



## JSA Newsletter Competition Law



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## National Company Law Appellate Tribunal

### NCLAT upholds the CCI order against Amazon for gun-jumping and omission of material facts

In a major development, the National Company Law Appellate Tribunal (**NCLAT**) upheld the order of the Competition Commission of India (**CCI**) whereby it suspended its approval of the acquisition of 49 per cent equity share in Future Coupons Private Limited (**FCPL**) by Amazon.com NV Investment Holdings LLC (**Amazon**) in September 2019 and imposed a penalty on Amazon for gun-jumping and suppressing material facts.

#### Brief Background

On September 23, 2019, Amazon filed a notice for the acquisition of 49 per cent equity share capital of FCPL (hereinafter referred to as '**Transaction**') which was approved by the CCI on November 28, 2019 (**CCI Approval Order**).

Prior to the execution of the Transaction, FCPL acquired certain equity warrants of Future Retail Limited (**FRL**) convertible into equity shares representing 7.30 per cent equity share capital of FRL (**Warrants Transaction**) and entered into a shareholders' agreement dated August 12, 2019 (**FRL SHA**). Amazon and Future group companies also had certain existing and potential business arrangements (collectively referred to as '**Commercial Arrangements**'). In the notice to the CCI, Amazon submitted that the Commercial Arrangements and the FRL SHA were not connected with the Transaction.

In March 2021, FCPL filed an application before the CCI stating that Amazon had concealed certain material facts from the CCI, and the actual purpose of the Transaction was to achieve a strategic alignment with Future group as a 'foot-in-door' in the Indian retail sector *via* FRL.

On December 17, 2021, the CCI passed an order against Amazon wherein it *inter alia* noted that: (i) Amazon's earlier intent was to acquire approximately 10 per cent shareholding in FRL. However, since the said acquisition could not be implemented, Amazon, indirectly, through the Transaction, sought to acquire shareholding and strategic interest in FRL; and (ii) Amazon did not mention its Commercial Arrangements with Future group in parts of the notification that requested specific disclosures on inter-connected transactions and milestones of the transaction. Amazon also failed to disclose that the FRL SHA was negotiated in the context of indirectly exercising rights in FRL.

Accordingly, the CCI imposed a penalty of INR 2 crores (USD 0.26 million)<sup>1</sup> for suppressing the actual scope and purpose of the Transaction and INR 200 crores (USD 26.36 million) for failure to notify the acquisition of strategic interest over FRL. Further, the CCI directed Amazon to file the notice for the Transaction in a Form II (long form) and until the approval of the same by the CCI, the CCI Approval Order was suspended (hereinafter referred to as the '**CCI Order**').

Aggrieved, Amazon filed an appeal challenging the CCI Order before the NCLAT.

#### NCLAT Decision

The NCLAT held as follows:

1. In the notice filed with the CCI for seeking approval of the Transaction, Amazon categorically mentioned that the Commercial Arrangements were not part of the Transaction. This is contrary to their stand before the arbitrator and High Court of Delhi (**DHC**).
2. Amazon failed to disclose certain documents to the CCI which revealed that the real purpose of the Transaction was investment in FRL and establishing a strategic partnership between Amazon and Future group in the Indian retail sector. Due to such non-disclosures, the CCI was misled into approving the Transaction.

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<sup>1</sup> USD 1 = INR 75.86

3. When an approval has been obtained by fraud/misrepresentation, the CCI has residuary powers under Section 45(2) of the Competition Act, 2002 (**Competition Act**) to suspend/ revoke it.
4. Amazon contended that the proviso to Section 20(1) of the Competition Act prohibits the CCI from initiating an inquiry into a transaction, after one year from the date of consummation. The NCLAT held that Amazon had not made full disclosure or notified the complete/actual transaction to the CCI and in absence of the said notification, and the consequent approval from the CCI, the period of limitation will not be applicable.

