

IN A CONTROVERSIAL FIRST, CCI SUSPENDS ITS APPROVAL OF AMAZON'S INVESTMENT IN FUTURE COUPONS

1. INTRODUCTION

- 1.1 On December 17, 2021, the Competition Commission of India (“CCI”) imposed a penalty of INR 202 crore (approximately USD 26.57 million)¹ on Amazon.com NV Investment Holdings LLC (“Amazon”) for: (i) misrepresentation and suppression of material facts in its merger notification to the CCI filed on September 23, 2019 for its acquisition of 49% of the equity share capital of Future Coupons Private Limited (“FCPL”) (hereinafter referred to as the “Combination”) (“Notice”); and (ii) failure to notify certain steps deemed to be inter-connected as a part of the Combination in the Notice. The CCI also kept its order approving the Combination, in abeyance and directed Amazon to file a new merger notification in a long form² (hereinafter referred to as the “Order”).³

2. BACKGROUND

- 2.1 On September 23, 2019, Amazon had filed the Notice seeking the CCI’s approval for the Combination comprising the following steps: (i) Future Coupons Resource Private Limited’s (“FCRPL”) subscription of 9.18 million Class A equity voting shares of FCPL, pursuant to which FCPL will be a wholly owned subsidiary of FCRPL; (ii) FCRPL’s transfer of 2.52% of the equity share capital of FRL to FCPL; and (iii) Amazon’s acquisition of 49% of the equity share capital of FCPL, by way of a preferential allotment.
- 2.2 Given that prior to the Combination in April 2019, FCPL had acquired certain equity warrants in FRL⁴ and Amazon would acquire certain rights for the limited purpose of protecting its investment in FCPL, in the interest of full disclosure, Amazon also provided details of other rights and agreements with the Future group of companies in the Notice. The rights and agreements disclosed were as follows: (i) FRL shareholders agreement dated August 12, 2019, between FCPL, FRL and the promoters of Future Group (“FRL SHA”), which granted certain indirect rights to Amazon over FRL, through FCPL;⁵ and (ii) certain pre-existing and contemplated business arrangements and agreements between the Amazon and Future group companies (“Commercial Arrangements”).⁶

¹ Converted at 1 USD = INR 76.

² Merger notifications are typically filed in long form i.e., Form II when the parties to the combination either: (i) have a combined market share of more than 15% and are engaged in similar, identical, substitutable goods or services; or (ii) their individual or combined market share is more than 25% and are engaged at different stages or levels of the production chain in different markets.

³ Order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/Order-688.pdf.

⁴ FCPL had acquired equity warrants in FRL convertible to equity shares representing 7.30% of FRL’s share capital. On April 15, 2019, the transaction was approved by the CCI, order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/Order-653.pdf.

⁵ Under the FRL SHA, Amazon’s indirect rights over FRL *inter alia* included: (i) veto on transfer of assets; and (ii) veto on the amendment of charter documents impacting Amazon’s rights.

⁶ (i) business arrangement between FRL and Amazon Seller Services Private Limited that govern the listing of the products of FRL, on the Amazon India marketplace; (ii) agreement dated August, 21, 2019 between Amazon Retail India Private Limited (“ARIPL”) and Future Consumer Limited for supply of, *inter alia*, food category to ARIPL; and (iii) memorandum of understanding dated August 21, 2019, between Amazon Pay (India) Private Limited and FRL to offer the option of making payments through Amazon Pay.

- 2.3 On November 28, 2019, based on Amazon's submissions in the Notice, responses to the requests for information,⁷ and its substantive competition assessment, the CCI approved the Combination ("Approval Order").⁸

CCI's Inquiry

- 2.4 On March 25, 2021, presumably pursuant to the ongoing arbitral proceedings between the Amazon and Future groups in relation to the latter's sale of its retail assets, FCPL filed an application before the CCI alleging that Amazon has taken contradictory stands regarding the purpose of its investment in FCPL and the consequent accrual of rights over FRL.
- 2.5 On June 04, 2021, based on the material on record, the CCI *prima facie* observed that Amazon had misrepresented and concealed material facts in the Notice, thus contravening provisions of the Competition Act, 2002 ("Act"). Accordingly, the CCI issued a show cause notice to Amazon in relation to: (i) its failure to identify and disclose the FRL SHA as part of the Combination; (ii) concealment of its strategic interest over FRL; and (iii) furnishing false, incorrect information and concealing material facts in relation to the Combination in the Notice.

