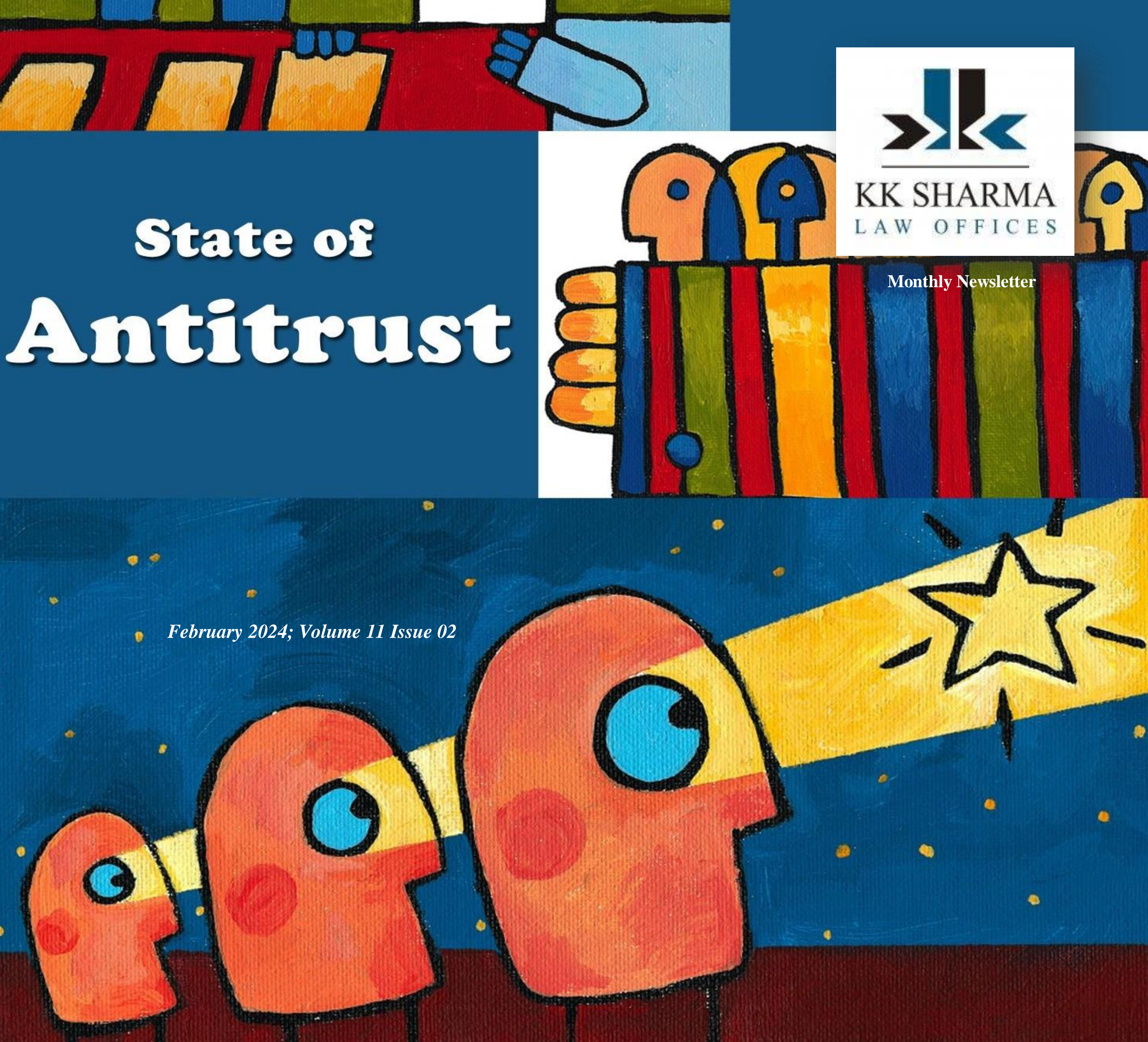

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U.S. Federal Court blocks JetBlue-Spirit deal

A Federal Judge in the United States' District Court for the District of Massachusetts vide its decision dated 16.01.2024 has blocked the $3.8 billion acquisition **('proposed acquisition')** of Spirit Airlines, Inc. **('Spirit')** by Jet Blue Airways Corporation **('JetBlue')** citing absence of sufficient entry, post-acquisition, by potential competitors to replace Spirit's current presence in the industry. According to the Court, the proposed acquisition, if allowed, would remove Spirit from the market that can have a significant impact on large consumer category – "*average Spirit consumer*" which relies mainly on Spirit for its cheaper and unbundled air tickets, thus, contravening with Section 7 of Clayton Antitrust Act, 1914 **('Clayton Act')**.

