



COMPETITION COMMISSION OF INDIA

Case No. 80 of 2014

In Re:

**Mr. Mohit Manglani
A/01, Jethe Tower, Ambawadi,
Borivali East, Mumbai**

Informant

And

- 1. M/s Flipkart India Private Limited
Ground Floor, 7th Main, 80 Feet Road, 3rd Block,
Koramangala Industrial Layout, Bangalore-34** **Opposite Party No. 1**
- 2. M/s Jasper Infotech Private Limited
Building No. 246, 1st Floor, Okhla Industrial Estate,
Phase-III, New Delhi- 110020** **Opposite Party No. 2**
- 3. M/s Xerion Retail Private Limited
Plot No. 109, Udyog Vihar, Phase-IV, Gurgaon-15** **Opposite Party No. 3**
- 4. M/s Amazon Seller Services Private Limited
8th Floor, Brigade Gateway, 26/1,
Dr. Rajkumar Road, Bangalore-55** **Opposite Party No. 4**
- 5. M/s Vector E-commerce Private Limited
Ground Floor & 1st Floor, Maruthi Chamber,
Annexe Survey No. 17/9B, Rupenaagaraha,
Hosur Road, Bangalore-54** **Opposite Party No. 5**



CORAM

Mr. Ashok Chawla
Chairperson

Mr. S.L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances:

For the Opposite Party No. 1: 1. Shri Ramji Srinivasan, Senior Advocate
2. Shri H.S. Chandhoke, Advocate
3. Shri Abdullah Hussain, Advocate
4. Ms. Kanika Chaudhary Nayar, Advocate
5. Shri Divye Sharma, Advocate

For the Opposite Party No. 2: 1. Shri Manas Chaudhuri, Senior Advocate
2. Shri Sagardeep Singh, Advocate
3. Shri Ashish Ahuja
4. Ms. Shine Joy
5. Shri Lunita Hijam



For the Opposite Party No. 3:1. Ms. Anindita Mitra, Advocate

2. Ms. Shruti Bhardwaj

3. Shri Satendra Vir Singh

For the Opposite Party No. 4:1. Shri Anand S. Pathak, Advocate

2. Shri Akshay Nanda, Advocate

3. Shri Rakesh Bakshi

4. Shri Ankur Sharma

For the Opposite Party No. 5:1. Shri Amit Tambe, Advocate

2. Shri Gautam Chawla, Advocate

All Delhi Computer Trader Association: 1. Shri Mahinder Aggarwal

2. Shri Swarn Singh

3. Shri Munish Sharma

For the Informant: The Informant in person.

Order under Section 26(2) of the Competition Act, 2002

1. The present information has been filed under section 19(1)(a) of the Competition Act, 2002 (the 'Act') by Mr. Mohit Manglani (hereinafter, the 'Informant') against M/s Flipkart India Private Limited (hereinafter, 'OP 1'), M/s Jasper Infotech Private Limited (hereinafter, 'OP 2'), M/s Xerion Retail Private Limited (hereinafter, 'OP 3'), M/s Amazon Seller Services Private Limited (hereinafter, 'OP 4'), M/s Vector E-commerce Private Limited (hereinafter, 'OP 5') and other e-commerce/portal companies (collectively hereinafter, 'OPs') for their alleged contravention of the provisions of section 4 of the Act.



2. Briefly, OPs are the individual e-portals or e-commerce sites for online trade and commerce. The Informant has alleged that OPs have been indulging in anti-competitive practices in the nature of 'exclusive agreements' with sellers of goods/services. It has been urged that due to such practices, the consumer is left with no choice in regards to terms of purchase and price of the goods and services as the buyer/consumer can either accept the terms and conditions in totality of the e-portal or opt not to buy the product.
3. The Informant alleged that the e-portals/e-commerce websites and product sellers enter into 'exclusive agreements' to sell the selected product exclusively on the selected portal to the exclusion of other e-portals or physical channels or through any other physical channel. Accordingly, the portal operator decides terms of resale, sale price, terms of payments, delivery period, quality and service standards *etc.* All of these conditions are non-negotiable for a consumer who intends to buy those products. Further, to create hype for the product, the supply is controlled by the e-portal with whom the exclusive arrangement has been made, creating an impression of scarcity.
4. The Informant has alleged that sections 3(1) read with section 3(4) of the Act are squarely applicable on 'exclusive agreement' and 'restrictive/unfair business practice' of these e-portals. It is contended that OP 1 has been campaigning in online and print media about author Chetan Bhagat's yet to be launched book titled 'Half Girlfriend' published by Rupa publications. The said book is available exclusively on OP 1's website. Buyers who wish to purchase the book have to unconditionally agree to all the terms and conditions. This, as per the Informant, amounts to exclusive agreement having an appreciable adverse effect on competition. It is urged that by slowly destroying players in physical market and creating product specific monopoly leading to manipulation of price, control of production and supply, imposing terms and conditions detrimental to interests of consumers, such agreements distort fair competition in the marketplace. The