Amazon's Submissions

Misrepresentation and suppression of material facts

- 2.6 Amazon *inter-alia* submitted that it had disclosed to the CCI (by way of the Notice and subsequent submissions) all the material facts relating to the Combination, namely: (i) Amazon's information rights over business activities of FRL; (ii) the Commercial Arrangements involving FRL; and (iii) the details required as per the short form (i.e., Form I) regarding relevant market and competition assessment, based on the business activities of the parties and affiliates.⁹ Further, the CCI while undertaking its substantive competition assessment took into consideration the business activities of FRL as well. Thus, there is no question of misrepresentation or suppression of material facts by Amazon.

Failure to notify inter-connected steps

- 2.7 Amazon *inter-alia* submitted that: (i) the FRL SHA did not constitute a combination and was in any case disclosed as forming the background to Amazon's investment in FCPL; (ii) Amazon was negotiating commercial arrangements with the Future group since 2018 and it had disclosed all the Commercial Arrangements; and (iii) Amazon neither exercises control over the day-to-day operational matters of FRL nor does it exercise any influence over the business operations of the market conduct of FRL. As such, Amazon never intended to exercise any control over FRL.

3. CCI's FINDINGS

Misrepresentation and Suppression of Material Facts

- 3.1 The CCI observed that in the Notice, Amazon stated that the purpose of the Combination was: (i) FCPL's potential to create long-term value and provide return on its investment; and (ii) to enhance Amazon's existing portfolio of investments in the payments landscape in India. Amazon further submitted that it

⁷ The CCI requested for information from Amazon *vide* letters dated October 9, 2019, and October 24, 2019, which were responded by Amazon on November 15, 2019.

⁸ Approval Order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/FinalOrder-688.pdf.

⁹ An enterprise will be considered as an affiliate of a another enterprise if the second enterprise has: (i) direct or indirect shareholding of 10% or more in the first enterprise; or (ii) a right or ability to exercise any right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder in the first enterprise; or (iii) a right or ability to nominate a director or observer in the first enterprise.

had no direct or indirect shareholding in FRL. However, based on Amazon's internal documents,¹⁰ the CCI observed that Amazon's actual rationale for the Combination was to become the single largest shareholder of FRL at the time when foreign direct investment ("FDI") opens up in the retail sector.

- 3.2 The CCI also observed that owing to the prevailing FDI norms, Amazon used a twin entity investment structure under which Amazon acquired 49% shareholding in FCPL which, in turn would hold 8-10% shareholding in FRL.¹¹ Further, the CCI observed that Amazon's disclosure in the Notice and its subsequent submissions, "did not indicate a possibility of the Combination being pursued by Amazon for having a 'foot-in-door' in the Indian retail sector, acquire strategic rights over FRL or entering into any commercial partnership with FRL". This led the CCI to hold that the instant case is a clear, conscious, and willful case of omission to state the actual purpose of the Combination despite the disclosure requirement. As such, Amazon knowingly misrepresented, suppressed relevant and material facts as well as failed to provide sufficient disclosures in the Notice.¹²

Failure to Notify Inter-connected Steps

- 3.3 Given that Amazon's internal e-mails established that the actual purpose was to acquire interest in FRL, the CCI observed that Amazon failed to disclose in the Notice that: (i) the FRL SHA was negotiated as part of the Combination and was a prerequisite for Amazon's investment in FCPL;¹³ and (ii) the Commercial Arrangements were an integral part of the Combination, both of which were conceived, contemplated, negotiated, and consummated as part of the Combination. Hence, the Combination comprised two additional steps, namely: (i) the FRL SHA for the purpose of acquiring strategic rights over FRL through FCPL SHA; and (ii) the Commercial Arrangements for the purpose of establishing a strategic alignment between Amazon group and FRL, which ought to have been notified and divulged in detail by Amazon.

