

# A 'LAW AND ECONOMICS' ANALYSIS OF THE CCI'S 'GREEN CHANNEL ROUTE'

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## ***Abstract***

*The 'Green Channel' Route for expediting merger control by the Competition Commission of India had drawn significant attention and appreciation at its inception in 2019. However, having completed almost four years of functioning, it is evident that the mechanism, though certainly a step in the right direction, suffers from certain systemic flaws. This article shall conduct a 'Law and Economics' analysis of the mechanism to highlight two of its flaws – its creation of new transaction costs in the merger review process, and its tendency to increase risk and uncertainty in this process manifold. It shall argue that these flaws are particularly clear in light of the recent, and first, instance of imposition of penalty on a set of parties for making 'false disclosures' while availing this route. Having highlighted these flaws, it shall contemplate measures to rectify them to improve the overall efficiency of the mechanism.*

## **I. INTRODUCTION**

This paper shall analyze the Competition Commission of India's ('CCI') 'Green Channel' route for the regulation of combinations, from a 'Law and Economics' perspective, to highlight two of its main flaws. Through its reliance on analytical tools drawing from this perspective, it shall make primarily two arguments – *first*, that the Green Channel route reflects an attempt by the CCI to overcome the trade-off between transaction costs and anti-competitive behaviour that antitrust agencies have been traditionally observed to face, but also its failure to do so; and *secondly*, that both the severe penalties it imposes on applicants found to have furnished false information to the CCI, as well as the broad nature of the components which it requires applicants to include in their self-assessments of the potentially anti-competitive effects of their proposed combinations, severely limit its success in doing so.

To this end, Chapter I shall describe the relevant features of the 'Green Channel' route introduced by the CCI in 2019. Chapter II shall briefly discuss the relevance and appropriateness of the Law and Economics perspective to analyze this mechanism. Chapter III shall apply the concept of 'transaction costs' to the 'Green Channel' route to argue that it reflects an attempt by the CCI to

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subvert the trade-off between transaction costs and anti-competitive behaviour that is commonly faced by antitrust agencies, but also its failure to do so. Chapter IV shall apply certain concepts labelled as part of ‘deterrence theory’ in legal and economic literature to the ‘Green Channel’ route. Chapter V shall employ a recent order by the CCI penalizing two entities, the Platinum Jasmine A Trust and TPG Upswing Limited, for furnishing false information in their application under the Green Channel route,<sup>1</sup> to demonstrate the validity of the arguments in Chapter III and IV in practice. Finally, the paper shall discuss its conclusions.

## II. THE ‘GREEN CHANNEL’ ROUTE FOR MERGER CONTROL

Sections 5 and 6 of the Competition Act, 2002 (**‘the Act’**) require parties intending to enter into a ‘combination’ – that is, conducting an acquisition, merger, or amalgamation, as defined under Section 5 – to notify the CCI before giving effect to such a combination.<sup>2</sup> Following this, such a combination is prohibited from being given effect for the shorter of two periods – either until the CCI’s approval of it is received, or until a period of 210 days has passed.<sup>3</sup> During this time, the CCI is required to conduct an assessment of whether the proposed combination will have, or is likely to have, an appreciable adverse effect on competition in India.<sup>4</sup>

While this type of *ex-ante* assessment of proposed combinations by the CCI is not unusual in comparison to its counterparts across various jurisdictions,<sup>5</sup> in 2019, the Competition Law Review Committee (**‘Committee’**) set up by the Ministry of Corporate Affairs of the Indian Government discussed a need to review this mechanism.<sup>6</sup> Noting that the CCI had ordered modifications in less than 2.6% of notified combinations in the past 7 years, and not rejected any of the combination proposals in that time, as well as that the ‘widely reported sentiment of the global business community’ was that merger control exacerbated transaction costs and delays in effecting combinations, the Committee recommended the establishment of a ‘Green Channel’ mechanism for according swift approval to combinations that were ‘unlikely to result in any appreciable adverse effect on competition’.<sup>7</sup> The main advantage of this mechanism would be that parties

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<sup>1</sup> Competition Commission of India Order dated 18 August 2023 in Combination Registration No. C-2022/12/995, *In re: Proceedings against Platinum Jasmine A 2018 Trust, acting through its trustee Platinum Owl C 2018 RSC Limited, and TPG Upswing Ltd under Sections 43A and 44 of the Competition Act, 2002* (hereinafter, ‘CCI Order dated 18 August 2023’).

