17th December, 2021

To,
Dept. of Corporate Services (CRD)
BSE Limited
Phiroze Jeejeebhoy Towers,
Dalal Street,
Mumbai - 400 001
Scrip Code: 540064
Scrip Code of Debt: 958809, 958810 & 959518

Listing Department
National Stock Exchange of India Limited
Bandra Kurla Complex,
Bandra East,
Mumbai - 400 051
Symbol: FRETAIL

Dear Sir / Madam,

Sub: Intimation in relation to order passed by Competition Commission of India ("CCI") on the application dated 25th March 2021 filed by Future Coupons Private Limited, promoter group entity

With reference to the above, we would like to inform that Competition Commission of India ("CCI") has passed an order in the proceedings against Amazon.com NV Investment Holdings LLC under section 43A, 44 and 45 of the Competition Act, 2002. Copy of the Order is enclosed as Annexure 1.

The above is for your information and record please.

Thanking you,

Yours faithfully,
For Future Retail Limited

C. P. Toshniwal
Chief Financial Officer

Encl. : as above.

CC: **Singapore Exchange Securities Trading Limited**
2, Shenton Way, #02-02, SGX Centre 1.
Singapore -068 804

सत्यमेव जयते

Fair Competition
For Greater Good

भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA

By e-mail and/or speed post

Ref No. C-2019/09/688 **17th December 2021**

To

Future Coupons Private Limited
Through: Agarwal Law Associates,
19, Babar Road, Bengali Market,
New Delhi – 110001
Email: pranjit@aglaw.in

Subject: Notice under Sections 43A, 44 and 45 of the Competition Act, 2002 (Act) in Combination Registration No. C2019/09/688 read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009

In the instant matter, Commission has passed its order on 17th December 2021 and the same is enclosed herewith for your information.

Ghosh Dastidar
Secretary

Encl: As above

9th Floor, Office Block-1, Kidwai Nagar (East), New Delhi-110 023, INDIA
Phone : +91-11-24664100, Fax : +91-11-20815022, Web. : www.cci.gov.in

COMPETITION COMMISSION OF INDIA

17th December, 2021

Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances

For Amazon	:	Mr. Gopal Subramanium and Mr. Amit Sibal, Senior Advocates with Mr. Anand S. Pathak, Ms. Sreemoyee Deb, Ms. Anubhuti Mishra and Mr. Rajat Moudgil, Advocates alongwith Mr. Rakesh Bakshi, Mr. Ankur Sharma, Ms. Ujwala Uppaluri and Ms. Hina Doon, representatives of Amazon
For FCPL	:	Mr. Harish Salve and Mr. Ramji Srinivasan, Senior Advocates with Mr. Raghav Shankar and Mr. Pranjit Bhattacharya, Advocates alongwith Mr. Sanjay Rathi, representative of FCPL
For CAIT	:	Mr. Krishnan Venugopal and Mr. Saurabh Kirpal, Senior Advocates with Mr. Rajat Sehgal and Mr. Debayan Gangopadhyay, Advocates

Order under Sections 43A, 44 And 45 of the Competition Act, 2002

This order shall govern the disposal of the proceedings initiated against Amazon.com NV Investment Holdings LLC (**Amazon**), a direct subsidiary of Amazon.com Inc, under Sections 43A, 44 and 45 of the Competition Act, 2002 (**Act**), in relation to its acquisition of 49% shareholding in Future Coupons Private Limited (**FCPL**), in pursuance of the show cause notice dated 4th June, 2021 (**SCN**), based on an application dated 25th March, 2021 (**Application**) of FCPL. The said transaction was notified to the Competition Commission of India (**Commission**) by Amazon in Combination Registration No. C-2019/09/688. The said notification (**Notice**) was given by Amazon on 23rd September, 2019, pursuant to Section 6(2) of the Act, in Form I of Schedule II to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**).

A. Background

2. In terms of 'Part V: Description of the Combination' of the aforesaid Notice, the **Combination** notified by Amazon comprised the following three (3) transactions[1]:

2.1. *Transaction I*: The issue of Nine Million One Hundred and Eighty Three Thousand Seven Hundred and Fifty-Four (9,183,754) Class A voting equity shares of FCPL to Future Coupons Resources Private Limited (**FCRPL**). Prior to, and immediately post issuance of such equity shares, FCPL will be a wholly owned subsidiary of FCRPL; and

2.2. *Transaction II*: The transfer of Thirteen Million Six Hundred and Sixty Six Thousand Two Hundred and Eighty Seven (13,666,287) shares of FRL held by FCRPL (representing Two decimal Five Two Percent (2.52%) of the issued, subscribed and paid-up equity share capital of Future Retail Limited (**FRL**), on a Fully Diluted Basis) to FCPL; and

[1] Paras 15 and 16 at page 20 of the Notice

2.3. *Transaction III*: The acquisition of the Subscription Shares representing Forty Nine percent (49%) of the total issued, subscribed and paid-up equity share capital of FCPL (on a Fully Diluted Basis) by Amazon, by way of a preferential allotment.

3. It was stated in the Notice that obligation of Amazon to consummate Transaction III is subject to the completion of Transaction I and Transaction II. It was stated in the Notice that neither Transaction I nor Transaction II, on a standalone basis, is notifiable to the Commission, being contemplated between a parent and its subsidiary. It was further submitted that Transaction III, on a standalone basis, benefits from Target Exemption[2] because the value of assets and turnover of FCPL (as of 31st March, 2019) (which is the target for the purpose of Transaction III) is below the thresholds prescribed for such purpose. Without prejudice to the submissions on exemption, Amazon has further stated that if the Commission considers the Combination to be notifiable, Amazon is notifying the Combination in terms of Section 6(2) of the Act read with sub-regulation (4) of Regulation 9 of the Combination Regulations[3].

4. It was also stated in the Notice that in relation to the Combination notified to the Commission, Amazon and the relevant entities and persons, belonging to the Future Group have entered into: (a) a share subscription agreement dated 22nd August, 2019 (**FCPL SSA**) to set out the terms and conditions of subscription by Amazon and the issuance by FCPL of its shares to Amazon; and (b) a shareholders agreement dated 22nd August, 2019 to determine their respective rights and obligations as shareholders of FCPL (**FCPL SHA**)[4]. Amazon has stated in the Notice that the parties have only executed FCPL SSA and FCPL SHA in relation to the Combination[5].

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[2] Notification No. S. O. 988(E) dated 27th March, 2017 of the Central Government

[3] Paras 20 and 21 at page 22 of the Notice

[4] Para 5 at page 5 of the Notice

[5] Para 34 of the Notice

5. The Notice also mentioned that Amazon would acquire certain rights in terms of FCPL SHA to protect its investment in FCPL. These, *inter alia,* included the requirement of prior written consent of Amazon, for FCPL to decide on or implement any matter under the shareholders' agreement dated 12th August, 2019 relating to FRL (**FRL SHA**), which requires the consent of FCPL. Footnote 3 of the Notice stated that, prior to the Combination, FCPL had acquired equity warrants of FRL, convertible into equity shares representing 7.30% of the share capital of FRL, within 18 months of the date of allotment (**Warrants Transaction**). The Warrants Transaction was notified to the Commission in Combination Reg. No. C-2019/03/653 and the same was approved *vide* order dated 15th April, 2019. Subsequently, the Promoters[6], FCPL and FRL entered into FRL SHA, which sets forth *inter se* mutual rights and obligations of the parties as shareholders. It was specifically asserted in the same footnote that the execution of FRL SHA is pursuant to the Warrants Transaction.

6. Reference was made in the Notice to certain existing and contemplated business arrangement/ agreements[7] between FRL and Amazon Seller Services Private Limited (**ASSPL**) that govern the listing of the products of FRL, including third-party brands sold by FRL, on the Amazon India Marketplace[8]. The Notice also referred to an agreement dated 21st August, 2019 between Amazon Retail India Private Limited (**ARIPL**) and Future Consumer Limited (**Future Consumer**) for supply of, *inter alia,* food category products of Future Consumer to ARIPL. The Notice further referred to a memorandum of understanding dated 21st August, 2019 amongst Amazon Pay (India) Private Limited (**APIPL**) and FRL to offer the option of making payments through Amazon Pay semi-closed wallet to end consumers making purchases across retail outlets and websites operated by FRL and entities controlled or wholly owned by FRL. However, it was stated that all these agreements/arrangements are neither inter-

[6] The term 'Promoters' has been used in the Notice to mean those identified as promoters in Schedule I of the FCPL SSA and Schedule I of the FCPL SHA. These are Mr. Kishore Biyani, Ashni Kishore Biyani, Anil Biyani, Gopikishan Biyani, Laxminarayan Biyani, Rakesh Biyani, Sunil Biyani, Vijay Biyani, Vivek Biyani, FCRPL and Akar Estate and Finance Private Limited

[7] Business Solutions Agreement, Prime Now Program Terms, Prime Now FRL Amendment Agreement and Softlines FRL Agreement, referred to in paras 62 to 66 of the Notice

[8] Para 63 of the Notice

connected with, nor part of, the Combination; or not related to the Combination in any manner whatsoever[9]. The agreement, arrangements and the memorandum of understanding referred above shall be collectively referred to as **Commercial Arrangements** or **BCAs**. In relation to the arrangements/agreement between ASSPL and FRL, it was stated that given the proximity of the execution of these agreements/arrangements, the parties, in good faith, have decided to give effect to the aforementioned agreements only after the receipt of the approval from the Commission in relation to the Combination[10].

7. On the rationale of the Combination, Amazon had stated in the Notice that it believes that FCPL holds potential for long term value creation and providing returns on its investment. It was further stated that Amazon decided to invest in FCPL with a view to strengthen and augment the business of FCPL (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards to corporate customers) and unlock the value in the company[11]. Amazon furnished a presentation titled Taj-Coupons – Business Plan for Five Years in response to Item 8.8 of Form I, which require the notifying party to disclose documents, material (including reports, studies, plan, latest version of other documents, *etc.*) considered by and/or presented to the board of directors and/or key managerial person, in relation to the proposed combination.

8. In terms of Regulation 14 of the Combination Regulations, letters dated 9th October, 2019 and 24th October, 2019 were issued to Amazon to remove certain information gaps in the Notice. Amazon filed its responses to both these communications on 15th November, 2019. Some of the statements and clarifications of Amazon in the said submissions that are relevant to the instant proceedings are as under:

[9] Paras 65, 96 and 100 of the Notice

[10] Para 65 of the Notice

[11] Para 30 of the Notice

8.1. To a query posed by the Commission, on the claim that the investment by Amazon is strategic for it to become a part of the ecosystem, it was submitted that the Combination will enable the parties to: (i) enhance existing portfolio of investments of Amazon in the payments landscape in India; (ii) provide an opportunity to FCPL to learn global trends in digital payments solutions and launch new and innovative product offerings; and (iii) offer innovative payments solutions to entities so as to enhance consumer convenience and user experience[12];

8.2. In response to a query on the rationale of Amazon to acquire rights over FRL and whether they are strategic or economic, Amazon submitted that its decision to invest in FCPL is, *inter alia*, based on the following considerations: (a) the unique business model of FCPL addresses an existing gap in the payments landscape in India, thereby making it a strong and sound investment opportunity for Amazon (which holds similar existing investments in entities engaged in business activities within the payments market in India); and (b) while FCPL has a strong growth potential, in the short term, to add credibility to its financial position, it has invested in and proposes to invest in FRL, which is a publicly traded company with strong financials and futuristic outlook[13];

8.3. Amazon had also stated that it does not have any direct or indirect shareholding in FRL. It would not acquire directly any rights in FRL. Amazon has only limited investor protection rights in FCPL with a view to protect the value of its investment in FCPL. These rights can be exercised only through FCPL and not directly by Amazon. The said rights have been derived from the rights granted to FCPL in terms of FRL SHA, which was negotiated by the

[12] Response to query No. 2.13 (c) of the letter dated 9th October, 2019 available at pp. 34 and 35 of the submissions dated 15th November, 2019 of Amazon

[13] Response to query No. 2.5 of the letter dated 24th October, 2019 available at para 35 at page 35 of the submissions dated 15th November, 2019 of Amazon

promoters, FRL and FCPL, independent of the investment by Amazon in FCPL and with a view to unlock value for FCPL[14]; and

8.4. Amazon had further claimed that the Commercial Arrangements have not been entered into pursuant to the Combination and are not part of, or connected with, the Combination in any manner whatsoever[15]. It was further asserted that though being executed contemporaneously with FCPL SHA and FCPL SSA, these are in no way connected with the Combination and each such commercial agreement has been negotiated between its respective parties, in isolation, and independent of the Combination[16]. Furthermore, the Commercial Arrangements need not be examined under the framework for the regulation of combinations in terms of the Act and the Combination Regulations[17].

9. The Commission approved the Combination under Section 31(1) of the Act, on 28th November, 2019 (**Approval Order**), upon competition assessment of the overlapping business activities of Amazon, FCPL and their group entities and after arriving at the opinion that the Combination is not likely to cause any appreciable adverse effect on competition in India.

