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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA
Combination Registration No. C-L-2019/08/13

12th November, 2020

Notice filed in Form III by BTO FPI III Pte. Ltd.

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 20(1) of the Competition Act, 2002

Background

1. On 05.08.2019, the Competition Commission of India (**Commission**) received a notice in Form-III, filed under section 6(5) of the Competition Act, 2002 (the **Act**) by BTO FPI III Pte. Ltd. (**Investor**). The notice was filed in relation to subscription of redeemable non-convertible debentures of Ryka Commercial Ventures Private Limited ("**Ryka**") and acquisition of minority shares in Future Lifestyle Fashions Ltd ("**FLFL**").

Summary of Transaction

2. It has been stated that the transaction is a composite debt transaction to extend a financial facility to Ryka for refinancing and consolidating all of Ryka's pre-existing debt. The investment is in relation to financing of Ryka for an aggregate amount of INR 1,750 Cr. by way of: (a) subscription of upto a maximum of 13,000 senior, unlisted redeemable, INR denominated, non-convertible debentures (**NCDs**) with a face value of INR 10,00,000 each (Debentures), issued or to be issued by Ryka in two tranches; and (b) acquisition of 6% of the equity shares of FLFL through purchase of shares on BSE Limited and National Stock Exchange of India Limited.

3. It has been mentioned in the notice that the Investor has entered into a Trust Deed for Investment in Debentures dated 23.07.2019, with Ryka, Vistra ITCL (India) Limited (**Trustee**) and Mr. Kishore Biyani (**Trust Deed for Investment in Debentures**), under which the Investor has agreed to subscribe to the Debentures, of which an aggregate of 6052 Debentures were issued and allotted to the Investor on 29.07.2019, and an additional 6000 Debentures will be allotted within 60 (sixty) days thereof subject to satisfaction of certain conditions precedent specified in the Trust Deed for Investment in Debentures. In addition, pursuant to a covenant in the Trust Deed for Investment in Debentures, the Investor has also acquired a minority equity shareholding of 6% in FLFL from Ryka, through a block trade transaction on the same day. The mechanics of this block trade transaction have been recorded under a share purchase agreement dated 23.07.2019 entered between the Investor and Ryka (**SPA**).

4. It has also been stated that pursuant to the terms of the Trust Deed for Investment in Debentures, the Trustee (i.e. Vistra ITCL (India) Limited) is required to appoint, based on the instructions of the Debenture Holders, which is currently the Investor:

   a) one nominee director on the board and each committee of the board of Ryka;
   b) one nominee director on the board of FLFL, who will also be appointed to the audit committee and the nominations and remunerations committee of FLFL; and
   c) one observer on the board and each committee of the board of FLFL.

   (Hereinafter, Ryka and FLFL are collectively referred to as '**Targets**', and the Investor and the Targets are collectively referred to as '**Parties**'.)

DESCRIPTION OF THE PARTIES

5. Investor is a Foreign Portfolio Investor (**FPI**) registered with the Securities Exchange Board of India (**SEBI**). It is controlled by funds managed and advised by affiliates of The Blackstone Group Inc. (**Blackstone**).

6. Ryka is a private company incorporated in India. It is stated to be engaged in the business of wholesale trading of goods and merchandise and has investments in entities engaged in fashion and apparel business in India.

7. FLFL, a public limited company incorporated in India, is a subsidiary of Ryka. It is stated to be engaged in the business of owning, operating, managing, marketing or benefiting from the operation and management of (a) retail stores, either owned and managed by FLFL or taken on lease, rent or through franchisees, or (b) fashion

brands, either owned or licenses. Further, it is stated that as on the date of filing of Form- III, FLFL is 47.41% held by Ryka, 6% held by the Investor, 5.57% held by other promoters and 39.47% held by the public.

PARTIES' SUBMISSIONS ON APPLICABILITY OF PROVISIONS OF SUB–SECTION (4) OF SECTION 6 OF THE ACT IN THIS CASE

8. The parties notified this transaction under section 6(4) stating that it: (i) is an acquisition in terms of Section 2(a) of the Competition Act (i.e., an acquisition of shares); (ii) has been undertaken by the Investor which is an FPI (FII as stipulated under the Competition Act) entity registered with the SEBI; and (iii) was effectuated pursuant to a covenant of a loan agreement or an investment agreement, executed by way of Debenture Trust Deed for Investment in Debentures.

