



## COMPETITION COMMISSION OF INDIA

Case No. 40 of 2019

### **In Re:**

#### **Delhi Vyapar Mahasangh**

877, 1<sup>st</sup> Floor, Qutab Road  
Sadar Bazar, Delhi 110006

**Informant**

### **And**

#### **Flipkart Internet Private Limited and its affiliated entities**

Buildings Alyssa, Begonia & Clover, Embassy Tech Village,  
Outer Ring Road, Devarabeesanahalli Village  
Bengaluru - 560103

**Opposite Party No. 1**

#### **Amazon Seller Services Private Limited and its affiliated entities**

8th Floor, Brigade Gateway 26/1  
Dr. Rajkumar Road,  
Bengaluru - 56055

**Opposite Party No. 2**

### **CORAM**

**Mr Ashok Kumar Gupta**  
**Chairperson**

**Ms Sangeeta Verma**  
**Member**

**Mr Bhagwant Singh Bishnoi**  
**Member**

### **Directions for investigation under Section 26(1) of the Competition Act, 2002**

1. The present information has been filed by Delhi Vyapar Mahasangh (hereinafter, referred to as '**Informant**'/'**DVM**'), a society registered under the Societies Registration Act, 1860 under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') alleging contravention, of the relevant provisions of Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1) of the Act, by Flipkart Internet Services Pvt. Ltd. (hereinafter, '**Flipkart/Flipkart marketplace**') and Amazon Seller Services Pvt. Ltd. (hereinafter, '**Amazon/Amazon marketplace**'). Flipkart and Amazon are, hereinafter, collectively referred to as '**Opposite Parties**'/'**OPs**'.



**Facts and Allegations, as stated in the Information**

2. As stated, the Informant's members comprise many Micro, Small and Medium Enterprises ('MSME') traders which rely on trade of smartphones and related accessories. It is stated that many such traders regularly list their smartphones for sale on online marketplaces to take the benefit of online distribution channel.
3. Flipkart, having its registered office in Bengaluru, is an ecommerce portal operating as a platform facilitating third party sellers to sell their goods to consumers on its online marketplace.
4. Amazon marketplace, having its registered office at Bengaluru, is the marketplace affiliate of Amazon.com Inc., a multi-national technology company based in Seattle, Washington and operates the Amazon India e-commerce portal, operating as a platform facilitating third party sellers to sell their goods to consumers on its online marketplace.
5. The Informant states that there are instances of several vertical agreements between (i) Flipkart with their preferred sellers on the platform and (ii) Amazon with their preferred sellers, respectively which have led to a foreclosure of other non-preferred traders or sellers from these online marketplaces. It has been alleged that most of these preferred sellers are affiliated with or controlled by Flipkart or Amazon, either directly or indirectly.

***Allegations under Section 3(4) of the Act***

6. The Informant alleges that there is a clear violation of Section 3(4) read with Section 3(1) of the Act. Allegedly, there is an existence of various vertical arrangements between (i) Flipkart with their preferred sellers on the platforms; and (ii) Amazon with their preferred sellers on the platforms, respectively which leads to a foreclosure of other non-preferred sellers from the online marketplace. These preferred sellers are also alleged to be affiliated with or controlled by Flipkart/Amazon either directly or indirectly.



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7. Further, these platforms are allegedly capable of influencing prices being charged by sellers by providing several discounts as well as inventory (in the form of private labels at the B2B level) to the sellers. OPs also gather data on consumer preferences and allegedly use them to their advantage. As per the information, the agreements/arrangements between Amazon and its sellers and Flipkart and its sellers respectively can be said to be in violation of Section 3 (1) of the Act which is an omnibus clause. The Informant has alleged that the OPs are involved in following practices which are anti-competitive in view of Section 3(1) read with Section 3(4) of the Act.

### 7.1. Deep discounting:

7.1.1. **Flipkart** provides deep discounts to a select few preferred sellers (such as Omnitech Retail) on its platform which adversely impacts non-preferred sellers such as members of the Informant from competing with such sellers on Flipkart's online platform. The Informant alleged that there is evidence in the form of communications from Flipkart to its sellers stating that it would incur a part of the cost during the Big Billion Days (BBD) sales or *Diwali* sales *etc.* However, no such opportunity is available to other sellers who are, thus, unable to compete with such preferred sellers.

7.1.2. **Amazon** has preferred sellers on its platform namely Cloudtail India (a joint venture between Amazon and Catamaran Ventures) and Appario Retail (a wholly owned subsidiary of a joint venture between Amazon and Mr. Ashok Patni which received a round of investment from Frontizo Business Services Ltd.) which are related to Amazon. Similar allegations of deep discounts by Amazon to the detriment of non-preferred sellers have been levelled. Further, the fact that Amazon and these preferred sellers have the same contact details are also evidence of linkage between them. Moreover, Amazon has its own private label brands which are sold only through these preferred sellers.

