Fair Competition
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COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2018/05/571)

08th August, 2018

Notice under sub-section (2) of Section 6 of the Competition Act, 2002 filed by Wal-Mart International Holdings, Inc.

CORAM:

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Legal representatives: Shardul Amarchand Mangaldas

Order under sub-section (1) of Section 31 of the Competition Act, 2002

A. Combination

1. On 18th May, 2018, the Competition Commission of India (**Commission**) received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 (**Act**) given by Wal-Mart International Holdings, Inc. (**Walmart**), a subsidiary of Walmart Inc. for acquisition between 51% and 77% of the outstanding shares of Flipkart Private Limited (**Flipkart**) and matters incidental thereto (**Proposed Combination**). The notice was given pursuant to the execution of a Share Purchase Agreement on 9th May, 2018 by and among Walmart and certain shareholders of Flipkart (**SPA**); and a Share Issuance and Acquisition Agreement on the same day by and among Walmart and Flipkart (**SIAA**).

2. In terms of Regulation 14 of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**), vide letter dated 24th May, 2018, Walmart was required to provide certain information/document(s) by 29th May, 2018. After seeking due extension of time, Walmart filed its response on 7th June, 2018.

3. Further, in terms of Regulations 5 and 19 of the Combination Regulations, *vide* letters dated 13th June, 2018 and 4th July, 2018. Walmart was asked to furnish additional information in relation to the Proposed Combination. Walmart filed its response on 26th June, 2018 and 23rd July, 2018, respectively.

4. As per the information provided in the notice, the various steps involved in the Proposed Combination are as under:

4.1. Pursuant to the SIAA, Walmart will subscribe to the ordinary shares issued by Flipkart for an aggregate purchase price of USD 2 billion in cash. WIH may assign its rights under the SIAA in whole or in part, to any other entity.

4.2. Pursuant to the SPA, contemporaneously with the closing of the Share Issuance, Walmart will purchase from the sellers preference shares and ordinary shares of Flipkart for an aggregate purchase price of approximately USD 14 billion in cash. Walmart may assign its rights under the SPA in whole or in part, to any other entity.

4.3. Immediately after the closing of the above acquisitions, all Flipkart preference shares will convert into ordinary shares. As a result, Walmart will hold approximately 51% - 77% of the outstanding shares of Flipkart.

4.4. At closing of the Share Transactions, Walmart or another affiliate of Walmart Group, Flipkart, and certain other shareholders of Flipkart will enter into a Shareholders Agreement, which will set forth the agreement of the Parties relating to the activities and governance of Flipkart and ownership and disposition of its shares.

B. Parties to the proposed combination

5. Walmart is a subsidiary of Walmart Inc. and belongs to the Walmart group. Walmart Inc. is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores, and grocery stores. Walmart Group is present in India through its indirect wholly owned subsidiary - Walmart India Private Limited, which is engaged in wholesale cash and carry of goods (**B2B Sales**). On account of restrictions under the Foreign Direct Investment (**FDI**) Policy, Walmart India cannot engage in direct sales to consumers (**B2C Sales**). B2B Sales of Walmart India are carried on through the following two channels:

5.1. *Best Price Stores:* Walmart India owns and operates 20 Best Price Stores in 9 States across India. The first store opened in Amritsar in May 2009. A typical Best Price Store spans over 50,000 square feet and sells around 5,000 products, including a wide range of fresh, frozen and chilled foods, fruits and vegetables, dry groceries, personal and home care, hotel and restaurant supplies, clothing, office supplies and other general merchandise items, at competitive wholesale prices. Best Price Stores operate on a member only model and to enter and purchase from Best Price Stores, it is mandatory to become a member. In compliance with the Foreign Direct Investment norms, members are not retail consumers and usually belong to different business categories, such as: resellers, offices and institutions and hotels, restaurants and caterers. Walmart India also has an operational fulfilment centre in Mumbai that focuses on storing and delivering fast moving consumer goods to registered business members of Walmart India.

5.2. B2B e-*commerce for members only*: On 1st July 2014, Walmart India launched B2B e-commerce platform to make the products provided at the Best Price Stores available to members through the e-commerce platform also (*https://www.bestprice.in/*). This platform acts as an exclusive virtual store available only to registered Best Price members. Walmart India does not provide e-commerce B2B services in the market and the presence of Walmart India in the e-commerce segment is limited to its members.