Informant has highlighted a few other examples which are exclusive sold by one or the other OPs.

5. It is also alleged that each e-portal *i.e.*, each of the OPs has 100% market share for the product in which it is exclusively dealing and therefore, leads to dominance. It is contended that the relevant market in such a case has to be defined in context of a particular product in question and the dominance is also seen accordingly. For instance, OP 1 has 100% market share in the relevant market for the book 'Half Girlfriend'. Similarly, other OPs, who entered into exclusive agreements with suppliers/manufacturers of goods, also enjoy dominant position in the market for such goods.
6. Based on these allegations, the Informant has submitted that the practice of entering into exclusive agreement for sale and purchase of goods by way of e-commerce is violating the provisions of sections 3(1), 3(4) (b) & (c) and sections 4(a) (i), 4(b) (i) and 4(b) (ii) of the Act and have an appreciable adverse effect on competition in India.
7. To form *prima facie* opinion in the instant case, the Commission perused the documents submitted by the parties and heard the parties through their authorised representatives. Further, the Commission observed that the Director General ('DG') *vide* its letter dated 24.12.2014 has forwarded a complaint of one Shri Mahinder Aggarwal, President, All Delhi Computer Trader Association (ADCTA) against the e-portals/e-commerce companies who are OPs in the present case. Accordingly, the Commission decided to provide an opportunity of hearing to Shri Mahinder Aggarwal also.
8. OPs submitted that they are third party platforms and offer ready to use environment to potentially large number of customers and manufactures. It was submitted that an e-commerce portal's business is based on a market place model



where the manufacturer/supplier is the owner of the products sold through online retail portals and the customer making such purchase is the end consumer of the product, the online retail portals merely acting as a platform that bring the two sides together for facilitating the transaction.

9. It was contended by the OPs that the relevant product market as suggested by the Informant is misconceived and will lead to fallacious results. It was submitted that each of the products cannot be construed as relevant product market in themselves. The relevant market to be delineated on the basis of the products considered to be substitutable or interchangeable with each of these products. The products which exercise a sufficient price constraint on these products would form part of the same relevant market. As per the OPs the relevant market for books may be delineated on the basis of nature of sale *viz.*, consumer or institutional; on the basis of category or genre *e.g.*, adult fiction, children's books, cookery, travel, history, biography, scientific/technical *etc.*; and/or the language. Similarly, in case of smartphones the relevant market should be the market for smartphones, not a specific model of smartphone a specific company such as Redmi 1S and Mi 3 variants of Xiaomi Mobile. It was also contended that online and offline retail do not constitute separate relevant market as they are merely different channels of distribution which are substitutable. It was submitted that the product purchased, whether from online portal or through offline brick and mortar retail outlets is fundamentally the same and merely the distribution channel through which such product is procured differs.
10. It was submitted that in spite of growing demand of e-commerce and online retailing, it accounts for less than 1% of the total retail in India. As per the OPs online retail is a sub-set of the organized retail market and since organized retail itself constitutes a miniscule portion, about 8% approximately of the total retail market in India, the share of online retail is extremely less.