<sup>2</sup> The Competition Act 2002 [Act No. 12 of 2003] §5, (IND); The Competition Act 2002, §6.

<sup>3</sup> The Competition Act 2002, §6.

<sup>4</sup> *ibid.*

<sup>5</sup> Roger Van Den Bergh (ed), *Comparative Competition Law and Economics* (Edward Elgar Publishing Limited, 2017).

<sup>6</sup> Government of India Ministry of Corporate Affairs, Report of the Competition Law Review Committee (*Indian Economic Service*, July 2019) <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> accessed 27 December 2023.

<sup>7</sup> *ibid.*

would not have to wait for 210 days between notifying the CCI of their intention to enter into a combination and receiving the CCI's approval for the same- instead, such an approval would be provided automatically, i.e., as soon as the parties notified the CCI of their proposed combination under this route.<sup>8</sup> This benefit would be available in all cases where the proposed combination qualified for the Green Channel as per the self-assessment of the relevant parties, on the basis of 'specified criteria' and 'pre-filing consultations with the CCI'.<sup>9</sup>

In line with this recommendation, the 2019 Amendment to the Competition Commission of India (Procedure in regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (**the 2011 Regulations**) introduced the 'Green Channel' for the approval of combinations through the insertion of Regulation 5A into the latter.<sup>10</sup> While the structure remained as articulated in the 2019 Committee Report, three regulations related to the operation of the Green Channel that are of particular relevance to this paper are highlighted below.

First, the Green Channel can only be used by notifying parties that are willing to 'confirm' two sets of facts to the CCI – first, that the combination is not likely to cause any adverse effect on competition,<sup>11</sup> and secondly, that 'considering all plausible alternative market definitions', the parties to the combination (or their group entities or entities in which they hold shares or control) do not provide, *inter alia*, substitutable products or services, products or services which are at different stages or levels of the same supply chain, or products or services which are complementary to each other.<sup>12</sup> Effectively, therefore, participants having any horizontal, vertical or complementary overlaps are barred from using the Green Channel.

Secondly, severe penalties are envisaged in case parties are found to have supplied false information on either count – that is, where they are in fact found by the CCI to be involved in a combination with another entity that provides substitutable goods/services, or goods/services at a different stage of the same supply chain, or goods/services that are complementary to those of the other entity, or where their proposed combination is in fact found by the CCI to be likely to cause an appreciable adverse effect on competition. These penalties are, first, that the 'automatic approval' granted by the CCI for the combination notified under the Green Channel shall be

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<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> The Competition Commission of India (Procedure in regards to the Transaction of Business Relating to Combinations) 2011, Regulation 5A.

<sup>11</sup> *ibid* Schedule IV.

<sup>12</sup> *ibid* Schedule III.

rendered void *ab initio*,<sup>13</sup> and second, those provided under Sections 43A and 44 of the Act.<sup>14</sup> The former is attracted on the rationale that applicants who choose to consummate their proposed combination on the basis of the automatic approval – which is later rendered void *ab initio* – are considered to have engaged in ‘gun-jumping’, and provides for a penalty up to 1% of the higher of the total turnover or assets of the combination,<sup>15</sup> and the latter includes a fine up to 1 crore rupees, as well as ‘such other order’ as the CCI may deem fit.<sup>16</sup>

Thirdly, while the legal provisions on the Green Channel do not refer to them, the recommendations of the 2019 Committee Report rely heavily on ‘pre-filing consultations’. Parties intending to apply under the Green Channel can undertake these consultations with the CCI officials to clarify whether or not they would be in compliance of the aforementioned conditions.<sup>17</sup> While the Report goes as far as declaring that the success of the Green Channel ‘hinges on a robust pre-filing consultation’ between the parties and CCI, it also prescribes that such consultations are required to be of an ‘informal and non-binding’ nature.<sup>18</sup> It may be noted, here, that pre-filing consultations are not unique to the Green Channel, but are available for parties applying for approval for combinations under the regular route as well.<sup>19</sup> Further, while the relevant staff of the CCI retain the discretion not to respond to ‘requests that are general in nature’ or which do not ‘sufficiently describe the factual situation’, the CCI’s Guidance Note on these consultations clearly encourages ‘early consultations’, even in ‘seemingly non-problematic matters’.<sup>20</sup>

