

**AMAZON'S COMPETITION
INVESTIGATION IN INDIA: A CASE
FOR EXPANSION OF INVESTIGATION
AND GRANT OF INTERIM RELIEF**

*Madhavi Singh**

ABSTRACT *In the last few years, associations of domestic retailers have become vociferous opponents of Amazon's practices in India. In response to complaints of anti-competitive conduct, the Competition Commission of India has initiated an investigation into Amazon's anti-competitive vertical agreements in online smartphone retail. Against this backdrop, Reuters published a series of investigative reports which indicate that Amazon used internal data of third-party sellers and engaged in preferential treatment of private labels and preferred sellers. The Reuters reports join a series of other reports and studies which reveal that such conduct is pervasive across product categories. In light of this information, this paper makes two broad arguments. First, the paper argues that the scope of the competition investigation in India should be broadened beyond smartphones. The investigation should be reoriented to focus on the relationship between Amazon and its preferred sellers or retailers more broadly, rather than bifurcating the investigation along the lines of separate product categories. Second, the paper argues that the publicly-available information is sufficient to satisfy the legal test for passing an interim order. Such an interim order should prohibit Amazon from acting in the dual capacity of marketplace and seller. The necessity of the interim order has been highlighted through reference to the potentially irreparable and unquantifiable harm done to competition and consumers and the protracted nature of competition proceedings which might render the final order redundant.*

* Felix Scholar, Bachelor of Civil Law (University of Oxford); BA LLB (National Law School of India University). The author is a Research Associate at the Centre for Asian Legal Studies at National University of Singapore and a Visiting Faculty at National Law School of India University. Views are personal. Email: madhavisingh@nls.ac.in.

I. Introduction	2	B. Element 2: Necessary to Issue an Order of Restraint	24
II. Competition Cases Against Amazon in India	4	Impact on End-Consumers	25
III. New Information and Evidence About Amazon's Practices	7	Impact on Retailers	26
IV. Need to Broaden the Scope of Competition Investigation	10	Potential Benefits of Amazon?	26
V. Satisfaction of the Legal Test to Grant Interim Relief	16	C. Element 3: Likelihood of Irreparable and Irretrievable Damage or Definite Apprehension of Adverse Effect on Competition	29
Proposed Interim Relief	17	VI. Operationalization of Interim Relief	30
A. Element 1: Contravention Has Been Committed and Continues to Be Committed - Satisfaction of A 'Higher Than <i>Prima Facie</i> ' Standard of Proof	20	VII. <i>Suo Moto</i> Action Taken by the CCI on the basis of the Reuters Report	32
		VIII. Conclusion	36

I. INTRODUCTION

Even as the world wraps its head around the Wall Street Journal exposé of Facebook¹ and attempts to understand the implications of the Facebook papers,² there have been yet other journalistic investigations of a Big Tech company's internal documents and practices which once again reveal legally and ethically dubious conduct. In 2021 Reuters published two special reports based on thousands of pages of Amazon's internal documents which show that, at least in India, Amazon has been copying retailers' products and favoring private labels on its e-commerce platform as part of its formal strategy and that even high-level executives of the company were aware of these actions.³ Although this exposé of Amazon's practices has attracted only a fraction of the public attention in comparison to the Facebook Papers, the investigation and evidence unearthed against Amazon are legally significant in multiple ways, especially in India, as most of these documents apparently pertain to the company's practices in India.

¹ 'The Facebook Files: A Wall Street Journal Investigation' *The Wall Street Journal* <<https://www.wsj.com/articles/the-facebook-files-11631713039>> accessed 6 December 2021.

² Andrew Marantz, 'The Meta Narrative: What we've Learned from the Facebook Papers' *the New Yorker* (5 November 2021) <<https://www.newyorker.com/news/daily-comment/the-meta-narrative-what-weve-learned-from-the-facebook-papers>> accessed 6 December 2021; Bill Chappell, 'The Facebook Papers: What you need to Know about the Trove of Insider Documents' *NPR* (25 October 2021) <<https://www.npr.org/2021/10/25/1049015366/the-facebook-papers-what-you-need-to-know>> accessed 6 December 2021.

³ Aditya Kalra, Test the Boundaries: Amazon Documents Reveal Company's Secret Strategy to Dodge Indian Regulators, *Reuters* (17 February 2021) <<https://www.reuters.com/investigates/special-report/amazon-india-operation/>> accessed 6 December 2021; Aditya Kalra & Steve Stecklow, 'The Imitation Game: Amazon Copied Products and Rigged Search Results to Promote its Own Brands, Documents Show' *Reuters* (13 October 2021) <<https://www.reuters.com/investigates/special-report/amazon-india-rigging/>> accessed 6 December 2021.

For a long time now, retailers in India have cried foul over Amazon's conduct claiming that it engages in several anti-competitive practices which disadvantage third-party sellers on its platform resulting in an uneven playing field and eventual elimination of retailers from the market. Associations of retailers and Small and Medium enterprises have raised these concerns before the Ministry of Commerce and Industry,⁴ the Reserve Bank of India,⁵ the Enforcement Directorate⁶ and the Competition Commission of India.⁷ Additionally, retailers have also resorted to other means of expressing their grievances including organizing a protest during Jeff Bezos' visit to India,⁸ launching a call for a boycott of Amazon during the festival sale season,⁹ requesting Indian tech moguls to discontinue their ties with Amazon and stop acting as a front for its private labels,¹⁰ and attempting to characterize Amazon as the modern 'English East India Company.'¹¹ In the shape of the collective of Indian retailers, Amazon might have found its match, because even though these entities may not be comparable to the global tech behemoth in terms of size and access to funds, they certainly have the political clout and sway to influence the government and lobby regulators

⁴ 'Complaints against E-commerce Players being Looked into: Govt' *Financial Express* (31 July 2021) <<https://www.financialexpress.com/industry/complaints-against-e-commerce-players-being-looked-into-govt/2301262/>> accessed 6 December 2021.

⁵ 'Centre Directs ED, RBI to Act against Amazon, Flipkart for FDI, FEMA Violations' *The Times of India* (31 December 2020) <<https://timesofindia.indiatimes.com/business/india-business/centre-directs-ed-rbi-to-act-against-amazon-flipkart-for-fdi-fema-violations/articleshow/80043646.cms>> accessed 6 December 2021.

⁶ 'ED Initiates Probe against Amazon Over 'Violation' of Foreign Exchange Law' *The Print* (28 January 2021) <<https://theprint.in/india/ed-initiates-probe-against-amazon-over-violation-of-foreign-exchange-law/594109/>> accessed 6 December 2021.

⁷ *Delhi Vyapar Mahasangh v Flipkart Internet (P) Ltd* 2020 SCC OnLine CCI 3 (India); *Lifestyle Equities CV v Amazon Seller Services (P) Ltd* 2020 SCC OnLine CCI 33 (India); 'Prepare, Present Complaints against Big Online Retailers before CCI: Goyal' *Business Standard* (9 August 2020) <https://www.business-standard.com/article/economy-policy/prepare-present-complaints-against-big-online-retailers-before-cci-goyal-121080901885_1.html> accessed 6 December 2021.