9. Further, Section 6(4) of Competition Act exempts a share subscription or financing facility or any acquisition, from filing prior merger notification with the Commission, if undertaken by an FII pursuant to any covenant of a loan agreement or investment agreement.

10. The Aggregate Investment amount received by Ryka will be utilised by Ryka for refinancing, repayment and restructuring of the existing debt, guarantees and/or any other payment obligations and for general corporate purposes. Therefore, it is in the nature of an investment made by the Investor by way of the Trust Deed for Investment in Debentures and as such, squarely falls within the requirements of Section 6(4) of the Competition Act.

ADDITIONAL SUBMISSION OF THE PARTIES

11. The Parties vide their submission on 30.08.2019, *inter alia*, submitted that acquisition of 6% shares of FLFL by the Investor (***Sale Shares***) has been done pursuant to a covenant in the Debenture Trust Deed. The acquisition of Sale Shares is not a separate independent transaction but a part of the consolidated commercial transaction which includes subscription to NCDs issued by Ryka and acquisition of Sale Shares by way of a secondary transaction, through a block deal.

12. Further, it has been submitted that the SPA entered between the Parties, only sets out (a) the conditions precedent that are required to be completed prior to the transactions; (b) the mechanism for the transfer of the Sale Shares, i.e., through a block deal on the stock exchange; and (c) fundamental representations and warranties

from the parties to the SPA. Unlike a typical equity investment, [redacted]

13. It is also stated that the acquisition of Sale Shares is different from a typical share acquisition in the following ways:

a. [redacted]

i. [redacted]

ii. [redacted] and

iii. [redacted]

b. [redacted]

c. [redacted]

COMMISSION'S PRIMA FACIE OPINION ON THE APPLICABILITY OF PROVISION OF SECTION 6(4) AND 6(5)

14. The Commission in its meeting held on 16.10.2019, considered *inter alia* the above submissions of the Parties in the notice and additional submissions dated 30.08.2019.

15. The Commission made following observations, detailing the reasoning/rationale for the current transaction being not a transaction reportable under Section 6(5) of the Act, which are as under:

a. Firstly, question arises whether debenture trust deed can be considered as loan agreement or investment agreement for the purpose of Section 6(4) of the Competition Act. The debenture trust deed is already part of the debenture issue process and hence it may not be considered as a separate loan agreement or investment agreement to fulfil the requirements of "… *pursuant to a covenant of loan agreement or investment agreement*" under section 6(4) of the Act.

b. Section 2(30) of the Companies Act, 2013, inclusively defines debentures as *"debenture stock, bonds or any other instrument of the company evidencing a debt, whether constituting a charge on the assets of the company or not".* Upon considering the definition of debentures as provided under the Companies Act, 2013 and submissions of the Parties, it appears that debentures are in the nature of instruments evidencing debts/loans. However, the scope of Section 6(4) is loan agreement and not loan.

c. In addition, under Section 71(2) of the Companies Act, 2013, a company cannot issue any debentures that carry voting rights. Therefore, it appears that a debenture as an instrument only carries an obligation to repay the sum paid for subscription of the debentures and does not carry any associated voting rights. But, in the present transaction, there are certain rights such as nomination of director on the board based on the instruction of the Debenture Holders.

d. The Commission further observed that Section 6(1) and 6(2) requires mandatory filing for combinations, whereas, Section 6(4) provides an exception. Exception cannot be so widely interpreted so as to erode the main rule. To that end, investment agreement must be strictly construed. Therefore, in view of the above, it appears that the present agreement doesn't fall under the category of investment agreement for the purpose of Section 6(4).

e. Secondly, Section 6(4) uses the phrase "…*pursuant to any covenant of a loan* agreement *or an investment agreement*." The dictionary meaning of "pursuance" means the act of trying to achieve something. The acquisition of 6% share of FLFL happened in secondary market which is open to all investors. Both the share purchase agreement and the debenture trust deed were not a requirement for purchasing shares in open market. Thus it may not be reasonably said that the share acquisition happened in pursuance of Trust Deed for Investment in Debentures. When the Investor has acquired a minority equity shareholding of 6% in FLFL from Ryka in addition to acquisition of debentures along with Trust deed for debentures but not as a mandatory requirement imposed, such composite transaction may not be considered pursuant to any covenant of a loan agreement or investment agreement.

f. The phrase '*pursuant to any covenant of*' in section 6(4) has specific purpose, and an investment may not be said to be pursuant to a covenant of a loan agreement or investment agreement, where the covenant is not part of a prior agreement. Section 6(4) read with section 6(5) that provides the requirement while filing mentions *"…the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequence of default arising out of such loan agreement or investment agreement, as the case may be*" signifies the triggering role of the phrase "*pursuant to any covenant*" as a pre-existing condition due to which the acquisition is taking place rather than allowing the covenant to run in parallel with the acquisition.

g. Further, if such transactions are permitted under Section 6(4) and 6(5), then the scope of section 6(4) is so broadened that almost all transactions by the FPIs may be circumvented through Section 6(4) without filing any formal notice under Section 6(2).

