



COMPETITION COMMISSION OF INDIA
Case No. 16 of 2021

In Re:

National Restaurant Association of India ('NRAI')
4th Floor, Phase II, PHD House,
4/2 Siri Institutional Area,
August Kranti Marg,
New Delhi- 110016

Informant

And

Zomato Limited ('Zomato')
GF-12A, 9A Meghdoot, Nehru Place,
New Delhi – 110019

Opposite Party No. 1

Also at:

Ground Floor, Tower C, Vipul Tech Square,
Sector 43, Golf Course Road,
Gurugram– 122009

Bundl Technologies Private Limited ('Swiggy')
3rd Floor (Internally designated as 4th Floor) Maruthi
Chambers, Survey No 17/9B, Roopena Agrahara,
Bangalore- 560068

Opposite Party No. 2

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member



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Order under Section 26 (1) of the Competition Act, 2002

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 ('Act') by National Restaurant Association of India ('Informant'/'NRAI') against Zomato Limited ('Zomato') and Bundl Technologies Private Limited ('Swiggy') (Zomato and Swiggy, hereinafter, collectively referred to as the 'Opposite Parties'/'OPs') alleging that the practices of Zomato and Swiggy are in violation of Section 3(4) read with Section 3(1) of the Act.

Facts, as stated in the Information

2. NRAI states that both Zomato and Swiggy are logistics-enabled restaurant marketplaces and have features of a platform with 'search compare booking' and delivering option, providing their services to distinct but inter-dependent consumer groups, being restaurant partners ('RPs') on one side, and the end-consumers/consumers ordering food on the other side where network effect plays a vital role. NRAI has submitted that the OPs provide RPs a listing service and allow consumers to interact with them through their platforms, in the form of mobile based applications running over the internet, such as the 'Zomato for Business' App or the 'Swiggy Partner' App.
3. NRAI has submitted that the relevant market should be delineated in the context of RPs, since the information shows the anti-competitive actions of Zomato and Swiggy from perspective of RPs. Further, it is averred that dine-in/take-outs/direct orders do not form part of the relevant market as there is a fundamental difference in consumer preference between dine-in and delivery. Also, Vertically Integrated food Chains (VIFCs) are stated to be not forming part of the same relevant market as they offer their own delivery service. Further, creation of a vertically integrated system from scratch requires significant adjustment in the state of existing assets and do not provide the convenience of Search-Compare-Order (SCO) Bundle. Accordingly, NRAI has proposed the relevant product market to be '*restaurant marketplace with delivery services*'.



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4. As regards the relevant geographic market, NRAI has submitted that the market is hyperlocal in nature as food delivery is restricted in the range of only a few kilometres. Since the platforms of Zomato and Swiggy work in such hyper localised markets, market position of any of the platform would change significantly from one region to another. As per NRAI, in southern region, Swiggy commands an overwhelming market share of nearly 70% and in northern India, it is Zomato that commands an overwhelming market share of 70%. Owing to the nature of model that is followed by both these platforms which work in hyper localised markets, the analysis has to be region-specific and the whole of India should not be considered as one single relevant geographic market. Therefore, the relevant market as a whole has been proposed to be '*restaurant marketplace with delivery services in various hyperlocal areas across India*'.
5. NRAI has alleged contravention under Section 3(4) as well as Section 4 of the Act and submitted that similar conduct can be looked at under both these Sections. It has been averred that the degree of market power required for an analysis under Section 3(4) is lower than that required under Section 4 of the Act. A party (although not declared dominant) with sufficient market power can cause AAEC by entering into anti-competitive vertical agreements.
6. In relation to the market share of the OPs, NRAI has submitted that Zomato has managed to increase its market share pursuant to its acquisition of Uber Eats. While referring to the RedSeer Report quoted in an article, NRAI has claimed that Zomato's market share is close to 52% in terms of gross order volume and Swiggy commands a market share of 43% in the market (pan-India basis). Further, NRAI has referred to the European Commission's *de minimis* doctrine and submitted that both Zomato and Swiggy have significantly high and durable market shares in the relevant market, and command positions of strong market power, which enables them to cause AAEC in the market through their respective agreements.
7. The Informant claims that OPs are characterised by high incidence of network effects as they themselves rely on a successful 'fly-wheel' effect from their operations in servicing both sides of the market. NRAI also highlighted that these platforms created network by



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adding more RPs on their network by reducing/waiving commission and simultaneously, giving huge platform backed discounts to consumers, thus creating a critical mass on both sides of the market. NRAI has stated that it is only because of the network effects of the OPs that, despite their anti-competitive practices, RPs are still dependent on the platforms to earn revenues, which shows the absence of countervailing buyer power with the RPs. This is because consumers log on to the OPs' platforms when they want to order food online, bringing their services under the so-called 'must-serve' category, synonymous with the must-stock nature of certain items, and thus, OPs have become unavoidable trading partners.

8. NRAI has also submitted that the market has seen a consolidation to the point where the market consists of only two major online food platforms that do not face competitive pressures from other players and/or the RPs. Further, there has not been any effective credible entry in the market since last three years and other players have been absorbed either by Zomato or Swiggy, demonstrating significant entry barriers. Further, NRAI also detailed the funds raised by Zomato and Swiggy for their operations in India and stated that the access to funding which these platforms have, also acts as an entry barrier.
9. NRAI has stated that Swiggy and Zomato collect data from customers based on their past purchases and uses that data to customise the offerings being made to each consumer. In case of Swiggy, each customer sees a different listing so that the list of restaurants that customer A sees is completely customised to his/her preference and may be very different from that of customer B sitting next to him. Similarly, Zomato focuses on providing its customers with 'structured content' [viz. information and data points such as photos of the menu, photos of the restaurant premises, address and GPS coordinates, phone number, website, social media presence (Facebook and Twitter links), among others] and non-structured content by inviting its customers to post photos, reviews and ratings of restaurants on the platform (referred to as customer-generated-content or CGC by Zomato). Thus, the data they possess also strengthens their market positioning, dissuading new players from entering the relevant market.



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10. NRAI has further stated that the OPs have taken unfair advantage of their significant market power and compounding network effect to enforce vertical agreements and impose vertical restraints on the RPs.
11. The first allegation made by NRAI is with regard to the bundling of food delivery services with the food ordering services on their platform by Zomato and Swiggy. Allegedly, such delivery services are not optional for the RPs who wish to avail the listing service, and they are forced to take the delivery service of the platform. NRAI has referred to the CCI's Market Study Report in ecommerce and stated that such bundling of delivery services is an unfair imposition. In support of this allegation, NRAI has submitted email communication of RPs with Swiggy and Zomato, which shows that those RPs do not have the option to self-deliver. NRAI has claimed that due to this kind of bundling, RPs are severely affected because of *inter alia* non-availability of delivery partners, delay in pickups and delay in delivery, which directly affects the business of the restaurant, especially those that majorly depend upon delivery of their food. NRAI submitted screenshots of the dashboard of Zomato, where two restaurants were adjoining each other (and screen shots taken in the time span of 7 minutes) but there was an arbitrary unavailability of delivery partner to one RP. While referring to the Zomato's Draft Red Herring Prospectus (hereinafter 'DRHP'), NRAI contended that VIFCs can negotiate special deals with the OPs, who are permitted to use their own delivery services.
12. NRAI has stated that such bundling of delivery service with the core listing services is anti-competitive, since it forecloses competition and creates barriers for new entrants in the downstream market for hyperlocal deliveries. It also creates an impediment to innovation and improvement in distribution of food, which could also be done by hyperlocal delivery entities, and not allowing the same is to the detriment of RPs and end-consumers alike. Hence, such bundling is violative of Section 19(3) of the Act.
13. The second allegation raised by NRAI in the information is that the OPs engage in the practice of data masking, where the RPs receive no data or information about the end-consumers to whom the food is delivered. The RPs receive temporary landline number



