia the LA, 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."

6. In view of position expressed in para 2-b of its letter dated September 25, 2013 to MoF and the above observations of the Competition Commission that agreements entered between Jet and Etihad establish joint control of Etihad over Jet, more particularly over the assets and operations of Jet, SEBI issued a show cause notice ("SCN") dated February 11, 2014 to the Noticees alleging possible acquisition of joint control over Jet by Etihad and other Noticees acting in concert in terms of regulation 2(1)(e) of the SEBI (Substantial

Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as ' the Takeover Regulations, 2011') and their probable obligation to make a public announcement in accordance with regulation 4 read with regulation 13(1) of the Takeover Regulations, 2011.

7. The Noticees filed their respective replies vide their letters dated March 5, 2014. They were also granted an opportunity of personal hearing on April 9, 2014, when the authorised representatives of the Noticees appeared and made submissions on their behalf. Thereafter, the Noticees also filed their written submissions dated April 09, 2014, April 11, 2014, April 14, 2014, May 04, 2014 and May 05, 2014 in the matter. The replies/submissions of the Noticees are, *inter alia*, as following:

8. **Submissions of Noticee 1, Noticee 2 and Noticee 3**

a. Noticee 1 was an erstwhile shareholder and promoter of Jet but has disposed off its entire equity interest in Jet. This divestment has been as one of the first steps to facilitate the acquisition of shares by Etihad, in a transaction that has been disclosed to SEBI. Since, the Noticee 1 is not a party or signatory to the CCA, the question of acquiring control as alleged does not arise at all. Therefore, SCN against the Noticee 1 should be dropped on this ground alone.

b. The SCN is based on the *obiter* observations made by the Competition Commission in the order dated November 12, 2013. Since, the observations made by the Competition Commission are made in the context of the provisions of Competition Act, 2002, they must be confined to the provisions of Competition Act. Any reference to or reliance upon the observations in the order of the Competition Commission are wholly irrelevant, immaterial and not germane to the provisions of Takeover Regulations, 2011.

c. The Competition law casts net wide since all kinds of combinations constitute issues that may impact competition. The Takeover Regulations, 2011, on the other hand, aims at providing an exit to the shareholders when there is a change in effective control over a target company. Neither the language nor the object of the two legislations is similar. The views of the Competition Commission cannot be the basis of assuming that there has been a transgression of the Takeover Regulations, 2011.

d. The order of the Competition Commission is silent why they chose therein to use the term "joint control" instead of the expression "combination" that was relevant for examination by the Competition Commission. It is further relevant that the expression "joint control" has not been defined either in the Companies Act, 2013 or in the Takeover Regulations.

- e. It is settled law that a determination of the Competition Commission that a transaction was not exempt under item 1 of Schedule 1 of the Competition Commission of India (Procedure in regard to the Transaction of Business Relating to Combinations) Regulations, 2011 does not result in an acquisition of control under the Takeover Regulations, 2011.
- f. The position that acquisition of shares of Jet by Etihad in this case does not amount to change in "control" within the meaning of Takeover Regulations, 2011 has been expressly conceded by SEBI itself vide its communication dated September 25, 2013 to MoF.
- g. The FIPB appear to have accorded its approval on October 10, 2013, only after the express opinion of SEBI was obtained confirming that "there was no change in control" or "persons acting in concert" issue and that the provisions of the Takeover Regulations, 2011 were not attracted.
- h. The expression "control" as defined in FDI Policy, Aeronautical Information Circular is similar to the definition of "Control" in the Takeover Regulations, 2011.
- i. The Transaction documents dated September 19, 2013 do not accord Etihad (i) any affirmative, veto or blocking rights; (ii) More than 2 out of 12 directors on the board of Jet; (iii) Any quorum rights at the board of general meeting; (iv) any casting vote rights; (v) any pre-emptive or tag along rights.
- j. The Promoters of Jet have (i) 51% shareholding in Jet; (ii) the right to appoint 4 out of 12 directors; (iii) the right to nominate the Chairman and the Chairman so nominated will have a casting vote on any matter.
- k. In view of the above, all allegations against Noticee 2 and Noticee 3 are unsubstantiated and should be withdrawn.