### 7.2. Preferential Listing

7.2.1. **Flipkart** lends the word "*Assured Seller*" to the products sold by its preferred sellers such as Vision Star, Flashstar Commerce and Flashtech Retail (since July 2017), and allegedly creates a bias in favour of preferred sellers to the detriment of other sellers. Besides receiving deep discounts, such assured



sellers also receive preferential listing on the website of Flipkart, pushing the results of the non-preferred sellers further down in the search results without any basis whatsoever.

7.2.2. **Amazon** lends the word “*Fulfilled*” to the products sold by preferred sellers and further allegedly creates search bias by listing its preferred sellers in the first few pages of the search results. The products sold by Cloutail India and Appario Retail allegedly dominate first few pages of search results whereas the products with the same ratings sold by non-preferred sellers are listed on later pages.

7.3. **Exclusive Tie-ups and Private Labels:** Both the OPs have several tie-ups and private labels which get more preference in terms of sales. The OPs’ private label brands, sold through their platforms, are routed through a few preferential sellers. It is submitted by the Informant that this *modus operandi* is being employed by Flipkart across all categories, including smartphones. It is alleged that by having exclusive tie-ups in the relevant market with the smartphone companies, it provides exclusivity through discounting and preferential listings.

7.4. This leads to other competitors being excluded and foreclosed from the market. It is stated that any benefit to the consumers is only apparent at the initial stage till critical mass of network effects is reached or competitors are eliminated. This arrangement has far-reaching consequences on the economy as the non-preferred sellers are relegated to sell only through traditional brick and mortar set-up which involves significant fixed costs and are devoid of wide pan-India reach which online marketplaces offer.

### ***Market Power***

8. It is alleged that Amazon and Flipkart are able to cross-subsidise because of the huge amount of funding received from their investors, which has resulted in incentives that allow pricing below cost on their platforms, through their sellers, resulting in creation of high entry barriers and high capital costs for any new entrant in the market. Resultantly, the existing sellers find it difficult to launch their own portals or marketplaces in order to compete with the OPs.



9. The Informant averred that the OPs have the ability to unilaterally terminate their agreements with non-preferred sellers without assigning any reason as a result of which non-preferred sellers have no option but to comply with their mandates (Clause 3 of Amazon Seller Agreement). Thus, unreasonable vertical restraints are created.

***Sections 4(2)(a)(ii); 4(2)(b)(ii) and 4(2)(c) allegations***

10. Both Flipkart and Amazon are alleged to be jointly dominant in the relevant market and are stated to be abusing their dominance in the present case.

10.1. Both OPs individually and jointly have extremely high market shares in the relevant market. Flipkart itself held more than 53 % of the market shares in the relevant market in the first quarter of 2019 and Amazon held 36% of the market shares in the relevant market in the first quarter of 2019. Market shares, while not the only source of dominance, can be categorized as an important factor for determining dominance.

10.2. Due to deep pockets, OPs are able to facilitate their sellers' predatory pricing on their respective platforms.

10.3. The OPs have been limiting the provisions of service and market of MSMEs and other small retailers by creating a separate 'preferential list'. The preferred sellers are put into an advantageous position as their names appear on the initial pages as compared to the non-preferred sellers, despite selling product with 'identical rating'. Thus, there has been restriction of services in the market.

10.4. Due to huge market base and market power, the OPs have large repositories of data which allow them to target advertisements based on consumer preferences and marginalise other competitors which are unable to capture the market due to lack of access to data. This has resulted in creation of high entry barriers on account of network effects.



- 10.5. Both OPs have the ability to unilaterally terminate agreements with their sellers without any reason and treat them arbitrarily.
11. Based on the above, the Informant alleged that Flipkart and Amazon have established an inherently anticompetitive model for e-commerce which consists of providing deep discounts and preferential treatment to a select few preferential sellers on their platform and the same merits examination by the Commission.
12. It is, thus, prayed by the Informant that an investigation be caused into the matter and the OPs be directed to cease and desist from indulging in anti-competitive activities and maximum penalty under Section 27 of the Act be imposed upon the OPs.
13. After considering the matter on 12.12.2019, the Commission directed the Informant to file an affidavit with supporting documents under Section 65-B of the Indian Evidence Act, 1872 in respect of certain documents annexed with the Information. The Informant filed the said affidavit on 10.01.2020.
14. The Commission has carefully perused the information, documents filed by the Informant and relevant information available in the public domain.
15. At the outset, the Commission notes that the Informant has levelled allegations against Flipkart and Amazon marketplaces under Section 4 of the Act on account of joint dominance. The Commission notes that it is a settled position that the Act does not provide for inquiry into or investigation into the cases of joint/collective dominance as the same is not envisaged by the provisions of the Act. Therefore, the Commission need not deliberate further on allegations on account of joint dominance as the same being untenable under the Act.
16. The Commission notes that Flipkart marketplace and Amazon marketplace are e-commerce entities, following a marketplace based model of e-commerce. They essentially provide online intermediation services to sellers on one side and consumers on the other. These platforms/marketplaces and the sellers selling on these platforms operate at different stages of the vertical/supply chain. Thus, any agreement between the