In view of the above, the NCLAT dismissed the appeal and upheld the penalty of INR 200 crores (USD 26.36 million) on Amazon for gun-jumping. However, it reduced the penalty of INR 2 crores (USD 0.26 million) for suppressing the actual scope of the Transaction to INR 1 crore (USD 0.13 million).

The NCLAT has also directed Amazon to file a notice with respect to the actual transaction before the CCI in Form II (long form) within 45 days from the date of the judgment and until then the CCI Approval Order shall be kept in abeyance.

*(Source: NCLAT Judgment dated June 13, 2022)*

## Competition Commission of India

### Enforcement

#### CCI dismisses case against Nandal Finance & Leasing and JPM Industries for indulging in alleged bid-rigging

The CCI received a complaint<sup>2</sup> against Nandal Finance & Leasing Private Limited and JPM Industries Limited (collectively referred to as the '**Bidders**') for indulging in bid-rigging, in relation to the disinvestment process of Central Electronics Limited (**CEL**)<sup>3</sup>, in violation of Section 3(3) of the Competition Act.

The complainant alleged that the Bidders: (i) submitted separate bids, despite the common linkages between them including a common director; and (ii) submitted their respective bids in close proximity to each other.

The CCI *inter alia* noted that: (i) the complainant failed to furnish enough evidence to substantiate the allegation of bid-rigging. By relying on its earlier decision<sup>4</sup>, it held that merely having common directors is not sufficient evidence of bid-rigging; and (ii) the disinvestment of CEL is a policy decision, and the CCI is not the appropriate authority to decide on the merits of the said disinvestment. Accordingly, the CCI dismissed the case.

*(Source: CCI order dated May 18, 2022)*

### Merger Control

#### CCI imposes a penalty of INR 1 crore on Veolia S.A. for gun-jumping

The CCI imposed a total penalty of INR 1 crore (USD 0.13 million) on Veolia Environment S.A. (**Veolia**)<sup>5</sup> for failing to notify: (i) its acquisition of 29.9 per cent equity share capital of Suez S.A. (**Suez**)<sup>6</sup> from its existing shareholder i.e., Engie S.A. (**Primary Acquisition**); and (ii) acquisition of remaining equity share capital of Suez by making a public offer (collectively referred to as the '**Transaction**').

<sup>2</sup> Mr. Virendra Kumar Singh, General Secretary, Central Electronics Limited Employees Union.

<sup>3</sup> It is a Government of India undertaking under the Department of Scientific and Industrial Research, Ministry of Science & Technology. It is engaged in the business of commercially exploiting indigenous technologies developed by National Laboratories and Research & Development (R&D) institutions in the country.

<sup>4</sup> *In Re: XYZ (Confidential) v. Continental Milkose India Limited (Case No. 25 of 2021)*.

<sup>5</sup> It is engaged in the business of optimized resource management and provides water, waste, and energy management solutions to both industrial and municipal clients.

<sup>6</sup> It is primarily engaged in the business provide water and waste management solutions to industrial and municipal clients.

The parties subsequently made structural changes to the Transaction such that Veolia and Suez would merge and form a new entity where Suez's relevant business would be transferred, together with other investors. The said transaction was notified to the CCI and subsequently approved *vide* order dated November 23, 2021.

### Brief Background

On October 6, 2020, Veolia consummated the Primary Acquisition and thereby consummated the Transaction in part, without seeking the approval of the CCI. On February 3, 2021, the CCI issued a show cause notice to Veolia to ascertain whether Veolia consummated the Primary Acquisition without seeking its approval and thereby, indulged in *gun-jumping*, in violation of Section 6(2A) of the Competition Act.

Veolia contended that the Primary Acquisition was a hostile takeover with no cooperation offered from Suez. Based on financial information available in the public domain, it was under the *bona fide* belief that the Primary Acquisition could avail the benefit of the *target exemption*<sup>7</sup>. The CCI rejected this contention and noted that there was adequate financial information of Suez available in the public domain to ascertain that the Primary Acquisition was not exempted.