9. **Submissions of Noticee 4**

- a. Both Noticee 4 and Jet were relatively small players in the global aviation market and therefore, there was a need to cooperate in certain commercial areas in order to enhance their network and reduce their respective cost bases. The investment of 24% in Jet through preferential allotment by Noticee 4, provides it access to the domestic Indian market, while providing Jet access to Etihad's more extensive international network. Jet, in financial difficulty, also needed a capital injunction, which was the basis for IA and SHA.

- b. CCA was entered into by Jet and Etihad (Noticee 4). CCA types of agreements are entered into by airlines to expand their respective networks to compete more effectively with other airlines, which may or may not be part of one of the three global alliances (Oneworld, Star Alliance, or Sky Team). Such an agreement merely facilitates rationalization of costs, efficiencies of scale and the ability to service different parts of the world by leveraging the presence of the partner airlines in that market.
- c. CCA is subject to the approval of the respective boards of Etihad and Jet, where the Etihad can only nominate 2 directors out of the total strength of 12, and consequently, does not have a majority. CCA sets out the areas where the parties may cooperate subject to Governance Procedure and applicable law. By virtue of clause 22.1 of CCA, such applicable law is an Indian law and therefore includes Press Note 6 of 2012, which requires control of Jet must remain with Indian nationals.
- d. It is inconceivable for Noticee 4 to have the intention to control Jet as this would result in endangering the operating license of Jet. It would also jeopardize the rights of Jet to continue to fly to third countries as bilateral agreements with such countries generally require control to vest with nationals of a particular country.
- e. The intention of Noticee 4 is to ensure that the CCA is compliant with extant laws is reflected in clauses of CCA, more specifically in clauses 2.1 and 2.2 which provide that any joint initiatives are '*subject always to governance procedures and to Applicable Law*'. Clause 5.1 of the CCA, which deals with termination, inter-alia, states that either party may terminate the CCA when a competent authority suspends, withdraws, revokes or threatens to suspend, withdraw or revoke the other Party's air operator's certificate and/or operating license or any other equivalent licenses. Clause 6 of the CCA, inter-alia, states that each party will comply with Applicable laws to maintain its existence as an air carrier permitted to operate air services for the public transportation of passengers and cargo.
- f. Press Note 6 requires that for a lawful investment into an Indian airline, effective control must remain with Indian nationals. The definition of control as per Consolidated FDI Policy (as amended by Press Note 4 of 2013 dated August 22, 2013) is in *pari materia* with definition of control under regulation 2(1)(e) of Takeover Regulations. Since, FIPB has already opined that the investment by the Noticee 4 in Jet, is in accordance with Press Note 6, the Noticee 4 cannot, by law, be said to have acquired control over Jet under the Takeover Regulations. Further, since, the issue of whether the Noticee 4 has already acquired control over Jet has been settled by the FIPB, the same need not be reopened by SEBI.