B. Initiation of proceedings under Sections 43A, 44 and 45 of the Act

10. FCPL filed the Application dated 25th March, 2021 stating that Amazon has initiated arbitration proceedings in relation to transfer of assets of FRL, a company in which FCPL holds 9.82% of the shareholding and there are related litigations pending before the constitutional courts. It has been alleged in the Application that Amazon has taken

[14] Response to query No. 2.5 of the letter dated 24th October, 2019 available at para 37 at page 36 of the submissions dated 15th November, 2019 of Amazon

[15] Para 72 at page 45 of the submission dated 15th November, 2019 of Amazon, submitted in response to query 2.21 of the letter dated 9th October, 2019

[16] Para 45 at page 32 of the submission dated 15th November, 2019 of Amazon, submitted in response to query 2.12 of the letter dated 9th October, 2019

[17] Para 4 at page 3 of the submission dated 15th November, 2019 of Amazon, submitted in response to query 2.5 of the letter dated 24th October, 2019

completely contradictory stands in the arbitration proceedings and constitutional courts with respect to its investments in FCPL as compared to the representations and submissions made before the Commission. Such contradictions were said to establish false representation and suppression of material facts before the Commission.

11. The Commission, in its meeting held on 17th May, 2021, considered the Application and the averments and allegations made therein; and was of *prima facie* view that: (a) Amazon failed to identify and notify FRL SHA as a part of the Combination, in terms of Regulation 9(4) and Regulation 9(5) of the Combination Regulations; (b) Amazon had concealed its strategic interest over FRL; and (c) Amazon had made false and incorrect representations and concealed/suppressed material facts in contravention of the provisions of the Act. Accordingly, the Commission issued SCN under Sections 43A, 44 and 45 of the Act to Amazon, on 4th June, 2021. The contents of the SCN are reproduced below for ease of reference:

> *"In the instant matter, the Competition Commission of India (**Commission**) in its meeting held on 17th May 2021 considered the application dated 25th March 2021 of Future Coupons Private Limited (**FCPL**), seeking action against Amazon.com NV Investment Holdings LLC (**Amazon**) under Sections 44 and 45 of the Competition Act and in terms of paragraph 16 of the order dated 28th November 2019 for the commission of alleged offences in Combination Registration No. C-2019/09/688) (**Application**).*
>
> *2. The Commission had approved acquisition of 49% equity shareholding of FCPL by Amazon in Combination Registration No. C-2019/09/688, vide Order dated 28th November 2019 issued under Section 31(1) of the Act.*
>
> *3. As per the Order, the notice under Section 6(2) of the Act was filed pursuant to the execution of Share Subscription Agreement (**FCPL SSA**) and Shareholders Agreement (**FCPL SHA**) both dated 22nd August 2019, inter alia between Amazon, FCPL and the promoters of FCPL. Prior to FCPL SSA and FCPL SHA, FCPL entered into Shareholders Agreement on 12th August 2019 with Future Retail Limited (**FRL**) and its promoters (**FRL SHA**). In terms of FRL SHA, FRL has to obtain the consent of promoters and FCPL for undertaking certain actions including the sale of retail assets. In terms of FCPL SHA, FCPL should take prior approval of Amazon before exercising any rights over FRL.*
>
> *4. Of late, disputes have arisen between Amazon and FCPL in relation to transfer of the assets of FRL, a company in which FCPL holds 9.82% of the*

shares. In relation to the above said dispute, Amazon had initiated arbitration and related litigation proceedings are also pending before the constitutional courts. In the present Application, FCPL has submitted that Amazon has taken a completely contradictory stand in the arbitration proceedings and constitutional courts with respect to its investments in FCPL as compared to the representation and submission before the Commission. Such contradictions are alleged to constitute false representation and a suppression of material facts.

5. It is observed that some of the contradictory statements made by Amazon before CCI vis-à-vis before Arbitrator[1], inter alia, are:

A. Purpose of the combination

A.1 *Before CCI: It is submitted that the Investor's decision to invest in FCL [FCPL] is, inter alia, based on the following considerations: (a) the unique business model of FCL addresses an existing gap in the payments landscape in India, thereby making it a strong and sound investment opportunity for the Investor (who holds similar existing investments in entities engaged in business activities within the payments market in India); and (b) while FCL has a strong growth potential, in the short term, to add credibility to its financial position, it has invested in, and proposes to invest in FRL, which is a publicly traded company with strong financials and futuristic outlook. In other words, the Investor has considered all the above-mentioned factors in totality to arrive at the value of the proposed investment[2].*

A.2 *Before the Arbitrator and constitutional courts: The foundation of the relationship between the Claimant [Amazon] and the Promoters [Promoters of FCPL] was and remains the special and material rights available with FCPL with respect to FRL's business and its Retail Assets[3].... The Claimant's Interest with respect to FRL's business and its Retail Asset is clear and unequivocal, and is made out from a bare reading of the agreements. FRL's widespread network of retail stores across India represented a significant and irreplaceable strategic asset to the Claimant[4]...*

B. Independence or dependence of FRL SHA

B.1 *Before CCI: In response to a specific query on the rights of Amazon over FRL, Amazon had submitted as follows: "The Investor has limited investor protection rights in FCL with a view to protect the value of its investment in FCL. Further, while all decisions with respect to FCL's investment in FRL will be taken by the board of directors of FCL, however, with a view to protect the Investor's investment in FCL, certain rights have been granted to the Investor with respect to FCL's investment in FRL. It is important to highlight that these rights can be exercised only*

through FCL, and not directly by the Investor. Importantly, these rights have been derived from the rights granted to FCL in terms of the FRL SHA which was negotiated by the Promoters, FRL and FRL independent of the investment by the Investor in FCL, and with a view to unlock value for FCL. These rights have been granted to FCL with a view that FCL would exercise its rights as a shareholder of FRL to protect the interest of its own shareholders, including the Investor[5]."

B.2 *Before the Arbitrator and constitutional courts: Agreements – single integrated transaction: ...FCPL SHA, SSA and FRL SHA are a single integrated transaction, FRL is expressly and impliedly bound by the FCPL SHA and SSA[6]...The interplay amongst the three agreements demonstrates that the unequivocal intention and interest of the Parties was to have one integrated understanding[7]....The FRL SHA, ..., formed a core basis of the FCPL SHA and the two agreements constituted a single integrated bargain[8].*

C. Amazon rights over FRL:

C.1 *Before CCI: The rights granted to Amazon in relation to FRL are with a view to protect its investment in FCPL. It would be important to note that not only are investor rights limited in scope, they also not extend to any subject matter that encroaches upon the commercial and operation decision making process of the FRL[9].... The Investor's has no shareholding in FRL, and does not exercise any control or influence on it, therefore the Proposed Combination should not be subjected to a Form II filing requirement[10].*

C.2 *Before the Arbitration and constitutional courts: The special and material rights under the FCPL SHA including under the FRL SHA, were contractually agreed, promised and provided to the Claimant as a material consideration to its investment[11]....*

6. Upon considering the Application and the materials relied upon therewith, the Commission is of the prima facie view that:

6.1. Amazon had represented before the Commission that FRL SHA was independent of the combination i.e. acquisition of 49% shareholding in FCPL by Amazon. However, it has now been brought to the notice of the Commission that Amazon has claimed before the arbitrator that FRL SHA is an integrated part of the combination. This factual aspect of the combination was not made known to the Commission. Rather, the submissions before the Commission presented a different factual scenario that the combination does not include FRL SHA; and the acquisition of 49% shareholding in FCPL by Amazon and FRL SHA were independent of each other. Amazon ought to have identified and notified FRL SHA as a part of the combination, in terms of Regulation 9(4) and Regulation 9(5),

of the Combination Regulations. It is further apparent that the representations and conduct of Amazon before the Commission amount to misrepresentation, making false statement and suppression or/and concealment of material facts in relation to the scope of the combination for which approval of the Commission was sought and taken.

6.2. *Amazon has concealed its strategic interest over FRL, which it now claims to be arising from the rights that were represented as mere investor protection. Such interest and the purpose of the combination (as has been claimed before the arbitrator) was not disclosed to the Commission despite specific requirements in Form I and the additional information sought from Amazon. Besides non-disclosure, false and incorrect representations have also been made in relation to the scope of the combination particularly the FRL SHA and the purpose of the combination.*

7. *In view of the above, under Sections 43A, 44 and 45 of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 you are being issued this show cause notice to explain, in writing, as to why you shall not be found to have: (a) failed to give notice in respect of FRL SHA; and (b) furnished false and incorrect information; and concealed/ suppressed material facts, in contravention of the said provisions of the Act and in which case, why no action including penalty in terms of Sections 43A, 44 and 45 of the Act, as the case may be, shall be imposed upon you. You shall submit your response within a time period of 15 days from the receipt of this notice."*

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1 *Application for Emergency Relief Under the Arbitration Rules of The Singapore International Arbitration Centre (Annexure 6 to the Application)*
2 *Para 35 at page 35 of the submission dated 15th November, 2019 of Amazon in Combination Registration No. C/2019/09/688*
3 *Para 4.3(a) at page 8 (running page no. 527) of Annexure 6 to the Application*
4 *Para 4.4(e) at page 15 (running page no. 534) of Annexure 6 to the Application*
5 *Para 37 at page 36 of the submission dated 15th November, 2019 of Amazon in Combination Registration No. C/2019/09/688*
6 *Para 7 at page 11 (running page no. 530) of Annexure 6 to the Application*
7 *Para 8 at page 11 (running page no. 530) of Annexure 6 to the Application*
8 *Para 1.3 at page 3 (running page no. 522) of Annexure 6 to the Application*
9 *Page 40 of the submission dated 15th November, 2019 of Amazon in Combination Registration No. C/2019/09/688*
10 *Point e at page 71 of the submission dated 15th November, 2019 of Amazon in Combination Registration No. C-2019/09/688*
11. *Para 1.3 at page 2 (running page no. 522) of Annexure 6 to the Application.*

12. After seeking extension of time, Amazon filed its response to the SCN on 28th July, 2021 along with a request for oral hearing in the matter (**Response to SCN**). The Commission acceded to the request and heard Amazon at length on 22nd September, 2021. Following the oral hearing, Amazon filed its written submissions as well on 5th

October, 2021. The Commission considered the written submissions in its meeting held on 18th October, 2021 and decided to pass an appropriate order in due course.

13. Subsequently, the Commission received a letter dated 20th October, 2021 from Amazon, *inter alia,* intimating that it has shared with Future Group, the Response to SCN and related correspondence with the Commission. Amazon *vide* another letter dated 29th October, 2021, furnished a copy of the partial award passed in the arbitration proceeding between Amazon and the Future groups. The Commission also received an application dated 7th November, 2021 from FCPL seeking access to the records of the case and provide a personal hearing in the matter. The Commission considered these submissions and applications in its meeting held on 15th November, 2021 and, *inter alia,* decided to hear both FCPL and Amazon on 4th January, 2022.

C. Writ Petition No. 12889/2021 [CAIT v. Commission]

14. In the meantime, Confederation of All India Traders (**CAIT**) filed a Public Interest Litigation before the Hon'ble Delhi High Court, seeking expeditious disposal of the matter. Upon considering the Writ Petition on 16th November, 2021, the Hon'ble Delhi High Court disposed of the same, *inter alia,* with the following directions to the Commission:

> *"...Looking to the controversy involved between the two Groups and the pending litigations in various Forums, as averred in the writ petition, we are not inclined to delve into the merits of the issues raised herein. Suffice would it be to state that the Show Cause Notice dated 04.06.2021, issued by CCI, based on the letter dated 25.03.2021, addressed by FCPL to CCI, as averred and alleged in the writ petition, shall be considered by CCI, within a period of two weeks from today. Needless to state, decision shall be taken by CCI, after giving an opportunity of hearing to the stakeholders..."*

15. Having considered the aforesaid developments and in deference to and in compliance with the directions issued by the Hon'ble Delhi High Court, the Commission, in its meeting held on 19th November, 2021, revised the timelines issued on 15th November, 2021. The revised timelines were: (a) FCPL to file its reply, if any, to the Response to

SCN latest by 21st November, 2021, with an advance copy to Amazon under intimation to the Commission; (b) Amazon may thereafter file its rejoinder, if any, latest by 23rd November, 2021, with an advance copy to FCPL under intimation to the Commission; and (c) FCPL and Amazon may appear for an oral hearing in the matter on 24th November, 2021. It was further made clear that no request for extension or modification of timelines on the hearing schedule shall be entertained by the Commission, and in the event of any party not availing the opportunity provided, the Commission would proceed to consider the matter on the basis of material available on record, in accordance with law. CAIT was also given liberty to attend the hearing, if so desired. Amazon, CAIT and FCPL were informed of the above decision and directions of the Commission on 19th November, 2021 itself *vide* separate letters of even date.

16. Subsequently, FCPL filed its response on 22nd November, 2021. Amazon did not file any rejoinder within the time prescribed but moved an application on 23rd November, 2021 stating that it has preferred a Special Leave Petition (**SLP**) before the Hon'ble Supreme Court of India, challenging the Order of the Hon'ble Delhi High Court, based on which the Commission advanced the timelines and hearing schedule. In view of the SLP, Amazon sought deferment of the proceedings before the Commission until its SLP was heard by the Hon'ble Supreme Court of India. It was further stated that the SLP would be heard by the Hon'ble Supreme Court of India on 25th November, 2021.