Further, the CCI *inter alia* noted that Veolia's contention that, as there were structural changes made to the Transaction and the same was completely revamped (for which Veolia also got the approval of the CCI), it cannot be held liable for gun-jumping as the transaction for which the gun-jumping proceedings were initiated ceased to exist, was misplaced. The CCI noted that the structural changes were made pursuant to the closing of the Primary Acquisition and the emergence of any structural changes to the transaction does not exonerate a party from the contravention of the provisions of the Competition Act.

The CCI, while computing the penalty took into consideration the cooperation extended by Veolia during the investigation and accordingly, imposed a penalty of INR 1 crore (USD 0.13 million).

(Source: Order dated May 17, 2022)

### CCI imposes a penalty of INR 20 lakh on Allcargo Logistics for gun-jumping

The CCI imposed a total penalty of INR 20 lakh (USD 26,542.80) on Allcargo Logistics Limited (**Allcargo**)<sup>8</sup> for failing to notify its acquisition of 46.86 per cent equity share capital of GATI Limited (**Gati**)<sup>9</sup> (referred to as the "**Transaction**").

By April 2020, Allcargo consummated the Transaction without seeking CCI approval for the same. In December 2020, the CCI issued a show a cause notice to Allcargo asking it to explain why the Transaction was not notified to the CCI for its approval. The CCI *inter alia* noted that while assessing the filing requirement of the Transaction, Allcargo wrongly relied on the standalone financial statements of Gati instead of its consolidated financial statements basis which the *target exemption* was not available and the Transaction ought to have been notified to the CCI. Accordingly, the CCI imposed a penalty of INR 20 lakhs (USD 26,542.80) on Allcargo.

(Source: CCI Order dated May 2, 2022)

<sup>7</sup> It exempts a transaction from mandatory notification to, and approval from, the CCI where the target enterprise either has assets of not more than INR 350 crores (USD 46.14 million) in India or turnover of not more than INR 1,000 crores (USD 131.82 million) in India.

<sup>8</sup> It is engaged in the business of provision of integrated logistics solutions.

<sup>9</sup> It is primarily engaged in the business of express distribution, supply chain management solutions etc.

## CCI approves the acquisition of minority shareholding of Xpressbees by the TPG Group

The CCI approved the acquisition of 6.92 per cent equity share capital of Busybees Logistics Solutions Private Limited (**Xpressbees**)<sup>10</sup> by the TPG group (**TPG Group**)<sup>11</sup> (referred to as the '**Proposed Transaction**'). Pursuant to the Proposed Transaction, the TPG Group will have the right to: (i) nominate a director on the board of Xpressbees; and (ii) participate in matters requiring the consent of a certain threshold of the investors.

The CCI noted that there are no horizontal overlaps or complementary relationships between the activities of Xpressbees and the portfolio companies of the TPG Group in India.

Further, the CCI noted that there is a vertical relationship between the activities of the parties in the upstream market of online business-to-business and business-to-consumer sale of products and the downstream market of logistics services for delivery of the products to the end-consumers.<sup>12</sup> Given that the volume of procurement of logistics services by TPG Group's portfolio companies is minuscule along with the presence of significant players in the market of logistics services for e-commerce, the CCI noted that the Proposed Transaction is not likely to raise foreclosure concerns.

*(Source: Order dated March 23, 2022)*

## CCI approves the acquisition of additional shareholding of Future Generali by the Generali Group

The CCI approved the acquisition of an additional 25 per cent equity share capital of Future Generali India Insurance Company Limited (**Future Generali**)<sup>13</sup> by Generali Participations Netherlands N.V. (**Generali Group**)<sup>14</sup> (referred to as the '**Proposed Transaction**'). Pursuant to the Proposed Transaction, the shareholding of Generali Group will increase from 49 per cent to approximately 74 per cent, in Future Generali.

The CCI noted that there is a vertical relationship between the activities of the parties in the upstream market for general insurance services and the downstream market for the distribution of insurance services, in India.<sup>15</sup> However, given the insignificant presence of the parties and the presence of several players in the markets, the Proposed Transaction is not likely to raise competition concerns.