- g. The concept of “control” for the purposes of competition law is specific to its own statute and applies to an entirely different context as opposed to the definition of control for the purposes of Takeover Regulations. The focus of the Competition Act is to determine whether there is control over an enterprise so as to constitute a ‘combination’. The focus of Competition Commission is actually to determine whether such combination has an appreciable adverse effect on competition in terms of section 20(4) of the Competition Act. The same is also evident from the fact that para 14 to 16 of the Competition Commission order dated November 12, 2013, are actually contained in the Section titled ‘Jurisdiction’.
- h. The term ‘control’ under the Competition Act has a much lower threshold than the term ‘control’ as used in the Takeover Regulations. In this regard, Noticee has cited various orders of the Competition Commission.
- i. Any opinion by the Competition Commission on the aspect of control cannot give rise to a notice by SEBI by invoking its powers under section 11 of the SEBI Act read with regulation 32 of the Takeover Regulations. This would tantamount to SEBI’s decision making powers transferred to another regulator under another statute, which is legally impermissible. In this regard, the Noticee 4 cited various cases.
- j. In the SCN, it has been alleged that a PAC relationship arises out of the CCA. In *Daiichi Sankyo v. Jayaram Chigurupati*, the Supreme Court has held that a target company cannot be a PAC with the alleged acquirer. As the CCA is entered into between Noticee 4 and Jet, the alleged target company, the allegation that a PAC relationship arises out of the said CCA is legally unsustainable.
- k. The Noticee 4 cannot be said to be acting in concert with the Promoters of Jet, as none of the requirements as set out in regulation 2(1)(q)(1) of Takeover Regulations have been met. Further, the Noticee 4 does not come within the ambit of any of the persons mentioned in regulation 2(1)(q)(2) which deals with specific instances in which persons would be deemed to be acting in concert with the Promoter group.
- l. The Noticee 4 cannot be said to have acquired control over Jet as none of the requirements of regulation 2(1)(e) have been fulfilled in the instant case as (i) mere existence of a shareholder’s agreement is not evidence of acquisition of control; (ii) the Noticee can appoint only two out of 12 members on the Board of Jet and one member on certain committees of the Board; (iii) the Noticee does not have any veto rights at the Board or Shareholders level; (iv) decision taken at co-operation committees and facilitation groups are under CCA are recommendatory in nature.

- m. The reference to 'joint control' in para 16 in the order dated November 12, 2013 of Competition Commission does not have any implication in terms of Competition Commission's clearance, i.e. there was no finding of an appreciable effect on competition. The purpose of Competition Commission and the consequence of acquisition of combination under the Competition Act are different from the objective of SEBI and consequences under Takeover Regulations. While the Competition Act deals with acquisition of control for the purpose of combination of enterprises, the Takeover Regulations deal with substantial acquisition of shares/ voting rights/ control in a target company.
- n. There is no specific provision in the SEBI Act or the Takeover Regulations, 2011 requiring SEBI to be guided by any other regulator, nor is it appropriate for SEBI to be so guided.
- o. The FIPB circulated the transaction documents to relevant authorities, including SEBI and Cabinet Committee on Economic Affairs (CCEA) before granting approval. Competition Commission was not part of the process, as the analysis of Competition Commission is not relevant for determining control in the context of FDI Policy or Takeover Regulations, 2011.
- p. It was never the intention of Etihad to acquire control in any manner over Jet Airways. The FIPB had approved the deal/transaction on being satisfied that the effective control over Jet remained with Indian nationals even consequent to the Transaction Documents. Further, the Transaction Documents do not confer any control on Etihad over Jet under the Takeover Regulations, 2011. If it is held that there was acquisition of control by Etihad, the permission granted by FIPB would be lost and the parties would lose bilateral rights as independent airlines.
- q. Without prejudice to the above, it is submitted that though the various clauses of CCA, which form basis of the observations in para 14, 15 and 16 of order dated November 12, 2013 of the Competition Commission do not confer control on Etihad as defined under Takeover Regulations, 2011 and CCA does not trigger the obligation to make open offer under the Takeover Regulations, 2011, the Noticee 4 has decided to delete/modify various clauses of CCA including those which were basis of the observations of Competition Commission. These voluntary changes have been made to ensure that there is absolute certainty that effective control of Jet Airways is and continues to vest in Indian nationals and the board of Jet Airways. These further changes/amendments reflect the commercial understanding between the parties, who will independently engage with one another in a spirit of transparency and reciprocity. These changes include with respect to the following:

- i. The areas of cooperation listed in the agreement are subject to the approval of the Board of Jet and/or Etihad (clause 2.1).
 - ii. Words 'without any restriction on Jet to enter into any similar global frequent flyer programs' has been inserted with respect to Jet joining Etihad's global FFP (clause 2.1.3).
 - iii. Etihad's right to recommend suitable candidates for senior management positions within Jet has been deleted (clause 2.1.6).
 - iv. Revenue Management function has been clarified to be 'optimisation of air fares' (clause 2.1.7).
 - v. Cooperation arrangements with respect to networks, addition of flights, etc is subject to approval of Board of Jet and/or Etihad (clause 2.2).
 - vi. Abu Dhabi is no longer an exclusive hub for Jet flights flying towards Africa, North America, South America and UAE (clause 2.2.5).
 - vii. Cooperative/collaborative arrangements are now subject to the approval of the Board of Jet and/or Etihad as the case may be (clause 2.3, 2.4, 2.5).
 - viii. The right of Etihad to take lead in negotiations on aircraft and engine purchases has been replaced by reciprocal arrangements that are subject to the approval of the Board of Jet and/or Etihad (clause 2.6).
 - ix. The cooperative arrangements can also be extended to other third party carriers with whom Jet/Etihad has similar arrangements or an equity investment subject to the approval of their Boards [clause 2.9(ii)].
 - x. Schedule 1 detailing the Governance Procedure and Deadlock Procedure has been deleted.
- r. None of the material provisions of the CCA including the Governance Procedure were implemented.
- s. Etihad undertakes to notify the FIPB and Competition Commission of the amended and restated CCA.
- t. Although, Jet is not party in the instant proceedings, it has vide its letter dated May 03, 2014 has confirmed that the above changes have been approved by its board.

10. I have considered the SCN, the oral and written replies/submissions of the Noticees and the material available on record. I note that on the basis of three Transaction Documents viz: (a) Shareholder Agreement dated September 19, 2013, (b) Investment Agreement dated September 19, 2013 and (c) Corporate Governance Code, executed/drawn between Jet Etihad and existing promoters of Jet, SEBI has already held in its letter dated September 25, 2013 written to MoF that the rights acquired by Etihad do not, *prima facie*, 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 existing promoter group of Jet in terms of regulation 2(1)(q) of Takeover Regulations, 2011. However, the question, whether the rights conferred on Etihad under the CCA would result in change in control or acquisition of joint control with existing promoters of Jet under regulation 2(1)(e) read with regulation 4 of the Takeover Regulations, 2011 was left open for determination on the basis of decision taken by the Government or other regulatory agencies regarding change in management/control.

11. I note that in the above regard, two regulatory agencies i.e. FIPB and the Competition Commission have examined the rights of Etihad under the Transaction Documents including the CCA to determine whether Etihad has acquired control or joint control in Jet with its existing promoters under the applicable laws / requirements administered by them. It is relevant to mention here that after the issuance of the SCN, SEBI, vide its letter dated February 11, 2014 sought views of the MoF referring to the above mentioned observations of the order of the Competition Commission. The MoF vide its letter dated March 14, 2014 advised that the crucial issue before FIPB with regard to the acquisition of shares by Etihad in Jet was relating to clause 6.2.9.3.1(c)(iv)(c) of the Consolidated Foreign Direct Investment (FDI) policy circular that requires that in Civil Aviation Sector, a Scheduled Operator's Permit can be granted only to a company, "if substantial ownership and effective control of which is vested in Indian Nationals". The MoF has also confirmed that, taking cognizance of this aspect, the FIPB has approved the proposal. Further, the CCEA approved the proposal subject to *inter alia* compliance with Takeover Regulations. SEBI, vide letter dated April 3, 2014 also sought comments of the MoF on the replies submitted by Noticees to the SCN dated February 11, 2014. MoF, vide their letter dated April 17, 2014 pointed out that the Competition Commission which is concerned with any adverse effect on competition vide order dated November 12, 2013 has concluded that "*.....the proposed combination is not likely to have appreciable adverse effect on competition in India and therefore, the commission hereby approves the same*". The MoF also advised that the mandate of FIPB/CCEA is to ensure compliance with FDI policy which *inter-alia* states that "*a scheduled Operator Permit can be granted only to a company the substantial ownership & the effective control of which is vested in Indian nationals.*" It has been confirmed by MoF that FIPB and CCEA have found the Jet -Etihad deal in compliance with the FDI policy and approved the proposal.