11. OPs submitted that their agreements with manufacturers have no provisions of exclusivity and the Informant has merely relied on the screenshots of these products without examining the actual agreements. It is further submitted that exclusivity, if any, is limited to online portals and not *vis-a-vis* brick and mortar stores. Accordingly, the manufacturer is free to sell the products in physical stores and on its own website. Further, it was contended that the exclusive agreement is not violative of section 3(4) of the Act as there is no appreciable adverse effect on competition (AAEC) in the relevant market. The OPs submitted that there is enough competition in the retail market and even in the e-portal market and their respective shares are miniscule to cause any AAEC in the said market. It was contended that given the wide range of products, availability of substitutes, and consumer preferences, no single manufacturer (of apparel or books or smartphones) is able to exercise market power to cause any competition concern.
12. ADCTA, an association of computer traders, submitted that these e-portals/e-commerce websites have engaged in unfair trade practices and introduced illegal black money as Foreign Direct Investment in such business. It was contended that OPs have adopted the practice of purchasing goods from distributors/dealers on 21 to 30 days credit and then subsequently selling these products at prices lower than the purchase prices. As such, their liabilities increase many fold compared to their assets and to escape their creditors, they suddenly wind up their businesses and run away with money of distributors/dealers. ADCTA further submitted that OPs impose conditions like quantity restrictions, purchase of goods by the end consumers only for personal use and not re-sale *etc.* It is alleged that the OPs have also indulge in practices like predatory pricing in abuse of their dominant position under provisions of section 4(1) and 4(2) of the Act.
13. The Commission has perused the material available on record and heard the parties. The Informant is primarily aggrieved by the exclusive distribution arrangements between the manufacturers and OPs which, as per the Informant,



leave the consumer with no option but to accept the onerous terms/price as imposed by the exclusive online seller *i.e.*, OPs. It is alleged that the OPs have exclusive arrangements with manufacturers of products for exclusive launch of their upcoming products on their websites which is violative of certain provisions of section 3(4) as well as section 4 of the Act.

14. For analysing allegations pertaining to contravention of section 3 (4) read with section 3(1) of the Act, it is necessary to first establish the existence of an agreement/arrangement. Once the agreement is proved, the next enquiry is into the effects of such agreement/arrangement; the test being AAEC as per the factors laid down under section 19(3) of the Act.

15. Though the OPs have denied exclusive arrangements, accepting that such exclusive arrangement did in fact exist, the important question is whether such arrangements/agreements are anti-competitive. Section 3(1) of the Act unequivocally condemns only such agreement/arrangement/understanding which has or is likely to have an AAEC in the market. Section 3(3) of the Act presumes AAEC in case of certain horizontal agreements/arrangements which have been specifically identified therein. However, vertical agreements/arrangements under section 3(4) and other agreements/arrangements which do not fall under section 3(3) are anti-competitive only when AAEC is proved. Therefore, the Commission has to consider various factors laid down under section 19(3) of the Act such as: a) creation of barriers to new entrants in the market; b) driving existing competitors out of the market; c) foreclosure of competition by hindering entry into the market; d) accrual of benefits to consumers; e) improvements in production or distribution of goods or provision of services; and f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services to assess the effect of such exclusive arrangement between manufacturers and e-portals.



16. The bare perusal of the agreement on the touchstone of the factors laid out above suggests that such agreements do not result into AAEC. It does not seem that such arrangements create any entry barrier for new entrants. It seems very unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products which are illustrated in the information to be sold through exclusive e-partners (OPs) face competitive constraints. For example, mobile phones, tablets, books, camera *etc.*, are neither alleged nor seem to be trodden by monopoly or dominance. Further, it does not appear that because of these exclusive agreements any of the existing players in the retail market are getting adversely affected, rather with new e-portals entering into the market, competition seems to be growing.
17. Further, the Commission observes that online distribution channel by the OPs provide an opportunity to the consumers to compare the prices as well as the pros and cons of the product. Furthermore, through the option of delivery right at their door steps consumers have the opportunity to accept the purchase at their convenience and do not need to set aside a couple of hours at a stretch to make the purchase through a brick-and-mortar retail outlet. Therefore, at this stage, it does not appear that the exclusive arrangement between manufacturers and OPs lead to AAEC in the market.
18. With regard to allegations pertaining to section 4 of the Act, the relevant market needs to be determined where OPs are operating. In this context, the Commission is convinced with the OPs that every product cannot be taken as a relevant market in itself. Irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the OPs seems to be individually dominant. There are several players in the online retail market which have been arrayed as OPs in the present case, offering similar facilities to their customers. In view of the above, the Commission does



not consider it necessary to go into the question of abuse of dominance by the OPs as raised by the Informant and ADCTA.

19. In the light of the above analysis, the Commission is of the *prima facie* view that no case of contravention of the provisions of either section 3 or section 4 of the Act is made out against the OPs. Accordingly, the matter is closed under the provisions of section 26(2) of the Act.

20. The Secretary is directed to inform all concerned accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S.L.Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C. Nahta)
Member

New Delhi
Dated: 23.04.2015

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