⁸ Soutik Biswas, 'Why India is Greeting Amazon's Jeff Bezos with Protests' *British Broadcasting Corporation* (15 January 2020) <<https://www.bbc.com/news/world-asia-india-51117315>> accessed 6 December 2021.

⁹ 'Traders, Online Sellers Protest against E-commerce Brands' *The Economic Times* (2 November 2021) <<https://retail.economictimes.indiatimes.com/news/industry/traders-online-sellers-protest-against-e-commerce-brands/87477436>> accessed 6 December 2021.

¹⁰ 'Indian Sellers Collective asks Narayana Murthy to end ties with Amazon' *Business Standard* (19 July 2021) <https://www.business-standard.com/article/companies/indian-sellers-collective-asks-narayana-murthy-to-end-ties-with-amazon-121071900531_1.html> accessed 6 December 2021.

¹¹ PTI, 'RSS - Linked Weekly Terms Amazon as 'East India Company 2.0'' *The Indian Express* (26 September 2021) <<https://indianexpress.com/article/india/rss-linked-weekly-amazon-as-east-india-company-7536066/>> accessed 6 December 2021.

into taking action and getting their voices heard.¹² Unsurprisingly, therefore Indian retailers have managed to convince several government agencies, including the Enforcement Directorate and the Competition Commission of India, to investigate Amazon's practices in India. Given the high stakes involved, namely, greater control of one of the biggest digital retail markets in the world,¹³ the altercation between independent retailers and Amazon is expected to be intense and long-drawn.

In this backdrop this article looks at some of the journalistic reports and studies, especially the Reuters reports on Amazon's conduct in India, to argue that in light of all the information that is publicly available, the Competition Commission of India ("Commission" or "CCI") should: (i) expand and reorient the scope of its competition investigation into Amazon; and (ii) pass an interim order prohibiting Amazon from operating in the dual capacity of a marketplace and a seller.

II. COMPETITION CASES AGAINST AMAZON IN INDIA

One of the primary regulators which is currently assessing the legality of Amazon's conduct is the CCI. The allegations against Amazon before the CCI have taken the form of two cases that have culminated in very different outcomes.

In *Delhi Vyapar Mahasangh v Flipkart Internet (P) Ltd & Amazon*¹⁴ an association of Small and Medium Enterprises brought a complaint against the two biggest e-commerce platforms in India, Amazon and Flipkart, alleging that both platforms entered into several vertical agreements with their preferred sellers, that is, sellers who are directly or indirectly affiliated or controlled by these e-commerce platforms. It was alleged that both

¹² Anuj Srivas, 'Amazon's Jeff Bezos is in India, But he is not Exactly Getting a Welcome Wagon' *The Wire* (15 January 2020) <<https://thewire.in/business/amazon-jeff-bezos-india-welcome-wagon>> accessed 6 December 2021.

¹³ 'Value e-commerce in India to grow to \$40 Billion by 2030: Kearney' *Livemint* (17 August 2021) <<https://www.livemint.com/economy/value-e-commerce-in-india-to-grow-to-40-billion-by-2030-kearney-11629176945549.html>> accessed 6 December 2021; 'Indian E-retail Market Expected to Grow to \$140 Bn by FY26: Bain & Company' *Business Standard* (17 August 2021) <https://www.business-standard.com/article/companies/indian-e-retail-market-expected-to-grow-to-140-bn-by-fy26-bain-company-121081700144_1.html> accessed 6 December 2021; 'India's Consumer Digital Economy to Grow 10X to \$800 Bn by 2030: Redseer' *Business Standard* (1 July 2021) <https://www.business-standard.com/article/current-affairs/india-s-consumer-digital-economy-to-grow-10x-to-800-bn-by-2030-redseer-121063001783_1.html> accessed 6 December 2021.

¹⁴ *Delhi Vyapar Mahasangh v Flipkart Internet (P) Ltd* 2020 SCC OnLine CCI 3 (India) ("Delhi Vyapar Mahasangh").

e-commerce platforms engaged in deep discounting, preferential listing and exclusive tie-ups for both preferred sellers as well as their own private labels which amounted to an abuse of dominance as well as an anti-competitive agreement under the Competition Act, 2002. Importantly, in *Delhi Vyapar Mahasangh* the allegations were limited only to the sale of smartphones on these platforms and did not cover other product categories. In this case, the CCI *prima facie* found merit in the allegations and initiated a detailed investigation. This investigation is still ongoing. It should be noted that Amazon is being investigated for entering into anti-competitive vertical agreements (with preferred sellers) in violation of section 3(4) of the Competition Act.¹⁵ There is currently no investigation against Amazon for abuse of dominance under section 4 of the Competition Act.^{16,17}

In contrast to *Delhi Vyapar Mahasangh*, the CCI in *Lifestyle Equities v Amazon* refused to initiate an investigation when similar allegations were levelled against Amazon in the category of online fashion retail.¹⁸ The different

¹⁵ The Competition Act 2002, s 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-

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance,
- (f) shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

¹⁶ The Competition Act 2002, s 4(2):

There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group]-

- (a) directly or indirectly, imposes unfair or discriminatory-
 - (i) condition in purchase or sale of goods or service; or
 - (ii) price in purchase or sale (including predatory price) of goods or service.
- (b) limits or restricts—
 - (i) production of goods or provision of services or market therefor; or
 - (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access in any manner; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

¹⁷ *Delhi Vyapar Mahasangh* (n 14) [15] (the Commission noted that the Informant had levelled allegations of joint or collective abuse of dominance which is not envisaged under the Competition Act).

¹⁸ *Lifestyle Equities CV v Amazon Seller Services (P) Ltd* 2020 SCC OnLine CCI 33 (“Lifestyle Equities”); The order has been appealed before the National Company Law Appellate Tribunal - Competition Appeal (AT)-20/2020.

outcomes were sought to be justified on the basis of the different market structures and competitive dynamics in the two markets. Online fashion retail was considered much more competitive than online smartphone sales and additionally, there was no evidence of exclusive tie-ups in the former.¹⁹ Further, the primary allegation in *Lifestyle Equities* pertained to counterfeiting and unauthorized selling of products – wrongs which were considered to be outside the scope of competition law.²⁰ The decision of the CCI to close the case in *Lifestyle Equities* has been appealed before the National Company Law Appellate Tribunal, whose decision is awaited.²¹

With these cases, India joins a slew of jurisdictions including the USA,²² European Union,²³ Germany,²⁴ France,²⁵ and Australia,²⁶ which are attempting to use the antitrust framework to regulate Amazon's practices. However, the investigation against Amazon in India unlike most other jurisdictions is not based on abuse of dominance.²⁷ The fact that Amazon's conduct is

¹⁹ *ibid* [30].

²⁰ *ibid* [28].

²¹ National Company Law Appellate Tribunal, Competition Appeal (AT)-20/2020.

²² Laurine Feiner & Annie Palmer, 'DC Attorney General Sues Amazon on Antitrust Grounds, Alleges it Illegally Raises Prices' *CNBC* (25 May 2021) <<https://www.cnb.com/2021/05/25/dc-attorney-general-sues-amazon-on-antitrust-grounds-alleges-it-illegally-raises-prices.html>> accessed 6 December 2022; Annie Palmer & Laurine Feiner, 'DC Attorney General goes After Amazon's First-party Business in Amended Antitrust Complaint' *CNBC* (13 September 2021) <<https://www.cnb.com/2021/09/13/dc-attorney-general-targets-amazons-first-party-business-in-amended-antitrust-complaint.html>> accessed 6 December 2021.