platforms and sellers selling through these platforms can be examined under section 3(4) of the Act, which deals with agreements amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services. For the sake of convenience, the section is reproduced herein below:

*“3(4) Any agreement amongst enterprises or persons at different stages or levels of the **production chain** in different markets, in respect of production, supply, **distribution**, storage, sale or price of, or trade in goods or provision of services, **including**—*

[...]”

(emphasis supplied)

17. It is also pertinent to note that the definition of ‘Agreement’ under the Act is an encompassing/inclusive one. It includes any arrangement, understanding or action in concert neither necessarily in writing nor intended to be enforceable by legal proceedings. Further, the list of vertical agreements provided under Section 3(4) of the Act is an inclusive one.
18. Online intermediation services have been identified as key enablers of entrepreneurship which offer access to new markets to sellers/business users and increase the consumers’ choice of goods and services. These services form a fulcrum of the commercial success of the sellers who avail such services to reach consumers on the platform. At the same time, online platforms providing intermediation services result in the growing dependence of businesses on these platforms.
19. The IT industry body the National Association of Software and Services Companies (Nasscom) estimated that the Indian ecommerce market was \$33 billion in 2017-18 that reached \$38.5 billion during 2018-19. Flipkart and Amazon comprise bulk of the online retail market in India.<sup>1</sup> Though these platforms are used for selling various categories of products, for some categories the online channel constitutes a predominant channel of distribution. Smartphones is one such category of product. The Informant has claimed that Amazon and Flipkart had 36% and 53% market share, respectively, in the market

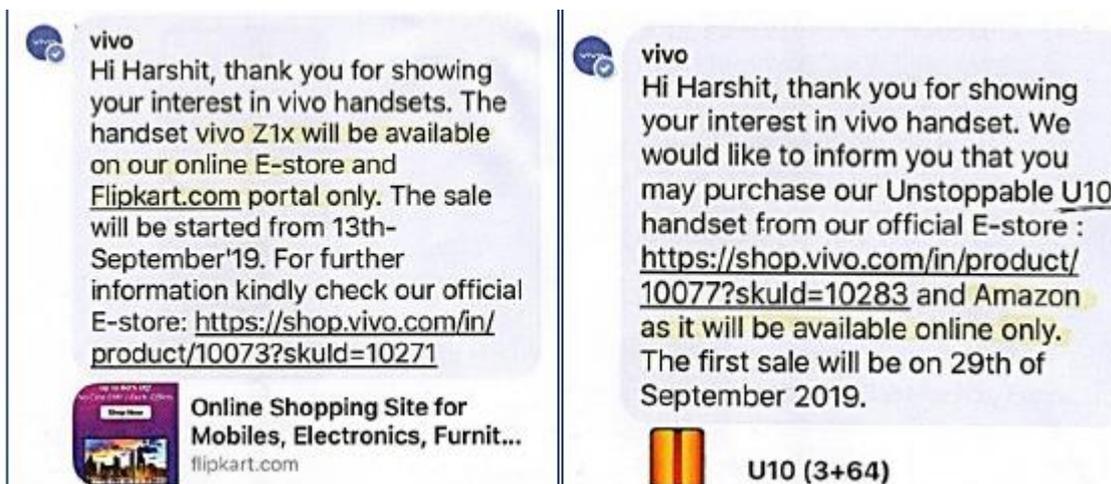
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<sup>1</sup> <https://economictimes.indiatimes.com/industry/services/retail/small-town-india-helps-amazon-flipkart-record-growth-in-sales/articleshow/71449679.cms>. This write-up was updated on 05.10.2019.

for smartphones sold on online marketplaces in India in the first quarter of the year 2019. Further, it is an accepted position that strong network effects generate a source of market power for such platforms. Large number of users make an ecommerce platform more valuable, which further attracts more users, platforms benefit from a ‘positive feedback loop’, which gives rise to market power.

20. On careful perusal of allegations levelled by the Informant and the documents provided, the Commission notes that there are four alleged practices on the marketplaces, namely, exclusive launch of mobile phones, preferred sellers on the marketplaces, deep discounting and preferential listing/promotion of private labels.