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instead of customer's phone number. The effect of such data masking is that the RPs are not aware of where the food is being delivered, to whom and in how much time. The same creates lack of transparency from the perspective of RPs and they receive least information despite being accountable for the services offered by them. Further, payments are being deducted by OPs for poor customer satisfaction without the RPs even knowing the reasons thereof. In addition, NRAI has alleged that the privacy policies of the OPs show that consent is taken from customers to share information with RPs, however, practically, such data is never shared with the RPs and is instead used by the OPs to their advantage, especially for the creation of their private labels.

14. Further, NRAI has submitted that the concerns stem from cloud kitchens, which are large co-working kitchen spaces managed by the online food aggregators. The OPs invite their top RPs to prepare food for delivery-only from these kitchen spaces. In support of its allegations, while referring to information available in the public domain, NRAI has submitted that Zomato launched Zomato Infrastructure Services in 2018 and now, while these kitchens are operative, Zomato has withdrawn exclusivity rights for restaurants operating out of its cloud kitchen facility. However, it is entitled to charge a rental commission on all orders that such RPs fulfil outside Zomato as well. NRAI has also referred to information in public domain to state that Swiggy launched 'Swiggy Access' that has partner restaurants setting up operations through co-working kitchen spaces. Swiggy's private label includes Goodness Kitchen, Breakfast Express, The Bowl Company and Homely. In addition, Swiggy also launched 'Brandworks' wherein it partnered with some restaurants on its platform to create delivery-only brands, with a separate identity from the parent eatery.

15. NRAI has further alleged that OPs are engaging in a dual role on their platform where they list their own cloud kitchen brands exclusively on their platform, akin to private labels, thereby creating an inherent conflict of interest in the platform's role as an intermediary on one hand and as a participant on the other hand. According to NRAI, such vertical integration may create an incentive to improve the platform's own/related entity's market position relative to its competitors, by engaging in preferential treatment on the platform to such related entities. This, as a result, has the effect of causing



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foreclosure of existing competition in the upstream market as well as aid the platforms to garner greater network effect and cause foreclosure and impede entry in the relevant market. As per NRAI, the operation of such cloud kitchens under preferential business terms will cause AAEC under Section 19(3)(a) to (c) of the Act. Moreover, it would not result in accrual of benefit to consumers as consumer choice may not reflect consumer preference with perfect information and this results in the violation of Section 19(3)(d) to (f) of the Act.

16. Next allegation raised in the information is that Zomato and Swiggy both enter into unfair and one-sided contracts with their RPs, owing to their superior bargaining power. As per Clause 15 of the Terms and Conditions of Restaurant Partner Enrolment Form for Online Ordering Services, Zomato exercises sole right to terminate the contractual agreement with or without cause at any point of time. Similarly, reference to clause VI (11) of the merchant terms between Swiggy and RPs would show that Swiggy has unilateral right to terminate the agreement pursuant to non-compliance by the RPs. NRAI has annexed these agreements with the information.

17. Further, NRAI has alleged that Zomato and Swiggy often compel the RPs to commit exclusively to be listed on their respective platform through incentives, lower commissions *etc.* to maintain their competitive edge in the market, at the exclusion of other new entrants. This creates/strengthens barriers for a new entrant into the market which would find itself deprived of essential and interdependent inputs like RPs and customers which would be locked-in to the incumbents' platforms. NRAI has submitted about the Exclusivity Contract of Zomato whereby it can enter into exclusivity contract with 0% commission also with the RPs. Also, Merchant Enrolment Form is annexed which shows that Zomato charges 3.75% commission for exclusive listing of partner restaurants on its platform and variable commission of 7.5%/10%/15% commission if such exclusive listing is not followed by those restaurants. NRAI also claimed that Zomato offers minimum guarantee in the form of order volume guarantee and order value guarantee to some restaurants subject to fulfilment of certain conditions such as minimum rejection and promptly acceptance of order by the RPs.



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18. Additionally, NRAI has submitted that the Restaurant Partner Enrolment Form for Online Ordering Services of Zomato specifies 2 Models: (a) Synergy: whereunder the RP is required to covenant that it shall not for a period of 12 months from the Effective Date, provide Restaurant Services on any third-party platform. (b) Non-Synergy: The RP elects to provide its services on any platform it chooses. The additional terms further specify that in case the RP provides its service on other platforms during the Synergy Term, then Zomato shall have the right to retrospectively charge: (a) Foregone commission under previous agreement; and (b) Commission @25% of Net Sale. Although, the RP was allowed to list or delist itself on any third-party platform at any juncture, the terms and conditions impose *de facto* exclusivity.
19. Further, NRAI has raised similar allegations against Swiggy and has submitted that, as per the signage policy of Swiggy, the RP/merchant is obligated to only display the co-branded signage and cannot display nor enter into any arrangement/agreement for the display of signage of competitors of Swiggy during the term of this Signage Policy without prior approval of Swiggy.
20. NRAI has also alleged that both the OPs have imposed price parity terms on the RPs through their respective contracts with such RPs. Wide price parity restrictions, in the present case, restrict the restaurant from charging lower prices or providing better terms on their website or offline shop, as well as through any other sales channel, including other online food aggregator platforms. NRAI has submitted that Swiggy has explicit terms and conditions, wherein RPs are required to maintain parity between the price of menu listed on Swiggy with the price listed on other platforms by such RPs or offered by them for retail. As a consequence of non-compliance, the said term/condition specifies that, in case a complaint is made by a customer in this regard, Swiggy shall be liable to verify the same and reserves its right to unilaterally cancel the agreement with such erring RP. NRAI has also submitted email communication wherein Swiggy threatened an RP to update price details *etc.* on Swiggy as per other platforms (where the prices shown were lower than those available on Swiggy's platform), and the said email also mentioned that a failure to do so may affect the restaurant's ranking on the Swiggy platform and may also result in the restaurant being delisted from the Swiggy platform.