6. As per the notice, Flipkart is principally an investment holding company incorporated in Singapore. In India, besides being engaged in B2B sales, Flipkart is also providing online marketplaces to facilitate trade between customers and sellers. The business activities of Flipkart in India are as under:

6.1. *Wholesale cash and carry of goods (B2B Sales)*: Flipkart group is engaged in B2B sales across several product categories. Flipkart does not operate in the online B2B space. Goods are bought from various manufacturers, suppliers, distributors and the same are sold on an offline B2B basis to various third party retailers and re-sellers.

6.2. *Marketplace based e-commerce platforms*: Flipkart offers online marketplaces for e-commerce. These online platforms offered are Flipkart.com, Myntra.com, Jabong.com, etc. Under the FDI Policy, a marketplace based e-commerce platform cannot hold inventory and it could only act as an interface to facilitate sales between buyers and sellers. The marketplace based e-commerce platform, thus, just acts as an intermediary between various retailers and the final consumers. As per extant policy the company that operates the marketplace cannot itself be a retailer offering goods to the final consumer. Thus, Flipkart cannot maintain inventory and sell goods on the marketplace as a retailer, its role is limited to a platform connecting retailers with the final consumers.

6.3. *Provision of other ancillary services*: Incidental to its main business activities, Flipkart also provides the following ancillary services:

(a) payment gateway, unified payment interface and prepaid payment instrument services;
(b) advertising services;
(c) information technology product related issues;
(d) logistics, courier and other allied services;
(e) installation, repair and other allied services; and
(f) technology based services.

6.4. Additionally, Flipkart is engaged in private labelling of products manufactured through third parties under certain brand names.

C. Assessment of the proposed combination

7. Before this Order delves into the competition assessment of the proposed acquisition, the Commission considers it pertinent to elaborate its legal mandate while assessing a combination as opposed to a conduct related to anti-competitive agreements and abuse of dominance. Unlike anti-competitive agreements and abuse of dominance conduct, that are prohibited, combinations (*i.e.* mergers, amalgamations and acquisitions) are only regulated under the Act.

8. A market structure with the presence of a large number of players, presence of a formidable competitor of sufficient scale and size and ease of entry are some of the fundamental factors indicative of a competitive market that will not allow any competition harm of a combination to play out in the market post combination. If combinations do not alter the competition both in the horizontal and vertical markets based on the above parameters as spelt out in section 20(4) of the Act, then the combination does not pose any competition harm. The purpose of this assessment is to assess the extent of competition that would be lost solely as a result of the proposed combination. In general, a combination would pose competition concerns if the parties are close competitors in similar lines of business (horizontal overlaps, in combination parlance). Similarly, a combination between a manufacturer and distributor who are at different stages or levels of production chain in different markets (vertical overlaps, in combination parlance) may pose competition concerns if it is likely to foreclose

the market for other distributors. The perception of competition harm would be an assessment of the competition landscape of the relevant markets based on several factors including market share, barriers to entry, extent of vertical integration, extent of competition likely to remain after the combination, etc.

9. In the instant case, pursuant to the Proposed Combination, Walmart group would hold substantial shares and control over Flipkart, which, *inter alia*, is engaged in B2B Sales, and provision of online marketplace platforms to facilitate trade between retailers and consumers (B2C). The Commission would examine the proposed combination from the perspective of horizontal overlap and vertical overlap.

9.1. **Horizontal overlap**

9.1.1. The Commission observes that both the parties are engaged in B2B sales and thus, there exists horizontal overlap between their businesses in the said segment. Walmart has proposed the relevant market as '*pan-India market for B2B sales*', which is being characterized by intense competition among a very large number of competitors – both online and offline; and both channels give the customers a plethora of choice.

9.1.2. It is observed that the both the parties to the Proposed Combination are entities with foreign investments and are thus governed by the stipulations under FDI Policy, which explains B2B Sales as "*Cash & Carry Wholesale trading/Wholesale trading, would mean sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers. Wholesale trading would, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption. The yardstick to determine whether the sale is wholesale or not would be the type of customers* *to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereafter sale, bulk imports with ex-port/ex-bonded warehouse business sales and B2B e-Commerce.*" This lays the boundaries of B2B sales within which the parties to the combination have to operate.