Penalty and Directions

- 3.4 In view of the above, the CCI imposed a penalty of: (i) INR 2 crore (approximately USD 0.26 million)¹⁴ for misrepresentation, suppression of material facts in relation to the scope and intent of the Combination, actual purpose of executing the FRL SHA and the strategic alignment between the parties through the Commercial Arrangements, under Sections 44 and 45 of the Act; and (ii) INR 200 crores (approximately USD 26.31 million)¹⁵ for failure to disclose: (a) the FRL SHA for the purpose of acquiring strategic rights over FRL through FCPL; and (b) the Commercial Arrangements for the purpose of establishing an alignment between Amazon group and FRL, as an inter-connected part of the Combination, under Section 43A of the Act. Interestingly, for the first time ever, the CCI invoked its residuary powers under Section 45(2) of the Act and directed Amazon to file a new merger notification in relation to the Combination (previously reviewed and approved) in a long form with true, correct, and

¹⁰ The internal documents relied by the CCI, include: (i) an internal note dated May 24, 2018, detailing the basis of the Combination; (ii) an e-mail dated July 10, 2018, elaborating background and purpose of the combination; and (iii) an e-mail dated July 19, 2019, by Mr. Rakesh Bakshi to Mr. Jeff Bezos, seeking approval to sign definitive documents in relation to the Combination.

¹¹ The number of equity shares of FRL held by FCPL was calculated in a manner such that Amazon indirectly held the same number of shares of FRL that Amazon would have acquired if it had directly invested in FRL. Further, the consideration for acquisition was arrived based on traded price of FRL shares plus a 25% premium. The CCI observed that the said premium was paid to acquire strategic rights and call options in FRL.

¹² In relation to Part V and Part VIII of the short form, which includes: (i) economic and strategic purpose of the notification; (ii) documents/material in relation to the combination presented to the key managerial person of the parties; (iii) any transaction that is interconnected; and (iv) steps to give effect to the combination.

¹³ Based on an internal e-mail dated April 4, 2019, from Amazon to Future Group demonstrating that the FRL SHA was executed at the behest of Amazon.

¹⁴ Converted at 1 USD = INR 76.

¹⁵ Converted at 1 USD = INR 76.

complete information.¹⁶ The CCI also kept its Approval Order in abeyance till the disposal of the new merger notification.

4. INDUSLAW VIEW

It is apparent from media reports that the unusual motion by the target company i.e., FCPL to the CCI may very well be 'inter-connected' to the Singapore arbitral proceedings between Amazon and Future group, however, we are limiting our views to the implication of this order on the decisional practice of the CCI as well as the implication for the parties before the CCI in other combination filings.

4.1 The Indian merger control regime requires transactions that are 'inter-connected' to one another to be mandatorily notified to the CCI by way of a single merger notification so that the CCI can review all of such transactions holistically, in the context of their 'ultimate intended effect'. The CCI, much like the Federal Trade Commission,¹⁷ took into account Amazon's internal documents to determine that the FRL SHA and Commercial Arrangements were an inter-connected part of the Combination and decided to re-examine an approved Combination. While this is not the first time the CCI has relied on internal documents of the parties to determine the inter-connected nature of a series of transactions,¹⁸ it is the first time the CCI has relied on such information to suspend its approval of a combination.

4.2 The Order also raises many important issues and questions in relation to the CCI's powers while reviewing combinations and parties' obligations for furnishing information in the merger notification, which would require serious deliberation and adjudication by the appellate fora, including the Supreme Court of India, namely:

- (i) Power of the CCI to suspend an approval order: The scheme of the Act empowers the CCI to only impose a monetary penalty for non-notification of a notifiable transaction or combination. However, in the instant case, the CCI suspended the Approval Order under its residuary powers, which is an interesting interpretation and is likely to be tested on the touchstone of the provisions of the Act. Notably, the CCI's counterparts, such as the competition law authorities in the European Union and Brazil have the power to revoke a clearance but only in limited circumstances (e.g., when the same is obtained based on incorrect information or deceit).¹⁹
- (ii) Impact of rationale for combination on the CCI's assessment: The Act lays down certain factors²⁰ which are to be considered by the CCI while undertaking the substantive competition assessment of a combination. Further, the short form and its notes provides guidance for the mapping of overlaps between the business activities of the parties, i.e., the acquirer group²¹ and target, including their affiliates for the purpose of the CCI's substantive competition assessment. Notably,

¹⁶ The CCI observed that by failing to make true, correct and full disclosures, Amazon has denied the CCI an opportunity to assess the effects of the actual Combination and its intended objectives. Further, given that the Combination is in between known players in the online marketplace and offline retailing and have contemplated a strategic alignment, the CCI considered it appropriate for Amazon to file a new merger notification to be given in Form II within 60 days from the receipt of the Order.