These three features of the Green Channel gain significance in light of the primary observations on this mechanism in popular commentary.<sup>21</sup> In particular, this combination of severe penalties with wide disclosure requirements, in addition to a tacit encouragement of ‘open and frank’ discussions with CCI officials prior to the filing of the application, has led to the conclusion that ‘complete alignment’ with the CCI’s opinion (gauged through pre-filing consultations) is vital for

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<sup>13</sup> *ibid* Regulation 5A (2).

<sup>14</sup> The Competition Act 2002, §44.

<sup>15</sup> The Competition Act 2002, §43A.

<sup>16</sup> *ibid*.

<sup>17</sup> Report of the Competition Law Review Committee (n 6).

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid*.

<sup>20</sup> Competition Commission of India, ‘Guidance Note on Pre-Filing Consultations’

<<https://www.cci.gov.in/images/combinationprefilingconsultation/en/pfc-guidance-note1651833852.pdf>> accessed 17 September 2023.

<sup>21</sup> Apurv Umredkar, ‘Green Channel Route: Resolving the Impediments and Procedural Infirmities’ (Kluwer Competition Law Blog, 28 June 2021) <<https://competitionlawblog.kluwercompetitionlaw.com/2021/06/28/green-channel-route-resolving-the-impediment-and-procedural-infirmities/>> accessed 17 September 2023.

parties seeking to avail the Green Channel.<sup>22</sup> As will be argued in a later section, it is this requirement for ‘complete alignment’ of applicants’ understanding with that of the CCI staff- at a pre-filing stage- on a range of amorphous criteria that largely limits the success of this mechanism in achieving its objectives.

### III. THE GREEN CHANNEL AND LAW AND ECONOMICS

Stepping away temporarily from the features of the CCI’s Green Channel, this section shall briefly outline a justification for using a Law and Economics-based analysis of this mechanism.

As a theory of law, Law and Economics seeks to apply economic theory to describe, understand and evaluate the law, while also refining such theory in light of the ‘real world’ insights that the functioning of the law provides.<sup>23</sup> While the descriptive (or positive) analysis of law, which believes – that the law can best be described as a system for increasing efficiency, as well as the prescriptive (or normative) analysis, which claims that the legal system ought to increase efficiency,<sup>24</sup> have been widely used in both ‘market’ and ‘non-market’ contexts. Competition law has traditionally been, and continues to be, an area of the law which is frequently evaluated with this type of lens.<sup>25</sup>

Yet, the primary justification of this paper for adopting this lens to evaluate the CCI’s Green Channel is more specific – it is rooted in the self-declared objectives of this mechanism itself. The 2019 Committee Report articulates these to be-, to “reduce transaction costs”, strike a balance between “adequate regulatory oversight” and the “ease of doing business”, save businesses time and costs as well as allow the CCI to devote its “limited resources” to “cases that actually pose competition concerns”.<sup>26</sup> These declarations convey clearly that at least one of the primary intentions behind the Green Channel is to decrease transaction costs of the merger control process, without significantly compromising the CCI’s ability to regulate anticompetitive conduct. This declared focus on increasing efficiency (of the regulation of combinations by the CCI), it is proposed, demonstrates that the convictions behind the Green Channel are clearly aligned with those of the Law and Economics perspective, making the latter a useful standpoint to evaluate the former from.

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<sup>22</sup> Sahyaja S, ‘Green Channel: In a First, CCI Penalizes IDIA TPG for Faulty Disclosures’ BQ Prime (28 August 2023) <<https://www.bqprime.com/law-and-policy/green-channel-in-a-first-cci-penalises-parties-for-faulty-disclosures>> accessed 17 September 2023.

<sup>23</sup> Guido Calabresi, *The Future of Law and Economics- Essays in Reform and Recollection* (Yale University Press, 2016).

<sup>24</sup> Klaus Mathis (ed), *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* (Springer, 2009).