Merging Parties: The acquirer – JetBlue, is the 6th largest airline by revenue in the U.S., primarily serving to locations in the East Coast of the U.S., areas of Caribbean & Latin America, Canada and Europe. JetBlue proclaims itself as "maverick" in the airline industry, as when JetBlue enters a market fares decrease and when it exits – fares increase; a pro-consumer phenomenon known as "*JetBlue Effect*". The JetBlue effect forces other airlines to lower their fares, meaning thereby that even the consumers who do not choose JetBlue also benefit from the JetBlue effect. JetBlue offers a diverse range of five classes of service – with an unbundled basic economy set (Blue Basic) up to a premium offering (JetBlue Mint).
Whereas, the target – Spirit, is an Ultra-Low Cost Carrier **('ULCC')** airline, ranked 7th largest by revenue in the U.S. Spirit's routes are primarily focused in the Eastern half of the U.S. & has its core operations in leisure travel destinations like Fort Lauderdale & Orlando, Florida & Las Vegas, Nevada, with aims to become a national carrier. Similar to JetBlue, when Spirit enters a market, it not only decreases prices of other Airlines on that market but additionally, it also stimulates or increase passenger demand on that market, also known as "*Spirit Effect*". In Spirit's unbundled fare model, base price of airline ticket is kept separate from the price of other additional items, which makes it a viable option for leisure travellers, who can pick and choose other ancillary services according to their choice and preferences. Spirit's aircraft configuration is denser as compared to JetBlue & other Airlines. However, Spirit has not been profitable since 2019, due to post-pandemic increase in demand from leisure travellers & resulting competition from other airlines & financial problems linked to issues with engines used in Spirit's aircrafts.
In July 2022, JetBlue & Spirit entered into a $3.8 billion merger agreement to transfer all the Spirit's assets to JetBlue and leading to removal of Spirit from the market. Pursuant to which the U.S. Department of Justice joined by 7 states filed a lawsuit seeking to block the merger.

U.S. Airline Industry: The court observed that the airline industry in the U.S. is an oligopoly, dominated by so-called "*Big Four*" – American, Delta, United, and Southwest, controlling approx. 80% of the market in the U.S. Among these – American, Delta, United are referred to as "*legacy carriers*" **('LC')**, which operates in a "*hub-and-spoke*" model, concentrating operations in their "*hub*" cities & offering connecting flights to numerous domestic & international destinations from these hubs. LCs offers multiple classes of service and other amenities to their passengers.
On the other hand, Southwest is a "*Low-cost carrier*" **('LCC')**, offering lower fares by operating fewer types of aircrafts, conducting operations from less-costly airports and by use of smaller "*point-to-point*" (non-stop) network. Alaska Airlines, Hawaiian Airlines and JetBlue itself, are among the other low-cost carriers.
Airlines like Spirit, Frontier Airlines, Allegiant Air, Avelo Airlines, Breeze Airways and Sun Country Airlines, are referred to as ULCCs in the U.S., which thrives by offering simplified experiences and removing traditionally bundled features from the airfare. Different airlines caters to different target audience which can be broadly categorised as – "*leisure travellers*" & "*business travellers*". LCs and also, some LCC like JetBlue segment their offerings to cater to both ends of the spectrum of passengers, whereas, ULCCs focus more on cost-conscious leisure travellers with their unbundled pricing and less differentiated product.

Assessment: The court defined the relevant market as market for "*scheduled air passenger service*" in each of origin-destination routes in which both, JetBlue & Spirit currently compete. Especially, relevant market for the following routes were found to be important for the current assessment – Non-stop overlap routes in which both, JetBlue & Spirit, currently operate; "connect routes" in which both fly connecting service; "mixed routes" in which one flies direct service & the

other provides connecting service, and “Spirit-only routes” in which only Spirit currently operates, but JetBlue does not. The court further noted that the airports at – Fort Lauderdale & Orlando (Florida); Las Vegas; Los Angeles; LaGuardia & Newark (New York) and San Juan (Puerto Rico) are the frequently flown destinations for Spirit.

Potential effects of proposed merger: The court highlighted following potential effects accruing from the proposed acquisition.

Decrease in number of seats – JetBlue has the incentive and ability to reconfigure Spirit’s aircraft configuration to that of JetBlue, leading to estimated seat reduction of 11%.

Increase in concentration – Out of 99 nonstop routes in which both parties fly, 30% & 40% of JetBlue and Spirit, respectively, of those routes overlap. Further, it was taken on records that, in the present case, post-acquisition Herfindahl-Hirschman Index **(‘HHI’)** would be greater than 1,500, with a change in HHI of at least 200.

Increased debt for JetBlue – JetBlue had to avail significant debt in order to consummate the acquisition, which will create abnormal debt-to-cap ratio for JetBlue between 83% and 111%.

Increased price for customers – It was asserted that the proposed acquisition has potential of raising prices for consumers because, post-acquisition, since Spirit will be eliminated from the market it will lead to removal of Spirit’s low prices option and removal of benefit accrued from Spirit’s downward pressure on other airline’s prices.