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21. As regards Zomato, NRAI has submitted an agreement between Zomato and RP, which was filed along with additional information dated 24.08.2021, wherein the RPs operating from the Allotted Kitchen Block are required to maintain parity with its other outlets/kitchens/restaurants, operating in the same city and any discount offered by the RPs through any channel other than Zomato Platform, including other aggregators, offline or partner's own channel, shall be at par or less than the discounts offered by the Restaurant Partner on the Zomato Platform. Further, the Informant also submitted that as per the Zomato Pro contract which Zomato has with its customers who have opted for the same, RPs at all times maintain parity in the pricing for all products offered for sale to such Zomato Pro Customers *via* the platform as against that made available for sale otherwise, including but not limited to any online aggregator and at its restaurant locations.
22. NRAI has also alleged that the commissions which are charged by the OPs from RPs are unviable and are to the tune of 20% to 30%, which are extremely exorbitant for the RPs. Zomato is alleged to be charging approximately 27.8% of the order value to the RPs listed on its platform, whereas for Zomato cloud kitchens, Zomato does a guarantee of certain sales per month but the commission rate is as high as 37%. Additionally, Zomato charges payment gateway charges even on cash on delivery orders and while Zomato charges a fixed fee 1.84% + GST as payment gateway charges to their merchants, their actual cost of payment gateway charges is much lower than that (from the data mentioned in DRHP of Zomato). As regards Swiggy, NRAI claims that it charges the commission rates as high as 24%.
23. Further, NRAI has alleged that OP's, who together corner more than 95% of the market, have been engaging in the practice of deep discounting, through schemes and incentives offered by them to customers. Further, it is alleged that although earlier OPs were funding such discounts themselves, now the discounts have been mandated to be funded by the RPs to maintain adequate listing on their platform. 'Proper listing' of RPs happens when they incur discounts. OPs successfully capitalised on network effects, attracting a critical mass of consumers on their platforms to ensure they assumed the role of an



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unavoidable trading partner for restaurants. Once such a position was assumed, OPs proceeded to successfully increase commission rates, and began requiring RPs to fund such discounts in exchange for visibility on the platform. This meant that RPs are dealt a double whammy, as increasing commission rates mean lesser revenue from orders, and increasing discount funding means an increase in expenses.

24. Based on the aforesaid allegations, NRAI has *inter alia* prayed for an inquiry under the Act against the OPs and has prayed to the Commission to direct the OPs to cease and desist from entering into anti-competitive practices.

25. The Commission considered the information in its ordinary meeting held on 03.08.2021 and was of the opinion that to effectively examine the present matter, the response of Zomato and Swiggy need to be invited on the contents of the information filed, including parts of the information on which confidentiality has been claimed. Thus, to effectuate a meaningful exercise, the Commission had directed NRAI to share the confidential version of its information with the OPs, in terms of directions and mechanism, as detailed in the order dated 03.08.2021.

26. The Commission had further directed the OPs to file their reply(s)/response(s) to the confidential information received from NRAI within four weeks of such receipt. NRAI was given liberty to file its further response, if any, to the reply(s)/response(s) of the OPs, within two weeks thereafter, with an advance copy to the OPs.

27. In compliance with the Commission's order dated 03.08.2021, the Informant served the confidential version of the information with the respective counsel of Zomato and Swiggy on 24.08.2021 and 26.08.2021, respectively. After duly seeking extensions, Swiggy and Zomato filed confidential and non-confidential version of their respective response(s) on 20.10.2021 and 22.10.2021, with an advance copy of non-confidential version of their respective responses served on NRAI.

28. Thereafter, NRAI filed an application dated 29.10.2021 with the Commission requesting that it be provided access to the confidential version of the reply(s)/response(s) filed by the OPs, which was allowed by the Commission on 23.11.2021. Accordingly, Swiggy



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and Zomato shared their confidential version of the reply(s)/response(s) with NRAI on 16.12.2021 and 29.12.2021, respectively. Thereafter, NRAI filed its rejoinder to Swiggy's and Zomato's reply/response on 24.12.2021 and 27.01.2022, respectively. Subsequently, Swiggy filed applications dated 03.02.2022 and 16.03.2022 requesting for a preliminary conference in the matter.

29. The aforesaid pleadings and documents were considered by the Commission in its meeting held on 22.03.2022. The respective response/reply of Zomato and Swiggy with regard each of the aforesaid allegations and the rejoinder of NRAI to such response/reply, along with Commission's observations and findings thereon are presented in the following paras in a sequential manner.

Observations and Analysis of the Commission

30. The Commission has given a thoughtful consideration to the material available on record and the arguments made by the parties in their respective written submissions. The Commission observes that all the parties have filed elaborate and extensive pleadings and thus, in the view of the Commission, there exists sufficient material on record to form a *prima facie* view without a requirement of holding any preliminary conference in the matter, despite specific request having been made by Swiggy in this regard *vide* its applications dated 03.02.2022 and 16.03.2022. In this regard, the Hon'ble Supreme Court in its judgment in Civil Appeal No. 7779 of 2010 titled *Competition Commission of India v. Steel Authority of India Ltd.*, has held that "Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a *prima facie* case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter."

31. NRAI has raised many allegations against the OPs for similar practices/restraints being followed by them which have been alleged to have adversely affected competition in the market. These allegations are stated to be in contravention of Section 3(4) read with Section 3(1) of the Act. Thus, as such, a *stricto sensu* delineation of relevant market is



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not required as per the provisions of the Act to carry out the assessment, though, to contextualise the discussion and to assess the impact of the alleged conduct of the OPs, some broad understanding of the market and OPs' business model is imperative.

32. NRAI has delineated the relevant market as 'market for restaurant marketplace for delivery services in various hyperlocal areas across India'. As alleged, Zomato and Swiggy are the two biggest players in the provisioning of online food intermediation services and collectively hold a very high market share (stated to be around 90-95%) in almost all regional/hyperlocal markets. Further, it is stated that the markets are hyperlocal and segmentation of the market in such regional/hyperlocal terms will show that Zomato is dominant in the north Indian markets and Swiggy in the markets based in southern India.

33. Zomato and Swiggy have controverted the relevant market delineation done by the Informant and have proposed a wider market. While Swiggy proposed the relevant product market as 'market for provision of listing and logistics services for cooked food', Zomato has suggested that relevant product market should include all logistic delivery companies (such as DotPe (backed by Google), Dunzo (backed by Google), Shadowfax, Delhivery, WeFast (Borzo), Pidge, *etc.*), direct ordering to the restaurants, as well as the entry of players like Amazon and Google.

34. As already mentioned, the allegation in the matter being under Section 3(4) of the Act, there is no need to go into precise relevant market delineation. Suffice to say that Zomato and Swiggy are prominent online food delivery platforms and operate as online intermediaries for food ordering and delivery.

35. Zomato and Swiggy both have their respective diversified business lines, primarily within the food delivery sector, and are present in the market through various verticals. However, given the nature of allegations, the Commission's analysis is primarily focused on the food intermediation services provided by Zomato and Swiggy, whereby they connect two sets of platforms' customers/consumers— those willing to order food (consumers) and those willing to sell food (Restaurant Partners/RPs). Using the



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Zomato/Swiggy app, a consumer makes a choice about the food he/she wishes to order from an array of choices available on the app. The information available to aid the consumer make such a choice include price, description, quantity *etc.* regarding the food item, time taken to deliver the said food item, the review/ratings of the RPs selling the said food item *etc.* Once the order is placed, the restaurant receives the order, allegedly without any details of the customer with only an algorithm generated identification/transaction number. If the RP confirms/accepts the order, the transaction is effectuated by the presence of a third side *i.e.* delivery partners, who are assigned to facilitate delivery of the order placed to consumer. Many of the allegations raised by NRAI stem from the fact that Zomato/Swiggy control delivery of orders placed by consumers using their apps and do not let RPs to service delivery in respect of such orders. Thus, the restaurant/RPs have to compulsorily deliver through the platform delivery partner, with a few exceptions where Zomato and Swiggy allow some of the Vertically Integrated Food Chains (VIFCs) to self-deliver using their own fleet.