17. On 24th November, 2021, the hearing before the Commission started in terms of the schedule fixed by the Commission, with the learned counsel appearing on behalf of Amazon pressing the application for deferment of the proceedings in light of the SLP, which was stated to come up for hearing on 25th November, 2021. On hearing the learned counsel, the Commission invited the attention of the learned counsel to the directions issued by the Hon'ble Delhi High Court and consequential timeline and hearing schedule fixed by the Commission *vide* its directions dated 19th November, 2021. The Commission observed that, *vide* the said directions, it had made it clear that no request for extension or modification of timelines and the hearing schedule shall be entertained, and in the event that any party does not avail the opportunity provided, the Commission would proceed to consider the matter on the basis of material available on

record and in accordance with law. Against this backdrop, the Commission heard the learned counsel(s) appearing on behalf of FCPL and CAIT at length. Thereafter, the Commission called upon the learned counsel appearing on behalf of Amazon to make its submissions on merits whereupon the learned counsel expressed its inability to argue the matter stating that making submissions may compromise the SLP and render it infructuous. The learned counsel also made a grievance that Amazon did not get sufficient time to file its rejoinder. Accordingly, despite the grant of opportunity, the learned counsel appearing on behalf of Amazon did not make oral submissions. Thus, having heard the counsel(s), the Commission decided to pass an appropriate order in due course.

D. Special Leave Petition (Civil) Diary No. 28613/2021

18. Further to the above developments, the Hon'ble Supreme Court of India considered the SLP filed by Amazon on 29th November, 2021 and disposed of the same with the following direction:

> *"Having heard..., and carefully perusing the material available on record, we are not inclined to interfere with the impugned Order passed by the High Court of Delhi at New Delhi ....Taking into consideration the facts and circumstances of this case, two more weeks' time from today is granted to the petitioner in the matter, which would be over and above the time already granted by the High Court in this behalf. The petitioner would be at liberty to raise all the objections before the Competition Commission of India. The said Commission would consider all the objections on its own merits and in accordance with law..."*

19. Pursuant to the aforesaid order of the Hon'ble Supreme Court of India, Amazon filed a letter dated 30th November, 2021 before the Commission, stating therein that it will file its response to the reply filed by FCPL on or before 9th December, 2021. Amazon also requested *vide* the said letter for an oral hearing at any suitable time after filing of the response. FCPL also filed a letter dated 30th November, 2021 praying that the Commission be pleased to pass necessary orders on the SCN before 13th December, 2021. CAIT also filed a letter on 29th November, 2021 stating therein that the Commission is obligated to pass an order on the SCN on or before 13th December, 2021.

20. In deference to and in compliance with the directions issued by the Hon'ble Supreme Court of India as also keeping in view the original directions issued by the Hon'ble High Court of Delhi in W. P. No. 12889/2021 on 16th November, 2021 whereby the Commission was directed to consider the SCN dated 4th June, 2021, based on the letter dated 25th March, 2021 of FCPL, within a period of two weeks from the date of the said order *i.e.* 16th November, 2021, the Commission allowed Amazon to make its oral submissions before the Commission on 13th December, 2021. FCPL and CAIT were allowed to remain present during the said hearing, if so desired. Amazon was directed to share a copy of its response/rejoinder with FCPL under intimation to the Commission.

21. Amazon submitted its response to the submissions of FCPL on 12th December, 2021. The Commission heard the learned counsel(s) representing Amazon at length on 13th December, 2021. The Commission also heard the learned counsel(s) appearing on behalf of FCPL and CAIT in response to the submissions made on behalf of Amazon. The Commission allowed Amazon and CAIT to submit brief submissions as requested by them, by the end of the day.

22. Before delving into the merits of the case, the Commission notes that Amazon has raised certain preliminary objections in its Response to SCN. These are primarily contentions on the commonality of the subject matter before the arbitrators and the instant proceedings; material adduced by FCPL before the Commission being pleadings before the arbitrators are disclosures made in contravention of the provisions of Section 42A of the Arbitration and Conciliation Act, 1996; and the Application is an attempt by FCPL to stifle the ongoing arbitration proceedings between the parties.

23. At the outset, the Commission notes that, while some of the factual foundations of the Combination may be relevant in both the arbitration and the instant proceedings, the legal issues for determination in the arbitration proceedings and the instant proceedings for violations of the provisions of the Act are mutually independent. The Commission does not see any bar on the instant proceedings only on account of the pendency of the arbitration between the parties. Even though the instant inquiry is triggered by the

Application filed by FCPL, the proceedings pursuant to SCN are essentially inquisitorial in nature, and the subject matter relates to the conduct of Amazon as the notifying party in Combination Registration No. C-2019/09/688, in terms of Regulation 9(1) of the Combination Regulations. Needless to say, the Commission is not concerned with the disputes between Amazon and Future groups. Further, if the parties were to allege violation of the provisions of any law other than the Act, they are free to pursue legal recourse before the appropriate forum. Thus, the preliminary objections raised by Amazon *sans* merit and are accordingly, dismissed.

24. Now coming to the merits of the case, the Commission notes that the allegations in the SCN concern the factual position and material particulars relating to (a) the purpose of the Combination; (b) independence or dependence of FRL SHA; and (c) the rights of Amazon over FRL pursuant to the Combination. The SCN notes that FRL SHA was not notified to the Commission despite being an interconnected part of the Combination and Amazon concealed its strategic interests over FRL, which were rather represented in the Notice as mere investor protection.

25. The submissions of Amazon in response to SCN, are summarised as under:

25.1. Amazon did not deny the factual aspects of the SCN but submitted that the context of the submissions before the Commission and the Arbitral Tribunal were different. Amazon contended that all material particulars relating to the Combination and those relevant for assessment by the Commission were disclosed in the Notice and subsequent submissions dated 15th November, 2019. These material particulars related to the Combination are: (a) a copy of FRL SHA; (b) fact that the value of assets and turnover of FRL was taken into consideration for the purpose of computing the thresholds under Section 5 of the Act; (c) identification of FRL, as a party, ultimate beneficiary of the Combination and a material entity in FCPL SHA and FCPL SSA; (d) fact that investment of FCPL in FRL was a key consideration for Amazon to pursue the investment and that the retail assets of FRL were also an integral part of it

decision to pursue the Combination; (e) details of the protective rights acquired by Amazon in relation to FRL; and (f) no control is acquired over FRL.

25.2. The material particulars that are relevant for the purpose of assessment of the Combination and disclosed by Amazon in the Notice and subsequent submissions were stated to be: (a) information rights over business activities of FRL; (b) all commercial agreements involving FRL were given effect to only after the approval of the Commission; and (c) the details required as per Form I regarding relevant market and competition assessment, based on the business activities of the parties and affiliates. It was also contended that all these disclosures were mentioned in the Approval Order and the competition assessment therein was necessarily inclusive of the business activities of FRL. Attention of the Commission was specifically drawn to paragraph 13 of the Approval Order, wherein the Commission noted that presence of FRL and the affiliates of the Acquirer is not such as to raise any competition concern. Having disclosed all material particulars relating to the Combination and competition assessment thereof, Amazon maintained that it cannot be held guilty of contraventions of the provisions of Sections 43A, 44 or 45 of the Act.

26. FCPL, on the other hand, primarily relied upon the emails and notes of Amazon Group (hereinafter, Amazon), to contend that Amazon all along intended the FRL SHA and the BCAs to be part of the Combination but did not notify the same to avoid regulatory scrutiny from statutory authorities including the Commission. These documents were furnished to the Commission *vide* submissions dated 22nd November, 2021 of FCPL and are stated to be internal documents of Amazon, contemporaneous and prior to the Combination, disclosed in the arbitration proceedings, and FCPL was not aware of their existence at the time of filing the Application. It was contended that these documents are contrary to and at variance to the statements and disclosures of Amazon in the Notice and subsequent submissions dated 15th November, 2019. It is further contended that Amazon enjoys control over FRL and, given the extent of contraventions, the Approval Order should be revoked in terms of paragraph 16 therein.

27. The learned counsel appearing on behalf of CAIT submitted that it is representing the interests of traders and retailers. It was argued that the conduct of Amazon is in violation of the laws relating to foreign investments in India and the Combination raises competition concerns as it is likely to create entry barriers in the retail market in India. The learned counsel emphasised that Amazon is guilty of *suppressio veri* and *suggestio falsi* and has thereby violated the provisions of the Act.

28. The learned counsel appearing on behalf of Amazon made the following submissions in response to the arguments and submission of FCPL and CAIT:

28.1. *Mala fide nature of the actions and representations made by Future Group*: Amazon has contended that the transaction between Future Group and Mukesh Dhirubhai Ambani Group (MDAG) constituted wilful and material breach of the agreements entered between Future Group and Amazon (Agreements). Amazon has various contractual rights under the Agreements, and FCPL's complaint is a *mala fide* attempt to violate the rights of Amazon. FCPL and FRL vetted all submissions made by Amazon to the Commission and therefore were equally responsible for the filings before the Commission. FCPL has approached the Commission with unclean hands and the *mala fide* nature of FCPL's conduct is also evident from its inconsistent stand before the Commission and the Arbitral Tribunal, regarding Amazon's alleged acquisition of control over FRL.

28.2. *CAIT is a stranger to the SCN proceedings and cannot be allowed to participate as a stakeholder*: CAIT has no *locus* to intervene in the SCN Proceedings in terms of the Act and the Combination Regulations. The representations made by CAIT before the Hon'ble High Court of Delhi and the Commission are yet another instance of forum shopping. Such forum shopping which seeks to undermine the judgment of the Hon'ble Supreme Court ought not to be entertained.

28.3. *There is no power to revoke an approval or direct notification of a consummated transaction:* Paragraph 16 of the Approval Order does not grant the power to revoke the Approval Order. Further, the Commission's power to approve the combination does not include the power to revoke the approval. Additionally, the present proceedings are governed by Section 44 of the Act, and no recourse can be had to Section 45 of the Act, which is a general provision. In any event, Section 45 of the Act does not empower the Commission to revoke Approvals. The scheme of the Act does not contemplate the enforcement of a revocation order, and the Commission's own guidance notes to the notification in Form I do not recognise power of revocation.

28.4. *Public policy mandates that the Commission should not exercise any power of revocation in respect of transactions which were approved more than two years ago:* Public policy dictates that the Commission should not become a forum for the resolution of contractual disputes between private parties.

28.5. *Section 44 and Section 45 would apply only when there is "material" suppression or omission:* The existence of jurisdictional facts are condition precedent for exercise of power by a statutory authority such as the Commission. It was submitted that the Commission may exercise the jurisdiction conferred under Section 44 and Section 45 of the Act only in cases where there is a suppression, omission or failure to furnish information, which would be "material" to the Commission's assessment of the proposed combination (*i.e.*, whether a notified combination causes or is likely to cause appreciable adverse effect on competition). There was no concealment of any material information in the present case. Review of a notified combination entails an *ex ante* assessment of the combination in terms of Section 20(4) of the Act, and all information that was "material" to such assessment was disclosed in the Notification. Also, all information material to the Commission's assessment of whether the notified Combination was likely to cause any

appreciate adverse effect on competition was disclosed by Amazon in the Notification.

28.6. On the merits of FCPL's submissions, Amazon contended as follows:

28.6.1. Regarding the allegation that FRL SHA was not notified as part of the Combination, Amazon submitted that FRL SHA does not constitute a "combination" insofar as Amazon is concerned. Further, FRL SHA was duly disclosed as forming the background to Transaction III. All relevant information pertaining to FRL that were material to the Commission's assessment were disclosed. It was submitted that Amazon had made submissions in relation to the potential synergies arising out of FCPL's business, the underlying investments held by FCPL in FRL and FRL's business itself.

28.6.2. Regarding the allegation of non-disclosure of non-compete obligations in the Notification, it was submitted that there are no non-compete clauses either in FCPL SHA or FCPL SSA or FRL SHA. Both SHAs provide transfer restrictions, which do not constitute a non-compete obligation.

28.6.3. Regarding the internal communications, it was submitted that commercial arrangements with Future Group were negotiated since January, 2018 and Amazon explored multiple investment structures. Some of these documents/emails pertain to the period when the parties were still in negotiations. Further, Amazon has made disclosures about BCAs and importance of FRL's Retail Assets.

28.6.4. Regarding the allegation that Amazon exercises control over FRL, it was submitted that Amazon does not exercise any control over the day-to-day operational matters of FRL; it does not exercise any influence over the business operations of the market conduct of FRL

and it is FCPL's own submission that expressly clarified that Amazon was never intended to exercise any form of control over FRL.

28.6.5. Regarding the submission that the Approval Order passed by the Commission must be revoked, it was pointed out that paragraph 16 of the Approval Order does not grant the Commission power to revoke the Approval Order. There is no power of revocation envisaged under the scheme of the Act. It was submitted that there are no incorrect statements made in the Notification, which would warrant the revocation of the Approval Order.

29. Following the above submissions of Amazon, the learned counsel appearing for FCPL contended that Amazon is contemplating a wrong threshold to determine the contraventions under Section 44 and Section 45 of the Act. The Commission deals with complicated matters of economics in review of combinations and thus, the material placed before it should be with integrity. Any deception in the Notice filed by Amazon vitiates the entire process, and Section 44 and Section 45 are penal provisions in case of contraventions. It was vehemently submitted that the Combination notified in the matter was not the actual combination contemplated by Amazon with FRL. Further, the material before the Commission in the instant proceeding was not placed before the Commission at the time of assessment of the Combination in Combination Registration No. C-2019/09/688.

30. The learned counsel appearing on behalf of CAIT submitted that FRL SHA and the commercial agreements were not even referred in the Approval Order as they were not notified to the Commission. Such conduct, suppressions and misrepresentations by Amazon had reduced the intensity of competition assessment in the matter. Accordingly, it was prayed that, apart from imposing monetary penalty, the Commission should revoke the approval granted to Amazon.