<sup>25</sup> Richard Posner, ‘The Law and Economics Movement’ (1987) 77 *The American Economic Review* 2.

<sup>26</sup> Report of the Competition Law Review Committee (n 6).

#### IV. TRANSACTION COSTS AND THE GREEN CHANNEL

Given both the centrality of ‘transaction costs’ to Law and Economics literature, as well as to the declared objectives of the CCI’s Green Channel, this section shall evaluate the extent to which the Green Channel may successfully claim to reduce transaction costs in combination regulation.

In Law and Economics literature, the concept of ‘transaction costs’, drawn attention to most significantly by Ronald Coase in the context of explaining the utility of a firm, refers to the costs necessarily incurred in conducting any transaction in the market.<sup>27</sup> These costs, he recognized, were dependent on the relevant institutional structures in society, leading to the more general inference that it is “institutions that govern the performance of an economy”.<sup>28</sup> In later writing, this concept has formed one of the principal tools for analyzing the efficiency of governmental intervention in the market.<sup>29</sup>

In a similar vein, it has been recognized in the context of competition regulation that antitrust agencies face a fundamental tradeoff between reducing transaction costs and reducing deterrence of anticompetitive behaviour, that is, increased deterrence of anticompetitive behaviour, through a more interventionist antitrust regime, is generally presumed to run the risk of also increasing transaction costs in the market, for instance of effecting mergers or acquisitions.<sup>30</sup> Recognizing precisely this tradeoff, the 2019 Committee Report, as highlighted earlier, came to the conclusion that the Green Channel offered a method of significantly reducing ‘transaction costs’ without compromising severely on the CCI’s ability to regulate anticompetitive combinations.<sup>31</sup> It is simple to see how this conclusion was drawn- the Green Channel certainly does reduce the time taken for a proposed combination to gain approval (reducing the opportunity cost of entering the combination review process significantly, from that accruing from a wait of 210 days to less than a single day).<sup>32</sup> It also, by imposing severe penalties for providing false information, appears to seriously deter such behaviour. It also seeks to deter the lack of adequate diligence to the potential anticompetitive effects of the proposed combination on the relevant market.<sup>33</sup> In this way, *prima facie*, the Green Channel appears to have been expected to achieve both objectives, of decreasing transaction costs *and* maintaining a high level of deterrence, in one strike.

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<sup>27</sup> Ronald Coase, ‘The New Institutional Economics’ (1998) 88 *The American Economic Review* 2.

<sup>28</sup> *ibid.*

<sup>29</sup> Roger Van Den Bergh (ed) (n 5).

<sup>30</sup> *ibid.*

<sup>31</sup> Report of the Competition Law Review Committee (n 6).

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

However, it is argued here that to conclude decisively that the mechanism indeed reduces transaction costs is incorrect, and such a conclusion ignores the set of such costs *created and perpetuated* by the Green Channel itself. These are primarily of two kinds – first, costs incurred by applicants in assessing both the anticompetitive effects of their proposed combinations as well as confirming that they do not fall foul of the widely-worded restrictions listed in Schedule III of the 2011 Regulations. Secondly, the costs incurred by applicants in engaging in extensive pre-filing consultations with CCI officials in order to ensure that their understanding of the various facts involved is ‘aligned’ with that of the CCI. It may be further noted here that even while the 2019 Committee Report emphasized the advantage offered by the Green Channel, of allowing the limited resources of the CCI to be devoted to combinations with a higher likelihood of having an adverse effect on competition.<sup>34</sup> It is plausible that the provision of such extensive consultations at the pre-filing stage may offset many of the gains in administrative capacity from this. Finally, as the CCI is required in any case to examine whether or not any of the information supplied by the applicants under the Green Channel mechanism is false, as well as empowered to conduct an inquiry on such combinations under Section 20(1) of the Act (that is, of whether it is likely to have an adverse effect on competition),<sup>35</sup> It is unclear how the Green Channel contributes substantially even to reducing the CCI’s own administrative costs- it seems to simply shift the post-filing administrative costs partly to the pre-filing stage (by requiring it to provide pre-filing consultations) and partly to the post-automatic approval stage (by requiring it to examine whether the declarations of the applicants were false).