²³ 'Antitrust: Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon' (*European Commission*, 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291> accessed 6 December 2021; 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public Independent Seller Data and Opens Second Investigation into its E-commerce Business Practices' (*European Commission*, 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 6 December 2021.

²⁴ Siladitya Ray, 'Amazon is being Investigated by Germany's Antitrust Watchdog for Allegedly Influencing Third-party Seller Prices During Pandemic' *Forbes* (17 August 2020) <<https://www.forbes.com/sites/siladityaray/2020/08/17/amazon-is-being-investigated-by-germanys-antitrust-watchdog-for-allegedly-influencing-third-party-seller-prices-during-pandemic/?sh=7104930a4ad6>> accessed 6 December 2021; 'German Watchdog Launches New Investigation into Amazon' *Reuters* (28 October 2020) <<https://www.reuters.com/article/amazon-com-germany-competition-idUSKBN27D2OQ>> accessed 6 December 2021; 'German Antitrust Watchdog Launches New Proceedings against Amazon' *Reuters* (18 May 2021) <<https://www.reuters.com/business/retail-consumer/german-antitrust-watchdog-launches-new-proceedings-against-amazon-2021-05-18/>> accessed 6 December 2021.

²⁵ 'France Files Complaint against Amazon for Abuse of Dominant Position' *Reuters* (18 December 2017) <<https://www.reuters.com/article/us-amazon-com-france-idUKKB-N1EC0QN>> accessed 6 December 2021.

²⁶ 'Australian Regulator to Probe Amazon, eBay and Other Online Markets' *CNBC* (21 July 2021) <<https://www.cnb.com/2021/07/22/australian-regulator-to-probe-amazon-ebay-and-other-online-markets.html>> accessed 6 December 2021.

²⁷ *See* (n 23-26).

being investigated using the framework of vertical agreements and not abuse of dominance is noteworthy since it changes the elements of the violation which have to be proved and has other potential implications. For instance, it means that the relevant market for Amazon need not be delineated and therefore, the competition assessment need not be narrowly focused on certain product categories which form the relevant market. Instead examining potential violation of 'vertical agreement' allows the investigation to be focused broadly on the nature of the relationship between Amazon and its sellers, not constrained by product categories. This and other peculiarities of using vertical agreements instead of abuse of dominance framework have been discussed in greater detail later in this paper.

III. NEW INFORMATION AND EVIDENCE ABOUT AMAZON'S PRACTICES

Amazon has consistently denied many of the allegations levelled against it as being factually incorrect. Before regulators in India as well as those in other jurisdictions, Amazon insists that it has access to the same data as all other sellers on its platform and it does not use internal non-public data of third-party sellers.²⁸ Similarly, Amazon claims that its search results are based on relevance, reviews and other objective metrics and it does not unfairly favour private labels or preferred sellers in the search ranking.²⁹ In the backdrop of these ongoing competition cases and Amazon's outright denial of the allegations as being factually incorrect, the Reuters' investigative reports come at a crucial time. According to Reuters, the internal documents in its possession reveal, amongst other things, that Amazon, at least in India:

- (i) Gave preferential treatment to a few Special Merchants³⁰ or selected sellers by giving them discounted fees, access to Amazon's global retail tools and helping them cut exclusive deals with other big tech manufacturers.
- (ii) Secretly exploited non-public internal seller data (including proprietary data, data relating to business strategies and transactions

²⁸ Lauren Feiner, 'Amazon Exec Tells Lawmakers the Company doesn't Favor Own Brands Over Products Sold by Third-party Merchants' *CNBC* (16 July 2019) <<https://www.cnbc.com/2019/07/16/amazon-tells-house-it-doesnt-favor-own-brands-in-antitrust-hearing.html>> accessed 6 December 2021.

²⁹ *ibid.*

³⁰ Kalra, 'Test the Boundaries' (n 3). (Cloudtail and Appario were two of Amazon's special merchants).

– number of units purchased, returned, etc.) to copy successful products,³¹ sell them at steep discounts and boost the sales of its private labels.

- (iii) Manipulated search results on the platform to favour the company's own products.³²

Apart from calling into question the credibility of Amazon's representations, the reports also indicate how extensive these practices are. Such conduct was observed across several product categories including textile/fashion retail, smartphones, home furnishings, health and household products. The Reuters reports come alongside other recent reports and studies in the *Wall Street Journal*,³³ the *New York Times*,³⁴ the *Markup*,³⁵ and the *Capitol Forum*,³⁶ which make similar claims that Amazon uses internal data of sell-

³¹ Whether unauthorized copying and counterfeiting falls within the subject matter domain of competition law is not a question that this paper seeks to answer. In order to avoid this question, the competition law concerns against Amazon which this paper seeks to address are not those of counterfeiting or copying but of use of internal seller data and preferential treatment.

³² Kalra, 'Test the Boundaries' (n 3); Kalra & Stecklow, 'The Imitation Game' (n 3).

³³ Dana Mattioli, 'Amazon Scooped up Data from its Own Sellers to Launch Competing Products' *The Wall Street Journal* (23 April 2020) <<https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>> accessed 6 December 2021; Shane Shifflett and others, 'Amazon's Choice isn't the Endorsement it Appears' *The Wall Street Journal* (22 December 2019) <https://www.wsj.com/articles/amazons-choice-isnt-the-endorsement-it-appears-11577035151#refreshed?mod=article_inline> accessed 6 December 2021; Dana Mattioli, 'Amazon Changed Search Algorithm in ways that Boost its Own Products' *The Wall Street Journal* (16 September 2019) <<https://www.wsj.com/articles/amazon-changed-search-algorithm-in-ways-that-boost-its-own-products-11568645345>> accessed 6 December 2021; cf Dana Mattioli, 'How Amazon Wins: By Steamrolling Rivals and Partners' *The Wall Street Journal* (22 December 2020) <<https://www.wsj.com/articles/amazon-competition-shopify-wayfair-all-birds-antitrust-11608235127>> accessed 6 December 2021.

³⁴ Julie Creswell, 'How Amazon Steers Shoppers to its Own Products' *The New York Times* (23 June 2018) <<https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>> accessed 6 December 2021

³⁵ Adrienne Jeffries & Leon Yin, 'Amazon Puts its Own "Brands" First Above Better-rated Products' (*The Markup*, 14 October 2021) <<https://themarkup.org/amazons-advantage/2021/10/14/amazon-puts-its-own-brands-first-above-better-rated-products>> accessed 6 December 2021; Leon Yin & Adrienne Jeffries, 'How we Analysed Amazon's Treatment of its "Brands" in Search Results' (*The Markup*, 14 October 2021) <<https://themarkup.org/amazons-advantage/2021/10/14/how-we-analyzed-amazons-treatment-of-its-brands-in-search-results>> accessed 6 December 2021.