36. While Zomato and Swiggy have accepted that they do not allow all RPs to self-deliver the orders placed through their platforms, they have argued that such bundling is not anti-competitive. Rather, it has been stated that the bundling is done to control the end-to-end service of the order placed through their respective apps with the objective of enhancing consumer welfare.
37. Zomato has stated that, *firstly*, restaurants are not constrained to be listed on Zomato's ordering and delivery platform in case they wish to be only listed in its restaurant search and discovery catalogue. *Secondly*, restaurants that choose to list themselves on Zomato's food ordering platform can also avail of alternate delivery methods if they are able to demonstrate the requisite broad capacities to do so. As per Zomato, the manner of determining the appropriateness of delivery from the restaurant partner to the end-consumer was based on the nature of the food product, the logistic capacities of the restaurant partners *etc.* Zomato also provided examples of various RPs across different cities which met the objective criteria to self-deliver and have been delivering the orders placed through Zomato app. Zomato further stated that if a new restaurant partner wishes to service deliveries on its own, it must demonstrate that it will meet the objective



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parameters such as: (i) ability to integrate rider tracking; (ii) providing the contact number of the rider; and (iii) ensuring delivery in a timely manner *etc.*

38. Further, Zomato stated that the delivery services are aimed at providing a better user experience and to work towards user retention and maintain its goodwill. This was prompted by a slew of deficient consumer satisfaction and negative reviews when the restaurant partners undertook the delivery themselves. Zomato has provided various feedbacks it received from customers which, as per Zomato, indicated that certain restaurant partners were not able to service self-delivered orders in a satisfactory manner and there was no accountability for the same. This caused reputational harm to Zomato as delayed/unprofessionally delivered orders leave an extremely unpleasant experience with all stakeholders, including customers, restaurant owners and Zomato, triggering consequences at each level in the form of refunds, credits, bad ratings *etc.* Thus, as per Zomato, only in cases where a restaurant partner continues to receive consistent negative feedback and is unable to maintain a desirable Order Requiring Support (ORS) score, does Zomato expect such restaurant partner(s) to avail delivery facilitated by Zomato. Zomato further stated that it operates in a market with cut-throat profit margins, high operational costs and other capital requirements and the refunds and cashbacks to customers constrain its resources, in case an order is delivered in an unfit condition.

39. Zomato also mentioned that it had piloted an improved integration system for self-delivery program to assist all restaurant partners desiring to offer self-delivery if they meet the objective parameters set out therein. This is intended to be rolled out pan India subject to the successful completion of the pilot. Further, Zomato stated that it had launched a pilot program wherein it released a white label application to enable restaurant partners to undertake self-deliveries; however, since the application was not showing satisfactory results, Zomato had no option but to roll back its plan to enable deliveries by the restaurant partner where they wanted to use the white label application.

40. Zomato has also criticised the Informant's illustration wherein the screenshots have been submitted to show that out of two nearby situated restaurants, one was shown '*no-delivery partner available*' while the other showed delivery in 50—60 mins. Zomato has



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submitted that these two screenshots were taken at a time difference of 7 minutes which is significant considering that the order life cycle from selection to placing the order, subject to availability of restaurant partner delivering in that time frame, is a matter of a couple of minutes, across thousands of active customers. Even the restaurant partner typically accepts an order placed on it within 30 seconds to a minute. Zomato has also highlighted that these two screenshots are not comparable as the one showing delivery in 50—60 mins was self-delivering.

41. In *arguendo*, Zomato has stated that even if it was indulging in ‘bundling’ as alleged under Section 3(4)(d), an assessment of relevant facts in terms of Section 19(3) of the Act would lead to the conclusion that no AAEC have been caused in the market in India. According to Zomato’s response, these practices are undertaken only with a view to introduce various efficiencies in the marketplace.
42. Swiggy has submitted that, since its inception, it has been working on an end-to-end model, and RPs are free to use other rival delivery services for leads generated outside Swiggy. As per Swiggy, the Informant’s averment that the bundling of services is to the detriment of the RPs and consumers is without merit and rather the bundling of services provides a positive benefit under Section 19(3)(d) and Section 19(3)(e) of the Act. If the delivery service is unbundled/controlled by the RPs, Swiggy would not be able to oversee last mile delivery and would not be able to resolve any consumer complaint. As a consequence, consumers experiencing poor delivery service on its platform would switch to other competing platforms, resulting in a decline in brand value and reputation of Swiggy and consequently resulting in loss to other RPs listed on its platform.
43. In its rejoinder, NRAI has rebutted these averments made by Zomato and Swiggy. NRAI has submitted that Zomato’s response itself shows the existence of logistics service providers like Pidge, Rapido, Shadowfax, *etc.*, however, because of the coerced bundling, RPs are unable to avail services of such other logistical service providers who may offer better terms and conditions. NRAI also contended that if VIFC like Dominos can avail the services of Shadowfax to deliver order sourced from Zomato / Swiggy, why other RPs are not allowed to do the same. NRAI has further countered Zomato’s claim



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that it follows objective parameters in deciding whether to allow an RP to deliver itself, stating that there are no criteria specified to the RPs as on date, nor are there any such terms available on its website under Merchant Terms.

44. From the market standpoint, NRAI has contended that players from each segment of the bundle can potentially compete and spur innovation in their respective segment, which is better for the ecosystem rather than the current duopoly bundled scenario coupled with the aspect of network effects. This is necessary to promote competition amongst the various logistics service providers, get the best prices for delivery services, and indeed pass on these savings to customers, as opposed to the present scenario where the breakup of commission charged by Zomato across its (outsourced) delivery services, listing services, *etc.* are a black box for the RPs. Coerced bundling causes AAEC under Section 19 (3) of the Act and harm to the end consumers as well as RPs, who are denied the benefit of cheaper and more efficient deliveries and hence is in contravention of the provisions of Section 3(4) of the Act.
45. By bundling delivery services with listing services along with data masking, Zomato hinders competition in the market in two ways, firstly, availing the platform's delivery services drives up the cost of doing business, which is passed on to the end consumers; and secondly, even non-price factors such as the quality of delivery are adversely affected, as certain RPs who can avail trained delivery fleet are not allowed to make deliveries.
46. NRAI has also countered the reputational argument given by Zomato stating that when a marketplace can distance itself from the quality of food by using rating mechanisms, they can also distance themselves from the delivery mechanism. In fact, Zomato distances itself from delivery responsibility under the Merchant Terms.
47. The Commission, at the outset, observes that bundling of services has been alleged as a contravention under Section 3(4)(d), which mandates a rule of reason analysis. Zomato and Swiggy, the two biggest players in the online intermediation of food ordering and delivery services market, compete for the end-consumer on three main parameters (i)



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array of choices available to the end-consumers in terms of RPs listed on their platforms;
(ii) prices of products offered by those RPs on their respective platforms; and (iii) time taken by Zomato/Swiggy to deliver the orders placed by a consumer as well as the quality of such delivery.