For the above-mentioned reasons, it is argued that while the Green Channel was introduced mainly to reduce transaction costs in the regulation of combinations, there are substantial limitations to its ability to do so- both in terms of costs incurred by applicant parties, as well as those incurred by the CCI itself.

## V. DETERRENCE AND THE GREEN CHANNEL

Besides lowering transaction costs, the second advantage expected to be conferred by the Green Channel appears to be its ability to offer a high degree of deterrence on providing false information in combination notifications. The 2019 Committee Report states that ‘the threat of a deal being undone [...] after being closed’ (that is, it deters by rendering the automatic approval void *ab initio*).

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<sup>34</sup> *ibid.*

<sup>35</sup> The Competition Commission of India (Procedure in regards to the Transaction of Business Relating to Combinations) 2011, Regulation 5A.

Also, the ‘severe penalty costs’ associated with violation of the various notification requirements ‘are likely to be sufficient incentives’ for ‘bonafide self-assessment and disclosure’ by applicants.<sup>36</sup>

This expectation leads logically from one of the predominant theories of deterrence in Law and Economics literature, which states that a ‘perceived threat of punishment’ is generated by a combination of two components- the severity of punishment and the certainty of punishment.<sup>37</sup> According to this theory, a potential offender commits an offence when the expected benefit from the offence outweighs this perceived threat of punishment.<sup>38</sup> Applied to the context of the Green Channel, it may be assumed that the ‘certainty’ of punishment can be held constant across the regular channel of combination regulation and the Green Channel, as the antitrust agency and its investigation and enforcement capacities remain the same regardless of the route (“certain” in the sense of ‘not left to the discretion of the CCI’). Given this, increasing the severity of punishment in the Green Channel route, by introducing the punishment of rendering the initial approval void *ab initio*, and hence of mandatorily requiring the combination to be ‘undone’, is likely, to provide increased deterrence to attempts to subvert the disclosure requirements. In this way, the expectation that the Green Channel increases deterrence is correct.

However, it is argued here that this increased deterrence effect creates a result that is counterproductive. It discourages parties from availing the Green Channel altogether, in which case the mechanism fails overall to meet its objectives. This problem is demonstrated in several commentaries in the popular press<sup>39</sup> that highlight the reluctance of entities to avail the Green Channel, for the primary reason that they do not wish to bear the risk of incurring severe financial and other costs of having to ‘undo’ a combination for which approval is later rendered void *ab initio*.

A second feature of the Green Channel’s disclosure requirements, it is argued, enhances this effect. This is that of the broadly worded declarations required to be made by parties under Schedule III to the 2011 Regulations. These also, it may be noted, require much more categorical incurring of liability by the applicant than those required under the regular notification mechanism. This is because, as highlighted earlier, it requires applicants to confirm the *absence of any overlap* (whether

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<sup>36</sup> Report of the Competition Law Review Committee (n 6).

<sup>37</sup> Murat Mungan and Jonathan Kick, ‘Identifying Criminals’ Risk Preferences’ (2016) 91 Indiana Law Journal 3.

<sup>38</sup> *ibid*.

<sup>39</sup> Umredkar (n 21); Sahyaja (n 22).



horizontal, vertical, or in terms of complementary goods) as opposed to merely a description of such overlaps, as is required under the regular notification route.<sup>40</sup>

It is therefore argued that, on account of the aforementioned two features, the Green Channel is unsuitable for even moderately risk-averse applicants. Conversely, its use requires applicants to show a significantly high degree of risk-seeking behaviour.<sup>41</sup> In addition to imposing a high *severity* and high *certainty* of punishment (which follows logically from the low certainty on what *would* constitute compliance with the extensive declaration requirements), as already established in Part III of this paper, the Green Channel, even while removing the transaction cost of delay in combination approval, imposes the new, twofold costs of need for heightened scrutiny in self-assessment and for engaging in extensive pre-filing consultations with the CCI. Given both these effects, it is evident that the Green Channel is severely limited in its ability to act as a more efficient alternative to the regular combination regulation framework.

