

AUGUST 2018

## WALMART'S ACQUISITION OF FLIPKART: THE ELEPHANT IN THE ROOM

### 1. INTRODUCTION

The Competition Commission of India (the “**Commission**”) finally announced its much-awaited verdict earlier this week, approving Walmart’s USD 16 billion acquisition of Indian e-commerce major, Flipkart.

Walmart Inc. (“**Walmart**”) is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores, and grocery stores. Walmart is present in India through its step subsidiary, Walmart India Private Limited (“**Walmart India**”), which is engaged in the wholesale of goods (“**B2B sales**”).

Flipkart Private Limited (“**Flipkart**”) is principally an investment holding company which, apart from being engaged in B2B sales in India, also provides a marketplace based e-commerce platform to facilitate trade between customers and sellers.

The acquisition of Flipkart’s majority stake for USD 16 billion is proposed to take place through Walmart International Holdings, Inc., a wholly owned subsidiary of Walmart, following the closing under the terms of the share purchase and share issuance and acquisition agreements for the transaction, which were executed by the parties on May 9, 2018.

The parties were required to approach the Commission for its approval since the assets and turnover of the combined entities exceeded the minimum thresholds prescribed under the Competition Act, 2002 (the “**Act**”).

While the spotlight is on the approval itself, we have highlighted some big takeaways from the order, which provide an insight into the Commission’s rationale for approving the deal, especially since a lot of pushback was received from certain stakeholders. In particular, this pushback obliged the Commission to clarify the scope of its powers under section 31 of the Act.

### 2. KEY ASPECTS ADDRESSED IN THE ORDER

#### 2.1 Delineation of the Relevant Market

Why is the relevant market not “B2C e-commerce” for the proposed combination? This is the first question on everyone’s mind. Walmart India is not engaged in B2C e-commerce in India and there is no overlap in this regard.

However, both parties are engaged in the business of B2B sales, the relevant market has been identified as the ‘*pan-India market for B2B sales*’ – which is characterized by intense competition among a very large

number of competitors – both online and offline; and both channels give the customers a plethora of choices.

Furthermore, given the small size of Walmart India's B2B sales business in India, a narrower delineation of the identified relevant market was considered unnecessary by the Commission. Accordingly, the relevant market for B2B segment was left open by the Commission.

With respect to direct sales to consumers ("B2C sales"), it was noted by the Commission that both Flipkart and Walmart India cannot engage in direct sales to consumers on account of restrictions under the Foreign Direct Investment ("FDI") policy.

Thus, although Flipkart is operating an online marketplace, the same cannot be used for B2C sales. Accordingly, no vertical overlap between the B2B business of Walmart India and the online marketplaces of Flipkart was found.

## 2.2 Due regard given to Competitive Forces

The Commission found it necessary to highlight and explain its rationale on how proposed combinations are assessed generally, which is not usual but perhaps necessary in this case, given the intensity of the resistance to this proposed combination by small online sellers, among others. It was further clarified that the purpose of this assessment is to assess the impact on competition solely as a result of the proposed combination.

Section 20 (4) of the Act lays down certain factors which are taken into consideration by the Commission while determining the adverse implications of any proposed combination. With regard to this particular combination, some important factors considered by the Commission were: (i) the presence of a large number of players; (ii) the presence of a *formidable* competitor of sufficient scale and size; and (iii) ease of entry.

It was observed that the presence of these fundamental factors in a market structure were indicative of a competitive market. Further, it was observed that if a proposed combination does not alter the competition in both horizontal and vertical markets, then such combination cannot be said to pose any harm to competition.

## 2.3 Stakeholder Representations

During its inquiry into the proposed combination, several representations were received from different stakeholders, including trade associations, traders and retailers, which raised allegations regarding not only 'predatory' practices and preferential treatment to specified sellers in Flipkart's online marketplaces but also regarding the impact of the proposed combination on employment, entrepreneurship, small and medium scale enterprises and retailing in general.

The Commission noted that several of the issues raised in so much as they concerned the FDI policy, fell *outside* the scope of its purview and may instead merit policy intervention. With respect to the issues pertaining to deep discounting and preferential treatment by Flipkart, the Commission observed that the scope of the Commission was to assess potential adverse implications resulting from the proposed

combination and not to address allegations relating to pre-existing market conditions that are not attributable to the proposed combination.

Although the Commission deliberated extensively on the concerns raised in the representations, it concluded that these could not be considered for the purpose of determining whether or not the *proposed combination* will cause or is likely to cause an appreciable adverse impact on competition in India, thereby standing firm on its view that market conditions would not be altered if the combination were to take place.

### 3. **INDUSLAW VIEW**

The elephant in the room or the key reason why there is no foreseeable *adverse* impact on competition in India with respect to the proposed combination is the presence of Amazon: a very large *and growing* competitor in the market for providing online marketplaces for B2C sales.

The Commission has stressed that this combination in fact seeks to *preserve* competition in the relevant market, as noted by the Commission in the text of the order:

*“the proposed combination is not resulting in elimination of any major player in the relevant market. The Flipkart marketplace platform will remain under the operation of Walmart, thus not only preserving a successful ecommerce platform but also enhancing the financial strength of the platform. This would enable the combined entity to compete effectively with competitors in a dynamic e-commerce market characterised with network effects.”*

Interestingly, the Commission did indicate that there is no bar on the Commission to examine anti-competitive behavior at any point of time under the relevant provisions of the Act. However, given that the players are responding to market pressure, Flipkart and Walmart India may not be singled out if any information regarding anti-competitive behavior is filed with the Commission in the future.

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**Date:** 10 August 2018

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