31. Having considered the written and oral submissions of Amazon, FCPL and CAIT and other material available on record, the Commission proceeds to determine whether the

alleged conduct(s) of Amazon is in contravention of the provisions of Sections 43A, 44 and 45 of the Act. The primary issue that arises for determination in the instant matter is whether Amazon, the notifying party in Combination Registration No. C-2019/09/688, has made misrepresentation, false statement or suppression/concealment of material facts in relation to the scope and purpose of the Combination; and failed to identify and notify FRL SHA as an inter-connected part of the Combination, in terms of Regulations 9(4) and 9(5) of the Combination Regulations. Such determination would primarily entail ascertaining whether the material brought before the Commission through the present proceedings demonstrate a different scope and purpose of the Combination than what was projected in the Notice and subsequent submissions of Amazon in Combination Registration No. C-2019/09/688.

32. From the material on record, the Commission notes the contract summary and internal e-mail dated 19th July, 2019 of Amazon Group with the subject '*Request for APPROVAL for Project Taj* [Future]...', which elaborate the business summary and summary of key terms of the Combination (**Approval Request**). This e-mail was sent by Mr. Rakesh Bakshi to Mr. Jeff Bezos, seeking approval to sign definitive documents in relation to the Combination. The relevant extracts of these are reproduced as under:

> *"Hi ...,*
>
> *We are in the final stages of negotiating definitive investment documents for an INR14B (~$204MM at current exchange rates) investment to acquire a 49% stake in Future Coupons Limited ("Future Coupons"). Future Coupons will hold ~8-10% of Future Retail Limited, India's second largest offline multi-category retailer, and we are requesting your approval to sign the definitive investment documents and close the transaction. Attached for your review (and reprinted below) is a legal contract summary. Please respond at your earliest convenience. ... have all reviewed and are supportive of the investment. In addition, Legal, Tax, and Accounting have signedoff.*
>
> *Thank you.*
> *Regards,*
> ...
>
> ***Future Retail Limited Investment***
> ***July 18, 2019***
>
> ***Business Summary***

Founded in 1987, Future Retail Limited ("Future Retail") is India's second largest offline multicategory retailer and is headquartered in Mumbai. Future Retail is listed on Indian stock exchanges and has a market capitalization of ~$3.4B. Future Retail is the flagship company of the Future Group, a large Indian offline retail conglomerate.

Future Retail has a pan-India presence, with a store network spanning ~16MM square feet across ~1K branded stores (with a variety of formats such as convenience stores, supermarkets, hypermarkets, and department stores) and over 33K employees. Future Retail's 340 hypermarkets cover ~70% of Amazon India's customer base (within a drive of less than 2 hours). As of March 31, 2019, Future Retail generated ~$3B in revenues with an EBITDA margin of 5%. Future Retail and its affiliates also have a strong portfolio of private label selection in grocery (450+ SKUs across packaged foods, home, and personal care) and value-fashion (27 brands with a median average selling price of ~$9.40, and contributing to 80% of Future Retail's gross merchandize sales for fashion).

Future Retail is currently listed as a 3P seller on Amazon.in. Concurrent with the investment, we will enter into commercial agreements with Future Retail and certain other members of the Future Group under which: (i) Future Retail will list the selection available in its hypermarkets on Amazon.in at significantly improved terms (representing an increase of 850 basis points). This will enable Amazon India to expand coverage (across ~15K SKUs) of our ultra-fast delivery service in the top four cities in India and launch the ultra-fast delivery service in the next 20 cities in India. Future Retail will not list its products on any other third party online website; (ii) Amazon Pay will be the exclusive third party wallet accepted in Future Retail's stores and website; (iii) one of Future Retail's affiliates, Future Consumer Limited, which owns and produces the Future Group's private label grocery and general merchandise (such as cooking needs, storage needs, and utensils) portfolio, will supply these products to our food retail entity in India and our affiliated sellers on a B2B basis at significantly improved margins, and will agree to not supply these products to certain named competitors; and (iv) one of Future Retail's affiliates, Future Lifestyle Fashions Limited (FLFL), will list brands owned by (or exclusively licensed to) FLFL in fashion on Amazon.in and will not list these fashion products on any other third party online websites.

Lastly, we have negotiated a call option over the shares held by Future Retail's promoters (who are also its largest shareholder), leaving us well-positioned to become the single largest shareholder of Future Retail (which would be very difficult through market purchases alone), if Indian foreign investment laws change in the future.

Summary of Key Terms

Structure:
Due to the recent PN2 restrictions under Indian foreign investment laws, we will use a "twin-entity investment" structure to ***invest in Future Retail****. Amazon will acquire 49% of Future Coupons, with the other 51% being owned by the promoters of Future Coupons (who are also promoters and single largest shareholders of Future Retail, the "Promoters"). Our shareholding in Future Coupons will be divided into voting equity share capital (25.1%), and non-voting equity share capital (23.9%), though we will have all the statutory rights available to a 49% shareholder. You may recall this structure and voting/non-voting split is also how we resolved PN2 for Project Brigade, our acquisition of a 49% interest in More Retail Limited (which is also engaged in retail of food and grocery in India).*

Future Coupons has acquired warrants representing ~7% of Future Retail (which warrants will convert into equity shares of Future Retail by October, 2020). Further, Future Coupons will, prior to our investment, acquire an additional 1-3% equity shares of Future Retail (from the Promoters) such that prior to our investment, Future Coupons will own 8-10% of Future Retail. The number of equity shares of Future Retail to be held by Future Coupons has been calculated such that ***Amazon can indirectly hold the same number of shares of Future Retail*** *that Amazon would have acquired if Amazon had directly invested INR14B in Future Retail at a price per share representing a 25% premium on the minimum regulatory price prescribed for issuance of fresh shares of a listed entity under Indian law. In summary, Amazon is paying a premium of 25% (INR2.8B i.e ~$41MM at current exchange rates) over the regulatory price of the securities of Future Retail. This premium is being paid on account of the* ***strategic rights*** *and Call Option being provided to Amazon. Due to the Call Option and the strategic rights being at or above the prevailing market price, we currently estimate a ~$41MM P&L loss at sign (see details in the accounting treatment section below).*

Future Coupons was founded in 2008 and is engaged in the business of marketing and distribution of gift cards, loyalty cards, and other rewards programmes to corporate customers..."

[Emphasis Supplied]

33. Prior to the Approval Request, a situation update relating to the negotiation between the parties, seen as a part of another internal e-mail dated 10th July, 2018 of Amazon (**Situation Update**), elaborates on the background and purpose with which the

Combination was contemplated between Amazon and Future Group. The relevant extract of the Situation Update is reproduced below:

"10 July 2018

Project Taj – Investment in National Multi-category Copperfield-seller

Situation Update:

The Taj group is India's largest and multi-category offline retailer with 280 multi-category stores, 620 grocery stores and 400 fashion only stores in top 50 cities. The Taj group's retail company, Taj Retail Limited (TRL) is publicly traded and has a market cap of $4.1B[1] (July 9, 2018). Amazon's India team likes Taj's management team, store footprint, private label capability and believe they are one of the key players in the offline retail market to ***partner with****. For an overview of relevant Taj group businesses, please refer to Annexure I.*

On 24 May, 2018, we received an approval from ... to indicate interest (to Taj's founder) to invest between $400 to $500 MM for upto 9.99% stake in TRL. In India, our ability to pursue investments / acquisitions of retailers is limited because laws restrict foreign investment in multi-brand retail assets (i.e., retailers selling multiple brands across categories under one roof). However, because TRL is a listed company, Alpha [Amazon] *can acquire upto 9.99% of TRL directly (as a foreign portfolio investor). Eventual ownership will vary upon final pricing discussions.*

Upon receiving ... approval, we engaged into deeper discussion with Taj on pricing / valuation, investment structure and strategic rights that we could get through an investment. As of last week, we have aligned with Taj on an investment framework to proceed further with this transaction. A Business Commercial Framework (BCF) to build and accelerate Ultra-Fast Delivery across top-20 cities in India leveraging Taj's national stores footprint as a Copperfield seller, is agreed in principle with Taj team; ***please refer to Annexure II for investment rationale and more details of the BCF****. This note provides background on the transaction, details of the investment framework and FAQs addressing the key points to consider before going back to Taj team with our offer...*

FAQs

1. What are the strategic objectives that we want to achieve through Taj?

We are looking to secure the following business objectives through this transaction:

a. *Ability to become the single largest shareholder in India's largest offline retailer (TRL) when foreign direct investment (FDI) opens up in this sector.*
b. *Precluding / blocking competitive interest in TRL, and preventing an IC from acquiring TRL.*
c. *Together with the investment, Alpha will enter into a commercial agreement to utilize TRL's pan-India store infrastructure to bolster Alpha's ultra-fast delivery program, exclusively carry private label portfolio in grocery and value fashion, and drive higher fees for Alpha.*

2. What is our business rationale and BCF for Taj?

We believe that a two-hour delivery promise, for 15,000 SKUs across top-20 cities will be a unique differentiating capability. It will allow us to cover 85% of our Prime members and 63% of all customers. To serve this customer base, we believe working closely with a large Copperfield seller is important. We believe that Taj is one of two key pan-India retailers worth pursuing (the other being Brigade). Taj has a strong portfolio of private label selection in grocery (450+SKUs, across packaged foods, home and personal care) and value-fashion (27 brands with a median ASP of $9.2 (INR 600), contributing to 80% of their GMS for fashion). Against our investment of $400 to 600MM in TRL, we estimate the discounted cash flow value of BCF over 10 years of $702MM (INR 45.6B); please refer to Annexure II for investment rationale and more details of the BCF. When foreign investment laws are relaxed and higher stake or acquisition of multi-brand retail assets is permitted beyond today's possibilities, we would have a foot-in-the-door to acquire more in this strategic asset, should we so desire at the time. For further details please refer to Annexure II – BCF Strategic Value. Importantly, our investment in TRL will be liquid given that TRL is publicly traded in the Indian stock market, and therefore, we can recover our investment in case TRL fails to deliver.

3. What is the proposed transaction?

An overseas Amazon entity, registered as a 'foreign portfolio investor', will acquire 9.99% (through a fresh issuance of shares) of TRL. Simultaneous with the investment, Alpha India will enter into a commercial agreement (BCF) with TRL, and Taj Consumer Limited (TCL), and Taj Lifestyle Fashion Limited (TLFL) in relation to the matters listed in FAQ 2...

6. If we were to execute both Taj and Brigade, why is a Call Option important in both situations?

Our ICs (BB, FK, Paytm Mall) are aggressive on grocery, general merchandise and general electronics categories. Specifically in grocery and fresh categories, we are lagging behind BB and FK is also nipping at our heels. Walmart's expertise in offline retail will likely spur FK and Alibaba's investment and technology will continue to push BB ahead.

Given the above, we need to build deep strategic alignments with offline grocery retailers to leverage their execution capabilities to power our fresh and grocery offering. India has 6 offline retailers (Taj, Brigade, Reliance Retail, D-Mart, Spencers and Nature's Basket). With a process of elimination on parameters of asset quality, partner quality and availability, only two i.e. Taj and Brigade remain. If we are able to close our investment in Brigade, we would secure a high quality asset, however it will lack the scale and national footprint that Taj offers. Further, Brigade is our bet to own a high quality grocery operation. Taj, on the other hand, is an investment in a multicategory Copperfield seller with a larger pan-India footprint. Getting a Call option in both assets allows us to acquire and raise our bet, at our discretion, in the player we feel best meets our objectives after having tested close operational alignment with both in 3-7 years following investment; when regulations permit.

7. If we were to execute both Taj and Brigade, how would we decide which Call Option to exercise then?

Keeping aside our tenets of Financial Discipline for the moment; holding a Call Option in both assets keeps our options open and it also serves as an incentive / deterrent to Brigade / Taj. If Brigade executes flawlessly, we can exercise our Call Option (when legally permissible) and make Brigade a spearhead of our 1P grocery operations. If Brigade doesn't execute to our bar, then we can choose to pull back from further investments in Brigade and double down on our investments in Taj, provided that it meets our expectations. If Taj executes well both on BCF as well as an independent retail asset, when regulations relax, we will have the ability to increase our stake in India's largest offline retailer and keep our competition. If Taj doesn't execute well, we can exit our ownership in listed stock. Holding Call Options in both assets, thus allows us to control our destiny in a thoughtful manner in the future...

Annexure II - Strategic value accruing to Amazon as a result of the Business Commercial Framework (BCF)

We started working with Taj, couple of years ago, as a Copperfield seller in three cities (across 23 stores) to learn and develop the ultrafast delivery model in India. In April-2018, we served about 2000 orders per day with an AOV of $12.3 (INR 802) and UPO of 9.3. We earn merchant fee of 5.4% and have a CPLF of -$4.55 (-INR 296) per order (55.5%). If we improve the order economics, we believe Taj's footprint of physical infrastructure can offer a unique 2-hour-delivery service across multiple categories in top-20 cities. Therefore, we constructed a BCF to estimate value creation from this partnership across their retail assets and private label capabilities.