16. In view of the foregoing, the Commission was of the prima facie view that the provisions of Section 6(4) may not apply in the instant case. Further, the transaction being a combination the Investor ought to have given notice to the Commission under Section 6(2) of the Act read with regulation 5 of the Combination Regulations. Accordingly, the Commission issued Show Cause Notice (**SCN**) to the Parties *vide* its letter dated 22.11.2019.

RESPONSE OF THE PARTIES TO SCN

17. The Parties responded to the SCN *vide* their submission dated 16.12.2019. The summary of the submissions of the Parties are *inter alia*, as under:

a. Ryka is the promoter shareholder of FLFL, and currently holds 37.48% of the equity shares of FLFL (FLFL Promoter Shares). Pursuant to the terms of the Trust Deed for Investment in Debentures:

- The Investor granted a financial facility to Ryka for the Facility Amount pursuant to the Trust Deed for Investment in Debentures dated 23.07.2019 (**DTD**). Out of this, the Investor had subscribed to the Debentures for the Debenture Amount. For the remaining amount, given that Ryka's primary asset is its shareholding in FLFL, for the purposes of enhancing the security offered to the Investor, and subject to completion of certain conditions precedent, the Investor acquired 6% stake in FLFL, by way of market purchase, pursuant to the DTD, on certain terms and conditions.

- [redacted]

- in order to protect the interests of the Investor and ensure that the Facility Amount is used for the intended purposes, the Debenture Trustee has a right to appoint a director on the board of Ryka and FLFL, [redacted];

- [redacted]

b. Further, it is stated that the transaction is purely a debt transaction, [redacted]

c. DTD is nothing but a loan agreement, given that the DTD records the terms and conditions of the investment by the Investor, irrespective of the nature of the investment (whether debt or equity). It can therefore be considered as an "investment agreement", falling squarely under the provisions of Section 6(4) of the Act.

d. As such, the acquisition of FLFL Shares is pursuant to the DTD, as a loan or an investment agreement, to be undertaken by the Investor (being a registered FPI) as a secondary purchase of shares on the stock market by way of a block-trade, upon completion of certain conditions precedent. [redacted]

18. It is also stated that the focus of Section 6(4) and (5) of the Act is on the categories of investors that are exempt and not on the nature of the transaction. Section 6(4) and (5) of the Act clearly states that "*the provisions of the* section *shall not apply to share subscription or financing facility or* ***any*** *acquisition, by"* PFIs, banks, VCFs and FPIs. The use of the words "*the provisions of this section*" and inclusion of the word "*any*" before acquisition, clearly shows that the intention of the legislature was to exempt "*any*" kind of acquisition (whether of shares, control, voting rights or assets) by certain class of investors from the provisions of Section 6 of the Act, irrespective of the kind of acquisition made by them.

19. In the present case, the [redacted], which is in line with the provisions of the Companies Act and the Debenture Rules.

20. It is also submitted that the Commission should look at the transaction as a whole and not adopt a dissecting approach of isolating the context to which a transaction belongs. The Transaction is effectuated pursuant to the DTD, which entails subscription of Debentures and upon completion of certain conditions precedent, acquisition of FLFL Shares. The acquisition of FLFL Shares is not a separate independent transaction and is undertaken pursuant to the covenant provided under the DTD, i.e., the loan agreement.

21. It is also mentioned that the parties to the DTD did not enter into a binding agreement to merely escape the domain of law (in this case, the requirement to notify the Commission under Section 6(2) of the Act). The DTD was entered into to record the commercial intent of the parties to provide a loan to Ryka, for it to achieve its goal of consolidating financial debt. The acquisition of FLFL Shares has been undertaken pursuant to a covenant in the DTD. The acquisition of FLFL Shares is not a separate independent transaction but a part of the consolidated commercial transaction which includes subscription of Debentures issued by Ryka and acquisition of FLFL Shares by way of a secondary transaction, through a block deal on the stock exchanges.