*(Source: Order dated March 15, 2022)*

## CCI approves the acquisition of L&T Investment Management by HSBC Asset Management

The CCI approved the acquisition of 100 per cent equity share capital of L&T Investment Management Limited (**L&T AMC**)<sup>16</sup> by HSBC Asset Management (India) Private Limited (**HSBC AMC**)<sup>17</sup>. Subsequently: (i) the sponsorship, trusteeship, management and administration of the L&T Mutual Fund schemes managed by L&T AMC will be operated

<sup>10</sup> It is engaged in the business of providing logistics and delivery solution services.

<sup>11</sup> It is an investment firm. TPG, Inc. is the ultimate holding company of the TPG Group. It also has a controlling stake in NewQuest Capital Partners, another private equity fund.

<sup>12</sup> TPG Group, through its portfolio companies, is present in the upstream market of online business-to-business and business-to-consumer sale of products which avails the services of Xpressbees which is present in the downstream market of delivery of the products to the end-consumers.

<sup>13</sup> It is an investment holding company, through which it holds shares (directly and indirectly) in joint ventures with Future Group, which are engaged in the provision of insurance services

<sup>14</sup> It is engaged in the business of the provision of finance activities, by borrowing and lending money, including private borrowings, worldwide.

<sup>15</sup> It is present in the upstream market of provision of general insurance services in India which can be distributed by FG&G Distribution Private Limited, a joint venture company of the Generali Group; and Future group, which is present in the downstream market of distribution of insurance services in India.

<sup>16</sup> It is an asset management company operating the day-to-day functioning of the L&T Mutual Fund schemes and manages the investment portfolio of the same.

<sup>17</sup> It is an asset management company operating the day-to-day functioning of the HSBC Mutual Fund schemes and provides portfolio management services and investment advisory services.

and managed by HSBC AMC; and (ii) the HSBC Trustee<sup>18</sup> will be appointed as the trustee of the L&T MF schemes (collectively referred to as the **'Proposed Transaction'**).

The CCI noted that there are horizontal overlaps between the activities of the parties in the broad market for the provision of mutual funds in India and the narrow market for the provision of: (i) equity oriented mutual fund schemes; (ii) debt-oriented mutual fund schemes; and (iii) hybrid mutual fund schemes, in India. However, given the low market shares of the parties with the presence of several significant players in these markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

Further, the CCI noted that there is a vertical relationship between the activities of the parties in the upstream market for the provision of mutual fund products and the downstream market for the distribution of mutual funds, in India.<sup>19</sup> However, given the insignificant presence of the parties and the presence of several players in the market, the same is not likely to raise foreclosure concerns.

Additionally, the CCI noted that there is a complementary relationship between the activities of the parties, as portfolio management services, can be considered complementary to mutual funds in India.<sup>20</sup> However, given the insignificant presence of the parties and the presence of several players in the market, the Proposed Transaction is not likely to raise competition concerns.

*(Source: CCI Order dated March 9, 2022)*

### **CCI approves the acquisition of joint control of athenahealth Group Inc. by H&F, Bain and GIC**

The CCI approved the acquisition of joint control of athenahealth Group Inc.<sup>21</sup> (**athenahealth**) by funds managed by Hellman & Friedman LLC (**H&F**)<sup>22</sup>, Bain Capital Investor LLC (**Bain**)<sup>23</sup>, and GIC Special Investments Pte. Ltd. (**GIC**)<sup>24</sup> (H&F, Bain, and GIC are collectively referred to as the **'Acquirers'**)<sup>25</sup> (referred to as the **'Proposed Transaction'**).

The CCI noted that there are horizontal overlaps between the activities of the portfolio companies of the Acquirers and athenahealth in the: (i) broad market for the provision of information technology and information technology enabled services; (ii) narrow market for the provision of business process outsourcing and information technology outsourcing services; and (iii) narrowest market for the provision of healthcare technology services. However, given the low market share of the parties as well as presence of several players in the markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

*(Source: CCI order dated February 7, 2022)*

<sup>18</sup> It holds fiduciary responsibility for the administration and management of the money, property, and assets under the HSBC Mutual Funds scheme.