12. Thus, I note that one regulatory agency i.e. FIPB, MoF has concluded that 'effective control' in Jet remains with Indian nationals i.e. existing promoters of Jet consequent to the deal between them as contemplated in the above referred Transaction Documents. In this regard, it is noted that in the consolidated FDI Policy dated April 5, 2013 as amended by press Note No.4 (2013 series) dated August 22, 2013 and Aeronautical Circular

No.12/2013 dated October 1, 2013 which deals with "Guidelines" for FDI in the Civil Aviation Sector , the word " control" has been defined as under :-

“Control shall include the right to appoint a majority of directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements”

13. For the purposes of the Takeover Regulations, 2011 the word "control" has been defined in regulation 2(1) (e) as following:-

“Control includes the right to appoint majority of directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

..... ”.

14. It is, therefore, noted that the FIPB has approved the Jet-Etihad deal in terms of the current policy on FDI which has definition of "control" that is *pari materia* the definition of "control" in regulation 2(1)(e) of the Takeover Regulations, 2011.

15. In the instant case, the charge in the SCN has been made in light of the observations made in para 14,15 and 16 in the above mentioned order of the Competition Commission. In this connection, I note that after the issuance of SCN, SEBI, vide its letter dated March 13, 2014, had sought views of the Competition Commission on the basis and parameters generally considered by it to arrive at whether there is any change in 'control'. The Competition Commission vide its letter dated March 24, 2014 advised that it is guided by the provisions relating to regulation of combinations in the Competition Act, 2002 and the facts and circumstances of each case. Vide letter dated April 03, 2014, SEBI forwarded the submissions of the Noticees particularly that the control under the Competition Act is entirely different from that under the 'Takeover Regulations and that the Competition Commission has extremely low threshold for determining 'control' as opposed to SEBI and sought views of the Competition Commission in this regard. The Competition Commission, vide letter dated April 9, 2014, has *inter-alia*, advised that - "*.....for determination of 'control' in a proposed combination, the Commission is guided only by the provisions relating to regulation of combinations in the Competition Act, 2002 (Act) and the facts and circumstances of each case. Every regulatory authority decides the cases as per their appreciation of the facts and documents made available and in accordance with the provisions of its statute and regulations.*" I have examined the precedents cited by the Noticees and observe therefrom that even if two persons are found to be in joint control over the enterprise/s, the Competition Commission can approve the transaction provided the acquisition of joint control has not resulted in '*appreciable adverse effect on competition*'. It is further observed that a conclusion of the Competition Commission that two parties are in joint control over an enterprise does not automatically lead to establishing

joint control for the purposes of the Takeover Regulations, 2011. I, therefore, find that the above observations in para 14, 15, and 16 of the order of the Competition Commission that are the basis of the SCN, *ipso facto*, cannot lead to conclusion that the Noticee 4 has acquired joint control over Jet along with its existing promoters.

16. I am of the view that one regulatory agency may be guided by the findings of other regulatory agency on a particular issue only if the two laws are *pari materia* in their substance and are being applied on the same set of facts and circumstances. I, therefore, deem it necessary to refer to the definition of 'control' under the Competition Act, 2002 that is provided by way of an Explanation to section 5 of the said Act as under-

' Explanation.— For the purposes of this section,—
(a) "control" includes controlling the affairs or management by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group;
(ii) one or more groups, either jointly or singly, over another group or enterprise;'

17. It is seen that the above definition of 'control' in the Competition Act, 2002 is a purposive definition and applies for the specific purpose of combination of enterprises by way of *inter alia*, acquisition of one or more enterprises or 'control' over an enterprise by one or more persons. From the language of Explanation to section 5 of the Competition Act, 2002, and regulation 2(1)(e) of the Takeover Regulations, 2011 it is noted that both contain inclusive definition. It is, however, noted that while the definition under 2(1)(e) is specific with regard to control by way of (a) right "to appoint majority of the directors" or (b) controlling 'the management or policy decisions', the definition under section 5 is only specific with regard to 'controlling the affairs and management'. It is further noted that while under the Takeover Regulations controlling the 'management or policy decisions' is relevant factor, under the Explanation to section 5 of the Competition Act controlling 'the affairs and management' is relevant factor. In my view, the expression 'affairs and management' is of much wider connotation than the expression "management or policy decisions". There could be a situation wherein by controlling "the affairs and management" in a company, a person may be in a position to control "management or policy decisions" but it may not always be the case.