1. ***Offer 2-hour-ready selection in top 4 cities with improved economics:*** *An average hypermarket store carries an in-stock selection of about 15,000 SKUs - 8500 in softlines, 5500 in grocery and 2000 in general merchandising (primarily home and kitchen). There are 104 stores in*

top 4 cities. In five years we can scale to 21K orders/day with an AOV of $24 (INR 1549) and GMS of $181MM (INR 11B). In this model we will bear only the last mile costs with increase in SoA fee for grocery at 13.5% (+810bps over current levels) and 32% for softlines. Therefore, we will improve our order economics with an OP per order of -$0.8 (-INR 53) or (+2495bps vs. 2021 LRF). OP less infra will be $1.3 (INR 84) (+2466 bps vs. 2021 LRF)

2. ***Build and expand 2-hour-delivery service in the next 16 cities**: These cities are likely to grow faster than the top-4 cities and therefore will lead in retail consumption. Taj has nearly 120 stores in these cities and carry an average selection of 12,000 SKUs. We expect to expand the Copperfield-service to these cities within three years and scale to 31K orders per day with an AOV of $20.9 (INR 1,363) by year 5. The order economics will be similar to that in top-4 cities.*

3. ***Carry Taj's private label selection across grocery and softlines exclusively**: We will leverage Taj's private label selection to substitute and accelerate the private label selection in Pantry. Our 2020-LRP assumes private-label penetration of 7.0% as proportion of Consumables GMS. We believe we can expand private-label participation to 18% by year-3 (current penetration of Taj is at 30% in FMCG and 60% in Staples). This will give incremental margins of INR 26 per order in Pantry. Taj has capabilities from design to manufacturing for fast and value-fashion brands in apparels, shoes and luggage. Leveraging this capability, we can improve the share of private labels to overall Softlines business by 10% (+500bps) in Year-5. Secondly, we expect Taj's fashion stores Fashion-Big-Bazaar, Central and Brand Factory to list as a seller, similar to Shopper Stop (we invested for a 5% stake in India's largest offline fashion department store to onboard 200K+ ASINs across 300 fashion brands) and generate additional 0.5MM order per month. We expect to improve Softlines CP by 507bps by year- by a combination of accelerated PL penetration, increased selection of Central and Brand Factory and improvement in SOA fees.*

4. ***Foot-in-the-door and a strategic option value**: Laws in India currently do not permit foreign investment in offline retail companies engaged in both food and non-food retail. This could change in the next 3-5 years, as government of India, is slowly relaxing the laws. At that point, Taj will likely still be the largest asset with pan-India footprint and the possibility of greater control."*

[Emphasis Supplied]

34. Another important internal document of Amazon that shows the basis of entering into the Commercial Arrangements and the share acquisition is its internal note dated 24th May, 2018, the relevant extract of which is reproduced as under:

> ***"Project Taj – National Multi-category Copperfield-seller***
>
> ***Background:****...Amazon's India team likes Taj's management team, store footprint, private label capability and believe they are one of the key players in the offline retail space to partner with. In January 2018, the founder of Project Taj had visited Seattle and presented the Taj Group's capabilities to Jeff Bezos and the senior leadership team. Since then, we engaged with Taj and discussed a Business Commercial Framework (BCF) to build and accelerate Ultra-Fast Delivery across top-20 cities in India leveraging Taj's national stores footprint as a Copperfield seller. In India, our ability to pursue investments / acquisitions of retailers is limited because laws restrict foreign investment in multi-brand retail assets (i.e., retailers selling multiple brands across categories under one roof). However, because Taj's Retail entity is a listed company, we could invest up to 9.99% of the company directly as foreign shareholders.* ***To execute on the above Business Commercial Framework (BCF) the founder of Taj believes a close alignment via a strategic investment with an online player is important.*** *We seek your approval to indicate our non-binding interest (to Taj's founder) to invest between $400 to $500 MM for up to 9.99% stake in the company. Eventual ownership will vary upon final pricing discussions. This indication of interest to invest in Taj will allow us to get engaged deeper into discussion on pricing / valuation (given fluctuating stock price & regulatory pricing guidelines), deeper financial performance of Taj, regulatory hurdles/challenges and strategic rights...*
>
> ***Investment Rationale****: We believe that a two-hour delivery promise, for 15,000 SKUs across top-20 cities will be a unique differentiating capability. It will allow us to cover 85% of our Prime members and 63% of all customers. To serve this customer base, we believe working closely with large Copperfield seller is important. We believe that Taj is one of two key pan-India retailers worth pursuing. Other retailers are sub-scale or part of business groups, or are unsuitable to partner with. Taj has a strong portfolio of private label selection in grocery (450+SKUs, across packaged foods, home and personal care) and value-fashion (27 brands with a median ASP of $9.2 (INR 600), contributing to 80% of their GMS for fashion).* ***An investment in Taj will allow us to provide the following benefits, based the commercial terms we have been discussing with Taj****: (a) expand coverage in top four cities with improve*

the merchant fee to 13.5% (+850bps); (b) build a two-hour-delivery service in next 20 cities; (c) exclusively carry their private label portfolio in grocery and value-fashion; and(d) obtain option value to increase our equity stake when laws change. In summary, ***against an investment of $400 to 500MM in Taj we estimate the discounted cash flow value of BCF over 10 years*** *of $702MM (INR 45.6B). Our investment will be liquid given that Taj is publicly traded in the Indian stock market..."*

[Emphasis Supplied]

35. The Commission notes that the above three internal documents (**Internal Correspondence**) of Amazon Group are relevant to understand its focus during negotiation with Future Group and what were its objectives to be achieved by way of entering into the Combination. As may be seen, the negotiations between the parties relating to the Combination were taking place as early as May, 2018, wherein Amazon initially planned to partner with Future Group, being a key player in the offline retail market, by acquiring 9.99% shareholding in FRL as well as entering into a business commercial framework to build and accelerate ultra-fast delivery services across the top-20 cities in India, leveraging the national footprints of Future Group. Through these transactions, Amazon Group wanted to secure its ability to become the single largest shareholder of FRL when the foreign direct investment opens up in the retail sector; preclude/ block competitive interest in FRL and utilise the pan-India store infrastructure of FRL to bolster the ultra-fast delivery program and exclusively carry private label portfolio in grocery and value fashion; and drive fees for Amazon. The rationale to enter into such Combination included the need for Amazon to build deep strategic alignments with offline grocery retailers to leverage their execution capabilities to power the fresh and grocery offerings of Amazon.

36. The Approval Request dated 18th July, 2019 suggests that, in view of certain developments relating to foreign investments in India, instead of directly acquiring 9.9% shareholding in FRL, Amazon would use a twin-entity investment structure to invest in FRL *i.e.*, Amazon would acquire 49% shareholding in FCPL which, in turn would hold 8 – 10% of the shareholding in FRL. It was further stated that the number of equity shares of FRL to be held by FCPL was calculated such that Amazon can indirectly hold the same number of shares of FRL that Amazon would have acquired i

it had directly invested the consideration in FRL. Further, the consideration has been arrived at on the basis of traded price of FRL shares, and a 25% premium is paid on account of the strategic rights and call option. Furthermore, it is evident that acquisition of shares in FRL/FCPL by Amazon was envisaged as a pre-requisite to enter into commercial agreements between Amazon and Future groups.

37. Seen against the above backdrop, the purpose of the Combination, including the rights over FRL and the Commercial Arrangements with FRL, as enlisted in the summary dated 18th July, 2019 appended to the Approval Request was for investment in FRL and establishing a strategic alignment/partnership between Amazon and Future groups, in the Indian retail sector.

38. Now coming on to the Notice, it is relevant to look at Item 5.3 of Form I, which requires the notifying party to disclose 'Economic and Strategic purpose (including business objective and rationale for each of the parties to the combination and the manner in which they are intended to be achieved) of the Combination'. Amazon submitted the following as its purpose for the Combination:

> *"The Investor* [Amazon] *believes that FCL* [FCPL] *holds a potential for long term value creation and providing returns on its investment. The Investor has decided to invest in FCL with a view to strengthen and augment the business of FCL (including the marketing and distribution of loyalty cards, corporate gift cards and reward cards to corporate customers) and unlock the value in the company."*[18]

39. In terms of Regulation 13A of the Combination Regulations, the notifying party is required to provide a summary of the combination containing, *inter alia,* the nature and purpose of the combination. The relevant extract of the summary filed by Amazon against this requirement states that:

> *"The Investor* [Amazon] *believes that FCL* [FCPL] *holds a potential for long term value creation and providing returns on its investment. The Investor has decided to invest in FCL with a view to strengthen*

[18] Para 30, at pp. 30 and 31, of the Notice

and augment FCL's business relating to marketing and distribution of corporate gift cards."[19]

40. Upon examination of the Notice, a specific query was posed to Amazon, *vide* letter dated 9th October, 2019, in relation to Item 5.3 of the Notice *viz.*, '2.13 With reference to item 5.3 of Form I, please provide the following: ... (c) According to media articles and statements of Mr. Kishore Biyani, the investment by Amazon is strategic to become a part of the ecosystem. Please elaborate'. In response, Amazon had elaborated the gift card business of FCPL and the interest of Amazon to expand its portfolio in the payments landscape in India and stated that:

> "*In this backdrop, it is submitted that the Proposed Combination will enable the Parties to: (i) enhance Investor's* [Amazon] *existing portfolio of investments in the payments landscape in India, (ii) provide an opportunity to FCL* [FCPL] *to learn global trends in digital payments solutions and launch new and innovative product offerings; and (iii) offer innovative payments solutions to entities so as to enhance consumer convenience and user experience*"[20].

41. A further query on the rationale of the rights under FRL SHA was posed to Amazon *vide* letter dated 24th October, 2019 *viz.* '2.5. As per the notice, Acquirer will get certain rights over the FRL. You are required to provide details of shareholding (directly / indirectly), affirmative rights/veto rights/ rights not available with ordinary shareholders in FRL or rights with respect to FRL being acquired by Amazon and strategic and or economic rationale for such rights'. In response, Amazon, *inter alia,* stated that:

> "*It is submitted that the Investor's* [Amazon] *decision to invest in FCL* [FCPL] *is, inter alia, based on the following considerations: (a) the unique business model of FCL addresses an existing gap in the payments landscape in India, thereby making it a strong and sound investment opportunity for the Investor (who holds similar existing investments in entities engaged in business activities within the payments market in India); and (b) while FCL has a strong growth*

[19] Para 5 at page 954 of the Notice

[20] Para 53 at page 35 of the Submission dated 15th November, 2019, in response to the letter dated 9th October, 2019 of the Commission

potential, in the short term, to add credibility to its financial position, it has invested in, and proposes to invest in FRL, which is a publicly traded company with strong financials and futuristic outlook. In other words, the Investor has considered all the above-mentioned factors in totality to arrive at the value of the proposed investment...[21]"

[Emphasis Supplied]

42. Amazon had further claimed in the said response that it does not have any direct or indirect shareholding in FRL[22], and with a view to protect its investment in FCPL, certain rights have been granted with respect to FCPL's investment in FRL. These rights were stated to be: (a) '*contractual investor protection right... with no voting rights, with a view to protect its investment in FCL* [FCPL]'[23]; (b) '*standard investment protection rights that are commonplace in investment agreements*'[24]; (c) '*it would be important to note that not only are investors rights limited in scope, they also not extend to any subject matter that encroaches upon the commercial and operation decision making process of the FRL...*[25]'; and (d) '*investor drives value of its investment from FCL and FRL (by virtue of being an underlying asset of FCL). Therefore, it is essential for the Investor to secure certain rights to protect its investment*'[26].

43. In stark contrast to the Internal Correspondence of Amazon, the disclosures made against Item 5.3 of Form I, summary filed pursuant to Regulation 13A of the Combination Regulations, query 2.13(c) of letter dated 9th October, 2019 and query 2.5 of the letter dated 24th October, 2019, 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 to

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[21] Page 35 of submission dated 15th Nov., 2019 of Amazon (response to letter dated 24th Oct., 2019)

[22] Page 35 of submission dated 15th Nov., 2019 of Amazon (response to letter dated 24th Oct., 2019)

[23] Page 37 of submission dated 15th Nov., 2019 of Amazon (response to letter dated 24th Oct., 2019)

[24] Page 39 of submission dated 15th Nov., 2019 of Amazon (response to letter dated 24th Oct., 2019)

[25] Page 40 of submission dated 15th Nov., 2019 of Amazon (response to letter dated 24th Oct., 2019)

[26] Page 43 of submission dated 15th Nov., 2019 of Amazon (response to letter dated 24th Oct., 2019)

expand the ability of Amazon in ultra-fast delivery services. Instead, the business potential of FCPL was shown as the driving factor for Amazon to pursue the Combination and FRL was merely shown as a factor of financial strength. The Internal Correspondence of Amazon makes it abundantly clear that Amazon was all along focussed/interested in FRL. The Internal Correspondence of Amazon does not speak about the business potential of FCPL, as has been claimed and projected in the Notice and in the responses to the letters of the Commission. Similarly, the Notice presents the rationale of indirect rights over FRL, as protection to investment in FCPL but the Situation Update dated 10th July, 2018 identifies the same set of rights as answer to the following question '*What strategic rights do we get through this investment.*' The expressions used by Amazon to describe the rationale behind the indirect rights over FRL varied from time to time: '*strategic rights*' in its Internal Correspondence; '*protection to investment in FCPL*' in the Notice given to Commission; and '*rights derived from FRL SHA are to protect the interest of the investor* [Amazon]' in the response to SCN. While the object and purport of mere investor protection rights are limited to protect the investment made, the object and purport of strategic rights, such as those reflected in the Internal Correspondence, are much different. Such difference is of significance in establishing a proper understanding of a combination and its purpose, and accordingly, deciding the appropriate line of inquiry to assess the effects of the combination on competition. The Commission observes that, in every case of investment, the acquirer would want to protect the value of its investment and the returns therefrom. However, when a strategic acquisition is contemplated to achieve synergies amongst the business activities of acquirer and target enterprise through acquisition of shareholding (or) integration of whole/part of their business (or) commercial contracts/arrangements (or) a combination of these, any right accruing to acquirer pursuant to such acquisition would be beyond, but not limited to, mere investor protection. The purpose of securing strategic interest over FRL and commercial partnership with FRL is much different from FRL, a company with strong financials and futuristic outlook, being merely taken as an element of financial strength and protection to the investment in FCPL.