<sup>19</sup> L&T Mutual Fund is present in the upstream market of supply of mutual fund products in India and which is distributed by the affiliate of HSBC AMC, which is present in the downstream market of distribution of mutual funds in India.

<sup>20</sup> HSBC AMC is engaged in the business of portfolio management services and L&T AMC is engaged in the market of mutual funds in India.

<sup>21</sup> It is engaged in the business of providing cloud-based services in the healthcare sector such as medical records, revenue cycle, patient engagement, care coordination, population health services, point-of-care mobile applications, advisory services, and telehealth. It is jointly controlled by Laran Aggregator LP and Veritas Capital Fund Management, LLC.

<sup>22</sup> Through Hellman & Friedman Capital Partners X, L.P., Hellman & Friedman Capital Partners X (Parallel), L.P., HFCP X (Parallel-A), L.P., H&F Executives X, L.P., H&F Executives X-A, L.P., and H&F Associates X, L.P.

<sup>23</sup> Through Bain Capital Fund XIII, L.P., and Bain Capital Fund (Lux) XIII, SCSP.

<sup>24</sup> Through Viggo Investment Pte. Ltd.

<sup>25</sup> The Acquirers are acquiring joint control over athenahealthcare Group Inc. through Minerva Bidco Inc.

## CCI approves the acquisition of additional shareholding of Escorts by Kubota

The CCI approved the acquisition of an additional 35.71 per cent equity share capital of Escorts Limited (Escorts)<sup>26</sup> by Kubota Corporation (Kubota)<sup>27</sup> (referred to as the 'Proposed Transaction'). Pursuant to the Proposed Transaction, the shareholding of Kubota will increase from 9.09 per cent to 44.80 per cent, in Escorts.

The CCI noted that there are horizontal overlaps between the activities of the parties in the market of manufacture and/or sale of: (i) tractors; (ii) combine harvesters; (iii) diesel engines; (iv) implements (rotavators only); (v) spare parts; and (vi) lubricants. However, given the low market shares of the parties with the presence of several significant players in the relevant markets, the CCI noted that the Proposed Transaction is not likely to raise competition concerns.

Further, the CCI noted that there is a vertical relationship between the activities of the parties in the upstream market of trading and assembly of agricultural machinery/equipment and the downstream market of sales, renting advanced agricultural equipment and providing agricultural after-sales services<sup>28</sup>. However, given the insignificant presence of the parties and the presence of several players in the market, the same is not likely to raise foreclosure concerns.

Additionally, the CCI noted that there are potential complementary relationships between the activities of the parties as: (i) implements<sup>29</sup> can be considered complementary to tractors; and (ii) spare parts and lubricants can be considered complementary to agriculture equipment. However, given the insignificant presence of the parties and the presence of several players in the market, the Proposed Transaction is not likely to raise competition concerns.

*(Source: CCI Order dated February 1, 2022)*

## CCI approves the acquisition of the packaging business of Jindal group by the Brookfield SPV under Green Channel

The CCI approved the acquisition of: (i) packaging business of JPFL Films Private Limited (**JPFL Films**)<sup>30</sup>; and (ii) compulsorily convertible preference share capital and equity share capital of JPFL Films, by Brookfield Asset Management Inc.<sup>31</sup>, through Project Holdings Fourteen (DIFC) Limited<sup>32</sup> (collectively referred to as the '**Proposed Transaction**'). The parties notified the Proposed Transaction under the Green Channel Route (**GCR**) as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

*(Source: Summary)*

<sup>26</sup> It is engaged in the business of manufacturing and sale of agri-machinery, construction equipment, crop solutions etc. and trading of oils and lubricants, implements, trailers, tractors etc.

<sup>27</sup> It is incorporated in Japan and is engaged in the business of manufacturing various product lines including tractors, combine harvesters and rice transplanters, utility vehicles, turf equipment, etc. In India, it is engaged in supplying tractors, rice transplanters, etc. and manufacture and sale of tractors.