³⁶ 'Amazon: EC Investigation to Focus on whether Amazon uses Data to Develop and Favor Private Label Products; Former Employees Say Data key to Private Label Strategy' (*The Capitol Forum*, 5 November 2018) <<https://thecapitolforum.com/wp-content/uploads/2018/11/Amazon-2018.11.05.pdf>> accessed 6 December 2021; 'Amazon: By Prioritising its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump Administration' (*The Capitol Forum*, 13 December 2016) <<https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf>> accessed 6 December 2021.

ers and prioritizes its own private labels. These claims are based on numerous employee testimonials, detailed experiments, studies and extensive internal documents. For its part, Amazon has simply responded that these reports are inaccurate and unsubstantiated.³⁷ Further, Amazon has stated that it has a company policy which prohibits the use of internal seller data to develop private labels and investigates any allegations of violation of this policy.³⁸

The Reuters reports have already caught the eye of relevant authorities both in India and abroad. The reports had a series of consequences. The Enforcement Directorate in India initiated an investigation into Amazon for potential violations of the foreign direct investment rules.³⁹ The High Court of Karnataka⁴⁰ and the Supreme Court of India dismissed Amazon's writ petition to halt the competition regulator's investigation.⁴¹ US lawmakers called for the breaking up of Amazon.⁴² Five members of the US House Judiciary Committee wrote to Amazon accusing the company's top executives of lying or misleading the Congress and threatening criminal action.⁴³ A global trade union urged the European Commission to widen its antitrust investigation of Amazon,⁴⁴ and the association of Indian digital companies

³⁷ 'Amazon India Boss Claims Report on Malpractices is Factually Incorrect' *The Economic Times* (18 February 2021) <https://economictimes.indiatimes.com/tech/tech-bytes/amazon-india-boss-claims-reuters-report-is-factually-incorrect/articleshow/81094015.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 6 December 2021.

³⁸ Steve Stecklow and others, 'Five U.S. Lawmakers Accuse Amazon of Possibly Lying to Congress Following Reuters Report' *Reuters* (19 October 2021) <<https://www.reuters.com/technology/five-us-lawmakers-accuse-amazon-possibly-lying-congress-following-reuters-report-2021-10-18/>> accessed 6 December 2021

³⁹ Aditya Kalra, 'India's Enforcement Directorate to Examine Findings in Reuters Report on Amazon: Agency Source' *Reuters* (18 February 2021) <<https://www.reuters.com/article/us-amazon-india-operations-enforcement-idUSKBN2A1ITC>> accessed 6 December 2021.

⁴⁰ Aditya Kalra, 'India Antitrust Body says Reuters Story Corroborates Evidence in Probe of Amazon' *Reuters* (19 March 2021) <<https://www.reuters.com/article/us-amazon-com-india-idUSKBN2BB1UF>> accessed 6 December 2021; Tarush Bhalla, 'HC Refuses to Halt CCI Probe against Amazon, Flipkart' *Livemint* (23 July 2021) <<https://www.livemint.com/companies/news/karnataka-hc-quashes-amazon-flipkart-s-plea-against-cci-investigation-11627049204076.html>> accessed 6 December 2021.

⁴¹ 'Supreme Court Refuses to Halt CCI Probe against Flipkart and Amazon' *The Indian Express* (10 August 2021) <<https://indianexpress.com/article/business/companies/supreme-court-refuses-halt-antitrust-probe-flipkart-amazon-cci-7445413/#:~:text=The%20probe%20ordered%20by%20the,refused%20to%20stay%20the%20investigation>> accessed 6 December 2021.

⁴² Aditya Kalra & Steve Stecklow, 'Indian Retailers Want Probe After Report Accuses Amazon of Rigging' *The Wire* (15 October 2021) <<https://thewire.in/business/indian-retailers-want-probe-after-report-accuses-amazon-of-rigging>> accessed 6 December 2021.

⁴³ Steve Stecklow and others (n 38).

⁴⁴ Aditya Kalra, 'Labour Union Urges European Authorities to Widen Amazon Antitrust Probe After Reuters Story' *Reuters* (22 October 2021) <<https://www.reuters.com/technology/labour-union-urges-european-authorities-widen-amazon-antitrust-probe-after-2021-10-22/>> accessed 6 December 2021.

demanded that the government initiate a probe into the company.⁴⁵ Quite apart from these developments, this paper argues that the Reuters and other recent reports on Amazon's conduct have important implications for the ongoing competition investigation and cases against Amazon in India.

IV. NEED TO BROADEN THE SCOPE OF COMPETITION INVESTIGATION

As outlined earlier the scope of the competition investigation against Amazon in India is rather narrow. At present, the investigation is limited only to the product category of smartphones as directed in *Delhi Vyapar Mahasangh*. Even after accounting for *Lifestyle Equities* in which investigation has not been directed but which is currently under appeal, only two product categories, namely, smartphone and fashion retail, are covered by the present cases. The remaining product categories currently do not seem to be on the radar of the Indian competition regulator. However, as the Reuters' and other reports reveal the alleged anti-competitive conduct is observed across multiple product categories (including textile/fashion retail, smartphones, home furnishings, health and household products) and this list seems to be ever-increasing as Amazon keeps expanding its private labels in new categories.⁴⁶ Given the ubiquity of the conduct, it is far from adequate that the competition investigation remains limited to only a few product categories.

Perhaps, one reason why the competition regulator might want to look at online retail in each product category separately is that the competitive dynamics and market structure of each category could be distinct. This was also one of the grounds adopted by the CCI while distinguishing *Delhi Vyapar Mahasangh* from *Lifestyle Equities* and refusing to direct investigation in the latter even though it had been directed in the former. For instance,

⁴⁵ 'Statement: ADIF Condemns Amazon's Predatory Playbook of Copying, Rigging and Killing Indian Brands, Urges Government for Timely Intervention' (Alliance of Digital India Foundation, 14 October 2021) <<https://blog.adif.in/p/adif-amazon-reuters-ecommerce-fair-markets>> accessed 6 December 2021.

⁴⁶ Anirban Sen, 'Amazon Trebles Choice of Offerings under Private Labels' *Livemint* (10 October 2018) <<https://www.livemint.com/Companies/O8Wc537U13T2iREYW1jYfM/Amazon-trebles-choice-of-offerings-under-private-labels.html>> accessed 6 December 2021; Digbijay Mishra, 'Amazon Scales up Accelerator for Private Labels' *The Economic Times* (13 November 2019) <<https://economictimes.indiatimes.com/tech/internet/amazon-scales-up-accelerator-for-pvt-labels/articleshow/72031746.cms>> accessed 6 December 2021; Alnoor Peermohamed, 'Only Private Labels Listings Back to Pre-Covid Days on Amazon' *The Economic Times* (28 May 2020) <<https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/only-private-labels-listings-back-to-pre-covid-days-on-amazon/articleshow/76055431.cms?from=mdr>> accessed 6 December 2021

in the online retail of smartphones or electronics, Amazon might be one of the biggest players as opposed to online fashion retail⁴⁷ or grocery shopping⁴⁸ where it might face fierce competition from other market players. However, the crucial question is whether this difference in competitive dynamics of the various product categories in which Amazon operates is 'legally relevant.'