18. In view of the above, I am of the view that in order to determine whether any agreement to acquire shares or voting rights or any other right in a company has resulted in change in control or joint control for the purposes of the Takeover Regulations, 2011, its provisions need to be independently examined in light of the facts and circumstances of each case. In the instant case, the charge is that Etihad, acting in concert with other Noticees, *prima facie*, agreed to acquire joint control over Jet under the Takeover Regulations, 2011. I note that the concerted action of Etihad and other Noticees has been alleged with regard to acquisition of joint control over Jet on account of Etihad's right to nominate two directors on the board of Jet and certain rights conferred on it as per the Transaction Documents,

referred to in para 14, 15 and 16 of the order of the Competition Commission. Therefore, in the instant matter, it has to be examined-

- a) whether in the facts and circumstances of this case, Etihad and the existing promoters of Jet were persons acting in concert (PACs) for the purpose of alleged 'joint control' over Jet; and
- b) whether the rights of Etihad under the Transaction Documents confer 'joint control' over Jet to Etihad under the Takeover Regulations, 2011.

19. As regards the first issue, I note that the expression "persons acting in concert" has been defined in regulation 2(1)(q) of the Takeover Regulations, 2011. For the purposes of present case, the first part of the definition in regulation 2(1)(q)(1) is relevant as the case does not involve any relationship amongst the parties so as to bring the deeming provision of regulation 2(1)(q)(2) in operation. Regulation 2(1)(q)(1) reads as following:-

“(q) “persons acting in concert” means,—

(1) persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.;”

20. The above definition is *pari materia* the definition of expression "person acting in concert" under regulation 2(1)(e) of the Takeover Regulations, 1997. In this regard, it is relevant to mention the observations of Justice Bhagwati Committee made in its report dated January 18, 1997, wherein it is stated that - "*To be acting in concert with an acquirer, persons must fulfil certain "bright line" tests. They must have commonality of objectives and a community of interests which could be acquisition of shares or voting rights beyond the threshold limit, or gaining control over the company and their act of acquiring the shares or voting rights in a company must serve this common objective. Implicit in the concerted action of these persons must be an element of cooperation. And as has been observed, this cooperation could be extended in several ways, directly or indirectly, or through an agreement - formal or informal.*"

21. It is relevant to mention here that the Takeover Regulations, 2011 have retained and continued the inherent and basic objectives that were highlighted by Justice Bhagwati Committee. It is settled position that the concept of PAC under Takeover Regulation is 'acquisition' specific and has to be determined on factual situations taking into account the commonality of objectives of the parties, community of interest, etc. It is the conduct of the party rather than his status that decides the identity. It is also settled position that the applicability of Takeover Regulations needs to be objectively considered and not only on mere technicalities. Further, for the purposes of the Takeover Regulations, 2011 unless there is common shared objective for acquiring shares/voting rights/control over the target company between two person, they cannot be termed as PACs.