48. It emerges from the claims made by Zomato and Swiggy that bundling delivery with ordering enables them to control the time taken for delivery and qualitatively standardise such delivery for the end consumer *e.g.* the delivery partners are tracked live by the consumer, who can see where such partner has reached during the currency of the transaction, the delivery partners are trained with basic etiquette, consumers get real-time customer support in case of delayed delivery or issues related to spillage/packaging and at times also to claim refund for such issues, *etc.* Such branding/standardisation and reduction in the time taken for delivery improves consumers' perception about the platform *i.e.* Zomato/Swiggy and thus, help such platforms compete better in the market.

49. In that sense, apparently, 'delivery of the food' ordered through their platform, seems to be an important characteristic feature of the business model as well an important parameter of competition that Zomato and Swiggy have adopted. Swiggy, as stated by it, operates an end-to-end model where the orders generated on the Swiggy platform are delivered by Swiggy's delivery fleet and this model is stated to ensure better performance, to the benefit of consumers. Though Zomato allows certain RPs to self-deliver, such self-delivery is allowed based on objective criteria when an RP demonstrates the requisite broad capacities to do so.

50. Though NRAI has countered some of the aforesaid assertions, the Commission nevertheless observes that the delivery partners are perceived as an extension of Zomato/Swiggy, since for the consumer ordering and delivery appear to be a composite service. The integrated service of food ordering and delivery provided by the OPs, when opted for by consumers, appears to be in alignment with user interest and preference of availing a hassle-free 'one stop' service. Further, unlike other e-commerce platforms, in case of food delivery market where these platforms are primarily delivering food for immediate consumption, time taken for delivery is of the essence and real time tracking



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plays a pivotal role. Moreover, these platforms, given their multisided characteristics, are competing in the market for consumers as well as for RPs and, as it appears, the competition between them is primarily a competition among bundles, where the time taken for delivery of orders and the qualitative aspect of it constitute relevant parameters of competition between these online food ordering and delivery platforms. Thus, the bundling does not seem to raise any competition concern as such. Even otherwise, the Informant has not been able to substantiate its claim that bundling of delivery with ordering, in itself, has led to or has the likelihood to cause AAEC either between restaurants or between hyperlocal delivery service providers.

51. NRAI has next alleged that Zomato and Swiggy engage in the practice of data masking, where the RPs receive no data or information about the end consumers to whom the food is delivered. The data is then used by the OPs to their own advantage. Further, OPs play a dual role where they list their own cloud kitchen brands on their platform, akin to private labels, thereby creating an inherent conflict of interest in the platform's role as an intermediary on one hand and as a participant on the other hand. According to NRAI, such vertical integration may create an incentive to improve the platform's own/related entity's market position relative to its competitors, by engaging in preferential treatment on the platform to such related entities.

52. As regards the allegation of data masking, Zomato stated that it makes attempts to ensure that customer data is protected and is not solicited, intentionally or unintentionally, for purposes beyond fulfilment of an order. It stated that, prior to October 2018, the restaurant partners were given complete access to customers' personal information. However, based on negative feedback from several users, Zomato believed that such practices may adversely impact customer interest and needed consideration prior to any sharing of such data.

53. Further, Zomato has submitted that it has not violated the principles of platform neutrality, as it does not have any ownership in any of the restaurants listed on its platform nor own or operate cloud kitchens or private labels or restaurants. Thus, no claims for discrimination and preferential treatment can be made against it. The amount



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of commission paid by an RP is not a factor on the basis of which listing is determined. Listings are stated to be broadly a function of: (i) location of user and serviceable distance for delivery in light of user location; (ii) individual user preferences derived from past orders in order to provide relevant listings to the user; and (iii) overall user reviews to determine restaurant partner rating. There is also a filter function available, wherein users can further refine their search on the basis of budget, cuisine, safety classifications introduced subsequent to the pandemic and restaurant partner rating, amongst others. Zomato also clarified that as a policy, it does not rank restaurants and the order of listing of restaurant partners as they appear on a customer's home-screen is generated for each end-consumer independently, considering multiple factors specific to that user. Further, for a consumer, it is very easy to switch from the Zomato platform and check the listings on competitor platforms or other third parties, in case their user experience is compromised or is not optimal.

54. With respect to advertisements, Zomato has averred that merely accepting advertisements does not violate any platform neutrality obligations. Zomato being a commercial entity can contract with other parties with free consent and use its platform to provide relevant advertising services. The allegations/claims of violation of platform neutrality may be made out in the event Zomato provided advertising services and does not disclose to customers which RPs had their listing boosted on account of having advertised on Zomato. However, Zomato marks all advertisements as 'Promoted', thus, making it clear to the end-customers why a restaurant partner is showing up at a particular spot on the listing page. This, as per Zomato, is in line with listings by all kinds of e-commerce platforms such as Swiggy, Amazon, Dunzo, Google, MakeMyTrip and Flipkart.

55. As regards the Access Kitchen Program, it has been stated that Zomato is only charging for use of its infrastructure and that it does not own/operate any restaurant or private kitchens. In fact, Zomato had subsequently shut this down in the last fiscal. Emails to this effect were sent out to all cloud kitchen operators starting December 2020–January 2021.



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56. NRAI has reiterated in its rejoinder that Zomato enters into preferential agreements with certain RPs which goes against the ethos of platform neutrality. Moreover, as per NRAI, entering into minimum business guarantee contracts also undermines platform neutrality as the same comes in the way of such platform acting neutrally.
57. NRAI has stated that, by masking consumer data from RPs, Zomato hinders competition in the market. NRAI also stated that the entire defense of Zomato for not sharing consumer data is that consumers have not given consent (which, as pointed out above, is an erroneous argument because consent is given by consumer to share the data with RPs), however, they use the consumer data so generated to their own benefit and monetise the said data.
58. Further, under its Access Kitchen Programme, Zomato has allegedly used data generated by its platform to identify consumer preferences/patterns, built cloud kitchen infrastructure at these locations and offered this infrastructure to brands for an additional fee (10—15% of revenue over and above the commission as rental commission) often even guaranteeing a minimum revenue to these brands, which could be more than INR 10,00,000 per month at times. Moreover, though Zomato has stated that it has closed these kitchens, this does not mean that by the time they were shut down, the market had already not been distorted as the Zomato Access Kitchen program came into existence as early as 2016 and, as per Zomato's own submissions, discontinued only recently. NRAI has also controverted the assertion made by Zomato that its Access Kitchens were shut recently (2020—2021) and submitted that, as per Zomato's website, such Access Kitchen programme still exists, which is liable to be investigated.
59. It is further stated that, under Zomato's Access Kitchen contracts, Zomato is entitled to Kitchen Commission from the RPs for use of access kitchen premises. Kitchen Commission is defined to mean (a) sum equivalent to Agreed Percentage of Net Sales per Order, and (b) in case where the Restaurant Partner selling its food and beverages through other online aggregators/marketplaces, there are additional pay outs. Agreed Percentage has been defined to mean: 16% (Online Ordering Commission) + 1.84% (Payment Gateway) + The higher of (a) 10% of the revenue earned by the Restaurant



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Partner in any given month by selling its food and beverages or (b) INR 30,000/- (Indian Rupees Thirty thousand only) + Taxes. Thus, more the revenues which happen through these kitchens, more would be the commission which Zomato gets. Thus, there is an incentive for Zomato to create more leads in favour of such Access Kitchens.

