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India: Amazon – Future Group Dispute: Revisiting the Standard of Disclosure in M&A Filings

Priyanshi (National Law University) · Saturday, October 1st, 2022

Background

Amazon.com Inc. recently approached the Supreme Court against the decision of the National Company Law Appellate Tribunal (NCLAT), where the Tribunal affirmed the ruling of the Competition Commission of India (CCI). The impugned decision of the Tribunal upheld the penalty order against Amazon.com, on the basis of non-disclosure and suppression of material information in its filings regarding the proposed acquisition of a 49% stake in Future Coupons Private Limited (FCPL).

The CCI had approved the proposed acquisition in 2019 however, the approval was later revoked through the penalty order in December 2021. The two main reasons for the revocation of approval were: a) Non-disclosure of Amazon's economic and strategic purpose and; b) Failure to notify the other inter-connected transactions.

Now supported by the opinion of NCLAT, the revocation has triggered a multi-dimensional debate, raising questions not only regarding the extent of the Commission's suspensory powers on an already approved deal but also on the standard of disclosure warranted, in the filings made to the Commission while seeking the approval for a Combination.

This article attempts to analyse the existing standard of disclosure under the Indian Competition regime in the backdrop of the proposed acquisition and the related aspects. Further, it aims to examine if the regulatory framework must be restructured to make it well equipped for assessing M&A filings. To that end, a few plausible suggestions are granted in this direction.

The applicable legal framework under the Indian regime

Section 5 of the Competition Act, 2002 lays down the thresholds, breaching which, any acquisition, merger or amalgamation shall be a 'Combination'. Further, Section 6 provides that Combinations that are likely to cause an appreciable adverse effect on competition (AAEC) shall be void. The parties to a combination are required to file a notice disclosing the relevant details related to the proposed transaction.

While determining whether a Combination causes or is likely to cause an AAEC, the Commission

takes into account certain factors, listed under Section 20(4), including but not limited to: the actual and potential level of competition; barriers to entry; level of combination in the market; the buyer's countervailing power; the availability of substitutes; the parties' market shares (individually and after the Combination); whether the combination would result in the removal of an efficient competitor; vertical integration in the market; nature and extent of innovation, etc.

The procedure for the investigation of a Combination is prescribed under Section 29. Upon the completion of the investigation, the Commission, under Section 30, is empowered to pass orders in cases where it is of the opinion that the proposed Combination has caused or is likely to cause an AAEC. The Commission has the powers to order the modification of the proposed Combination, order interim measures restraining the parties from proceeding with the transaction during an ongoing inquiry and it can also impose penalties in case any provision of the Act has been contravened.

The filings to be made before the Commission as prescribed under Section 6 are governed by the 'CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011' (Combination Regulations, 2011). Regulation 5 prescribes that the filings should ordinarily be made in the manner prescribed under Form I, whereas filings under Form II are preferred in cases where:

- Parties are dealing in identical or substitutable goods or provision of services (horizontal) with more than 15% of the market share pursuant to the Combination or;
- Parties are operating at different stages of the value chain (vertical) with more than 25% of the market share pursuant to the Combination.

The forms are prescribed under Schedule II of the 2011 Regulations.

Relevant to the dispute at hand, the disclosure of 'the economic and strategic purpose of the transaction' and 'the inter-connected transactions', are required to be furnished by the parties primarily against Item 5.3 and Item 5.1.1/5.1.2 of Form I, respectively.

The relevant Regulations governing the items include – Regulation 9 wherein the parties are required to disclose all the inter-connected transactions and; Regulation 13(1A) requiring the parties to provide a summary (in no more than 1000 words) including the names of the parties to the Combination; the nature and purpose of the Combination; the products, services and business(es) of the parties to the Combination and; the respective markets in which the parties to the Combination operate.

The Commission recently amended Form II in 2022 (effective from May 1, 2022), which, as per CCI's press release, is aimed to remove duplicities, the information required is focused and relevant to assess a merger, streamlining the flow of information for better analysis of the situation by the competition authority, appreciation of material furnished in the notification, for reducing the compliance burden on enterprises and promoting ease of doing business in the country.

The Impugned Decision and its relevance

Amazon filed a Form I notice before the CCI (dated September 23, 2019), notifying the proposed acquisition of over 49% shareholding in Future Coupons Private Limited (FCPL).

