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Trust is essential for social cohesion and well-being as it affects the government's ability to govern and enables them to act without having to resort to coercion





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Amazon suffered a serious setback in its legal struggles with Future Retail in India when the antitrust regulator, the Competition Commission of India (CCI), passed an order last December – the first of its kind in its brief enforcement history – imposing a heavy penalty equivalent to about USD 27 million.

The Indian merger regime is mandatory in cases where the prescribed turnover or assets thresholds are crossed. The acquiring party is required to submit an application with detailed information in the prescribed form. In this case, the CCI held Amazon guilty of omissions, false statements and misrepresentations contained in its application submitted in 2019 to the CCI for approval of its investment in the Future Group. The CCI concluded after due process that Amazon had failed to fully and properly disclose the purpose of the acquisition, the interconnected transactions and certain critical internal documents submitted to its senior management which were essential to give the CCI a clear and complete picture of the transaction required for a proper appreciation of the commercial and economic contours of the transaction and to decide the appropriate framework for its assessment.

In CCI’s view, the deal was designed effectively to give Amazon strategic rights in regard to the operations of Future Retail Ltd, which has a vast network of retail outlets across the country thereby benefiting the retail and speedy delivery operations of Amazon. It noted that Amazon had pursued the deal to ensure that the business of Future Retail becomes a strategic asset for Amazon to expand and enhance its ultra-fast delivery services. In the words used in Amazon’s internal communications, through this deal, Amazon intended to obtain a “foot in the door” in India’s rapidly expanding retail industry. However, in its merger filing the company represented the deal as being limited to acquiring interest in Future Coupons a company in the business of marketing and distribution of loyalty cards, corporate gifts cards and reward cards to corporate customers, etc. and that Amazon had decided to invest in Future Coupons with a view to strengthen and augment the latter’s business.

The CCI observed that “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.”

The CCI order draws attention to a wider issue—that of the role of trust in governance and institutional functioning. While trust is the basis for an orderly functional society, its role is critical in the relationship between individuals and government and governmental institutions. A document¹ of the UN Department of Economic and Social Affairs states that trust is integral to the functioning of any society. Trust in each other, in our public institutions and in our leaders are all essential ingredients for social and economic progress, allowing people to cooperate with and express solidarity for one another. It allows public bodies to plan and execute policies and deliver services. It observes that greater public trust has been found to improve compliance in regulations and tax collections, even respect for property rights. It also gives confidence to consumers and investors, crucial to creating jobs and to the functioning of economies more broadly.

Similarly, an OECD document² states that trust in government has been identified as one of the most important foundations upon which the legitimacy and sustainability of political systems are built. Trust is essential for social cohesion and well-being as it affects the governments’ ability to govern and enables them to act without having to resort to coercion.

The above mentioned UN document notes that trust in government or its institutions has deteriorated in recent years showing a marked decrease in developed countries. In the United States, trust in the national government has declined from 73 per cent in 1958 to 24 per cent in 2021. Western Europe has seen a similar steady decline in public trust since the 1970s. The percentage of people expressing confidence or trust in their Governments in 62 developed and developing countries peaked at 46 per cent, on average, in 2006 and fell to 36 per cent by 2019. It similarly notes comparable declines in other types of institutions e.g. trust in financial institutions in these countries decreased on an average from 55 per cent to 46 per cent. It noted the Euro barometer data showing that trust in political parties in EU countries has remained low, hovering between 15 and 20 per cent on average between 2000 and 2019.

Trust in public institutions is easily eroded by perceptions such as of corruption in high places, suspect motives behind policy measures, partisan enforcement of laws, and even by the prevalence of economic uncertainty. In our own country for example trust in government is being undermined by the perception that the police and certain other government agencies

are biased in their enforcement. Perceived blatant corruption some years back in the allocation of natural resources like spectrum and mineral leases had deeply offended the sensibilities of the intelligentsia.

More recently, holding of large electoral rallies across election bound states before these were restrained by the Election Commission and later even holding physical rallies under the garb of virtual rallies visibly throwing COVID precautions to the wind while exhorting the public to strictly adhere to such measures has been damaging to the citizens’ faith in the sincerity of purpose of the leaders. Permission to go ahead with major religious festivals like the Kumbh in Haridwar during the pandemic intensified cynicism among the public. Reports about the open availability of fraudulent negative COVID test reports on these occasions undermined the reputation of Indian tests not only in India but also overseas leading many countries to derecognize Indian COVID tests in allowing entry into their countries. The disparity in the economic impact of the pandemic on different segments of society also has hit the faith of the poor people in the government.

On the other hand, public trust can be enhanced by transparency in governance, by evenhandedness in enforcement of the law, and by policies that are fair and sensitive in the distribution of public benefits. The use of modern technology in governance e.g. through the COWIN app for access to vaccines, or the direct transfer of benefits to the beneficiary bank accounts have strengthened public trust in government.

1 <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/>

2 https://www.oecd-ilibrary.org/docserver/gov_glance-2013-6-en.pdf?expires=1643015233&id=id&accname=guest&checksum=F262B48194E57BAD5EAE9F70D338C600

However, trust is not a one-way street. Public discourse has been mainly around the issue of trust of the citizens in government. But trust the other way round, of institutions in the stakeholders, is equally important. Institutional regulation is crucially dependent on the adherence of the stakeholders to the letter and spirit of the law. Flagrant violations or gaming of the system by those who are the subject of the law seriously erodes the effectiveness of the regulation. Besides, suspicion can be the cause of over regulation e.g. the laws and policies in the days of command and control economic regime, or tax rules built around suspicion of wide spread evasion.

In the enforcement of competition law, an important consideration of the CCI has been not to hurt the country's 'ease of doing business'; it even adopted the novel 'green channel' which allows for the approval of a merger in certain circumstances by the mere filing

“ *In the enforcement of competition law, an important consideration of the CCI has been not to hurt the country's 'ease of doing business'* ”

of the application. In the absence of trust of the Commission in the filings made by parties to a merger, it can make the green channel unworkable. If the Commission were to suspect the information submitted in merger filings and felt compelled to resort to deeper due diligence into such information to check its veracity and completeness, it could mean that the business community should give up expectations of speedy decisions in merger cases, thereby delaying the consummation of their deals.

Like in most competition law jurisdictions, in India too, merger approval depends heavily on the veracity and completeness of the information furnished by the parties themselves; the parties are also required to give a declaration that to their knowledge and belief all information given in the application form is true, correct and complete. Thus the responsibility for the smooth and efficient functioning of the merger approval regime depends equally on the trust the CCI can repose in the stakeholders.

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Vinod Dhall was the founding Member and acting Chairman of the Competition Commission of India (CCI). He laid the groundwork for the eventual functioning of the Commission inter alia by preparing the draft regulations, framework for competitive analysis, and capacity building; earlier when in government, he was a key player in the enactment of the Competition Act itself. He is an active and respected expert in competition policy and law, and is sought out for his high-level strategic advice and unique perspective on complex issues, including in mergers, cartels, abuse of dominance matters and compliance. He has advised global and Indian clients in several high-profile cases, both domestic and cross-border. Clients comment on his "unquestionable understanding and pedigree", find him "an expert amongst experts" (Chambers Guide 2015) and he is considered "a central figure in India's competition law marketplace" (Indian Lawyer 250). Chambers and Partners Global Ranking – 2019, 2020, 2021 and 2022 ranked him as the only "senior states people" in the competition / antitrust field for India. He is also recognized as Global Leader / Thought Leader by Who's Who Legal in 2021 and 2022 and a leading lawyer in the competition / antitrust field for India by Global Competition Review.

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