As noted earlier, Amazon is being investigated for entering into an anti-competitive vertical agreement in violation of section 3(4) and is not being investigated for abuse of dominance under section 4 of the Competition Act. Establishing a vertical agreement does not require delineation of the relevant market or proving dominance unlike abuse of dominant position under section 4. The Supreme Court's decision in the *Coordination Committee* case created some confusion about whether relevant market delineation was a necessary step in a Section 3 analysis.⁴⁹ This confusion however has now been put to rest by the Supreme Court through an order pronounced in a Miscellaneous Application referred by the CCI requesting clarification of the ambiguous *Coordination Committee* holding. The Supreme Court has now clarified that "*the determination of 'relevant market' is not a mandatory pre-condition for making assessment of the alleged violation under Section 3 of the Act.*"⁵⁰

It is now clear that section 3(4) does not require delineation of relevant market and the constituent elements of a vertical agreement under section 3(4) are limited to the following:

- (i) the existence of an agreement;
- (ii) amongst enterprises at different levels or stages of the production chain;
- (iii) which causes or is likely to cause an appreciable adverse effect on competition in India.

⁴⁷ *Lifestyle Equities* (n 19) [30].

⁴⁸ Debojyoti Ghosh & Purna Lidhoo, 'What's Cooking in India's E-grocery Market?' (*Fortune India*, 15 July 2021) <<https://www.fortuneindia.com/enterprise/whats-cooking-in-indias-e-grocery-market/105623>> accessed 6 December 2021; 'Amazon, Flipkart, Others May have More Fierce Competitors Ahead After Reliance in E-commerce, Grocery' *Financial Express* (23 August 2020) <<https://www.financialexpress.com/industry/amazon-flipkart-walmart-and-ril-market-wars-indian-e-commerce-pond-big-enough-for-plenty-of-fish/2062742/>> accessed 6 December 2021.

⁴⁹ *CCI v Coordination Committee of Artists and Technicians of W.B. Film and Television* (2017) 5 SCC 17 (India).

⁵⁰ *CCI v Coordination Committee of Artists and Technicians of W.B. Film and Television* (2017) 5 SCC 17 (India).

Thus, for the assessment of vertical agreement the focal point or at least the starting point is the nature of the agreement between enterprises and not the relevant market (if at all the relevant market were to form part of the assessment). Had the competition investigation against Amazon been for abuse of dominance under section 4, then the starting point for analysis would necessarily have to look at the market structure and competitive dynamics as part of the relevant market delineation exercise. By choosing to investigate Amazon for vertical agreement under section 3(4) rather than for abuse of dominance under section 4, the CCI has successfully averted the compulsion to look at competitive dynamics or market structure as the first step of its analysis. Instead, the first step in the competition analysis of Amazon's conduct would look at the vertical relationship or agreement between Amazon and preferred sellers or retailers through which Amazon sells its private labels. More specifically, the first two elements of section 3(4) would look at the terms of Amazon's agreements with its preferred sellers (for instance, exclusivity, special benefits etc.) and the stages of the production chain at which they operate (role of Amazon as producer, distributor, inventory-manager etc.) Hence, any variance in competition dynamics or market structure of different product categories is irrelevant for the assessment of the first two elements of section 3(4) and does not justify limiting or defining the scope of the competition investigation along the lines of product categories.

The variance in competitive dynamics and market structures of different product categories on Amazon could be relevant for the assessment of the third element of section 3(4), that is, for ascertaining whether the vertical agreement(s) caused 'appreciable adverse effect on competition'. For instance, if Amazon's market share in the product category of smartphones is high then a vertical agreement in that category could have an 'appreciable adverse effect on competition'. Whereas in product categories such as fashion retail or grocery where Amazon's market share might be comparatively lesser and competition might be fierce, the effect of Amazon's vertical agreement on competition might not be appreciable. Although Amazon's market share in each product category might admittedly be different, an assessment of the third element of 'appreciable adverse effect on competition' examines not just the market share but several other factors including entry barriers, foreclosure effects etc.⁵¹ Hence, merely because Amazon's market share in a

⁵¹ The Competition Act 2002, s 19(3):

The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:

a. creation of barriers to new entrants in the market;

particular product category is low does not necessarily mean that its vertical agreement in that category is incapable of causing an 'appreciable adverse effect on competition'. For instance, even if Amazon's market share in online grocery retail is low, an 'appreciable adverse effect on competition' assessment should holistically look at other factors such as the company's potential to leverage its market power in other product categories and adjacent markets or its established distribution channels etc. The variance in competitive dynamics across different product categories of Amazon only becomes relevant (if at all)⁵² while assessing the final element of section 3(4), namely, 'appreciable adverse effect on competition'. If such differentiated analysis of 'appreciable adverse effect on competition' for each product category is needed, then the same can be carried out during the detailed competition investigation undertaken by the Director General. It does not explain why the investigation overall needs to be limited to or defined along the lines of one or two product categories.

Another potential reason why the Indian competition regulator might be comfortable with limiting the competition investigation to one or two product categories could be because they expect that any directions given by them regarding one product category would have a domino effect⁵³ and would result in Amazon changing its practices across the board. Even legally it could be used as a precedent to initiate cases against Amazon in other product categories and demand it to change its behaviour. However, such a process would not only be time-consuming but also uncertain and potentially ineffectual. Without a doubt, Amazon would argue (as it did in *Lifestyle Equities*) that the precedent would not directly and squarely apply across all product categories due to differences in competitive dynamics and market structure of each category. Therefore, it is unlikely that a direction given in

-
- 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; or
 - f. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

⁵² It might not be relevant if for instance, the CCI decides to look at 'appreciable adverse effect on competition' at the aggregate level, that is, aggregated across all product categories.

⁵³ For instance, the European Commission's decision in the Google comparison shopping case was considered to form a precedent which would provide the framework to consider the legality of Google's conduct vis-à-vis its other verticals. cf 'Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service' (*European Commission*, 27 June 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed 6 December 2021; Natasha Lomas, 'Google Fined \$2.7bn for EU Antitrust Violations over Shopping Searches' (*TechCrunch*, 27 June 2017) <<https://techcrunch.com/2017/06/27/google-fined-e2-42bn-for-eu-antitrust-violations-over-shopping-searches/>> accessed 6 December 2021.

one product category would have a domino effect and influence Amazon to change its behaviour voluntarily across all categories. As evidence, the CCI's Market Study on E-Commerce already prescribes that e-commerce platforms observe platform neutrality,⁵⁴ but as revealed by subsequent reports and studies (discussed above) this prescription might not have had the desired prohibitory and self-regulatory effect. It is unclear why an order of the CCI pertaining to one specific product category would have the desired domino effect when the CCI's Market Study could not achieve the same especially if Amazon feels that it has a chance to be able to distinguish the cases on the basis of different market structures and competitive dynamics.

In line with the spirit of section 3(4), the competition investigation against Amazon should focus on the vertical agreement or relationship between Amazon and its preferred sellers or sellers through which it sells private labels more generally rather than being limited by narrow product categories. Further, the boundaries of these product categories are hardly clear or fixed. Each category could arguably be broken down into further sub-categories and the competitive dynamics in each of them might be different. For instance, household appliances could be broken down into sub-groups of electrical appliances, kitchen appliances, bathroom supplies etc.⁵⁵ and conceivably, the competitive dynamics in each of these sub-groups might be different. Thus, by attempting to look at the competition in each product category separately the competition regulator might be setting themselves up for not just an arduous but maybe even an impossible task. In any event, since section 3(4) is based on the agreement between enterprises rather than the products in question, basing the competition investigation on product categories seems redundant and inessential as per statutory requirements. Thus, the scope of the competition investigation against Amazon should be broadened.