60. Thus, as alleged by NRAI, there is an inherent case of conflict of interest because of the dual role played by Zomato as an intermediary on one hand and as a market participant on the platform through these RPs. This gives it an incentive to leverage its control over the platform in favor of the RPs located in its Access Kitchens to the disadvantage of other RPs on the platform.

61. Swiggy, in its response, has stated that NRAI has misunderstood/misconstrued the private labels of Swiggy and cloud kitchens present in the market, these two being distinct businesses operated by it. As regards the private labels operated by Swiggy, it claimed that the same constitute a small portion of its business with less than 1% of its turnover and as stated by the Informant, Swiggy faced massive disruptions due to the pandemic and had to lay off staff from its private labels. Private labels owned and operated by Swiggy such as The Bowl Company, Homely, Breakfast Express *etc.* cater food to consumers. Swiggy further claimed that it treats its private labels in a non-discriminatory manner and that such private labels receive the same nature of data that it shares with other RPs and that no preferential treatment or competitive advantage is accorded to the private labels in terms of consumer data.

62. As regards the cloud kitchens, Swiggy stated that it is an innovative business model/concept used by a large number of players in the market and Swiggy is just one of the many players operating in the cloud kitchen space. Under this model, commercial kitchen spaces are set up with equipment and facilities needed to prepare food and delivered to consumers. Swiggy has emphasised that it is not a significant player in the cloud kitchen segment and there are larger players such as Rebel Foods which are backed by large investors. Swiggy stated that it operates cloud kitchens in only 5 cities with its presence declining from 170 locations to only 59 locations nationwide. Contrastingly, Rebel Foods presently has operations in 6 countries, with about 350 cloud kitchens and



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3500 RPs. Another player in the same segment is stated to be Curefoods, which is also backed by several large investors, having a large number of top restaurant brands under its banner.

63. From a consumer point of view, Swiggy has submitted that the cloud kitchens model is gaining traction amongst food entrepreneurs, which aids them to save significant fixed costs related to rental (one of the major costs, reaching upto 10% of RPs revenue), equipment, staff *etc.* and pass on the cost savings to end consumers.

64. With respect to collaboration with big RPs for cloud kitchens, Swiggy submitted that such collaborations are commercial decisions. The establishment of a cloud kitchen is similar to building a shopping mall and involves significant upfront investments in the form of cost of acquiring real estate, construction, equipment/facilities *etc.* However, as per Swiggy, there are no added benefits to such cloud kitchens or the RPs with whom Swiggy collaborates, in terms of listing or any other additional benefits on the platform and that Swiggy's private labels do not receive any preference to get enrolled on the Swiggy Access program, nor do such private labels get any special treatment with respect to the data of consumers.

65. As regards the non-sharing of user data with RPs, Swiggy stated that the same is done to protect the privacy of users and enhance the user experience of the Swiggy app. If such data is shared, there would be significant breach of privacy and the RPs would intend to reach out to consumers with numerous promotional schemes and feedback calls, causing irritation to the users, thereby driving down sales and the overall consumer experience on the app. Swiggy also highlighted that it is under no obligation to share more data than is necessary to allow the RPs to service the leads generated. However, it is important to share the consumer feedback received by Swiggy with the RPs without revealing the identity of the consumers, for the RPs to improve upon their services, if they so wish.

66. In its rejoinder, NRAI has stated that Swiggy's assertions on private labels and cloud kitchens cannot be taken at face value as it has not brought any material to substantiate its assertions, and the veracity of such assertions must be made subject to investigation.



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Being a marketplace, which derives revenue from commissions, Swiggy is incentivised to increase the relevance and visibility of the private labels on its platform.

67. NRAI has stated that private labels, contrary to what Swiggy suggests, have been a leading growth driver for Swiggy, and Swiggy plays a pivotal role in partnering with them for their growth. NRAI has relied upon a news article published by entrackr.com which, on the basis of the balance sheet for the FY 2020, has noted that private labels now constitute 15% of the operating revenue of Swiggy, six times that of the revenue of private labels from FY 2019.
68. NRAI has also asserted that Swiggy enters into agreements with certain brands ensuring to share data on supply gaps in the area, deciding on pricing of such private labels and then, co-promoting the brand in exchange for exclusivity. NRAI has cited some public statements made by Swiggy officials, wherein, Swiggy takes joint accountability for the success of the brands launched.
69. Further, NRAI has stated that the entire modus operandi of Brandworks, through which Swiggy provides certain market level and granular insights to RPs, needs to be investigated. Swiggy gets access to such data because of orders placed by consumers on the platform which, thereafter, Swiggy uses to enter into agreements with certain restaurants/set up private labels/cloud kitchen *etc.*
70. As per NRAI, Swiggy has tried to mislead the Commission on the manner of operation of cloud kitchens and tried to build an argument that it is a small player in the cloud kitchen space, and thus, there is no competition effect on the market. However, in effect, it enters into an agreement with the Licensee and the License Fee payable to Swiggy shall be a combination of (i) fixed sum per month; and (ii) % of Gross value of sale of food products by Licensee in a month. As Swiggy itself admitted that it generates the entire lead, thus there lies an incentive for them to divert more leads/traffic in favor of such cloud kitchens with whom they have a revenue share. Thus, the dual role played by Swiggy/platforms who own and list their cloud kitchen brands/private labels exclusively



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on the platform create an inherent conflict of interest between the platform's role as intermediary on one hand and as a market participant on the platform on the other.

71. Thus, as per NRAI, Swiggy has the incentive to leverage its control over the platform in favour of its cloud kitchens and private label products to the disadvantage of other sellers/service providers on the platform.

72. After careful perusal of the allegations as well as the submissions made by the parties, the Commission is of the view that *prima facie* a conflict of interest situation has arisen in the present case, both with regard to Swiggy as well as Zomato, because of the presence of commercial interest in the downstream market, which may come in the way of them acting as neutral platforms. This requires a detailed examination. Given that platforms are vertically related with the RPs, including their private brands and those operating through their respective cloud kitchens, such arrangements whereby preferential treatment is accorded to some entities can be looked as a potential contravention of Section 3(4) read with Section 3(1) of the Act.

73. Swiggy has accepted having presence with regard to both private brands as well as cloud kitchens. Though Swiggy has claimed that private labels operated by it constitutes a small portion of its business with less than 1% of its turnover, NRAI in its rejoinder has disputed the said percentage stating that Swiggy's private labels for the FY 2020 constituted 15% of the operating revenue of Swiggy. As regards Zomato, even if it does not 'own' the Access Kitchen space or the brand that operates from that Kitchen space, the revenue structure being created by Zomato, as is apparent from the Access Kitchen programme highlighted by NRAI in the information, under which Zomato facilitates the RPs in getting access to those kitchen spaces (owned by third parties) in return for commission from rent as well as all orders placed in such Access Kitchens (whether placed through Zomato or otherwise), calls for a scrutiny. Further, Zomato also has minimum business obligations with some of the RPs which also incentivises it to divert traffic to such RPs. Thus, even if Zomato does not own the kitchen space as claimed by it, *prima facie* the Commission is satisfied that the revenue interest that exists in favor of



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Zomato, along with minimum guarantee obligation, can act as an incentive to divert traffic to the RPs situated in those Access Kitchens.