¹⁷ The Federal Trade Commission attempted to re-examine Facebook's acquisitions of Instagram and WhatsApp based on Facebook's internal e-mails which indicated that the acquisition was to neutralise competitive threats and expand its dominance.

¹⁸ Combination Registration No. C-2017/11/536, *Canada Pension Plan Investment Board and ReNew Power Limited*, the CCI relied on press release and internal emails of the parties, order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/order/CDPQ.pdf.

¹⁹ Articles 6(3) of the EC Merger Regulation and Article 91 of the Brazilian Competition Act (Federal Law No. 12,529/2011).

²⁰ Such as: (i) market share in the relevant market of the parties to the combination; (ii) nature and extent of vertical integration; and (iii) extent of effective competition, etc.

²¹ Group means two or more enterprises which, directly or indirectly, are in a position to: (i) exercise fifty per cent or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

given that the Approval Order states that the CCI conducted its substantive competition assessment between Amazon and Future group companies, including FRL and concluded that the Combination does not raise any competition concerns, it will be interesting to see whether and to what extent the rationale for a combination plays on the CCI's substantive competition assessment and if it is likely to change the CCI's analysis. Indeed, several M&A transactions have multiple rationale, and it is often difficult for the parties to pin down the exact synergies generated in every respect or prioritize which synergy is paramount vis-a-vis the others.

- (iii) The importance of context while making disclosures: Notably, Amazon had disclosed the FRL SHA and Commercial Arrangements in the Notice. However, the CCI held that the context was not proper and penalized Amazon. Hence, the question whether Amazon had discharged its statutory duty to submit all relevant information and documents, or the context of disclosure is paramount remains to be seen. The subjectivity of such a finding shall hang as a 'damocles sword' on the parties and their lawyers.
- (iv) Unprecedented quantum of penalty for non-notification: While under Section 43A of the Act, the CCI is empowered to impose a penalty of up to 1% of the combined turnover or the value of assets, in the past, the highest penalty it has imposed is INR 5 crore²² (approximately USD 0.66 million).²³ However, in the instant case, for failure to notify the FRL SHA and Commercial Arrangements as inter-connected to the Combination and misrepresentation of its relevance, the CCI imposed a penalty of INR 200 crore (approximately USD 26.31 million),²⁴ the highest since the introduction of the merger control regime. The absence of a clear criteria and the quantum of penalty likely to be imposed vis-à-vis the maximum permissible penalty under the statutory framework, leads to uncertainty in the minds of businesses over the metrics considered while imposing penalty.

Authors: Unnati Agrawal | Parth Sehan | Deepanshu Poddar

Practice Areas: Competition Law

Date: December 27, 2021

DISCLAIMER

This article is for information purposes only. Nothing contained herein is, purports to be, or is intended as legal advice and you should seek legal advice before you act on any information or view expressed herein.

Although we have endeavored to accurately reflect the subject matter of this alert, we make no representation or warranty, express or implied, in any manner whatsoever in connection with the contents of this alert.

No recipient of this article should construe this article as an attempt to solicit business in any manner whatsoever.

²² Combination Registration No. C-2015/02/249, *Piramal Enterprises Limited*, order available at: <https://www.cci.gov.in/sites/default/files/Order%20under%20Section%2043A-%20.pdf> and Combination Registration No. C-2015/01/241, *GE Energy BV*, order available at: <https://www.cci.gov.in/sites/default/files/Section%2043A%20Order.pdf>, the CCI imposed a penalty of 0.005% and 0.0001% of the total value of assets of the parties under Section 43A of the Act, respectively.

²³ Converted at 1 USD = INR 76.

²⁴ Converted at 1 USD = INR 76.