The notified transactions included:

- *Transaction I* – certain voting rights of Future Coupons were transferred to Future Coupons Resources Private Limited (FCRPL), making the former a wholly owned subsidiary of the latter;
- *Transaction II* – 2.52% of equity shares of Future Retail Limited (FRL) held by FCRPL to be transferred to FCPL;
- *Transaction III* – Amazon to acquire 49% stake in FCPL.

It is relevant to mention that both FCRPL is the parent entity of FCPL. Further, both FCRPL and FCPL are the promoter entities of FRL (a flagship retail entity) of Future Group, with FCRPL also being the single largest shareholder of FRL.

The proposed transaction was approved by the Commission on November 28, 2019.

In March 2021, in its application to the Commission, FCPL contended that Amazon's filings before the Commission were contradictory to the stance it took in the internal emails, negotiations and also before the Singapore Arbitral Tribunal (where Amazon has initiated proceedings against FCPL, for breach of agreement in relation to the transfer of FRL's assets. The application contended that the true intent/purpose of the Combination was not disclosed and material information related to the transaction was suppressed, misleading the Commission.

In its order dated December 17, 2021, observing non-disclosure of material information, the Commission revoked its approval keeping the deal in abeyance until complete disclosures were made as per Form II through a new filing. Amazon preferred an appeal against the order of the CCI before the NCLAT. The Tribunal in its decision dated June 13, 2022, affirmed the decision of the Commission.

The decisions of the authorities are primarily based on the non-disclosure of the following information:

1. **Non-disclosure of Amazon's Economic and Strategic purpose: 'Foot-in-the-Door' Strategy**

Before the CCI

Item 5.3 of Form I, requires the parties to state their 'economic and strategic purpose' which includes the rationale behind the deal and business objectives sought by the parties and the way it shall be realized.

The Commission noted that the email communications between the parties revealed that the proposed acquisition was directed toward Amazon's indirect and strategic acquisition of stakes in FRL. It was subsequently revealed through the communication that the key terms deliberated between the parties in 2018 also included the following arrangements:

- FCPL acquiring 7% equity warrants of FRL (convertible into equity shares) and
- FCPL acquiring another 1-3% equity share of FRL

The aforementioned transactions were to be carried out prior to Amazon acquiring 49% of the shareholding in FCPL. Thus, strategically transferring around 9-10% of FRL's share to FCPL and subsequently upon acquisition to Amazon, aimed at its entry into the offline retail market (referred to as foot-in-the-door in the retail market). The Commission noted that neither a) nor b) were

disclosed in the notification filed by the parties.

However, the disclosures made in Item 5.3 mentioned the economic and strategic purpose to be – strengthening and augmenting the business of FCPL and unlocking the value in the company aimed at long-term value creation and gaining returns on the investment. A similar response was filed under Regulation 13(1A) *('Summary of the Combination – nature and purpose of the Combination').* Additionally, in queries 2.13 (to elaborate on the media statements of Mr. Kishore Biyani about Amazon investments in FRL being strategic) and 2.5 (regarding details of Amazon's shareholding in FRL), Amazon's response was entirely centred around FCPL and a reiteration of its earlier versions. The CCI noted the contradiction.

Before the NCLAT

On the first issue, the Tribunal agreed with the Commission and observed a clear contradiction between the internal communications of the parties and the disclosures made to the Commission. Under Item 5.3, the 'Rationale' for each of the parties involved was described as:

"Rationale for FCRPL: Being the parent entity of FCL and a part of the Promoter Group, it invited the investor to invest with a view to strengthen and augment the business of FCL.

Rationale for FCL: Currently engaged in the business of inter alia marketing and distribution of corporate gift cards, loyalty cards, and reward cards to corporate customers. FCL believes that the Proposed Combination will provide an opportunity to FCL to learn global trends in digital payments solutions and launch new products and usage of in-built payment mechanisms can lead to the acquisition of a customer base and increased loyalty.

Rationale for the Investor: FCL holds the potential for long-term value creation and providing returns on its investment. The investments are being made with a view to strengthen and augment the business of FCL and unlock the value in the company."