There are unilateral anti-competitive effects, in the proposed acquisition, since JetBlue & Spirit compete head-to-head with each other on multiple routes. Further, since the proposed acquisition will lead to elimination of Spirit – a low-cost competitor, Spirit’s disruptive force as ULCC creating a downward pressure on other airline will dampen, leading to less competition to both discipline the prices and spur the innovation of other airlines.

The parties proposed modifications in the form of divestitures of parties’ assets (take-off & landing slots, gates and associated ground facilities) in Boston, the New York metropolitan area, and Fort Lauderdale to remedy the antitrust concerns. However, as per the court, the proposed modifications fails to include measures on how to replace Spirit’s capacity on the Spirit’s exited-routes nor putting an obligation to the airline getting divested assets to maintain a particular level of services from the divestiture airports.

The court, to some extent, agreed with the defence of the merging parties that, post-acquisition, entry and expansion from potential competitors (airlines), is very likely and timely, in the affected market. However, according to the court, given the post-pandemic constraints faced by the airline industry, replacement of Spirit’s position through entry or expansion from potential competitors is not sufficient to offset pressure currently exerted by Spirit as an ULCC on other airlines. In its defence, merging parties also contended that there are pro-competitive effects linked to the proposed acquisition, *firstly*, considering the financial struggle, Spirit relied on “failing company” doctrine to assert that the proposed acquisition will protect consumers from a weak & failing Spirit. *Secondly*, the consolidated firm would provide stronger competitive counterpart to the Big Four.

However, the court found abovementioned contentions insufficient to disprove the likelihood of anticompetitive effects resulting from the proposed acquisition. Ultimately, the court observing removal of Spirit – as an low-cost option for consumers, lessening of direct competition between the merging parties and competition arising from other airlines and absence of evidence to establish that entry or expansion from other ULCCs to protect every consumer in every market/routes from harm, took the stance the proposed acquisition is likely to substantially lessen competition in at least some of the relevant markets. Thus, the court “*enjoined*” the parties from executing the merger agreement.

(Order dated 16.01.2024)

Examining dismisses allegations of abuse of dominant position against Ola, Hero, TVS & Ather

The Competition Commission of India **('CCI')** has dismissed a case of abuse of dominant position against Ola Electric Ltd. **('Ola')**, VIDA Hero Moto Corp Ltd. **('Hero')**, TVS Motors **('TVS')** & Ather Energy Pvt. Ltd. **('Ather')**, **(**collectively as **'OP')**, by taking note of the fact that currently, none of the OPs have acquired a position of strength required to assert dominance of an entity under Section 4 of the Competition Act, 2002 **('Act')**.

It was alleged that the OPs indulged in taking undue & illegal advantage of the Ministry of Heavy Industries and Public Enterprises' Faster Adoption and Manufacturing of Electric & Hybrid Vehicles Policy **('FAME')**, by deliberating under-pricing the Electric Two-Wheelers **('ETW')** below the threshold of Rs.1.5Lacs to illegally avail the demand subsidy/incentive under the policy. Further, the OPs deliberately kept their prices below Rs.1.5Lacs while charging extra from the customers for sale of integral equipment such as charger and other proprietary software/upgrades.

The CCI, noting the distinct characteristics of ETWs like quick mobility, good mileage, low maintenance cost etc., delineated the relevant market as "*the market for manufacture and sale of ETWs in India*". CCI noted that apart from the major players like OPs there are other players present in the market – Okinawa, Ampere, RGM etc. Upon considering, the nascent stage of competition in the market, presence and likely entry of other competitors and unstable market share and power, CCI concluded that, at present none of the OPs hold sufficient market power, so as to have a "*position of strength*" to be in a dominant position within the meaning of Section 4 of the Act. Thus, it dismissed the case. ***(Order dated 23.01.2024)***

CCI dismisses case alleging discriminatory treatment in film exhibition by PVR

The CCI has dismissed a case filed against PVR Ltd. **('PVR')** alleging preferential treatment in exhibition of films produced by large production houses leading to discriminatory treatment being accorded to independent filmmakers like the Informant.

PVR is primarily engaged in the business of production, promotion, release, and exhibition of films in India through multiplexes. The Informant alleged that PVR enjoys a dominant position in market of exhibition of films in India, by virtue of controlling majority of the upscale multiplex screens in India, through which it accorded special treatment to films of large production houses and thereby, abused its dominant position by constraining the entry of films by independent filmmakers. Further, through its group company – Starlight Pictures Pvt. Ltd., PVR has entered into the business of film production and has thereby, vertically integrated itself in production, distribution and exhibition of films.

