

Jet-Etihad deal – more clarity on “Control”

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Securities and Exchange Board of India ("SEBI") passed an Order^[2] dated 08 May, 2014 concerning the matter of acquisition of shares of Jet Airways (India) Limited ("Jet") by Etihad Airways PJSC ("Etihad"). The Order considered whether the acquisition of 24% equity shares in Jet by Etihad will result in obtaining 'control' mandating an open offer under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 ("Takeover Code"). After considering various aspects, SEBI has concluded that the transaction does not result in Etihad obtaining 'control' over Jet.

Facts

On 24 April 2013, Etihad entered into various agreements with Jet and its existing promoters to subscribe to 24% equity shares in Jet (collectively called as the "Transaction Documents" which include an Investment Agreement, a Shareholders' Agreement, a Commercial Cooperation Agreement and a Corporate Governance Code).

Initially, the transaction came under the review of SEBI while the matter was under consideration of the Ministry of Finance and SEBI opined that the rights proposed to be acquired by Etihad under the Transaction Documents do not appear to result in the change in control. Thereafter, while approving the transaction, the Competition Commission of India ("CCI") has observed that the transaction may result in Etihad obtaining 'joint control' over assets and operations of Jet.

In light of the above referred observation of CCI, SEBI issued a show cause notice alleging acquisition of 'joint control' over Jet by Etihad. The current Order has been passed in this context.

Issues

1. Whether Etihad and the existing promoters of Jet were 'person acting in concert' ("PAC") for the purpose of Etihad obtaining 'joint control' over Jet?
2. Whether the rights of Etihad under the Transaction Documents confer 'joint control' over Jet to Etihad under the Takeover Code?

Decision

SEBI answered the first issue in the negative on the ground that unless there is common shared objective for acquiring shares/voting rights/control over the target company between two persons, they cannot be termed as PACs for the purposes of the Takeover Code. Etihad and the promoters of Jet are not PACs because there was no common objective to acquire control of Jet. SEBI observed that there is some cooperation between Jet and Etihad under the Commercial Cooperation Agreement. However, this agreement is between Jet and Etihad and the promoters of Jet are not a party. To establish PAC, the target company has to be on one side and the PACs have to be on the other side for the purpose of acquiring shares/voting rights/control over the target company. A target company itself cannot be PAC under the Takeover Code.

regarding the second issue, it was observed that for purpose of acquisition of control under the Takeover Code, two tests should be followed. The tests are:

1. First, that acquirer should have a right to appoint majority of the directors; and
2. Second, that acquirer has a right to control the management or policy decisions.

SEBI answered both the above tests in the negative and concluded that Etihad has no 'joint control' over Jet. SEBI has emphasized on following aspects, while drawing the conclusion:

- Etihad has the right to appoint only two out of twelve directors of the board of Jet;
- material recommendation of various governing committees constituted under the Transaction Documents are subject to the approval of board of directors of Jet. Hence, Etihad has no control over management or policy decision of Jet as the supremacy of the promoters in the board is unaffected by the transaction; and
- in addition, SEBI 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; and
 - (iv) any pre-emptive, tag along rights regarding the transfer of shares

Conclusion

Based on the regulatory interventions, the Transaction Documents of the Jet-Eti had deal had already undergone various changes prior to this Order. As a result, many clauses in the Transaction Documents which would have given Eti had management control had already been amended. Hence, SEBI does not have to delve into more complex issues such as whether affirmative or veto rights amounts to 'control' while delivering this Order. However, this Order is important as it is pointer while structuring investment transactions in listed companies.

The scheme of the Takeover Code mandates an open offer by the acquirer, if the acquisition results in the acquirer obtaining control over the target company. The requirement is mandatory despite the fact that the acquisition is below the threshold level prescribed under the Takeover Code to make open offer. The factors determining 'control' varies from case to case. However, the Order makes it clear that absence of certain provisions in the Transaction Documents such as affirmative rights, veto rights, quorum, casting vote, pre-emptive rights, tag along rights, etc. in favor of the acquirer can avoid the transaction getting caught under the definition of 'control'.

[2] *WTM/RKA/CFD-DCR/17/2014*