The Tribunal noted the apparent contradiction between the two versions and the arrangement of indirectly holding shares in FRL, through FCPL, as it intended to become the single largest shareholder of FRL whenever the FDI policy of the country opens for the Indian retail market. It also noted that Amazon had kept its stance unchanged in all the subsequent clarifications and queries related to FRL.

Further, the emails also revealed the strategic decision of entering into BCAs with FRL (discussed in the next section) to expand into the Indian retail market, citing that the true intent and strategic purpose was not disclosed, in its entirety.

2. Failure to identify the Share Holding Agreements, Project Taj, and Business Commercial Arrangement as an inter-connected transaction to Amazon's primary deal i.e., acquisition of 49% of FCPL

Before the CCI

Besides the three transactions in question, the internal correspondence revealed that certain agreements were entered into namely:

- A Share Subscription Agreement (FCPL SSA);
- Shareholders Agreement (FCPL SHA) between Amazon, FCPL and the promoters of FCPL and;

1. A Shareholders Agreement between FCPL and FRL (FRL SHA)

Through FCPL SHA, FCPL was required to take prior approval from Amazon before exercising any rights over FRL. While, through FRL SHA, FRL had to obtain the consent of promoters and FCPL before taking any action, including the sale of its retail assets. Both FCPL SHA and FCPL SSA were furnished to the Commission upon a query regarding disclosures against Item 8.8 (Material Documents). Two other agreements namely – 'Project Taj' – Investment in National Multi-category Copperfield seller and A Business Commercial Framework (BCF) were also deliberated, as evident from the internal correspondence, however, were claimed as independent of the primary transaction, before the CCI.

Considering the different agreements as a composite package, the CCI observed that Amazon aimed to leverage the pan-India footprint and assets of Future (Taj) in the retail market with the introduction of the former's ultra-fast delivery program. This was to be given effect by indirectly acquiring a stake in FRL through FCPL, through FRL SHA and BCAs. Thus, it failed to issue a single notice, notifying all inter-connected transactions.

A transaction is considered inter-connected if it is material to achieve the ultimate intended effect of the proposed combination. The Commission relied upon the decisions in – *CCI v. Thomas Cook and Anr.* and *Canada Pension Plan Investment Board and ReNew Power Limited*, wherein it has been observed that assessment of inter-connected transactions depends upon – the subject matter of each case, the entities involved, negotiations between the parties and their simultaneity, execution, completion and whether it is impractical to view the transactions independent from each other.

Before the NCLAT

Agreeing with the observations of the Commission, the Tribunal noted that even though other transactions were inherent to the principal transactions in question, Amazon failed to fully disclose them. It stressed that the acquirer persistently, on multiple occasions claimed that FRL SHA and BCAs were independent transactions and were not part of the proposed Combination. Thus, Amazon failed to comply with the disclosure requirement under Regulation 9.

Relevance of the dispute before the Supreme Court

The dispute marks the first occasion where the CCI has revoked its approval, keeping the deal in abeyance until full disclosures are made. It must be noted that the stance of the parties over disclosures has remained unchanged with Amazon arguing that the CCI had notice of all the relevant information.

The Supreme Court's opinion becomes even more relevant to settle the dispute primarily around

two major conflicts – firstly, identifying and deciding the contours of the 'inter-connected transactions' and 'identification of the actual economic and strategic purposes.' The decision would also assist the Commission in assessing whether the disclosures enlisted under the Forms at present warrant any restructuring and amendments. In addition, it can also go a long way in the strengthening of pre-merger notification of the CCI, given an already approved deal was revoked by the Commission after more than two years, citing non-disclosure.

Last but not the least, the dispute could be a landmark in deriving and revamping the appropriate standard of disclosure for the CCI, allowing a holistic assessment of any proposed transaction.

Disclosure requirement: Takeaways from other prominent jurisdictions

The United States

Section 18a, Clayton Act, 1914, prescribes pre-merger notifications of proposed acquisitions. The pre-merger filing requirements are governed by the Hart-Scott-Rodino Antitrust Improvements Act, 1976, which are triggered upon breach of the **'Size of Transaction'** threshold – "*the acquiring party holding voting securities, non-corporate interests, or assets valued at or above $101 million (2022 Amendment)"* and **'Size of Person'** threshold – "*if the acquirer has $202 million in annual net sales or total assets (Acquired or Acquiring Party), and the other party to the transaction has at least $20.2 million in annual net sales or total assets"*.