This would also be in consonance with the investigations being carried out in other jurisdictions such as the European Union and the USA, which are looking at Amazon's practices on its e-commerce platform more broadly, not constrained by specific product categories. The European Commission has opened two antitrust investigations against Amazon. The first looks specifically at Amazon's use of non-public data from independent retailers who sell on its marketplace and whether such data is being used to favour

⁵⁴ Market Study on E-Commerce in India (*Competition Commission of India*, 8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 6 December 2021.

⁵⁵ Based on Amazon's own categories and sub-categories of products at amazon.in.

Amazon's private labels.⁵⁶ The second investigation looks into the possible preferential treatment of Amazon's private labels and those of marketplace sellers that use Amazon's logistics and delivery services.⁵⁷ The two European Commission investigations broadly pertain to Amazon's dual role as a marketplace and a retailer on its own marketplace and any potential unfairness which could arise as a consequence of this dual role. Similarly, in the USA, the first antitrust suit brought against Amazon by the D.C. Attorney General is not constrained by any specific product category.⁵⁸ Hence, leading anti-trust investigations into Amazon around the world have dealt with the practices of the platform more broadly rather than restricting it to or bifurcating it along narrow product categories.

Based on the Reuters' reports which reveal the prevalence of the allegedly anti-competitive conduct across numerous product categories and in light of the spirit and elements of section 3(4) as discussed above, the scope of the competition investigation against Amazon should be expanded. It should be based on the interactions and agreements between Amazon and preferred sellers/ third-party sellers more broadly and should not be limited in scope to only certain product categories. The variance in competitive dynamics and market structures across product categories could be dealt with during the detailed competition investigation. Procedurally too, the Director General has the power to expand the scope of the investigation beyond what has been raised in the information or the reference.⁵⁹ Even if the DG is unable to exercise her discretion liberally to expand the scope of the existing investigations, the CCI could anyway initiate a broader inquiry into Amazon on its own motion – a power which has been expressly conferred on it by the Competition Act,⁶⁰ and which has been exercised by the Commission on numerous occasions in the past.⁶¹ Any subsequent broader inquiry initiated

⁵⁶ 'Antitrust: Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon' (*European Commission*, 17 July 2019) <https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291> accessed 6 December 2021.

⁵⁷ 'Antitrust: Commission Sends Statement of Objections to Amazon for the use of Non-public Independent Seller Data and Opens Second Investigation into its E-commerce Business Practices' (*European Commission*, 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 6 December 2021.

⁵⁸ Laurine Feiner & Annie Palmer (n 23).

⁵⁹ The Director General got this power pursuant to an amendment to the Competition Commission of India (General) Regulations 2019; See Competition Commission of India, The Competition Commission of India (General) Amendment Regulations 2020, S. No. 49 (Notified on February 6, 2020) <https://www.cci.gov.in/sites/default/files/regulation_pdf/216024.pdf>; See also *Excel Crop Care Ltd v CCI* (2017) 8 SCC 47 (India), [44]-[45].

⁶⁰ The Competition Act 2002, s 19(1) (Gives the Commission the power to inquire into any alleged contravention on its own motion).

⁶¹ Most recently the CCI used this power to *suo moto* begin an inquiry against Facebook and WhatsApp (*In re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, 2021

by the CCI could also be joined with all other similar matters.⁶² Thus, there exist neither substantive legal nor procedural hurdles to expanding and reorienting the scope of the competition investigation and such expansion of scope has been made necessary by the emergence of new information and evidence.

V. SATISFACTION OF THE LEGAL TEST TO GRANT INTERIM RELIEF

In addition to expanding and reorienting the scope of the competition investigation, the information and evidence made available by journalistic reports and studies conducted create a convincing case for the grant of interim relief against Amazon. The CCI has the power to issue interim orders even without giving notice to the parties under section 33 of the Competition Act. However, the Supreme Court has cautioned that interim orders should be issued only sparingly and under compelling and exceptional circumstances.⁶³ In accord with this direction, the CCI has rarely granted interim relief.⁶⁴ The Supreme Court in *CCI v SAIL* has held that in order to pass an interim order under section 33, the CCI should record its satisfaction that:

- (i) A contravention has been committed and continues to be committed or is about to be committed. Such satisfaction should be of a higher degree than the formation of a *prima facie* view under section 26(1) of the Competition Act.
- (ii) It is necessary to issue an order of restraint.
- (iii) There is every likelihood of irreparable and irretrievable damage or there is definite apprehension that it would have an adverse effect on competition in the market.⁶⁵

In the light of employee testimonials and the unearthing of internal documents through journalistic reports,⁶⁶ this paper attempts to show that the

SCC OnLine CCI 19).

⁶² The Competition Commission of India (General) Regulations 2009, Regulation 27 (Power of Commission to join multiple information).

⁶³ *CCI v SAIL* (2010) 10 SCC 744, [119] (“*Steel Authority of India*”).

⁶⁴ *Nuziveedu Seeds Ltd v Mahyco Monsanto Biotech (India) Ltd* 2016 SCC OnLine CCI 48 (India); *Indian National Shipowners’ Assn v ONGC Ltd* 2018 SCC OnLine CCI 48 (India); *Confederation of Real Estate Developers Assn of India v Department of Town and Country Planning, Government of Haryana*, 2018 SCC OnLine CCI 6 (India); *Federation of Hotel & Restaurant Associations of India v MakeMyTrip India (P) Ltd* 2021 SCC OnLine CCI 12 (India).

⁶⁵ *Steel Authority of India Ltd* (n 63) [31], [119].

⁶⁶ See (n 32- 36).

Steel Authority of India Ltd. test for granting interim relief stands satisfied. Reuters claims that it has thousands of internal documents in its possession which include drafts of meeting notes, PowerPoint slides, business reports and emails. The contents of these as extracted in the Reuters reports seem to pertain directly to Amazon's alleged anti-competitive conduct in India. The Commission has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 including summoning and examining any person, requiring the discovery and production of documents, receiving evidence on affidavit etc.⁶⁷ Thus, the Commission should utilize these powers to inspect these documents and examine the reports and studies which are already publicly available to ascertain whether interim relief needs to be granted.

PROPOSED INTERIM RELIEF

At the outset, it is crucial to understand the kind of interim restraint being proposed to curb Amazon's anti-competitive conduct before delving into its necessity and satisfaction of the legal test under section 33 of the Competition Act. The simplest and most straightforward relief which might come to mind is that Amazon provides an undertaking that it would not engage in preferential treatment of its private labels or preferred sellers, nor use internal seller data. However, such a simple prohibitory dictum to not engage in anti-competitive conduct would be redundant. This is because Amazon already claims that it does not preferentially treat certain products nor use internal seller data.⁶⁸ Hence, such an interim order would simply prohibit Amazon from doing something which according to its own representations it already doesn't do. Further, such a simple prohibition in fact already exists. The CCI's Market Study on E-Commerce already recognizes 'Platform Neutrality' as an area requiring self-regulation from e-commerce platforms. The CCI Market Study report advises e-commerce platforms to maintain platform neutrality and not engage in preferential treatment of either private labels or preferred sellers.⁶⁹ Yet neither the CCI's directions in the Market Study report nor Amazon's own representations to this effect seem to have prevented the company from engaging in such conduct as revealed through several journalistic reports.

