

India's Fair Market Regulator Needs to Define What is the Market Sin it has Penalized Amazon For

By Subhomoy Bhattacharjee



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When France and Germany went to war in 1870, a London newspaper pithily remarked "The Liberal Empire goes to war on a mere point of etiquette." The order issued by the Competition Commission of India² against Amazon revoking its acquisition of 49 percent in Future Coupons Private Limited ("FCPL") in 2019 seems to be similarly based somewhat on a question of etiquette.

Amazon.com NV Investment Holdings LLC ("Amazon"), a direct subsidiary of Amazon.com Inc, and India's Future Group, operating in the retail and fashion sector have presented competing claims before the Competition Commission of India ("CCI"). Amazon has claimed³ the fair market regulator made a mistake in approving FCPL's sale of its retail assets housed in Future Retail Limited ("FRL") to a company owned by Reliance Industries ("RIL") for US\$ 3.4 billion. According to the US-based multinational technology company, the approval was "illegally obtained" since a previous order exists against the finalization of the deal, issued by a Singapore arbitration court.

FCPL has, in turn, **contended**⁴ that Amazon filed "false and incorrect information" to acquire the 49 percent stake in FCPL. For context, FCPL is the primary shareholder of FRL, holding a 9.82 percent equity. The key point of the dispute was whether FCPL should get prior approval from Amazon before exercising any rights over FRL, essentially a Right of First Refusal clause.

At this stage, it is not my intention to question whether Amazon has disclosed all that is material in the case with CCI or anyone else. The same holds true regarding its competitor, RIL. Rather, this paper analyzes only the documents made publicly available in the respective cases.

The fast-growing retail sector in India has become a highly sought-after space for Indian

and foreign businesses to expand their presence. The struggle between Amazon and RIL is the most visible manifestation of this competition.

The CCI has upheld FCPL's argument that Amazon had "suppressed the actual purpose and particulars of the combination." In issuing its order the Commission noted Amazon's original application had "omissions, false statements and misrepresentations (which) have the effect of influencing the line of inquiry in assessing the Combination."

Consequently, the CCI has:

- a) revoked its approval of the combination between Amazon and FCPL which was given on 28th November 2019;
- b) asked Amazon to refile its application within 60 days of the new order "with true, correct and complete information"; and
- c) imposed a penalty of Rs two hundred and two crores (Rs 2.02 billion) on Amazon.

Whatever the position of the contestants, one of the highlights of the dispute pitching Amazon against RIL is that it has again come back to be settled by the CCI. This is where it should have been from the beginning, since August 2020, when RIL's branch Reliance Retail Ventures Limited announced the **buy-out** of FRL's retail business. Soon thereafter, however, Amazon moved to contest the deal at the Singapore International Arbitration Centre. An interim decision was passed by the Emergency Arbitrator in Singapore in favor of Amazon, preventing FRL from moving forward on the deal with the RIL-owned company.

In response, the Future Group also turned to the courts in order to nullify the arbitration orders. There were competing court cases at the Delhi High Court and at the Supreme Court.

¹ Consulting Editor for Business Standard. His areas of interest include public policy, especially regulatory issues, finance, and urban development.

² https://www.cci.gov.in/sites/default/files/Notice_order_document/Order-688.pdf.

³ <https://www.financialexpress.com/industry/amazon-asks-india-antitrust-body-to-revoke-reliance-future-deal-approval/2377772/>.

⁴ <https://www.thehindubusinessline.com/companies/cci-issues-notice-to-amazon-for-suppression-of-facts/article35475920.ece>.

CCI Purview

At its core, the dispute between Amazon on one side, and FRL and RIL on the other, should be about market share and the possible formation of cartels, basically the possibility of an anti-competitive behavior. However, in its 57-page order issued 17th December, 2021 the CCI only provided reams of text to prove that Amazon had “concealed its strategic interest over FRL.” Principally, it has argued that Amazon did not disclose FRL’s shareholders agreement, which apparently gave Amazon an overriding presence in FCPL. This is what I call an issue of etiquette, which has riled CCI. While the CCI is within its rights to demand all sorts of documents in order to issue a decision on a proposed combination, if they do not establish the reasons why the absence hurts the market and consumer welfare, the regulator has no basis for passing any order.

Under the Competition Act, the CCI’s rationale for examining any case is only supposed to be anti-competitive behavior. It is not a court of law, and therefore is not able to examine evidence from any other point of view. This is the basis, as one understands, even for its power to impose penalties for furnishing false or incomplete information on a transaction, under Sections 44 and 45 of the Competition Act, as in this case.