44. In the Notice, Amazon had represented that its rationale behind the Combination was the business potential of FCPL to create long term value and provide return on the investment made by Amazon. However, the Internal Correspondence of Amazon clearly shows different purposes for envisaging the Combination (*i.e.*, 'foot-in-door' in the Indian retail sector, secure rights over FRL that are considered as strategic by Amazon and Commercial Arrangements between the retail business of Future Group and Amazon). In its response to the letters dated 9th October, 2019 and 24th October, 2019 of the Commission, Amazon had continued with the suppression of actual purpose of the Combination. Amazon has not contested the genuineness of the Internal Correspondence or their contents. It is obvious that the purpose of Amazon to pursue the Combination was not the potential of the gift and loyalty card business of FCPL, as has been claimed in the Notice. Rather, FCPL was envisaged only as a vehicle in the Combination to which no value or purpose is ascribed in the Internal Correspondence. Further, it is clear from the above discussed e-mail dated 19th July, 2019 that the entire consideration of the Combination has been arrived at on the basis of 25% premium to the regulatory price of FRL shares and that such premium was paid on account of the strategic rights and the call option provided to Amazon. Thus, the instant matter is a clear, conscious and willful case of omission to state the actual purpose of the Combination despite the disclosure requirement under Item 5.3 of Form I read with Regulation 5 of the Combination Regulations and Section 6(2) of the Act. Further, Amazon has failed to provide any material or plausible explanation in its response to the SCN and in the subsequent submissions to demonstrate that its disclosures against Item 5.3 are correct and that the business potential of FCPL was a consideration for Amazon to pursue the Combination. Seen in the context of the Internal Correspondence and failure to provide any of the said material and/or explanation, it is evident that Amazon, in addition to the omission to state the purpose of the Combination, has misrepresented the Commission by stating that the purpose of the Combination is an opportunity arising from the business potential of FCPL and to add credibility to FCPL's financial position, FCPL invested and proposed to further invest in FRL, a company with strong financials and futuristic outlook. Seen against the backdrop of Internal Correspondence, the statements of Amazon in the Notice and subsequent

submissions dated 15th November, 2019 regarding the purpose of the Combination, stand belied. It is evident that these statements have been made with full knowledge that the same are false in material particulars. Amazon had misled the Commission to believe, through false statements and material omissions, that the Combination and its purpose were the interest of Amazon in the business of FCPL.

45. At this juncture, it also relevant to look at the disclosure of Amazon against Item 8.8 of Form I, which requires a notifying party to furnish documents, material (including reports, studies, plan, latest version of other documents), *etc.* considered by and/or presented to the board of directors and/or key managerial person of the parties to the combination and/or their relevant group entities, in relation to the proposed combination. The purpose of this requirement is to understand the commercial and economic contours of the given combination in addition to the legal contracts submitted as trigger documents against Item 8.7 of Form I. True and complete disclosure against Item 8.8 enables the Commission to determine the appropriate framework for competition assessment of the Combination. In response to Item 8.8, Amazon had furnished a presentation titled '*Taj Coupons - Business Plan for 5 years*'. The eight-page presentation provides only a brief idea of the gift voucher business of FCPL, its business operating model, estimated five-year business size, organisation design, sales team and financial summary, without any reference to FRL.

46. Considering the disclosures in the Notice, including that against Item 8.8, a specific query was posed to Amazon *vide* letter dated 24th October, 2019 of the Commission: '2.1 It is noted that in terms of query 8.8 of Form I, Parties have not furnished requisite documents. Accordingly, you are required to provide documents, material (including reports, studies, plan, latest version of other documents), *etc.* considered by and/or presented to the board of directors and/or key managerial person of the parties to the combination and/or their relevant group entities, in relation to the proposed combination. Further, for each document, indicate the date of preparation and the name and title of the addressee(s)'.

47. In response, Amazon furnished copies of resolution authorising the execution of FCPL SSA and FCPL SHA, and copies of the reports on legal due-diligence and key tax issues relating to FCPL. Neither copies of the above discussed Internal Correspondence nor any other document containing the actual purpose reflected in the said documents was furnished to the Commission. It is noted that no purpose elaborated in the Internal Correspondence surfaced in any of the material furnished against Item 8.8 of Form I or query 2.1 of the letter dated 24th October, 2019 of the Commission. Similarly, the purpose of the Combination stated in the Notice and subsequent submissions of Amazon, were not a consideration in the Internal Correspondence. These clearly establish that Amazon had knowingly suppressed relevant and material documents to be furnished under Item 8.8 of Form I.

48. In view of the above, the Commission notes that the Internal Correspondence discussed above clearly demonstrates that Amazon had failed to disclose true and complete details of the purpose of the Combination, which is required to be given under Item 5.3 of Form I. Further, Amazon had misrepresented that its decision to pursue the Combination was based on the unique business model of FCPL, and that FRL, a company with strong financials and futuristic outlook, is relevant to the Combination only from the perspective of financial strength to FCPL. As brought out earlier, Amazon also failed to disclose and clarify the real purpose of the Combination in the Notice and continued with its false/misleading assertions even in its response to the queries posed *vide* letters dated 9th October, 2019 and 24th October, 2019 of the Commission. Amazon has also supressed relevant and material documents required to be furnished in terms of Item 8.8 of Form I. Considering these, the Commission has no hesitation to hold that such conducts of Amazon amount to suppression and misrepresentation of the purpose of the Combination, which is a material particular. This is in contravention of the provisions contained in clauses (a) and (b) of Section 44 and clause (a) of sub-section (1) of Section 45 of the Act. The conduct of Amazon in supressing relevant and material documents against the disclosure requirement under Item 8.8 of Form I is a contravention of clause (c) of sub-section (1) of Section 45 of the Act. Similarly, the rights over FRL that were considered as strategic in the Internal Correspondence of Amazon, were represented as

mere investor protection rights. Such repeated assertions, contrary to their actual purport, amount to statements that are false in material particular, in contravention of the provisions contained in clauses (a) and (b) of Section 44 and clause (a) of sub-section (1) of Section 45 of the Act.

49. Another issue that arises for determination out of SCN, is whether FRL SHA was identified and notified as an inter-connected part of the Combination, in terms of Regulations 9(4) and 9(5) of the Combination Regulations. In response to the SCN, Amazon has, *inter alia,* submitted that there was no reason for Amazon to represent that the FRL SHA was negotiated independent of its investment in FCPL[27]. In the written submissions filed following the oral hearing in the matter[28], Amazon has further submitted that it had disclosed FRL SHA to the Commission in compliance with the requirements of Regulation 9(4) and 9(5) of the Combination Regulations.

50. Before determining the merits of this issue, it is pertinent to note the relevant provisions of the Act and the Combination Regulations. Unlike the proceedings relating to anti-competitive agreements and abuse of dominant position, the Act envisages *ex ante* regulation of combinations. Section 5 of the Act means combination as acquisition of shares, voting rights, assets or control, merger or amalgamation between enterprises, provided the parties meet the financial thresholds provided therein. Section 6(1) of the Act prohibits combination that causes or likely to cause appreciable adverse effect on competition. Section 6(2) of the Act obliges parties to combination to give notice in respect of their proposed combination, in the form as may be specified. Further, Section 6(2A) of the Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days from the date of notification or earlier approval by the Commission. If the Commission fails to take a decision within the said time period, the combination would be deemed approved. Thus, the scheme and purpose of the Act is to provide a time-bound opportunity to the Commission to evaluate the likely effects of the proposed combination on competition in the relevant market(s) in India and

[27] Page 19 of the response of Amazon filed on 28th July, 2019

[28] Para 58 at page 8 of the written submissions of Amazon filed on 5th October, 2021

regulate them appropriately. If a party fails to comply with the requirement of Section 6(2) of the Act to give notice to the Commission of their proposed combination, the same would attract penalty under Section 43A of Act.

51. In exercise of the powers conferred under Section 64 read with Section 6(2) of the Act, the Commission has issued the Combination Regulations, which govern the procedural aspects relating to regulation of combinations. These regulations provide that a notifying party may choose to give notice under Section 6(2) of the Act either in Form I or Form II. While Form I is a short form, Form II requires detailed information and is preferred in cases where the business activities of the parties are similar or identical or substitutable and their market share is higher than 15% in the relevant market, or the activities of the parties are in different levels of the production chain and the individual or combined market share of the parties is more than 25% in the relevant market.

52. Regulation 9(4) of the Combination Regulations states that "*Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination*". This provision makes it mandatory for parties to the combination to give one notice covering all inter-connected steps of their proposed combination. Further, Regulation 9(5) of the Combination Regulations stipulates that "*The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded*".

53. In the context of the notification of inter-connected steps of a combination under Section 6(2) of the Act and applicability of exemption to such a step, on a standalone basis, the Hon'ble Supreme Court of India in *Competition Commission of India* v. *Thomas Cook & Anr.*[29] held that technical interpretation to isolate two steps of the same

[29] Judgment dated 17th April, 2018 in Civil Appeal No.13578 of 2015

combination would be contrary to the sprit and provisions of the Act. In the said matter, the Commission, in its decision[30], had observed that considering two different transactions as one combination depends on the facts and circumstances of each case with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately. In another decision of the Commission relating to *Canada Pension Plan Investment Board and ReNew Power Limited*[31], the Commission observed that a holistic appreciation of the facts and circumstances of the given case would be relevant to determine inter-connectedness and an isolated or piecemeal appreciation of specific facts or parameters may not yield any pragmatic conclusion.

54. As brought out earlier, the Combination in the instant matter, is a composite of acquisition of shares, rights and commercial contracts. These together were for the purpose of a strategic alignment amongst the business of the parties, in particular to expand the ultra-fast delivery service of Amazon. The internal notes and e-mails dated 24th May, 2018, 10th July, 2018 and 18th July, 2019 clearly reveal that all the said three elements have always been considered parts of one proposal, 'Project Taj'. In particular, the internal note dated 24th May, 2018 shows that Amazon had initially proposed approval to the strategic investment so that the parties could execute the commercial agreements and had estimated the returns on its investment in FRL through discounted cash flows from such agreements over 10 years. The commercial agreement and acquisition of shares in FCPL to secure shareholding and rights over FRL had been inter-connected to each other and were conceived, contemplated, negotiated and consummated as part of one composite combination. However, Transaction I, Transaction II and Transaction III alone were identified and notified as constituent steps

[30] Order dated 21st May, 2014 passed under Section 43A of the Act in Combination Registration No. C-2014/02/153

[31] Order dated 21 November, 2019 under Sections 43A and 44 Chapter VI of the Act

of the Combination[32], and FCPL SSA and FCPL SHA alone were stated as agreements executed in relation to the Combination[33]. These details are further discussed in the succeeding paragraphs.

55. The fact that FRL SHA was part of the Combination and was executed at the behest of Amazon, is overwhelmingly evident from the email dated 4th April, 2019 of Amazon to Future Group which, *inter alia,* states as follows:

4.	*Enforcement of rights with respect to FRL*	*The SHA provides certain rights which are specific to FRL, being:* • *The right of Alpha to appoint an observer;* • *Veto of Alpha on further funding (if not done in accordance with the provisions of the SHA)* • *Veto of Alpha on transfer of assets;* • *Veto of Alpha in case of amendment of charter documents which impacts Alpha's rights;* • *ROFR of Alpha in case of Restricted Transaction;* • *Process for further funding by FRL.* *As per the current proposal Alpha has no recourse in case FRL does not give effect to these provisions, including for instance, if Promoters for any reason are not able to exercise their vote on such matters. To ensure that these rights are enforceable against FRL albeit through the Company, it is preferred that these rights are captured by way of a specific agreement between the Company, the Promoters, and TRL. The manner in which the Company exercises these rights will be a veto matter under the SHA. Further, the articles of association of FRL will also be required to be amended to include such rights.*

[Emphasis Supplied]

[32] Disclosure against Item 5.1.2 of Form I at paragraphs 15 and 16, at pages 20 and 21, of the Notice

[33] Para 34, at page 35, of the Notice and Para 44, at page 48, of the written submissions dated 15th November, 2019, in response to the letter dated 09th October, 2019

56. To determine whether FRL SHA was identified and notified as a part of the Combination, as claimed in the response to SCN, it is relevant to look at Part V of Form I, which requires a notifying party to describe the details of the proposed combination notified to the Commission. Item 5.1 seeks details of the Combination notified under Section 6(2) of the Act. The same is reproduced for ease of reference:

> *"5.1. Scope of the combination notified pursuant to sub-section (2) of section 6 of the Act (with reference to relevant clause under the agreement(s), as applicable):*
>
> *5.1.1. Details of acquisition or merger or amalgamation, as the case may be, with reference to relevant clause of section 5;*
>
> *5.1.2. Any other transaction(s) that is/are inter-connected, in terms of sub-regulation (4) and / or (5) of regulation 9 of these regulations; and*
>
> *5.1.3. Right(s) acquired or arising out of or in connection with the transaction(s) referred to at 5.1.1 and 5.1.2 above."*

57. It is observed that, in response to Item 5.1.1, no reference was given to FRL SHA or the Commercial Arrangements. Amazon had merely submitted that the value of assets and turnover of FRL is higher than the jurisdictional threshold prescribed under Section 5(a)(i)(A) of the Act. Based on the information relating to the constituent steps of the Combination provided in pages 2 and 3 of the Notice and the disclosure against Item 5.1.2, it is apparent that the financials of FRL were taken into consideration as it was identified as the target enterprise in Transaction II. However, no reference was made to FRL SHA in the disclosures against Items 5.1.1 and 5.1.2. FRL SHA and the commercial agreements, being inter-connected parts of the Combination, their details ought to have been furnished in Item 5.1.2 of Form I. In response to Item 5.1.3, Amazon had given a list of rights to be acquired by it in terms of FCPL SHA to protect its investment in FCPL (*Table 3 – The rights proposed to be acquired by the Investor in terms of the SHA to protect its investment in FCL*)[34]. In this section, it has been brought out that FCPL has to take Amazon's consent for exercising some of its rights under

[34] Para 24 at Page 23 of the Notice

FRL SHA. However, it has never been the case that Amazon disclosed the fact that FRL SHA was negotiated as a part of the Combination and was executed to achieve one of the objectives of the Combination. Similarly, no reference about the commercial agreements was made in this section of the Notice. The Commission observes that mere consideration of the values of the asset and turnover of FRL cannot be considered as notification of FRL SHA and BCAs, as parts of the Combination.