9.1.3. The Commission notes that B2B supply chain entails flow of goods from manufacturer to the wholesaler, retailer or institutional buyers. Such goods are typically bought in bulk and the recipient buys such goods for the purpose of using as inputs/raw materials for production of goods for sale or for re-sale of the products. Apart from the sellers and buyers in this segment, there are other incidental service providers who may facilitate the B2B Sale. Walmart has submitted that between every level of supply chain, there are enablers like logistics, financial intermediaries, service providers, etc.

9.1.4. The competition assessment of this transaction reveals that the parties are neither close competitors in the B2B sales nor have a combined market share that raises competition concern. Walmart has submitted that as per Indian Brand Equity Foundation, the retail market size of India for 2017 was estimated at USD 672 billion and 93% of retail trade is unorganized (traditional) trade. Walmart estimates that 30-40% of this to be the size of B2B sales across India and the combined market share of the parties in that would be less than five percent. It has been submitted that given the limited size of the B2B Sales of the parties to the Combination, the Proposed Combination is not likely to cause any adverse impact on competition. As per the notice, the market share of Walmart in B2B sales in India is less than half a percent and thus, the incremental changes on account of the proposed combination is insignificant.

9.1.5. In order to understand the extent of overlap, Walmart was asked to provide further information regarding B2B business of both the parties at the granular level of verticals. Upon examination of the relevant details, it was found that the operations of Flipkart were relatively strong in mobile and electronics products, which constituted substantial majority of its business. However, operations of Walmart in the same products was insignificant. On the other hand, operations of Walmart were focussed on groceries but Flipkart was not present in this segment. Both the parties do have some horizontal overlap in lifestyle products, which includes skincare, haircare, oral care, baby & feminine hygiene, personal wash, apparel and shoes & accessories. But again, the combined value of sales of the parties in this segment is low and relatively insignificant to the size of the markets for the said products. At the margin this combination, therefore, does not alter the current market structure.

9.1.6. The parties have not made a distinction between organised and unorganised B2B sales. They have considered both these as part of one relevant market. However, even if both the segments are defined as separate markets and the parties are considered to be present in organised B2B sales, such market still looks competitive due to the presence of larger plyers such as Reliance Retail, Metro Cash and Carry, Amazon wholesale *etc*. Apart from these players, unorganised sector also pose a significant constraint on organised wholesalers.

9.1.7. Based on the foregoing, the Commission is of the view that the Proposed Combination is not likely to have any adverse implication on competition irrespective of the whether the market is taken as all B2B sales or narrower B2B markets on the basis of particular category of product sold by the parties to the combination. Accordingly, the relevant market for B2B segment is left open.

9.2. **Vertical overlap**

9.2.1. With respect to B2C sales, Walmart has submitted that the FDI Policy restricts the parties from engaging in business to consumer sales and thus, they are not engaged in the said segment. However, there is no restraint on the parties to offer an online marketplace platform to facilitate sales between retailers and consumers. Flipkart operates such platforms in the name of Flipkart.com, Myntra.com, Jabong.com, etc. Presently, Walmart is not engaged in any online marketplace business for B2C sales. Based on these, it has been further submitted that there is no vertical overlap between the businesses of the parties.

9.2.2. As the parties have regulatory restriction to engage in B2C sales and are admittedly not engaged in the same, the Commission does not find any vertical overlap between B2B business of Walmart and the online marketplaces of Flipkart.

10. Furthermore, the Commission notes that the proposed combination is not resulting in elimination of any major player in the relevant market. The Flipkart marketplace platform will remain under the operation of Walmart, thus not only preserving a successful ecommerce platform but also enhancing the financial strength of the platform. This would enable the combined entity to compete effectively with competitors in a dynamic e-commerce market characterised with network effects. It is also relevant to note that 100% FDI under automatic route is permitted in marketplace model of e-commerce and B2B segment, which is an encouraging factor for entry of new players.

