

DID CCI OVER-REACH IN SUSPENDING THE AMAZON-FUTURE DEAL?

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Was the Competition Commission's suspension of the Amazon-Future deal a slam-dunk or is there more to it than it seems?

On Wednesday, a division bench of the Delhi high court stayed arbitration proceedings initiated against the Future Group by Amazon. Future had filed a petition for invalidation of those proceedings based on a recent order of the Competition Commission of India (CCI) suspending its two-year-old approval of an Amazon-Future deal and imposing a penalty of 202 crore on Amazon. The CCI decided to take this unprecedented step on a complaint by Future that Amazon had made false representations and suppressed material facts whilst seeking CCI approval of its 2019 purchase of a stake in Future Coupons (FCPL). Amazon and Future are in the midst of a legal battle on Future's decision to sell its retail assets to Reliance Retail without Amazon's consent—which allegedly breached their pact.

In September 2019, Amazon sought the CCI's approval of its acquisition of a 49% stake in FCPL. This was subject to FCPL's parent FCRPL transferring its 2.5% stake in Future Retail to FCPL (referred to as the Coupons Transactions). These transactions also required FCPL not to exercise certain rights over Future Retail without Amazon's written consent (including consent for the sale of Future's retail assets to Reliance Retail). FCPL got those rights through a separate agreement (FRL SHA) which was executed with Future Retail before the Coupons Transactions.

Based on Future's complaint in March 2021, the CCI held that the Coupons Transactions were merely a vehicle for Amazon to "seal a strategic alignment" with Future Retail, which would give Amazon a "foot-in-the-door" of the Indian retail sector. This alignment was further secured through various commercial arrangements between Amazon and Future Retail along with the FRL SHA (referred to as the Retail Transaction).

According to the CCI, the Amazon-Future combination comprised not only the Coupons Transactions but also the Retail Transaction, and the two were inter-connected as one would not take effect without the other. Amazon failed to notify the composite combination and suppressed the actual purpose of the combination, held the CCI. Such misrepresentation and suppression by Amazon denied the CCI an opportunity to assess the effect of a strategic deal between competitors in the retail sector. Therefore, the CCI directed Amazon to re-notify the deal and suspended its approval.

The question is whether the CCI went too far in ordering a re-inquiry into a combination which closed over a year ago and should have limited sanctions only to a penalty for misrepresentation. Here are the missing links:

Was there a failure to notify? The CCI's case seems to be that there was a partial failure to notify. Only the Coupons Transactions were notified, but another inter-connected part of the same combination (i.e. the Retail Transaction) was not. If that is the case, it is not clear how the CCI had the jurisdiction to review the Coupons Transactions, as none of these individually triggered the 2019 CCI filing. This fundamental issue of jurisdiction has not been dealt with by the CCI, leaving us to wonder if there was some way in which the Coupons Transactions as a whole (not individually) could have triggered that filing in the absence of the Retail Transaction.

The CCI has acknowledged that Amazon had submitted all underlying agreements on the Retail Transaction, including an assessment of the combination's impact on the retail market. However, the CCI assessed the effects of the combination in the retail market only from the perspective of the Coupons Transactions and not the Retail Transaction. The key question here is: If Amazon submitted all agreements on the Retail Transaction (which was implicit in the Coupons Transactions, with misrepresentations only on its purpose and inter-connection), could the CCI have imposed a penalty of 200 crore for a failure to notify? In such a case, the penalty could have been limited to misrepresentation and suppression (1 crore each).

What is suspended and why? According to the CCI, the Retail Transaction was not notified. Therefore, it could not have been approved. This means that only the Coupons Transactions were approved. For not notifying the Retail Transaction, the CCI has effectively suspended its approval of the Coupons Transactions. The practical purpose sought to be achieved through the suspension is not clear—except that there can only be a consolidated approval and a partial approval cannot exist. In that case, the CCI could have simply revoked its approval on account of Amazon's misrepresentations. The 2019 order had stated that the approval would stand revoked in case of a misrepresentation.

Could the CCI override the statutory sunset period? The CCI order is conspicuously quiet on the basis for overriding a statutory sunset clause that takes away the CCI's ability to probe a combination after one year of its taking effect. The only basis could be a provision allowing the CCI discretion to pass any order for suppression. However, the legislative intent of the sunset clause is clear, and it must limit any general discretion available to the CCI. The sunset clause is sacrosanct because even the possibility of unscrambling a combination, especially a year after taking effect, could jeopardize legal certainty and adversely impact investor sentiment.

If the CCI had to play it safe, it could have pulled up Amazon only for misrepresentation and suppression. However, the maximum penalty possible would have been only 2 crore, which would hardly be a deterrent. For the greater good, the CCI perhaps decided to send out a strong message that any misrepresentation in combination cases would be unpardonable. However, it remains to be seen if the CCI's stance (especially on suspension and re-inquiry) would pass muster with appellate authorities. Having said that, I do agree with the general outlook that if combining entities are not deterred from attempts even at suppression (let alone misrepresentation), the CCI's time-bound merger control regime may be rendered futile.

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