22. The FLFL Shares were acquired primarily as a financing arrangement between Ryka and the Investor, and not for the purposes of an acquisition in FLFL. In this context, it is submitted that unlike in a typical combination under the Act: (i) [redacted] and (ii) [redacted]

[redacted]

23. Further, the holistic reading of Section 6(4) with Section 6(5) of the Act, does not indicate that "pursuant to any covenant" requires a covenant to exist prior to the investment. According to the Black's Law dictionary, "pursuant to" refers to in compliance with, or in accordance with, which is the case in the present Transaction. Therefore, reading of the above clauses to mean that the covenant should exist prior to the investment, is flawed and does not hold good. Notwithstanding the above, even if the said clause is read like that, the present Transaction is squarely covered under the provisions of Section 6(4) of the Act, as pursuant to the terms of the DTD, the acquisition of FLFL Shares took place after completion of certain conditions precedent. Section 6(5) of the Act states that the special class of investors are required to make a filing "in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be". The plain reading of the above section simply states that while submitting a Form III, details relating to the acquisition, including consequences of default arising out of such a loan agreement or investment agreement, as the case may be, need to be provided. It does not give the impression that the acquisition should be as a consequence of an event of default. Section 6(4) of the Act very clearly provides the exemption to certain class of investors, in relation to any acquisition and not the one emanating as a consequence of an event of default.

24. The acquisition of shares in the Form III filing referred above was not as a consequence of an event of default. It has also been submitted that in relation to the Transaction, whilst the DTD and the share purchase agreement were executed on the same date, the acquisition of FLFL Shares took place after completion of certain conditions precedent, in accordance with the terms of the DTD.

25. FPIs can only purchase shares of a listed company on the floor of the stock exchanges (i.e., where the market price is determined by stock exchange mechanism). FPIs are not permitted to buy shares on an off-exchange transaction. Therefore, it is submitted that if FPI transactions on the floor of the exchange are bought within the purview of Section 6(2) of the Act, then it will defeat the purpose and legislative intent of Section 6(4) of the Act – which was meant to facilitate FPIs conducting on market trades to create a wider participation of foreign investors in the Indian equity markets.

Oral hearing on 28.02.2020 and Written submissions dated 13.03.2020

26. The Investor also requested the Commission to provide an opportunity of hearing to make its oral submissions before the Commission, in response to the Notice. The request of the Investor was accepted. Accordingly, the Commission heard the Investor on 28.02.2020. The Investor argued the matter at length and completed its oral submissions. On the direction of the Commission, the Investor filed the written submissions on 13.03.3030 pursuant to the oral hearing. The summary of the submissions are as follows:

a. The transaction is a financing facility with features of Debt and not Equity. The key features of the Transaction are set out below:

(i) [redacted]

(ii) [redacted]

(iii) [redacted]

(iv) [redacted]

(v) [redacted]

(vi) [redacted]

[redacted]

(vii) Board Seat: Though the Investor would have the right to appoint a nominee on board of directors, such rights would be different from typical equity investor *inter alia,* [redacted]

b. FLFL Shares form part of the Financing Facility: The acquisition of FLFL Shares cannot be seen in isolation and is an intrinsic part of the financial facility granted to Ryka as a part of the Transaction, based on the highlighted features set out below:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- The right to nominate a director emanates from the DTD and [redacted]
- [redacted]

c. Therefore, transaction is essentially a "unique" composite debt transaction, wherein the equity of 6% shares is very closely linked to the financial facility extended to Ryka. Transaction entails a composite debt transaction [redacted], by the Investor, being a foreign portfolio investor ("FPI"), the Transaction falls within the ambit of Section 6(4) of the Act and therefore, the Investor has filed a Form III Notice.

d. If FPI Investments, which are conducted on the floor of the stock exchange are brought under the purview of Section 6(2) of the Act, the legislative intent of

Section 6(4) would be defeated, which meant to facilitate FPI investments in conducting market trades, thereby creating a wider participation of foreign investors in the Indian equity market. In absence of the same, the FPI investments will fail to implement transactions at commercially viable price. This in turn would impede the entire FPI Investment market in India.

e. Acquisition of Shares is 'Pursuant to' a 'Covenant' of a Loan Agreement/ Investment Agreement: The Transaction (including the acquisition of FLFL Shares by the Investor) is "pursuant to" a "covenant" of the DTD, especially since it is a part of a composite transaction, to be undertaken by the Investor (being a registered FPI) as a secondary purchase of shares on the stock market by way of a block-trade, upon completion of certain condition precedent.

f. Holistic reading of Section 6(4) with Section 6(5) of the Act, does not indicate that "pursuant to any covenant" requires the acquisition as a step 2 of the Transaction, i.e. for the covenant to exist prior to the investment. All words used in the provision stand on an equal footing with each other and that they must be read together. The Transaction Documents clearly show that the acquisition of FLFL Share is pursuant to a covenant in the DTD entered between the parties.

g. The Transaction does not cause any appreciable adverse effect on competition in India, *inter alia*, due to no horizontal or vertical overlaps between the Parties to the transaction. Further, the wholesale and retail sectors in India are characterised by the presence of several international and domestic players along with the significant presence of unorganised sector.