74. Thus, in case of both Swiggy and Zomato, from an overall appreciation of the facts, *prima facie* there exists a conflict of interest situation, warranting a detailed scrutiny into its impact on the overall competition between the RPs *vis-à-vis* the private brands/entities which the platforms may be incentivised to favor. Both Swiggy and Zomato operate as major intermediary platforms in the food delivery space, underscoring their market power and ability to adversely as well as appreciably affect the level playing field. Preferential treatment accorded to the RPs in which these platforms have an equity or revenue interest can create barriers for the existing RPs to compete on fair terms. Such preferential treatment can be through various ways given the platform's control over different aspects that influence competition on them, including control over deliveries, search ranking *etc.* which can only be examined appropriately in an investigation. In view of the foregoing as well as conflicting submissions made by the parties, including relevant data brought on record, the Commission is of the view that this allegation merits an investigation under Section 3(4) read with Section 3(1) of the Act.

75. The Commission further notes that NRAI has also alleged that OPs often induce the RPs to commit exclusively to be listed on their respective platforms. Zomato offers exclusivity on the basis of commission as low as 0% and also offers minimum guarantee in the form of order volume guarantee and order value guarantee. Swiggy is also stated to be imposing exclusivity on the RPs on the basis of signage policy. Swiggy, in its response, has stated that NRAI has not provided any evidence against Swiggy and the signage policy referred to by the Informant is aimed at preventing freeriding by competitors of Swiggy. Zomato in its response has stated that as of 2021, only around 1% of all restaurant partners listed on Zomato were exclusive to it. In its rejoinder, NRAI has averred that exclusivity, minimum business guarantee agreements and preferential listings in terms of advertising *etc.*, show that the platform is not neutral and intentionally fosters an uneven playing field for the RPs.



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76. The Commission observes that it has already found merit in investigating the issue pertaining to platform neutrality. It may also be seen during investigation whether exclusivity in conjunction with minimum guarantee obligation is further accentuating the structure which may come in the way of the platform operating in a neutral manner. Thus, the aforesaid conducts require a holistic examination to ascertain whether these intermediaries prevent competition on merits, creating an ecosystem causing or likely to cause an appreciable adverse effect on competition.
77. The next allegation raised by NRAI is with regard to price parity arrangement. It is submitted that there exist price parity terms in the agreements/contracts between Zomato/Swiggy and RPs which do not allow such RPs to develop their own direct ordering channels or a competing platform by offering more competitive rates, thereby directly reducing inter-platform competition.
78. Zomato, in its response, has referred to the latest version of its Terms (Clause 5 (iv) – Restaurant Partner Menu and Price List) wherein, it is observed that no restriction has been placed by Zomato on pricing of items by its restaurant partner on any third-party platforms. Pursuant to these terms, Zomato only requires its RPs to maintain parity in the pricing of its products offered for sale to customers on its platforms against prices offered through its restaurant locations or other direct channels (*i.e.* parity with its menu card rates). Also, it stated that it does not enforce price parity clauses on its RPs and several RPs continue to offer better deals on their own websites/other direct channels as well as on third party platforms where they are listed. The Informant has also failed to place on record specific instances of enforcement of such clause by Zomato.
79. Countering Zomato's claim, NRAI has stated that when the information was filed, the price parity clause which existed in the Merchant Terms were wide price parity clauses. Post filing of the Information, Zomato seems to have changed their price parity clause to a narrow price parity which is also anti-competitive. Zomato not only demands the best price on its platform *qua* another competing online restaurant marketplace, but also on the RP's own physical and online stores or on any other channels.



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80. The Informant also referred to Zomato's tweets and emails referred to by Zomato in its reply, to claim that Zomato does enforce its price parity clauses. Thus, Zomato's argument that as a policy they do not enforce any parity clauses and RPs continue to offer better deals on their own websites/other direct channels as well as on third party platforms where they are listed has been stated to be untrue.
81. Swiggy also stated that its price parity clause only requires the RPs to provide a competitive 'list price' of its products as offered on other platforms. However, the RPs are free to offer discounts and schemes such that the final price charged to a consumer on a platform may differ from platform to platform. Thus, an RP or a competing platform is not required to extend the same discounts or schemes on the Swiggy platform and has the ability to compete with Swiggy on the final pricing of the food items.
82. Swiggy has also submitted that the provision of price parity was put in place to protect buyers and ensure that RPs do not inflate prices on its platform as Swiggy has, in the past, received complaints from buyers who have found discrepancies between the prices listed on the Swiggy platform and RPs' respective menus. Such complaints were duly escalated to the RPs for their action as Swiggy does not and cannot control, alter or affect the prices of items listed on its platform in any manner.
83. In its rejoinder, NRAI has stated that price parity conditions are in the nature of 'wide' parity conditions, as they not only demand the best price on Swiggy platform *qua* another competing online restaurant marketplace, but also on the RP's own physical and online stores or on any other channels. Contrary to the assertions made by Swiggy that they do not enforce price parity, Swiggy enforces price parity strictly. As stated in the Information, there is a team in Swiggy which ensures adherence by RP to such price parity clauses and emails are sent to restaurants in case of discrepancies. Not maintaining price parity may lead to such RPs getting pushed down the listing page, thus leaving them with no other option.
84. The Commission has considered the respective averments of the parties in their submissions on this issue. The RPs and OPs are in a vertical relationship and OPs operate



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as platforms providing listings to the RPs. Clause VI (9)(xvii) of Merchant Term- Restaurants by Swiggy states that *“to ensure competitive price for the Buyers on the Platform, it shall ensure that it will at all times maintain competitive prices for its products offered for sale on the Platform as against its other sales channels, including but not limited to other online aggregators and its self-operated retail locations whether on online platform or physical stores”*. NRAI has also submitted emails received by its RPs from Swiggy informing the RP about the price difference with other aggregators or their own supply channel. From the emails, it is also evident that Swiggy has dedicated Email Ids and teams such as ‘priceparitysupport@swiggy.in’ and ‘costly@swiggy.in’ to keep the price parity in check. Further, in such emails, Swiggy has raised concerns about the RPs selling at Swiggy at a price higher than other competing channels and has asked those RPs to correct the prices to avoid a push down in the search ranking. Similarly, Restaurant Partner License Agreement between Zomato and RPs, Clause 4(iiA)(f) states that *“the prices on the menu of the food and beverages offered by the Restaurant Partner in the commercial kitchen operated from the Allotted Kitchen Block shall be on parity with its other outlets/kitchens/restaurants, operating in the same city”* and Clause 4(iv)(a) states that *“any discount offered by the Restaurant partners through any channel other than Zomato Platform, including other aggregators, offline or partner's own channel, shall be at par or less than the discounts offered by the Restaurant Partner on the Zomato Platform.”* Also, Terms and Conditions of Restaurant Partner Enrolment Form for Online Ordering Services by Zomato Clause 3(xxxix)(f) states that *“The Restaurant Partner will, at all times, maintain parity in the pricing for all products offered for sale to the Zomato Pro Customers via the Platform as against that made available for sale otherwise, including but not limited to any online aggregator and at its Restaurant locations.”*

85. In case of food delivery apps, widely defined price parity arrangements/restrictions may result in removal of the incentive for platforms to compete on the commission they charge to restaurants, may inflate the commissions and final prices paid by consumers and may also prevent entry of new low-cost platforms.