⁶⁷ The Competition Act 2002, s 36(2); The Competition Commission of India (General) Regulations, regs 44-45.

⁶⁸ Lauren Feiner (n 28).

⁶⁹ Market Study on E-Commerce in India (n 52) [86]-[89].

Additionally, at the interim stage, it is very difficult for the regulator to monitor and ensure that Amazon does not mete out preferential treatment nor use internal seller data especially since the internal workings of Amazon and its search and ranking algorithms are closely guarded secrets. Moreover, the meaning of 'preferential treatment' and which practices might fall within its ambit continues to be disputed. For instance, Amazon claims that several of its practices such as 'search seeding' and 'search sparkles' are legitimate practices to promote new products which do not yet have enough sales or reviews to be effectively ranked by the search algorithm.⁷⁰ A simple prohibitory interim relief of not engaging in 'preferential treatment' would give rise to interpretative uncertainty, and potential redundancy and would also be equivalent to treating the symptoms of the problem without targeting the incentives which influence the company's conduct.

Amazon's dual role as the marketplace as well as the seller on the same marketplace is the root cause of the conflict of interest which manifests itself in the form of these anti-competitive practices. Amazon's stake in the products sold on its e-commerce platform either through special merchants/preferred sellers or in the form of its private labels incentivizes the company to engage in preferential treatment. The sale of private labels and products of preferred sellers usually come with higher profit margins. The company's push for greater penetration of private labels in all categories encourages a company-wide culture of pervasive use of internal seller data and preferential treatment,⁷¹ which will be impossible to deter unless this incentive is removed. Most of the alleged anti-competitive practices including use of non-public seller data, unfairly favouring its own products, brokering exclusive deals between preferred sellers and manufacturers etc. are traceable to the conflict of interest which arises when Amazon plays the dual role of marketplace and seller. Thus, the solution to the continuing anti-competitive conduct should target this root cause of the problem by prohibiting Amazon from operating as both the marketplace and the seller. This would entail that

⁷⁰ Kalra & Stecklow, 'The Imitation Game' (n 3).

⁷¹ See (n 94)

neither Amazon nor its associate companies⁷² nor its subsidiary companies⁷³ directly or indirectly operate as manufacturers or sellers on its platform.

This absolute restriction prohibiting Amazon from operating in the dual capacity of both seller and marketplace might appear harsh at first sight especially since it seems that traditional brick-and-mortar stores,⁷⁴ as well as other e-commerce platforms⁷⁵ in India, also operate their own private labels. However, traditional business models cannot be accurately compared to an e-commerce platform since the latter has characteristics (such as network effects and data-driven precision targeting) which are unique to or at least exaggerated in comparison to the former.⁷⁶ Network effects, use of big data, collection of vast troves of granular data facilitating precise behavioural discrimination and targeting, ability to engage in targeted advertising and pop-up notifications (even outside Amazon's platform) and search bias are features which are unique to or are much more exaggerated in the

⁷² The Companies Act 2013, s 2(6):

“associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation - For the purposes of this clause, “significant influence” means control of at least twenty per cent. of total share capital, or of business decisions under an agreement.

⁷³ The Companies Act 2013, s 2(87):

“subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company –

- (i) controls the composition of the Board of Directors; or
- (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation – For the purposes of this clause –

- (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;
- (b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- (c) the expression “company” includes any body corporate;
- (d) “layer” in relation to a holding company means its subsidiary or subsidiaries;

⁷⁴ Abhirup Roy & Aditya Kalra, ‘In India, Reliance Retail's Private Labels Revolution Spooks Global Consumer Goods Makers’ *Reuters* (22 March 2021) <<https://www.reuters.com/article/india-retail-reliance-privatelabels-idUSKBN2BE0B9>> accessed 6 December 2021; Malavika Velayanikal, ‘Happy Days for Customers as Retailers go the Private Label Way’ *Livemint* (10 November 2019) <<https://www.livemint.com/companies/start-ups/happy-days-for-customers-as-retailers-go-the-private-label-way-11573392752234.html>> accessed 6 December 2021.

⁷⁵ Suneera Tandon, ‘Private Labels to Help Drive Profitable Growth for E-commerce Marketplaces: Report’ *Livemint* (26 February 2020) <<https://www.livemint.com/industry/retail/pvt-labels-to-help-drive-profitable-growth-for-e-commerce-marketplaces-report-11582728645180.html>> accessed 6 December 2021.

⁷⁶ Julie Creswell (n 34).

e-commerce model than in traditional retail stores selling private brands. For instance, Amazon has unprecedented amounts of data to know rather accurately consumers' preferences, price sensitivity points etc. Such data is used by Amazon to design its private labels, unfairly advantage them in search ranking and follow the customer incessantly with advertisements and pop-up notifications not just on Amazon's own platform but perhaps even on other websites. These characteristics are either unique to or at the very least much more exaggerated in the e-commerce model than in traditional brick-and-mortar stores. Additionally, the proposed interim relief doesn't seek to single out or disadvantage Amazon in comparison to other e-commerce platforms in India such as Walmart-owned Flipkart⁷⁷ or Ajio,⁷⁸ etc. which also operate their own private labels. This article argues for the grant of interim relief against Amazon based on the evidence of preferential treatment that has emerged against Amazon⁷⁹ and if evidence of preferential treatment were to emerge against some traditional brick-and-mortar stores or even other e-commerce platforms then similar investigations or reliefs could also be demanded against them based on the facts of those cases.

Thus, as explained above, prohibiting Amazon from operating as a seller on its own marketplace is the only viable non-redundant interim relief that could be granted that addresses the competition concerns at issue. Such a restriction would manage to address almost all of the competition concerns ranging from the use of non-public seller data, search bias, preferential treatment, exclusive agreements etc. by removing the incentive which leads Amazon to engage in such conduct. The subsequent sections of this paper discuss the manner in which this proposed relief satisfies the elements of the *Steel Authority of India Ltd.* test and therefore can be granted by the CCI under section 33 of the Competition Act.

⁷⁷ Flipkart also a range of private brands. See Vishnu Sreekumar, 'Quality First: How Flipkart's Private Labels Bring Trust and Affordability to the Indian Market' (*Flipkart Stories*, 25 April 2019) <<https://stories.flipkart.com/flipkart-private-brands-trust-affordability/>> accessed 6 December 2021.

⁷⁸ Ajio sells private labels such as 'Ajio Own'. See <<https://www.ajio.com/help/whoweaare>> accessed 6 December 2021; Rasul Bailay, 'Reliance Retail's Private Labels Outpace Top Fashion Brands Like Puma, Nike on Ajio' *The Economic Times* (18 September 2021) <<https://economictimes.indiatimes.com/industry/services/retail/ajios-private-labels-outpace-top-fashion-brands/articleshow/86304404.cms?from=mdr>> accessed 6 December 2021.

⁷⁹ See (n 32-36).