An examination of how “strategic” Amazon’s interest in FRL is should therefore be linked specifically to the use of penalties to impact the market. For instance, when the capital market regulator, the Securities and Exchange Board of India (“Sebi”) examines any charge of insider trading (the highest offence under its purview) or that of misguiding investors, it does so with reference to the integrity of the market. The government has, for instance, denied Sebi the power to tap phones⁵ and other similar activities, leaving those up to the tax authorities and other prosecuting agencies. Penalties are therefore monetary, while issues of fraud and other related problems are dealt with by the courts.

The Sebi order in the *Sahara* case is a fine example in this respect:

“The Board as a regulator has been assigned a statutory duty to protect the integrity of the securities market and the interests of investors in securities, apart from promoting the development of and regulating the market by such measures as it may deem fit. It is in the discharge of this statutory obligation that the Board has framed the Regulations, with a view to keeping the marketplace safe for investors to invest by keeping undesirable elements out.”⁶

Nowhere in the CCI order does it mention what material damage to the market was being investigated in this case. The Commission has not gone into whether the submission of additional documents was necessary to understand the supposed market power that shall be garnered by either Amazon or FCPL.

Instead, it argues, as follows:

“Through these transactions, Amazon Group wanted to secure its ability to become the single largest shareholder of FRL when foreign direct investment opens up in the retail sector; preclude/block competitive interest in FRL, and utilize FRL’s pan-Indian store infrastructure to bolster their ultra-fast delivery program, exclusively carry private-label portfolio in grocery and value fashion; and drive fees for Amazon.”

All of the above are objectives that a company can legitimately have. More significantly, these do not denote any anti-competitive behavior. What, then, is the misdemeanor being pursued by the CCI in the order delivered on December 17, 2021?

In determining its approval of the investment by Amazon into FCPL, the CCI was supposed to stitch all the information Amazon offered, considering whether said information or facts

⁵ <https://www.moneycontrol.com/news/business/markets/centre-declines-sebis-request-to-tap-phones-in-insider-trading-cases-report-5737031.html>.

⁶ https://www.sebi.gov.in/enforcement/orders/mar-2021/order-in-the-matter-of-sahara-india-financial-corporation-limited_49381.html.

were a) materially different from what it had offered earlier, and b) whether they would have hurt the market adversely. Incidentally, para. 12 of the CCI order did recognize the overlap of Amazon's business with FRL⁷. In other words, the question was whether the combination had the potential to affect the operation of a fair market.

To provide further context, the acquisition of FCPL by Amazon in 2019, and by the RIL subsidiary of FRL in 2020 were both cleared by CCI. While the two acquirers had offered different reasons for their respective transactions, the CCI, surprisingly made no mention of the first one in its second order. In para. 42 of the second order, CCI had recognized the presence of Amazon in the B2B marketplace in India, among others, as a competition constraint. Yet it had found no reason to contextualize the second order.

Incidentally, in the case of RIL subsidiary RRVL's takeover of FRL, while the RIL entities had clearly stated the market where the combined entity would operate as being the one for business-to-business sales in India (the same market where Amazon got its license to operate). However, CCI's order was regarding the B2C segments. In paragraphs 25, 29, 31, and 33 of the order, the regulator notes⁸ that the parties have averred "that the relevant product market may be considered as the market for the overall retail market and alternatively as the markets for retail of (i) F&G; (ii) AFA; and (iii) GM...The retail market in India comprises large brick-and-mortar stores, online retailers, mom and pop stores, kirana stores, etc. These offer the same or similar

products to end consumers and compete inter-se. There is presence of retail hubs such as haats, mandis, bazaars, and cluster markets ("Local Hubs"). Largely, the stores can be said to fall under the unorganized or the organized segments. All kinds of retail products (like grocery, apparel, general merchandise, etc.) are sold through both organized and unorganized segment stores." Comparing the size of this retail universe to the proposed merger, the Commission "decided to leave the delineation of the relevant market open as it was observed that the Proposed Combination is not likely to cause an appreciable adverse effect on competition in any of the possible alternative relevant markets." The assessment does look all over the place.

This brings us the need to define "consumer welfare." The CCI has always shied away from a definition of consumer welfare. In other words, has there been any welfare loss for the economy? It has instead pursued market share as evidence of anti-competitive behavior, as it has done in the case of Google. If the charge is of suppressing "strategic interests" in FRL, that should have been served by referring the same to other government agencies like the Enforcement Directorate. The latter has already summoned both the companies for a hearing on the same.

Finally, in order to face a legal challenge for which there is essentially no precedent and very little jurisprudence to guide its work, the CCI will be handling this most sensitive analysis when the post of adviser (law) in the Commission is vacant. It has put out an advertisement to fill this position.

⁷ https://www.cci.gov.in/sites/default/files/Notice_order_document/FinalOrder-688.pdf.

⁸ https://www.cci.gov.in/sites/default/files/Notice_order_document/Order771-Webhost.pdf.