21. The first issue under examination is that of the exclusive launch of mobile phones on the two major e-commerce platforms. The Informant has provided a list of phones which were exclusively launched on the platforms. The Informant has provided the following evidence in the form of text messages, as shown below, to indicate that due to partnership between mobile manufacturer (Vivo Z1x and Vivo U10 models) and platforms (Flipkart and Amazon), offline retailers are forced to purchase smartphones either from manufacturers’ e-stores or from the platforms e-portals.



22. The Commission has also noted several reports in the media as well as advertisements by e-commerce portals regarding exclusive launches. Mobile manufacturing companies like One Plus, OPPO, and Samsung have exclusively launched several of their models on Amazon. Similarly, Vivo, Realme, Xiami *etc.*, have exclusively launched several of



their models on Flipkart. In 2018, Flipkart launched 67 mobile phones and Amazon launched 45 mobile phones exclusively on its platform.<sup>2</sup> Thus, it appears that these mobile manufacturers partner with the e-commerce platforms and their brands are sold by the platforms' exclusive sellers.

23. The Informant has also alleged that Amazon and Flipkart have their own set of preferred sellers and that these preferred sellers have nexus with the e-commerce platforms either by way of direct or indirect ownership or some understanding. It is observed that there are only few online sellers, which are selling these exclusively launched smartphones either through Amazon or through Flipkart. Based on the evidence adduced by the Informant and information available in the public domain, it can be *prima facie* inferred that there appears to be exclusive partnership between smartphone manufacturers and e-commerce platforms for exclusive launch of smartphone brands. Thus, exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition.

24. The issue of deep discounting alleged by the Informant needs to be assessed in the context of exclusive agreement discussed in the foregoing paragraphs. The Informant has furnished emails *inter-alia* dated 31.03.2019, 20.09.2019 *etc.* whereby communications were allegedly sent by Flipkart and Amazon to their sellers for incurring a part of the discounts offered during the big sale events like the Big Billion Days (BBD) of Flipkart and the Great Indian Festival of Amazon. At the same time, it is alleged that preferred sellers at Amazon and Flipkart are in some way or the other connected to Amazon and Flipkart, respectively, through common investors, directors, shareholders *etc.* Relying on these, it has been alleged that these preferred sellers are extension of these marketplaces, operating through different 'proxy' entities blessed with the support of these marketplaces. The Commission perused the prices for different smartphone brands sold through Flipkart and Amazon, *i.e.* original price and discounted price. It was observed that certain smartphone brands/models are available at significantly discounted price on these platforms and are sold largely through the sellers

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<sup>2</sup> <https://www.firstpost.com/tech/news-analysis/amazon-vs-flipkart-the-fight-for-oneplus-exclusivity-3694471.html> and <https://www.livemint.com/Companies/0kg99mEITjiWdU429gZIfM/Flipkart-Amazon-in-tight-race-for-exclusive-tieups-with-ph.html>



identified, by the Informant, as the platforms' 'preferred sellers'. Whether funding of discounts is an element of the exclusive tie-ups is a matter that merits investigation.

25. The issue of preferential listing should also be viewed in conjunction with the foregoing. Competition on the platforms may get influenced in favour of the exclusive brands and sellers, through higher discounts and preferential listing. Thus, the allegations are interconnected, and warrant a holistic investigation to examine how the vertical agreements operate, what are the key provisions of such agreements and what effects do they have on competition. Given that both the major platforms are stated to follow the same mechanics in terms of their exclusive tie ups and preferential terms with brands/sellers, competition between the platforms *prima facie* does not play a role in mitigating the potential adverse effect on competition on the platforms.

26. Thus, the Commission observes that the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms, as demonstrated in the information, coupled with the allegation of linkages between these preferred sellers and OPs alleged by the Informant merits an investigation. It needs to be investigated whether the alleged exclusive arrangements, deep-discounting and preferential listing by the OPs are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition contravening the provisions of Section 3 (1) read with Section 3(4) of the Act.

27. In view of the foregoing, the Commission is of the opinion that there exists a *prima facie* case 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.

28. Accordingly, the Commission directs the DG to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs



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the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order.

29. It is also made clear that nothing stated in this order shall 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 therein.

30. The Secretary is directed to send a copy of this order along with the material available on record to the DG forthwith.

**Sd/-**  
**(Ashok Kumar Gupta)**  
**Chairperson**

**Sd/-**  
**(Sangeeta Verma)**  
**Member**

**Sd/-**  
**(Bhagwant Singh Bishnoi)**  
**Member**

**New Delhi**  
**Date: 13/01/2020**