COMMISSION'S FINAL OPINION ON THE APPLICABILITY OF PROVISION OF SECTION 6(4) AND 6(5)

27. The Commission considered the submissions of the Investor including submission made during the oral hearing, the Commission also considered its earlier observations and made the following additional observations:

a. Based on the submission, it is noted that the assets and turnover of Investor, Ryka and FLFL in India for the year 2019 are as under:

Parties	**Assets (in INR Cr.)**	**Turnover (In INR Cr.)**
Investor	[redacted]	[redacted]
Ryka	[redacted]	[redacted]
FLFL	5,060.59	5,728.12

From the above, it may be seen that the turnover of Ryka is well below the *de minimis* thresholds and only if investment in both Ryka and FLFL are considered together as single transaction then Parties are meeting the thresholds under section 5 of the Act.

Further, as per Section 2(a) of the Act, "acquisition" *means, directly or indirectly, acquiring or agreeing to acquire— (i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise*;

b. From the plain reading of the above provisions, acquisition of debentures alone does not appear to be notifiable, as it is similar to a kind of loan. In the instant case since the Parties acquired debentures as well as shares [redacted] this transaction is notifiable. Further, Investor itself submitted that this is a composite transaction including debt and equity. [redacted] Therefore, the acquisition of shares cannot be regarded merely as a market transaction, [redacted]. Furthermore, market transactions cannot be treated as occurring pursuant to any covenants.

c. Based on the submissions, it is noted that the present transaction is an extension of a financing facility to Ryka [redacted] It has also been submitted that the said financial facility shall include acquisition of shares of subsidiary along with the right to nominate a director on the Board of Directors of such subsidiary. Therefore, owing to the nature of the interest created by such a transaction, Commission is of the view that such transaction is neither a pure loan transaction nor a transaction covered under section 6(4), notifiable under section 6(5) of the Act.

d. In response to SCN, the parties have submitted that the debenture trustee's right to nominate a director is a common market practice in case of issuance of debenture. In this regard, Parties have provided a list of entities listed with Indian Stock Exchanges with right to nominate a director to the board, and claimed that the same *ipso facto* suggests that the transaction is more of granting loans rather than that of an investment. The list provided by the Parties includes names of lenders such as SIDBI, Exim Bank, IDBI and SBI. The names of these lenders suggest that the primary function of these institutions is to provide loan whereas the general understanding of working of an FPI is that of investing. Therefore, lending institutions and FPIs cannot be compared.

e. Further, the Competition Act does not require all acquisitions to be notifiable to the Commission, but transactions that cross the threshold are deemed to be combinations and are to be notified. There may be a number of transactions in nature of investments by FPIs in India, but the Act requires only those transactions that meet the criteria as specified in the Act to be notified. In this regard, it is observed that the submission of the Investor in relation to interpretation of the section 6(4) and section 6(5) of the Act would make the respective sections exceptionally broad by allowing exemption to all entities mentioned in that section *viz:* Public Financial Institution, Foreign Institutional Investors, Bank or Venture Capital Fund within its ambit. Permitting such wide interpretation would be contrary to the legislative intent behind section 6 of the Act. Further, there are multiple instances where FPIs had notified combinations under section 6(2) of the Act. Therefore, it is observed that combination involving acquiring of shares and debentures pursuant to DTD cannot be deemed as acquisition of shares pursuant to any covenant of a loan agreement or investment agreement for the purpose of Section 6(4) and/or Section 6(5).

DIRECTIONS OF THE COMMISSION

28. In light of the peculiar facts and circumstances of the present case as detailed in this order, the Commission is of the opinion that the present transaction is not covered under the provisions of Section 6(4) and 6(5) of the Act. Accordingly, the Investor is directed to submit the notice under section 6(2) read with regulation 8 of the Combination Regulations.

29. The Secretary is directed to communicate to the Parties accordingly.