58. Item 5.2 of Form I requires the notifying party to disclose:

> *"Step(s) to give effect to the combination, along with timelines for **each step(s)** of the combination"*
>
> [Emphasis Supplied]

59. In response the this, Amazon provided the following disclosure:

> *"The milestones relating to the Proposed Combination have been undertaken as follows:*
>
> ***Table 4- Milestones for the Proposed Combination***

Milestone	*Date*
Execution of the SSA [FCPL SSA] *amongst the Investor, Promoters and FCL in relation to the acquisition of the Subscription Shares*	*August 22,2019*
Execution of SHA [*FCPL* SHA] *amongst the Investor, Promoters and FCL.*	*August 22, 2019*

> *The Proposed Transaction I and Proposed Transaction II are conditions precedent to Proposed Transaction Ill. Therefore, after receipt of the approval of the Hon'ble Commission, in order to effectuate Proposed Transaction III, the Promoter Group will carry out Proposed Transaction I and Proposed Transaction II. Under the SSA, the Long Stop Date is 180 days from the date of execution, i.e., 18 February 2020 (or such date as may be mutually agreed between the parties)*[35] *"*
>
> [Emphasis Supplied]

[35] Paras 25 and 26, at pp. 28 and 29, of the Notice

60. As may be seen above, details of FRL SHA were not mentioned in Item 5.2. As has emerged now, FRL SHA and the commercial agreements were inter-connected parts of the Combination and accordingly, their details ought to have been disclosed against Item 5.1.2 and in the above table.

61. At para 34 of the Notice, Amazon had stated that "*The Parties have only executed the SSA* [FCPL SSA] *and the SHA* [FCPL SHA] *in relation to the Proposed Combination.*". Further, in response to query 2.12 of the letter dated 9th October, 2019 - 'Please elaborate all types of rights that Amazon would acquire *viz.* shareholder, commercial, business related, exclusivity rights *etc.* as a result of proposed combination', Amazon had, *inter alia,* stated that:

> "*it is submitted that the Proposed Combination, in its entirety, is envisaged within the SHA* [FCPL SHA] *and the SSA* [FCPL SSA], *and that the SHA* [FCPL SHA] *and the SSA* [FCPL SSA] *are the only transactional documents executed pursuant to the Proposed Combination...*"
>
> [Emphasis Supplied]

62. Similar to the disclosures against Items 5.1.1, 5.1.2, 5.2 and 5.3, 'Part I: Basic Information' of the Combination, presented at pages 1 to 5 of the Notice, also does not reveal that FRL SHA and the BCAs were part of the Combination, and that FRL SHA was executed to confer to Amazon indirect rights over FRL, which Amazon considered strategic in the Internal Correspondence. On page 5 of the Notice, it was stated that FCPL SSA and FCPL SHA are the transaction documents that were entered into in relation to the Combination.

63. In response to a specific query 2.5 *vide* letter dated 24th October, 2019 of the Commission, on the nature of rights and interest over FRL, Amazon in its submission dated 15th November, 2019 had, *inter alia,* submitted that:

> "*The Investor* [Amazon] *has limited investor protection rights in FCL [FCPL] with a view to protect the value of its investment in FCL. Further, while all decisions with respect to FCL's investment in FRL will be taken by the board of directors of FCL, however, with a view to protect the*

*Investor's investment in FCL, certain rights have been granted to the Investor with respect to FCL's investment in FRL. It is important to highlight that these rights can be exercised only through FCL, and not directly by the Investor. Importantly, these rights have been derived from the rights granted to FCL in terms of the **FRL SHA which was negotiated by the Promoters, FRL** [FCPL] **and FRL independent of the investment by the Investor in FCL**, and with a view to unlock value for FCL. These rights have been granted to FCL with a view that FCL would exercise its rights as a shareholder of FRL to protect the interest of its own shareholders, including the Investor"*

[Emphasis Supplied]

This was a categorical statement by Amazon that FRL SHA is independent of the Combination. Similarly, the commercial agreements were also stated as being neither a part nor inter-connected to the Combination, although they were at the heart of the one composite proposal *viz.* Project Taj [Future] all along.

64. In relation to the above submissions, Amazon has submitted that it had inadvertently missed to add the following words: '*which was executed subsequent to the Warrants Transaction*[36]' between the words 'FRL SHA' and 'which', and in one of the places, FRL needs to be read as FCPL. It has been further claimed that the impugned statement needs to be read with footnote 3 of the Notice, which reads as follows: *It may be noted that prior to the Proposed Combination, FCL had acquired equity warrants of FRL, convertible into equity shares representing seven decimal three percent (7.30%) of the share capital of FRL within a period of eighteen (18) months from the date of allotment. This transaction was notified to the Hon'ble Commission through a notification dated March 19, 2019 (Combination Registration No. 2019/03/653) and was unconditionally approved by the Hon'ble Commission through its order dated April 15, 2019. Subsequently, the Promoters (defined hereinafter) (including FCRPL), FCL and FRL have entered into a shareholders agreement dated August 12, 2019 ("FRL SHA") which sets forth the inter se mutual rights and obligations of the parties to the FRL SHA as shareholders of FRL (See, Section 8 and Section 9 of the FRL SHA). A copy of the FRL SHA is attached as ANNEXURE 33.* ***It is clarified that the execution of the FRL SHA***

[36] Para 39(d), at page 18, of the response to SCN filed on 28th July, 2021

is pursuant to FCL's acquisition of equity warrants of FRL *(see Recitals 0 and E of the FRL SHA)."*

[Emphasis Supplied]

65. Accordingly, Amazon has contended that the impugned statement should be read as:

> *"Importantly, these rights have been derived from the rights granted to FCL* [FCPL] *in terms of the FRL SHA which was executed subsequent to the Warrants Transaction which was negotiated by the Promoters, FCPL and FRL independent of the investment by the Investor in FCL, and with a view to unlock value for FCL. These rights have been granted to FCL with a view that FCL would exercise its rights as a shareholder of FRL to protect the interest of its own shareholders, including the Investor".*
>
> [Underlined portion added]

66. On the claim that the impugned statement needs to be read with footnote 3 of the Notice, the Commission observes that the same states that FRL SHA was executed pursuant to the Warrant Transaction. It may be true that FCPL held warrants in FRL and the same fact was reflected as one of the recitals of FRL SHA. The Notice, however, nowhere discloses the fact that FRL SHA was negotiated as part of the Combination and was executed for the purpose of Amazon acquiring rights over FRL, through FCPL SHA, and that Amazon had insisted for FRL SHA to be entered into as a prerequisite to Transaction III. In the absence this material fact being disclosed, footnote 3, read with the disclosures and statements in the Notice and subsequent submissions of Amazon, including those against Items 5.1.2 and 5.2 of Form I, statements made in paragraphs 34 of the Notice and paragraph 44 of the submission dated 15th November, 2019 (in response to the letter dated 9th October, 2019 of the Commission), the impugned statement is self-evidently misleading to the effect that FRL SHA was not a part of the Combination and is only pursuant to the Warrants Transaction. Further, the Notice and subsequent submissions of Amazon, including footnote 3 and the impugned statement above read as a whole bring out that Amazon was not forthcoming in disclosing the true and complete background/information regarding FRL SHA, particularly its inter-connectedness with the Combination and its purpose.

67. As regards the contention on inadvertent omission, it is noted that the impugned submission dated 15th November, 2019 of Amazon was in response to query 2.5 of the letter dated 24th October, 2019 of the Commission. The query related to the rights of Amazon over FRL and the strategic and economic rationale behind them. Consistent with the design of projecting FRL only as an element of financial strength to FCPL and all its engagement with Amazon Group as independent of the Combination, Amazon had replied that the rights over FRL are for the limited purpose of protecting the investment in FCPL. It is pertinent to note that Amazon suppressed the actual purpose of the Combination; the fact that FRL SHA was executed to ensure that Amazon indirectly gets the strategic rights over FRL; and the BCAs are parts of the Combination. When seen in totality, the Commission is of the considered view that the claim of purported omission to add the words *"which was executed subsequent to the Warrants Transaction"* is an afterthought and not an inadvertent omission. Amazon now claims that there was no reason for it to represent that the FRL SHA was negotiated independent of its investment in FCPL. In such a case, Amazon ought to have disclosed FRL SHA and related material particulars against Items 5.1.1, 5.1.2 and 5.2 of Form I. Thus, the Commission is not inclined to persuade itself to accept the plea of 'omission' taken by Amazon, and the Commission has no hesitation in holding that the same is clearly an attempt in afterthought.

68. The Internal Correspondence of Amazon clearly highlights that the rights of Amazon over FRL are at the heart of the negotiations and the need for FRL SHA was to achieve the said objective of the Combination. It is for these strategic rights and for the call option, that Amazon had paid a premium of 25% over the regulatory share price of FRL. This makes it clear that neither FRL SHA would have been executed in the absence of other steps/ transactions of the Combination nor would Amazon have gone ahead with Transaction III in the absence of FRL SHA. However, in blatant disregard of Regulation 9(4) and 9(5), read with Items 5.1.1, 5.1.2, 5.2 and 8.7 of Form I, FRL SHA was not disclosed in the Notice in its actual context; its inter-connectedness to FCPL SSA and FCPL SHA were suppressed in spite of the disclosure requirements under the said provisions of Combination Regulations. In other words, the mentioning of FRL

SHA in footnote 3 of the Notice can, in no manner, be considered a notification of the same as a part of the Combination either in substance or form. This is more so when there were repeated or categorical assertions that the rights over FRL are limited to investor protection and no influence over FRL is acquired and FRL SHA was negotiated independent of the combination. Therefore, Amazon failed to give a single notice covering all the inter-connected steps of the combination, as required in Regulation 9(4) read with Regulations 9(5) and 5 of the Combination Regulations, and Section 6(2) of the Act. Further, Amazon also failed to give true and complete disclosure with respect to substance of its combination in this case, as the FRL SHA was pursued to ensure that the business of FRL become a strategic asset for Amazon to expand and enhance its ultra-fast delivery services.

69. The Internal Correspondence show that the strategic rights over FRL though FRL SHA and FCPL SHA were contemplated by the parties to establish and cement their strategic partnership through a series of commercial agreements. The inquiry in pursuance of the SCN reveals that the Commercial Agreements were essential and inter-connected parts of the Combination and those were the trigger for Amazon to acquire shareholding in FCPL as well as secure rights over FRL. The fact that the commercial agreements are integral parts of the Combination was suppressed in the Notice and the subsequent submissions of Amazon. Amazon had consistently represented that BCAs are independent of the Combination. In para 65 of the Notice, the arrangements between Amazon and FRL for listing of the products of the latter in Amazon marketplace were claimed as *"neither inter-connected with, nor part of, the Proposed Combination"*. In para 96 of the Notice, the arrangement between ARIPL and Future Consumer for supply of food category products to the formers was stated as "*not related to the Proposed Combination, in any manner whatsoever*". Further, in para 100 of the Notice, in relation to the memorandum between APIPL and FRL to offer the option of making payments through the Amazon Pay semi-closed wallet to end consumers making purchases across retail outlets and websites operated by FRL and entities controlled or wholly owned by FRL, it was *clarified that the MoU is not related to the Proposed Combination, in any manner whatsoever.* Amazon continued with these assertions in

paragraphs 45 and 72 of the written submissions dated 15th November, 2019, filed in response to the letter dated 9th October, 2021 of the Commission and paragraphs 4 and 44 of the written submissions dated 15th November, 2019, filed in response to the letter dated 24th October, 2021 of the Commission. These repeated assertions invariably suggest that these commercial contracts were negotiated and executed in the normal course of business of the concerned parties independent of the Combination. The distorted disclosures and omissions in the Notice and subsequent submissions dated 15th November, 2019 of Amazon, as discussed above, do not allow to even suspect that the Commercial Arrangements were parts of the Combination to establish a strategic alignment between the parties in retail sector.