<sup>28</sup> Kubota is present in the upstream market of trading and assembly of agricultural machinery/equipment and the portfolio company of Escorts i.e., Escorts Crop Solution Limited is present in the downstream market of sales, renting advanced agricultural equipment and providing agricultural after-sales services.

<sup>29</sup> Equipment connected with the tractors to perform various functions like ploughing, threshing, etc.

<sup>30</sup> It is not engaged in any commercial activity currently however, the packaging business will be transferred by Jindal Poly Films Limited and Jindal Films India Limited to JPFL Films, prior to the implementation of the Proposed Transaction.

<sup>31</sup> It is listed on New York and Toronto stock exchanges and is an alternative asset manager and operator of assets, focused on investing in long-life, high-quality assets across real estate.

<sup>32</sup> It is incorporated in United Arab Emirates and is a special purpose vehicle of Brookfield Inc.

## CCI approves the acquisition of shareholding of Crystal Group Protection by the World Bank Group under Green Channel

The CCI approved the acquisition of compulsorily and mandatorily convertible debentures of Crystal Crop Protection Limited<sup>33</sup> by the World Bank Group through International Finance Corporation<sup>34</sup> and IFC Emerging Asia Fund, LP<sup>35</sup>, which will subsequently be converted to certain equity share capital (referred to as the '**Proposed Transaction**'). The parties notified the Proposed Transaction under the GCR as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

*(Source: Summary)*

## CCI approves the acquisition of additional shareholding of Aviva Life Insurance by Aviva International under Green Channel

The CCI approved the acquisition of an additional 25 per cent equity share capital of Aviva Life Insurance Company India Limited (**Aviva Life Insurance**)<sup>36</sup> by Aviva International Holdings Limited (**Aviva**)<sup>37</sup> (referred to as the '**Proposed Transaction**'). Pursuant to the Proposed Transaction, the shareholding of Aviva will increase to 74 per cent from 49 per cent, in Aviva Life Insurance. The parties notified the Proposed Transaction under the GCR as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

*(Source: Summary)*

## CCI approves the acquisition of minority shareholding of Sagar Cements by the Premji Foundation under Green Channel

The CCI approved the acquisition of 10 per cent equity share capital of Sagar Cements Limited<sup>38</sup> by Premji Foundation, through PI Opportunities Fund I – Scheme II<sup>39</sup> (referred to as the '**Proposed Transaction**'). The parties notified the Proposed Transaction under the GCR as there were no horizontal, vertical, or complementary overlaps between the activities of the parties in India.

*(Source: Summary)*

## Miscellaneous

### CCI conducts a market study on the film distribution industry

Based on media reports, the CCI is conducting a market study on the film distribution industry to better understand competition law concerns that might arise in the said industry. The market study aims to understand the: (i) role of several federations and associations in the film distribution industry; (ii) the role of over-the-top platforms as important channels for distribution of content; and (iii) possibility of self-regulation for ensuring healthy competition in the film distribution industry.

*(Source: The Hindu)*

For more details, please contact [km@jsalaw.com](mailto:km@jsalaw.com)

<sup>33</sup> It is engaged in the business of manufacture and sale of: (i) crop protection products; (ii) seeds; and (iii) farm solution/ agri-equipment products.

<sup>34</sup> It is a multilateral organisation part of the World Bank. It provides financial assistance to encourage private sector development in emerging economies and makes investments in private enterprises located in its member countries. It also provides advisory and asset management services.

<sup>35</sup> It is a fund managed by IFC Asset Management Company a division of IFC. It makes investments in emerging markets of Asia.

<sup>36</sup> It is engaged in the business of offering insurance products including saving plans, term protection plans, health plans, pension products and micro insurance (rural) products.

<sup>37</sup> It is a holding company and does not carry on any business or operations.

<sup>38</sup> It is engaged in the business of manufacturing and selling different varieties of cement such as ordinary portland cement.

<sup>39</sup> It is a category II alternative investment fund registered with the Securities and Exchange Board of India.





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