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86. The price parity clauses mentioned in the agreements of Zomato and Swiggy appear to indicate wide restrictions where the RPs are not allowed to maintain lower prices or higher discounts on any of their own supply channel or on any other aggregator, so that the minimum price or maximum discounts can be maintained by the platform. Such price parity clause may discourage the platforms from competing on the commission basis as RPs need to maintain similar prices on all platforms and provide similar prices to the customers, regardless of the commission rates paid to the platform. Given that Zomato and Swiggy are the two biggest platforms present in the food delivery segment, their respective agreements with RPs of this nature are likely to have an AAEC on the market by way of creating entry barriers for new platforms, without accruing any benefits to the consumers. Thus, the Commission is of the view that an investigation under Section 3(4) read with Section 3(1) of the Act is made out on this aspect as well.
87. NRAI has next alleged that the agreements which the RPs have with the OPs are one-sided and contain unfair conditions *e.g.* unilateral right to terminate the services of RPs based on their Contractual Agreement. There are also allegations of exorbitant commission being charged to RPs. NRAI has also alleged that the OPs delay in making timely remittances and payment cycles, which started with 2—3 days from the date of order have now increased to 7 days. In addition to protracted payment cycles, OPs also deduct arbitrary amounts/hidden charges from the payments.
88. On the aspect of commissions, Zomato has submitted that commissions are negotiated with RPs and charged from RPs in the course of its operations as a commercial entity facilitating the placing of orders with RPs. The amount of commission paid by a RP is not a factor on the basis of which listing is determined. Zomato has also submitted that lower commission rates resulting from exclusivity arrangements have the effect of reducing operational costs of RPs, which can be used by an RP to improve the quality of food by way of using the savings to upskill current staff and invest in better ingredients resulting in a superior product, amongst a host of other possibilities.
89. Swiggy stated that it has standard term contracts with its RPs and it should not be expected to negotiate the agreement with each RP on its platform. It also stated that both



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Swiggy and RPs have the right to terminate the contract. Moreover, Swiggy has the option to temporarily discontinue or terminate its services only with regard to issues that may have an impact on the quality of service provided on the Swiggy app.

90. On commissions, Swiggy stated that the same vary in the range of 10—24%, the final quantum of which is determined on the basis of objective criteria such as the popularity of restaurant, volumes of orders generated, cuisines of the restaurant, location of restaurant, length of association with Swiggy *etc.* The commissions are the primary source of revenue through which Swiggy recovers significant portion of its costs and clarified that where a RPs average order value is high, the commission rate charged by Swiggy would be low and *vice versa*.
91. Swiggy also averred that the Commission is not a price regulator and cannot review the appropriateness of the commissions/discounts charged by Swiggy, more so because Swiggy does not hold a position of dominance, resultantly, the commissions charged by Swiggy cannot be scrutinised under Sec 3(4) of the Act. With respect to discount policies, Swiggy stated that it does not violate the Act as the RPs have the freedom to choose whether they would like to provide discounts on the platform, and the requirement to provide discounts is not a pre-requisite to be listed on the Swiggy platform. Moreover, discounting does not result in any favourable listing on the primary search results.
92. In its rejoinder, NRAI stated that one of the causes of existence of such one-sided clauses in the contracts with Zomato and Swiggy is the lack of countervailing power with the RPs. Further, NRAI stated that to submit that both parties have termination rights to terminate the contract does not offer any justifications, as this argument ignores the economic and legal context in which the agreement operates.
93. NRAI has alleged that the commissions are solely decided by Zomato and Swiggy and are presented to the RP as a take it or leave it proposition. Though Zomato has claimed that the clauses mentioned in the Merchant Terms are fair to ensure a high level of consumer satisfaction on its app, it is unfounded since Zomato distances itself from all



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liability, specifically delivery, imposes price parity and, yet charges such exorbitant commission from the RPs for the bundled service it provides.

94. As per NRAI, ideally, in a market which is characterised by network effects, the commission should come down to justify economies of scale and pass on the reduced cost to consumers and other stakeholders in the market. However, with Zomato, the commissions have nearly doubled in the last two years, presently standing over and above 25% and can reach as high as 37%. Rather, Zomato, in the past, has sent one-sided WhatsApp messages to RPs to increase the commission to 22% without even discussing and without giving a chance to negotiate, making the price increase uncontestable.
95. As regards Swiggy also, the RPs have no option but to accept the terms and conditions laid down by Swiggy due to the high dependence of RPs on such platforms. Moreover, some clauses in the Merchant Terms are onerous and shows the skewed bargaining power of Swiggy. Swiggy's statement that it has an objective criterion for charging commission, such as popularity of restaurants, location, length of association, average order value *etc.* is incorrect and, in any event, liable to be investigated.
96. The Commission has given a thoughtful consideration to the submissions made by Zomato and Swiggy on the allegations pertaining to delayed payment cycle, imposition of one-sided clauses in the agreement, charging of exorbitant commission *etc.* and based on those submissions, the Commission is of the view that *prima facie* these do not seem to have an effect on competition in the facts and circumstances of the present case.
97. However, as discussed in the foregoing paragraphs, the Commission is of the view that there exists a *prima facie* case with respect to some of the conduct of Zomato and Swiggy, which requires an investigation by the Director General ('DG'), to determine whether the conduct of the OPs have resulted in contravention of the provisions of Section 3(1) of the Act read with Section 3(4) thereof, as detailed in this order. The DG is, thus, directed to carry out a detailed investigation, in terms of Section 26(1) of the Act, and submit a report to the Commission, within 60 days from the date of receipt of this order.



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98. It is also made clear that nothing stated in this order shall be tantamount to a final expression of opinion on the merits of the case, and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.
99. Before parting with this order, the Commission notes that during the course of the proceedings, parties had filed their respective submissions in two versions *viz.* confidential as well as non-confidential. They had also filed applications seeking confidentiality over certain documents/information filed by them under Regulation 35 of General Regulations, 2009. In order to enable the parties to file meaningful responses, they were given access to confidential versions of such responses. Certain excerpts from such responses, over which confidentiality has been sought, have been relied upon by the Commission to reach its *prima facie* conclusion. Such excerpts, which have been reproduced or used in this order, have not been granted confidentiality. The rest of the documents/information on which confidentiality has been sought by the parties is allowed, subject to Section 57 of the Act, at present. The DG is at liberty to review their confidentiality during investigation as per law, if necessary, for the purposes of the Act. The confidentiality requests of the parties are hence disposed of accordingly.
100. The Secretary is directed to send a copy of this order, along with the information, the documents filed therewith, and the written submissions filed by the parties, to the DG.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 04/04/2022