70. In relation to the agreements between the affiliates of the parties, Amazon had submitted that, given the proximity of the date of execution of these agreements with FCPL SSA and FCPL SHA, the parties, in good faith, have decided to give effect to the aforementioned agreements only after receipt of the approval from the Commission in relation to the Combination[37]. While this is now being alluded to as an indication in the Notice that the said arrangements/agreements are inter-connected to the Combination, given the categorical submissions discussed above, the said submission can in no manner be considered a disclosure of true, correct and complete information regarding BCAs and notification of BCAs as a part of the Combination. These again go on to establish that Amazon had supressed the actual scope of the Combination and had made false and incorrect statements in relation to the BCAs, which are intertwined into the scope and purpose of the Combination.

71. The foregoing discussion brings out that Amazon had failed to disclose the fact that FRL SHA was negotiated as a part of the Combination and an intrinsic element thereof to confer Amazon rights over FRL. This is more so when Amazon had been considering these rights as strategic in the Internal Correspondence. The learned counsel for Amazon alluded that a combined reading of FCPL SHA, FRL SHA and other

[37] Para 66, at page 48, of the Notice and para 44, at page 47 of the submissions dated 15th November, 2019 of Amazon, filed in response to the letter dated 24th October, 2019 of the Commission

documents enclosed in the Notice clearly present the actual scope and purpose of the Combination. However, no plausible explanation has been given as to why Amazon failed to notify FRL SHA as an inter-connected part of the Combination; why the details of FRL SHA was omitted in the disclosures against Items 5.1.1, 5.1.2 and 5.2 of Form I; and why the rights over FRL were portrayed as limited investor protection rights when the Internal Correspondence considers them essential to establish strategic alignments with FRL and its affiliates, which also weighed in Amazon paying 25% premium over FRL Share price. The mention of FRL SHA in the footnote as an agreement executed pursuant to Warrants Transaction, coupled with the assertions that FRL SHA was negotiated independent of the acquisition of 49% shareholding in FCPL, the indirect rights are for the limited purpose of protecting the investment in FCPL and the BCAs are not related to the Combination, shows a deliberate design, not to state the true, correct and complete facts regarding FRL SHA, but to suppress and misrepresent their inter-connection to the Combination. Such conducts of Amazon are in contravention of the provisions contained in clause (b) of sub-section (1) of Section 45 of the Act. The categorical statements that FRL SHA and BCAs were independent of the Combination sufficiently establish that the same were not notified to the Commission as a part of the Combination, which is a contravention of the obligation contained in Section 6(2) of the Act, which attracts penalty under Section 43A of the Act.

72. The Act has established the Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. Apart from enforcements against anti-competitive agreements and abuse of dominant position, the Commission also reviews combinations to ascertain their impact on the concerned market structure and determine whether the potential changes make the relevant market(s) vulnerable for appreciable adverse effect on competition. Unlike the *ex post* enforcement relating to anti-competitive agreements and abuse of dominant position, the proceedings relating to regulation of combinations are *ex ante* and are based on a

time-bound mandatory notification regime. While Section 6(2) of the Act obligates the parties to provide details of the combination, the Commission has to assess the effects of combination within a period of 210 days from the date of notification, absent which the combination is deemed to be approved.

73. It is relevant to note that Section 6(2) of the Act requires any person proposing Combination '*to give notice to the Commission in the form as may be specified...disclosing the details of the proposed combination*'. The legislative intent behind such requirement is that the specified format of the notice would provide the Commission with all the information that is necessary to conduct competition assessment of the effects of the given combination with due regard to the factors enlisted in Section 20(4) of the Act and determine whether the notified combination is likely to cause appreciable adverse effect on competition. These have to be completed by the Commission within the prescribed time limit of 210 days. The notice given pursuant to Section 6(2) of the Act is the starting point of examination of the notified combination. To ensure that the notifying party furnishes the relevant particulars, Form I requires the notifying party to submit a declaration that "*The notifying party declares and confirms that all information given in this Form and all pages annexed hereto are* ***true, correct and complete*** *to the best of its knowledge and belief, and that all estimates are identified as such and are its best estimates based on the underlying facts*". The scheme of the Act and Combination Regulations is to establish a trust-based regulatory system, wherein the party seeking approval furnishes true, correct and complete details of its proposed combination and the Commission inquires the effects of the notified combination on competition in the relevant market(s). In this time-bound process, misrepresentations and suppressions are serious challenges to the trust based regulatory mechanism for combinations and the sanctity of the institutional framework established under the Act.

74. Seen in the scheme of the Act and the underlying spirit, the notice given under Section 6(2) of the Act is not a document of complex defence with legal arguments submitted in an adversarial litigation, but an application for approval containing relevant facts and

particulars regarding the proposed combination that are true, correct and complete to the best of knowledge and belief of the notifying party. The facts, particulars and documents required to be furnished under Form I, including the purpose of the combination (item 5.3), inter-connected transactions (item 5.1.2) and documents considered by boards of the parties or key managerial personnel (Item 8.8), are essential to have a full, clear and complete picture of the notified combination. The requirement to disclose these material facts and particulars is paramount as they enable the Commission to appreciate the commercial and economic contours of the combination and decide appropriate framework for assessment in the matter. If a party conceals/suppresses and/or misrepresents to the Commission the scope and purpose of the Combination and obtains approval, the same would effectively amount to approval/consent having been obtained by way of fraud. Such breach of trust of the Commission, established under the Act for the benevolent purpose of promoting and sustaining competition in markets in India, manifests a deliberate disregard to the trust based regulatory mechanism provided under the Act.

75. A holistic appreciation of the Notice and material brought on record reveals that there has been a wilful and deliberate design threaded across the Notice and subsequent submissions dated 15th November, 2019 of Amazon, to suggest that the Combination consists of only Transaction I, Transaction II and Transaction III; and that FCPL SSA and FCPL SHA are the only two agreements entered into between the parties in relation to the Combination. The manner and extent of assertions regarding FRL SHA is that the same was a pre-existing arrangement amongst the shareholders of FRL, executed pursuant to the Warrants Transaction, and it was negotiated independent of Transaction III *i.e.,* acquisition of 49% stake in FCPL by Amazon. The inter-connection between FRL SHA and the Combination was suppressed. Similarly, the BCAs, although disclosed, were claimed as neither inter-connected with, nor a part of the Combination. However, the Internal Correspondence brings out that BCAs and acquisition of strategic rights over FRL, through the acquisition of shares in FCPL, had been considered together as parts of one composite package, *viz.*, '*Project Taj* [Future Group] – *Investment in National Multi-category Copperfield Seller*'. FCPL was merely a vehicle

for Amazon to acquire interest over FRL, and such interest was considered necessary to implement strategic alignments between the business activities of Future and Amazon groups in India.

76. The learned counsel appearing for Amazon argued that it had disclosed FRL as a material entity, the object of attention and that its businesses were essential consideration for Amazon to pursue the Combination. This does not meet the requirement of notification in Form I read with Regulation 5(2) of the Combination Regulations and Section 6(2) of the Act. It is true that Amazon had disclosed several materials relating to the overlapping business activities of the parties to the Combination, FRL and other affiliates. However, such disclosures relating to the overlapping activities of Amazon group and FRL were claimed to be by way of abundant caution as FCPL held warrants issued by FRL[38] (. Amazon has not provided any details in the context of the actual combination, including FRL SHA and BCAs, being pursued for strategic alignments between the business activities of Amazon group and FRL / its affiliates. In the letter dated 24th October, 2019 of the Commission, the following specific query was posed to Amazon: '2.9 According to the notice, in certain overlapping segments of the areas of the operations of the parties, the combined market shares are exceeding the thresholds given in regulation 5 (3) of the Combination regulations, you are required to provide justification for filing the notice in Form I'. In response, Amazon had *inter alia* submitted that:

> *The Investor's has no shareholding in FRL, and does not exercise any control or influence on it, therefore the Proposed Combination should not be subjected to Form II filing requirement…In the present case, with a view to assist the Hon'ble Commission and out of abundant caution, the overlap in the retail market has been identified,* ***pursuant to the FRL Warrants held by FCL…***"
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> [Emphasis Supplied]

[38] Para 80 of the submissions dated 15th November, 2019 of Amazon, in response to the letter dated 24th October, 2019 of the Commission

These claims were made by completely masking the fact that FRL SHA and BCAs are inter-connected parts of the Combination, contemplated to establish strategic alignments between the business activities of FRL and Amazon Group. This is a critical factor for determining the need for filing Form II in the matter. However, consistent with the design across the Notice and subsequent submissions of Amazon, the said details were suppressed in response to the said query 2.9.

77. The Commission notes that the details of overlap between FRL and Amazon Group, provided in the Notice, and subsequent submissions of Amazon as well as the competition assessment conducted in the Approval Order are in the context of FCPL holding warrants in FRL. However, the said assessment is definitely not from the perspective of strategic alignments between FRL and Amazon Group. This is obvious from the Approval Order as it does not make any reference to FRL SHA or the BCAs. The Commission observes that the effect of commercial contracts entered into between FRL and Amazon Group entities, in their normal course of business, would be considerably different from parties contemplating strategic alignments between their business through strategic investments. The regulatory process of notification by the parties that would follow an admission of the commercial contracts being part of the combination and also the purpose of the strategic acquisition of shares and rights would entail consequential presentation of facts, representations, clarifications and undertakings, if any, which would not be present when such contracts are independent of the combination. The nature of inquiry by the Commission in these cases would also be necessarily with due regard to the acquisition and contracts being part of one single understanding to establish a strategic partnership. This regulatory process, in itself, makes the notifying party to furnish true, correct and complete information regarding the actual combination pursued by the parties and thus, meet the requirements of the Act and the Regulations framed thereunder. Concurrently, such process would enable the Commission to appreciate the combination in its actual sense, and accordingly, discharge its functions in terms of the Act. If one were to argue otherwise, it would be sufficient that the notice filed with the Commission merely describes the name of the parties and their business activities and there would be no need to give any other detail

as required in Form I or Form II, including the scope of arrangements, their purposes and context of the combination. This is *ex facie* contrary to the scheme and intendment of the Act and Combination Regulations.

78. The above discussed omissions, false statements and misrepresentations have the effect of influencing the line of inquiry in assessing the Combination. Irrespective of what would have been the outcome of a notice with true, correct and complete disclosures, the misleading submissions, false statements, omission and suppression of material particulars, facts and documents discussed above, have denied and disabled the Commission an opportunity to assess the effects of the actual Combination, with specific focus to the actual intended objectives. Condonation of such lapses would effectively mean that a notifying party could disclose its legal contracts in a distorted and elongated manner of its convenience and engage in suppressions and misrepresentations of the actual scope and purpose of the Combination. This makes all details sought in Form I and purpose of regulation of combination under the Act, otiose, besides stultifying the very legislative intent for merger review process.

79. In sum, Amazon ought to have notified the combination, *inter alia,* consisting of the following inter-connected steps: (a) Transaction I; (b) Transaction II; (c) Transaction III; (d) FRL SHA for the purpose of acquisition of strategic rights over FRL through FCPL SHA; and (e) commercial agreements between Amazon and Future groups, for the purpose of establishing strategic alignment and partnership between Amazon Group and FRL as well as have a 'foot-in-the-door' in the India retail sector. Amazon failed to notify FRL SHA and the commercial arrangements, as parts of the combination between the parties, and supressed the actual purpose and particulars of the combination, as discussed above, in contravention of the obligation contained in sub-section (2) of Section 6 of the Act read with Regulation 5 and sub-regulations (4) and (5) of Regulation 9 of the Combination Regulations.

80. Given that the Combination is between players who are known in the online marketplace and offline retailing and they have contemplated strategic alignment between their businesses, the Commission considers it necessary to examine the

combination afresh based on a notice to be given in Form II with true, correct and complete information, as required therein. Accordingly, in exercise of the powers conferred under sub-section (2) of Section 45 of the Act, the Commission hereby directs Amazon to give notice in Form II within a period of 60 days from the receipt of this order, and, till disposal of such notice, the approval granted *vide* Order dated 28th November, 2019, in Combination Registration No. C-2019/09/688, shall remain in abeyance.

81. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination. In case of a contravention under Sections 44 and 45 of the Act, each of the said provision renders the contravening person liable, *inter alia,* to a penalty, as provided therein. Though the penalty under Sections 43A, 44 and 45 of the Act can be to the extent mentioned therein, the Commission has sufficient discretion to consider the conduct of the parties and the circumstances of the case to arrive at an appropriate amount of penalty.

82. In the instant case, all the contraventions discussed above arise from a deliberate design on the part of Amazon to suppress the actual scope and purpose of the Combination, and the Commission finds no mitigating factor. Resultantly, the Commission considers it appropriate to levy the maximum penalty of INR One Crore each under the provisions of Section 44 and Section 45 of Act. Accordingly, Amazon is directed to pay a penalty of INR Two Crore.

83. As regards failure to notify combination in terms of the obligation cast under Section 6(2) of the Act, Section 43A of the Act enables the Commission to impose a penalty, which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination. Accordingly, for the above mentioned reasons, the Commission hereby imposes a penalty of INR Two Hundred Crore upon Amazon.

84. Amazon is directed to pay monetary penalty as imposed *vide* paras 82 and 83 above, within a period of 60 days from the receipt of this order.

85. It is made clear that nothing contained in this order shall be deemed to be confidential as the same has been used for the purposes of the Act in terms of the provisions contained in Section 57 of the Act.

86. The Secretary is directed to inform the concerned parties, accordingly.

भारतीय प्रतिस्पर्धा आयोग Competition Commission of India सत्यमेव जयते नई दिल्ली / New Delhi

Certified True Copy

17/12/2021

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