## **VI. LESSONS FROM THE FIRST PENALTY IMPOSED UNDER THE GREEN CHANNEL**

Having presented two criticisms of the Green Channel using analytical tools from the Law and Economics perspective, this paper shall exhibit the validity of these criticisms in practice, through an analysis of the CCI's recent order against two entities, Platinum Jasmine A Trust and TPG Upswing Limited, penalizing them for having made false disclosures in their Green Channel notification.<sup>42</sup>

### **A. Background of the Order**

On 20 December 2022, the two mentioned parties had availed the Green Channel mechanism to jointly notify the CCI of the proposed acquisition of a 5% stake by Platinum Trust and TPG Upswing (through the Upswing Trust) (the 'Acquirers') in UPL SAS (the 'Target').<sup>43</sup> The required declarations under Schedule III and IV of the 2011 Regulations were duly filed.<sup>44</sup> Having received automatic approval for their proposed combination, the transaction was consummated by 17 February 2023.<sup>45</sup>

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<sup>40</sup> The Competition Commission of India (Procedure in regard to the Transaction of Business Relating to Combinations) 2011, Schedule II, Forms I and II.

<sup>41</sup> Mungan and Kick (n 37).

<sup>42</sup> CCI Order dated 18 August 2023 (n 1).

<sup>43</sup> *ibid* 1, 2.

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*.

On 18 May 2023, nearly 5 months after the grant of automatic approval and 3 months after the consummation of the transaction- the CCI issued a show-cause notice against the applicants, observing that there were certain overlaps between the businesses of the Acquirers and Target entities.<sup>46</sup> As a result of this, the order declared that the applicants had made false declarations in their notice under the Green Channel.<sup>47</sup> The submissions of the Acquirers in response to the show-cause notice were considered, after which the CCI issued its order dated 18 August 2023, penalizing the applicants, under Sections 43A and 44 of the Competition Act 2002.<sup>48</sup>

## **B. The CCI's Holding**

Three aspects of the CCI's holding in this order are relevant for the purposes of this paper, and are discussed below.

### **i. Eligibility is a Distinct Issue from the Effect of the Combination**

First, the CCI rejected the Acquirers' argument that the overlap in question was miniscule, and that the CCI had previously taken a liberal approach towards these types of overlaps.<sup>49</sup> It observed that eligibility to use the 'Green Channel' was an issue entirely distinct from the effects of the proposed combination notified under it.<sup>50</sup> As far as the issue of eligibility is concerned, therefore, it held that, facts or opinions regarding the transaction not altering the degree of competition, or of the overlapping entities belonging to the same group, or of no likely effect of the combination, etc., were completely irrelevant.<sup>51</sup>

The rationale provided for this observation was that, in earlier cases where the CCI had taken a liberal approach towards overlaps on the basis of the mentioned factors, such an approach had been taken in view of a holistic and detailed assessment carried out by it under the regular route of combination approval.<sup>52</sup> The 'Green Channel', on the other hand, was meant only for instances where such weighing of factors was unnecessary- it was not to be used where parties thought such weighing of factors to be necessary, and certainly did not envisage them proceeding to carry out such an assessment themselves.

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<sup>46</sup> *ibid* 23.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid*.

<sup>49</sup> *ibid* 28.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid*.

<sup>52</sup> *ibid*.

ii. Uberima Fides Standard to be Applied in Availing Green Channel

Secondly, the CCI rejected the argument of the Acquirers for mitigating penalty for the reason that they had notified and consummated the transaction on the legitimate expectation and bona fide belief that the transaction was eligible for a 'Green Channel' notification, and the information declared false was immaterial given its negligible impact on competition in the market.<sup>53</sup> Adopting the same strict approach as it did on the merits of the case, the CCI proceeded to also highlight that the criteria for the 'Green Channel' are 'objective and specific', and '*do not envisage assessment of the likely effect of the combination by the CCI*'.<sup>54</sup> It further observed that applicants choosing to use the 'Green Channel' must do so with 'utmost good faith' (that is, observe the standard of *uberimma fides*), and that any violations of the eligibility conditions would be dealt with 'seriously' in the future.<sup>55</sup>