22. In this case, the acquisition of shares or voting rights by Etihad in Jet through any concerted action with other noticees is not an issue. It is further noted that, on examination of the Transaction Documents except CCA, SEBI has, in its letter dated September 25, 2013, found that Etihad is not PAC with the existing promoters for acquisition of control over Jet. Thus, the present proceedings are limited to the examination of the common objective of Etihad and other Noticees to acquire joint control under the Takeover Regulations in light of the rights of Etihad under the clauses of the Transaction Documents referred to in para. 14, 15 and 16 of the order of Competition Commission.
23. With regard to the right of Etihad under the SHA to nominate two directors on the board of Jet and its nominee acting as Vice-Chairman and chairing Board meeting in the absence of the Chairman, I find that the material available on record does not suggest that Etihad and other Noticees are PACs, as already stated in SEBI's letter dated September 25, 2013. With regard to the CCA, it is noted that it is an agreement entered into between Jet and Etihad. The existing promoters of Jet are not parties to the CCA. As held by the Hon'ble Supreme Court in *Daiichi Sankeyo v. Jayaram Chigurupati*, for PAC to be established, the target company has to be on one side and the PACs on the other side acquiring shares/voting rights/control over such target company. The target company by itself cannot be a PAC. It is noted Etihad and Jet have executed the CCA with a view to achieve the objective of enhancing their airline business through joint initiatives. The CCA aims to exploit the synergies between Jet and Etihad and deals with the operational modalities agreed upon between them at the grass root level. The said objectives differ from that of PACs as required under regulation 2(1)(q)(1) of the Takeover Regulations, 2011 wherein, PACs are required to have a *common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company*. I, therefore, find that Etihad and other Noticees cannot be said to be PACs under the Takeover Regulations, 2011.
24. With regard to the second issue, I note that for the purpose of acquisition of "control" as defined under regulation 2(1)(e) of the Takeover Regulations, 2011 the first test is that the acquirer should have right to appoint majority of the directors. I further note that the total number of directors (in this case 12) in the board of the company is taken into account for the purpose of Takeover Regulations, 2011 as against the approach of Competition Commission of considering the total number of shareholder directors (in this case 6) for the purposes of joint control under the Competition Act, 2002. Therefore, in the instant proceedings, the issue has to be examined in the light of the right of Etihad to appoint 2 directors out of 12 and not its right to appoint 2 directors out of 6 shareholder directors. Considering the board strength of 12 directors in Jet, Etihad's power to appoint 2 directors on the board of Jet does not result in conferring control of Jet to Etihad under the Takeover Regulations, 2011. Further, in this case, the Chairman of the board of Jet, who has a casting vote at all meetings, shall be a nominee of promoters of Jet. It is only in the

absence of the Chairman, subject to the approval of the board of Jet, the Vice-Chairman, who is a nominee of Etihad, shall chair the meetings of the board and will not have any casting vote as confirmed by the Noticees. In the light of these facts, I am of the view that Etihad's nominee chairing the meetings of board in absence of the Chairman would also not confer any control over Jet to Etihad as defined in regulation 2(1)(e) read with regulation 4 of Takeover Regulations, 2011.

25. With regard to the second test for determining 'control' under regulation 2(1)(e) i.e. right to control management or policy decisions in this case, it is noted that Schedule 1- Part A of CCA provides for the Governance Procedures. As per the Governance Procedures, a Cooperation Committee and four Facilitation Groups are to be formed to implement the commercial cooperation contemplated by this CCA. Any material recommendation of these committees will be subject to board approval by both parties [Schedule 1-Part A-A(d)]. The Facilitation Group would be given the powers by the parties without detracting from the fullness of management powers of the board of directors of each party [Schedule 1-Part A-c(1)]. Since material recommendation of the Facilitation Groups and Cooperation Committees will be subject to the approval of board of both parties, the power of the Jet board to control the policy decisions has not been affected by the CCA and the supremacy of the board of Jet to determine the provisions of CCA and changes to that has been retained and not diluted. I have also perused the other clauses of CCA and find that Jet can free itself from the CCA and exercise its powers over the commercial spheres covered therein under its board structure and even if the CCA is terminated, the present governance structure of Jet through its board will not be affected. I, therefore, am of the view that the clauses of CCA do not confer control over Jet to Etihad along with the existing promoters of Jet under the Takeover Regulations, 2011.
26. I note that the rights of Etihad to nominate two directors on the board of Jet and its nominee to act as Vice-Chairman and its rights under CCA as observed in the Competition Commission's order have been examined in the previous paragraphs of this order for the purposes of the Takeover Regulations, 2011. I, further, note that various clauses of the Transaction Documents include the following:
- a) Etihad can only have two directors out of a total of 12 on the board of Jet as long as Etihad holds at least a 15% equity interest in Jet, whereas 4 directors shall be nominated by the promoters of Jet (Clause 3.2.1 of SHA);
 - b) The promoters of Jet shall have the right to nominate one of the promoter board member as the Chairman of the board of Jet (Clause 3.2.2 of SHA);
 - c) The Chairman shall have a casting vote at all meeting (Clause 4.3 of the Code);