Upon perusal of the information, CCI took note that the allegation of discriminatory treatment by PVR, in allocation of screens for screening movies cannot be substantiated given the fact that PVR exhibited Informant's film alongside a blockbuster movie. CCI further noted that allocation of screens is based on number of factors such as movie's revenue generation potential, marketing, advertising, previous review of film maker, cast & crew etc., thus, commercial wisdom of exhibitors like PVR is aimed at maximization of footfalls & consumer demands. Thus, CCI noting that the autonomy of film exhibitors and their right to choose a movie for exhibition cannot be curtailed by CCI, unless it causes harm to competition, decline to initiate an investigation in the present matter. Based on the aforesaid observations, CCI refused to compel PVR to exhibit the Informant's film through its screens.

(Order dated 03.01.2024)

Note on Competition Commission of India (General) Amendment Regulations, 2024

The CCI, on 12.01.2024, published the Competition Commission of India (General) Amendment Regulations, 2024 **('Amendment Regulations')** with an aim to facilitate monitoring & tracking of Interlocutory Application **('IA')** filed for seeking adjournment, extension of time, confidentiality ring, impleadment etc. As per the Amendment Regulations, the IAs filed by the parties, except filed in compliance with the order or direction of the CCI, shall be registered & numbered, and must be filed along with fees in the manner as laid out below – Individual/Hindu Undivided Family – *Rs.500*; NGO/Consumer Association/Co-operative Society/Trust – *Rs.1000*; Firm (including proprietorship, partnership or Limited Liability Partnership) or Compnay having turnover in the preceding year up to Rs.2 Cr. – *Rs.1000*; In all other cases – *Rs.5000*.

(Gazette Notification dated 12.01.2024)

Madras HC dismisses case filed by Indian App Developers against Google Play Billing

The High Court of Madras **('Mad. HC')**, by its judgment dated 19.01.2024, dismissed an appeal filed by Info Edge (India) Ltd. **('Info Edge')**, against a rejection order passed by a Single Judge of the Mad. HC, on the ground that the subject matter of the suit cannot be adjudicated by the civil courts, owing to bar under Section 61 of the Act. In its original suit, Info Edge prayed that the Google Play Billing System terms/User Choice Billing terms be declared illegal & unenforceable and asked for permanent injunction in relation to the same.

The issue raised before the Mad. HC was that whether the jurisdiction of civil courts is ousted in view of subject matter jurisdiction allocated under the Competition Act, and Payment and Settlement Systems Act, 2007. The Mad. HC observed that the original plaint **('plaint')** filed by Info Edge was dismissed, upon an application for rejection of plaint filed by Google, on the ground that the suit appears to be barred, by virtue of Order VII Rule 11(d) of the Code of Civil Procedure, 1908. Thereafter, Mad. HC scrutinized the contents of the plaint, to conclude that the reliefs sought by Info Edge are in relation to abuse of dominant position by Google, which are not beyond the realm of CCI and can be appropriately dealt by it. Info Edge further contended that Section 62 of the Act enables them to approach the civil court seeking appropriate remedy. However, according to the Mad. HC, Section 62 of the Act must be interpreted such that it *"will not negate Section 61 of the Act of 2002, which specifically bars the jurisdiction of the civil court in matters to be dealt with by the Competition Commission of India"*. Thus, it was clarified that Section 62 shall only apply to those matters wherein the CCI does not have the authority or jurisdiction to pass appropriate orders. Based on the observations, the Mad. HC upheld the rejection of the plaint for the reason that the cause of action shall be dealt with by the CCI, and no other fora shall have the jurisdiction in accordance with Section 61 of the Act.

(Order dated 19.01.2024)

CCI approves acquisition of 38% shareholding in MG Motors India by JSW Group

The CCI vide its order dated 23.01.2024 has approved the proposed acquisition of approx. 38% shareholding in MG Motor India Pvt. Ltd. **('MG Motor')** by JSW Ventures Singapore Pte. Ltd. **('JSW')** from the seller – SAIC Motor HK Investments Ltd. **('SAIC')**. JSW belongs to the larger JSW Group which is engaged in sectors, *inter alia*, steel, energy, cement, paints etc. in India, U.S. etc.; whereas, MG Motor, jointly owned by SAIC & SAID Motor International Co. Ltd., manufactures and sells passenger cars in India.

Regarding the business overlaps linked to the proposed acquisition, CCI noted that one of the affiliates of JSW i.e., JSW Steel Limited **('JSW Steel')** manufactures steel (*especially cold rolled closed annealed steel & surface coated steel products*), which is the primary material used for manufacturing of cars & auto-parts. By perusing at, the miniscule volume of steel procured by MG from JSW Steel, low market shares of MG & JSW Steel in their respective markets, level of competition posed by the upstream & downstream players in the market, the CCI was of the opinion that it is very unlikely that the proposed acquisition will cause any appreciable adverse effect on competition in India.

(Order dated 23.01.2024)

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