iii. Prospective Approval of Transaction due to no Anti-Competitive Effect

In an ironic but clear demonstration of the above two observations, the CCI, after imposing a penalty of Rs 55 lakh on the applicants and rendering the automatic approval provided for their combination under the Green Channel void *ab initio*, proceeded to conclude that the acquisition in question had no appreciable adverse effect on competition, and hence approved the same *vide* this order.<sup>56</sup> As the approval was not mentioned to have retrospective effect,<sup>57</sup> it may be concluded that it would have come into force only from the date of this order. This would mean, effectively, that the parties would not be required to 'undo' their transaction, but were made to suffer penalty for both, false disclosures *and* 'gun-jumping'. It may be noted, however, that in a different case, it would have been entirely possible for the parties to be required to 'undo' the transaction (if it had been assessed by the CCI as likely to cause an appreciable adverse effect on competition). The mitigated losses are unique to circumstances of the instant case.

**C. Demonstration of Transaction Costs and Excessive Deterrence in the Green Channel Framework**

This order demonstrates the twin conditions of firstly, high transaction costs- required to be incurred by parties at the pre-filing stage to ensure that they fulfil the eligibility criteria - and secondly, high risk of penalty- faced by parties due to the excessively strict and narrow construction

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<sup>53</sup> *ibid* 30.

<sup>54</sup> *ibid* 30.

<sup>55</sup> *ibid* 38.

<sup>56</sup> *ibid* 44.

<sup>57</sup> *ibid*.

of the eligibility conditions employed by the CCI. It is notable that the CCI has not hesitated to distinguish between an assessment of the potential anti-competitive effects of a combination and an assessment of *eligibility* under the Green Channel. This makes it possible for parties to be penalised in case they use the Green Channel even when their proposed combination has no adverse effect on competition whatsoever. As a result, it is apparent, at least from the CCI's holding and observations in this order, that using the Green Channel not only creates its own transaction costs and risks, but also that these costs and risks can quite plausibly be *higher* than those in the regular route of combination notification.

## VII. CONCLUSION

From the preceding arguments and demonstration, the emergent prescription for potential applicants is to carefully weigh the single benefit of not having to wait for 210 days between the notification of a combination and its approval by the CCI, against the numerous costs and risks involved in conducting self-assessment, engaging in pre-filing consultations to remove even minor doubts in this regard, exposure to penalty under Sections 43A and 44, as well as to the penalty of having the initial approval of the combination being rendered void *ab initio*.

On the other hand, two sets of prescriptions arise for increasing the efficacy of the Green Channel. The first would be to reduce the severity of the penalty possible to be imposed in case of 'false information'. For instance, by making the penalty of rendering the automatic approval void *ab initio* only applicable to more egregious instances of falsification as opposed to those that would have a negligible anti-competitive effect. Where the CCI is willing to approve, the proposed combination for the reason that it would have no appreciable adverse effect on competition, for instance as in the *Platinum Jasmine* case, the penalty imposed may extend only to those under Section 44 and not 43A.

In addition to making the Green Channel more palatable to risk-averse applicants, this type of calibrated penalty would also be consistent with the purpose of the Section 43A penalty, which is to reduce omissions to notify combinations, or conversely, incentivize a greater rate of combination notification. This is because, in cases where a proposed combination is approved by the CCI, there is in any case no further need for a party to notify the CCI under Regulation 8 of the 2011 Regulations, as the *Platinum Jasmine* case shows.<sup>58</sup> Hence, approving an incorrectly notified combination but also subjecting parties to a penalty for *not* notifying the same combination does

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<sup>58</sup> *ibid* 44.

not in any way increase future applicants' incentives to notify their proposed transactions (whether through the Green Channel or otherwise). It only disincentivizes applicants from notifying their combinations through the Green Channel, where they may have to suffer this penalty despite having notified their combination (albeit incorrectly).

The second would be to delineate more clearly what type of products and services would be considered 'substitutable', 'part of the same supply chain', or 'complementary'- for instance, through sets of market-specific guidelines. This would decrease the 'certainty of punishment'- thus reducing the degree of risk needed to be incurred by parties in availing the Green Channel- as well as reduce, at least to some extent, the need for extensive pre-filing consultations to ensure 'alignment' of parties' understanding with that of the CCI. Adopting either of these prescriptions, it is suggested, would decrease the disincentives for risk-averse actors to avail the Green Channel, while also decreasing transaction costs without reducing the existing level of deterrence offered by the combination regulation framework.