- d) Etihad shall have the right to nominate Vice chairman of the Board (without having casting vote as confirmed by the Noticees), who will chair the board meeting only in the absence of Chairman (Clause 3.2.2 of SHA);
- e) Candidates for appointment to the post of Independent Director and CEO shall be recommended by the Nomination Committee (Clause 3.3 of SHA). But the board shall resolve, in its absolute discretion whether to approve such appointment. (Clause 5.1 of the Code);
- f) Etihad does not have any quorum rights for the meeting of the Board. (Clause 3.4 and 3.5 of the SHA);
- g) The maximum number of members of Audit Committee shall be 6 directors. The Chairman (Nominee of Jet) and Vice Chairman (Nominee of Etihad) of the Board shall be permanent members of the Audit Committee (Clause 7.2 of the Code). The Chairman of the Nomination Committee shall be an Independent Director and shall have a casting vote. The other members shall be Independent Directors appointed by the Board. The Chairman of the Audit Committee shall be an Independent Director who shall have a casting vote (Clause 6.2.2 of the Code);
- h) All decisions in relation to the recommendation of the Nomination Committee shall be said to have been effective if three-fourth members of the Nomination Committee vote in favour of such decision (Clause 6.4.2 of the Code);
- i) In addition to the above, it is also observed that Etihad does not have:-
 - (i) Any affirmative, veto or blocking rights at board or general meetings
 - (ii) Any quorum rights at board or general meetings.
 - (iii) Any casting vote rights.
 - (iv) Any pre-emptive, tag along rights regarding the transfer of shares.

27. The above clauses and the fact that existing promoters hold 51% shares and voting rights in Jet strengthen the stand of SEBI as communicated to MoF vide letter dated September 25, 2013 that Etihad cannot be termed as a person acting in concert along with the existing promoters of Jet under regulation 2(1)(q) of the Takeover Regulations, 2011 and it has not acquired control over Jet under regulation 2(1)(e) read with regulation 4 of the Takeover Regulations, 2011.

28. In view of the above, I find that Etihad and other noticees are not having joint control over Jet in terms of regulation 2(1)(e) read with regulation 4 of the Takeover Regulations, 2011.

29. I have noted that Noticee 4 has voluntarily decided to delete/modify various clauses of CCA including those which were the basis of the above referred observations of the Competition Commission in its order dated November 12, 2013 [as summarised in para 9(q) of this order] and has informed SEBI as follows:-

- a) Etihad and Jet have reviewed the order of the Competition Commission dated 12 November, 2013, and have undertaken a pro-active re-examination of the CCA and to voluntarily carry out changes/amendments to the CCA .
- b) All of these voluntary changes (including deletion of a Schedule I to the CCA i.e. with regard to the Governance Procedures) have been made to ensure that there is absolute certainty that "effective control" of Jet is and continues to vest in Indian nationals and the board of Jet. These further changes/amendments reflect the commercial understanding between the parties, who will independently engage with one another in a spirit of transparency and reciprocity.
- c) None of the material provisions of the CCA, including the Governance Procedures, were implemented, nor any of the Committees (as contemplated therein) constituted.
- d) It never was Etihad's intention to acquire control in any manner over Jet. In fact, the Shareholders Agreement and the other Transaction Documents were amended accordingly and the concerned Regulatory Authorities were satisfied that "effective control" was vested in Indian nationals before approving the FDI in Jet by Etihad.
- e) Jet vide its letter dated 3rd May, 2014 to Etihad has confirmed its agreement with the changes made to the CCA and its board has approved the revised CCA.
- f) Etihad undertakes to notify FIPB and the Competition Commission of the amended and restated CCA.

30. In view of the above, I do not find the need for issuing any direction in the matter.

DATE: May 8th, 2014

PLACE: MUMBAI

**RAJEEV KUMAR AGARWAL
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**