The pre-merger notifications require the parties to disclose:-

The information around 'already held' and 'to be held as a result of the transaction', the voting securities, non-corporate interests and assets (Item 2) and; the necessary studies, surveys, and reports of professionals like investment bankers, consultants, and advisors to assist the authorities in assessing the probable impact of the transaction. (Item 4).

For the inter-connected transactions, the Act makes such transactions subject to separate filing requirements under Section 801.2(e) under the Code of Federal Regulations, except in the case of a transaction that is *"solely for the purpose of investment"*.

The European Union

In the EU, Council Regulation 139/2004 governs the control of concentration in the European Union. The Regulation is applicable to all the Member States and the Commission has the power to assess the M&A having a community dimension, meeting the following thresholds:

"(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million"

Form CO (*'Relating to the notification of concentration pursuant to the Regulation'*) prescribes the

details required in the pre-merger filings. An important feature of the regime is that the Regulations provide for pre-notification, where parties can voluntarily opt for the Commission's assistance in finalizing the notification.

The relevant disclosures required are:

- The filing of documents 'bringing about the concentration', 'the minutes of the meetings and its excerpts', 'information on the affected markets', 'information on the pipeline products and plans', the 'relevant majority/minority stakes including tangible/intangible asset' for the assessment of the actual intent/purpose of the proposed transaction.
- The identification of inter-connected transactions is based on the following principles enlisted under Consolidated Jurisdictional Notice – a) unitary in nature i.e., the transaction would result in conferring one enterprise with control (sole or joint) over the other; b) they are linked by conditions; c) transactions are inter-dependent and one wouldn't stand if the other falls; d) if control over a single economic entity is acquired through several inter-conditional transactions including majority/minority stakes and tangible/intangible assets.

The Key Takeaways

Against the background of the case, it does seem that information about strategic arrangements including FRL SHA and Commercial Agreements were not disclosed against the designated items, amounting to non-disclosure of the true intent of the deal. The analysis of the issues involved in the present case shows that Form I requires more precision in the disclosures sought under the items, primarily around – already held securities (both majority and minority shareholdings) and the negotiations between the parties bringing about the transaction. Such precise information can help the CCI in formulating its firm opinion related to any given transaction and its probable impact on the existing competition in India.

Another significant observation can be to assess whether the decision of the Commission would have been different if the disclosures were made. The case has highlighted the need of establishing a review mechanism for already approved deals, aimed at checking whether the actual executed transactions conform to the deal proposed and approved by the Commission.

Suggestions

Based on the analysis of the case, the following suggestions can be drawn:

- To bring more relevant disclosures to Commission's notice, a regulatory mechanism specifically aimed at carrying out independent research and inquiry, distinct from the information provided in the forms, appears essential.
- A monitoring mechanism to continuously assess the intention and activities of the acquirer and the acquired entity over at least one-year pre-M&A and post-M&A can assist the Commission in deriving a more holistic assessment of any proposed transaction. In addition, tracing the negotiations between the parties leading to any proposed Combination can also assist in dissecting the actual intent and purpose of the deal including the identification of the other connected transactions.

- The pre-filing consultation mechanism can be further strengthened to attract more parties to approach the forum for informal guidance.
- One of the crucial aspects of the conflict in the case at hand has been the formal interpretation of the terms. For clearer interpretation of the terms, the Commission can release guidance from time to time. Terms like the extent and scope of 'economic/strategic purpose' and 'inter-connected transactions' can be clarified through such guidance.
- Even though the 2011 Regulations provide for calling independent agencies to oversee the modifications required to be undertaken by the parties, the CCI must also consider calling experts and advisors to assess the transactions economically.
- Inter-connected transactions can be made subject to a separate filing and approval, allowing the Commission to carefully peruse the transactions and their actual purpose.
- The regulations must also consider making any acquisition of the shareholding of up to 10-15%, happening before/after the principal transaction in question, and other minority shareholdings, subject to the scrutiny of the Commission.
- Lastly, while introducing changes to its regulatory framework, it must be considered that expanding the scope of the filing requirements does not lead to an act of over-enforcement, leading to a heavy compliance burden on the enterprises, and affecting the ease of doing business.

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“>Mergers, Minority shareholding, Misleading information
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