D. Third party representations

11. During the inquiry into the matter, the Commission received representations against the Proposed Combination from trade associations, traders/retailers, etc., which besides expressing concerns on compliance of FDI norms by Flipkart; 'predatory' practices and preferential treatment to specified sellers in Flipkart's online marketplaces; also expressed concerns on the impact of the Proposed Combination on employment, entrepreneurship, small and medium scale enterprises, retailing, *etc*. Some of these also placed reliance upon the decision dated 25th April, 2018 of Income Tax Appellate Tribunal in *Flipkart India Private Limited v. Assistant Commissioner of Income-Tax* [ITA No.693 /Bang/2018 (Asst. Year - 2015-16)] to suggest 'predatory' pricing by Flipkart and its nexus with certain specified etailers in the online marketplaces.

12. The Commission notes that majority of the concerns expressed in the representations referred above have no nexus to the competition dimension of the Proposed Combination. Issues falling beyond the scope of the Act cannot be a subject matter of examination by the Commission, though they may merit policy intervention. As per FDI Policy an e-commerce platform cannot influence market prices directly or indirectly. However, this is a matter of consideration for the appropriate regulatory/ enforcement authority. The issues concerning FDI policy would need to be addressed in that policy space to ensure that online market platforms remain a true marketplace providing access to all retailers.

13. The limited concerns in the representations that may merit examination from competition perspective were deep discounting and preferential treatment to select etailers in online marketplaces of Flipkart. In this context, Walmart was asked to furnish detailed information on the said aspects to gauge whether the Proposed Combination would have nexus to any of the said concerns. Upon examination of the relevant facts, it was found that a small number of sellers in Flipkart's online marketplaces contributed to substantial sales. Almost all of these were customers of Flipkart in B2B segment, and hence were common

customers, availing significant discounts from Flipkart in both B2B segment as well as in the online marketplaces. Further, the revenue earned from these common customers in the online marketplaces was relatively less *vis-à-vis* the non-common sellers whose sales on the platform was considerably low. It was also seen that the top common customers in the Flipkart online marketplaces were incorporated on or after 2016.

14. While the above factors may merit examination from the perspective of anti-competitive vertical restraints under the Act, the same to be a subject matter of regulation under Section 6 of the Act has to be a consequence of the Proposed Combination. Competition assessment of a combination involves analysis of two counterfactual market scenarios *i.e.* with and without the combination. The Commission considers the relevant factors mentioned under Section 20(4) of the Act, which, *inter alia*, includes market share of the parties to the combination, entry barriers, extent of vertical integration and the economic strength of the parties, and determines the effect of the Proposed Combination on competition in the relevant markets. In doing so, the endeavour is to address potential adverse implications resulting from the combination but not to address pre-existing conditions that are not attributable to the proposed combination or problems in the markets, in general. Based on the facts on record, the Commission observes that the discounting practice of Flipkart and its preference, if any, to select etailers in its online marketplaces are not specific to the Proposed Combination, as they are already prevalent in the market even without the proposed acquisition by Walmart. In other words, the issues about common customers of Flipkart are not directly or indirectly related to the Proposed Combination and thus, the same is not likely to alter the competition dynamics as it exists today.

15. Section 6(1) of the Act regulates combinations that are likely to cause appreciable adverse effect on competition. Section 6(2) requires parties proposing combination to give prior notice to the Commission. In terms of Section 6(2A) of the Act, such combination reported 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. These envisage *ex ante* regulation of combinations, the purpose of which is to provide an opportunity to the Commission to evaluate and address potential competition concerns, if any, emanating as a result of the Proposed Combination. The Commission deliberated extensively on the concerns raised in the representations but concluded that the instrument of Regulation of Combinations cannot address these and different policy and legal instruments maybe taken recourse to. Thus, this review process cannot be a window to resolve concerns that are not incidental or arise from the Proposed Combination. Nevertheless, there is no bar on the Commission at any point of time to examine such issues under the relevant provisions of sections 3(4) and 4 the Act and regulations made thereunder.

E. Decision of the Commission

16. Considering the facts on record and the foregoing assessment, the Commission is of the opinion that the Proposed Combination is not likely to have an appreciable adverse effect on competition in India and therefore, the same is hereby approved in terms of Section 31(1) of the Act.

17. The information provided by Walmart is confidential at this stage, in terms of and subject to the provisions of Section 57 of the Act.

18. This order shall stand revoked if, at any time, the information provided by Walmart is found to be incorrect or misleading.

19. The Secretary is directed to communicate to Walmart accordingly.