A. Element 1: Contravention Has Been Committed and Continues to Be Committed - Satisfaction of A 'Higher Than *Prima Facie*' Standard of Proof.

The standard for passing an interim order under section 33 is higher than the standard for initiating an investigation under section 26(1).⁸⁰ According to the Supreme Court, for initiating an investigation the Commission needs to reach a “*tentative view at that stage*” whereas for granting interim relief there should be “*a definite expression of the satisfaction recorded by the Commission upon due application of mind*”.⁸¹ Since the CCI in *Delhi Vyapar Mahasangh* has already formed a *prima facie* opinion that there exists a contravention, the subsequent emergence of additional internal documents and evidence should concretize proof of contravention and meet the ‘higher than *prima facie*’ standard required under section 33. Specifically, in the context of smartphones, Reuters reported that Amazon gave preferential treatment to its Special Merchant, Cloudtail, and helped it enter into deals with tech companies such as Apple, Microsoft and OnePlus including exclusive deals to sell their smartphones.⁸² This information is directly relevant for *Delhi Vyapar Mahasangh* which pertains to the exclusive sale of smartphones and proof of Amazon brokering such exclusive tie-ups for its special merchants would meet the higher standard stipulated for grant of interim relief. For other product categories too, especially textiles and categories in which Amazon’s private labels compete, the reports’ claim to be based on substantial evidence (including internal memos and reports) of unfair preferential treatment, manipulation of search results and use of third-party internal data which warrant closer scrutiny and could potentially satisfy the higher than *prima facie* threshold required under section 33.

In any event, as argued in the earlier section of this paper,⁸³ the competition investigation against Amazon should be designed to look at the agreements of Amazon with third-party sellers/ preferred sellers more generally rather than examining a few distinct product categories. Consequently, the CCI need not look for ‘higher than *prima facie*’ evidence for vertical agreement in each product category separately. Instead, the CCI should examine whether there exists evidence of vertical agreement between Amazon and its preferred sellers more generally. The constituent elements of a vertical agreement under section 3(4), as discussed earlier, are: (i) the existence of an agreement; (ii) amongst enterprises at different levels or stages of the production

⁸⁰ *Steel Authority of India Ltd.* (n 63) [31], [119].

⁸¹ *ibid* [117].

⁸² Kalra, ‘Test the Boundaries’ (n 3).

⁸³ See text in Part IV titled ‘Need to Broaden the Scope of Competition Investigation’.

chain; (iii) which causes or is likely to cause an ‘appreciable adverse effect on competition’. For Amazon, each of these elements can be proved to a ‘higher than *prima facie*’ standard. For the first two elements, the existence of at least some of these agreements and relationships between Amazon and a few sellers is a matter of public record and is not contested even by Amazon. For instance, Amazon’s joint venture with Catamaran and Patni Group which resulted in the creation of special merchants such as Cloutail⁸⁴ and Appario⁸⁵ are all matters of public record. Any doubt regarding the existence of such agreements also stands clarified in light of subsequent evidence highlighted by Reuters’ reports.⁸⁶

What could be contested by Amazon is the satisfaction of the third element of section 3(4) - whether these agreements cause or are likely to cause ‘appreciable adverse effect on competition’. Once again, the reports of Reuters,⁸⁷ the Wall Street Journal,⁸⁸ the New York Times,⁸⁹ the Markup,⁹⁰ the Capitol Forum⁹¹ etc. provide substantial evidence of preferential treatment and ‘appreciable adverse effect on competition’ attributable to Amazon’s engagement with preferred sellers and its foray in private labels. Although the Reuters reports are primarily the ones that concern the company’s conduct in India, even the other reports and studies conducted in the context of

⁸⁴ Nisha Poddar, ‘Narayana Murthy to Partner with Amazon for E-commerce Business in India’ *The Economic Times* (27 June 2014) <<https://economictimes.indiatimes.com/tech/ites/narayana-murthy-to-partner-with-amazon-for-e-commerce-business-in-india/articleshow/37267628.cms?from=mdr>> accessed 6 December 2021; Mihir Dalal & Shrutika Verma, ‘Amazon’s JV Cloutail is its Biggest Seller in India’ *Livemint* (29 October 2015) <<https://www.livemint.com/Companies/RjEDJkA3QyBSTsMDdaXbCN/Amazons-JV-Cloutail-is-its-biggest-seller-in-India.html>> accessed 6 December 2021; ‘Amazon, Catamaran to End Cloutail Joint Venture Next Year’ *The Times of India* (9 August 2021) <<https://timesofindia.indiatimes.com/business/india-business/amazon-catamaran-to-end-cloutail-joint-venture-next-year/articleshow/85181383.cms>> accessed 6 December 2021 (Although both companies have announced that the joint venture will be discontinued from 2022).

⁸⁵ Digbijay Mishra, ‘Amazon Forms JV with Patni’ *The Times of India* (25 September 2017) <<https://timesofindia.indiatimes.com/business/india-business/amazon-forms-jv-with-patni/articleshow/60820854.cms>> accessed 6 December 2021; ‘Amazon may not Renew Venture with Patni Group’ *The Hindu Business Line* (11 November 2021) <<https://www.thehindubusinessline.com/companies/amazon-may-not-renew-venture-with-patni-group/article37424077.ece>> accessed 6 December 2021 (Although there are news that the JV with Patni Group may also be dissolved).

⁸⁶ Kalra, ‘Test the Boundaries’ (n 3); Aditya Kalra, ‘Amazon Deployed Secret Strategy to Dodge India’s Regulators, Documents Show’ *Reuters* (17 February 2021) <<https://www.reuters.com/article/amazon-india-operation-ecommerce-idUSKBN2AH1HY>> accessed 6 December 2021.

⁸⁷ Kalra, ‘Test the Boundaries’ (n 3); Kalra & Stecklow, ‘The Imitation Game’ (n 3).

⁸⁸ See (n 33).

⁸⁹ See (n 34).

⁹⁰ See (n 35).

⁹¹ See (n 36).

other jurisdictions could provide useful insights and learnings into Amazon's core infrastructure, search algorithm or common practices.⁹² These reports reveal that Amazon has access to non-public seller data (including search data, price sensitivity data and information about previous transactions of each customer) which allows it to target its private label products with almost perfect precision.⁹³ Some of this additional data that Amazon has access to is extremely useful. For instance, some reports suggest that Amazon's private label team has access to its database of search terms that customers frequently use and these terms are added to descriptions of Amazon's private label products which boosts the ranking of the products on the search results page.⁹⁴ Similarly, it has been suggested that Amazon has access to data about consumers' price sensitivity points, their buying patterns and the items they have viewed in the past- all of which are used by the company to push its private label products on consumers. Using data which is not available to other sellers and more egregiously using the non-public internal data of sellers, Amazon increases the conversion rates for its private labels and since the search algorithm looks at the conversion rates of products, it succeeds in artificially increasing the ranking of its private labels.⁹⁵ Although Amazon claims that it has a company policy prohibiting employees from using internal seller data, employee testimonials reveal that in fact employees have unfettered access to this data and its use in decision-making is pervasive to the extent that such data was even openly discussed in company meetings.⁹⁶

Other studies reveal that Amazon accords prominent placement to its private labels in comparison to competing products⁹⁷ - even when these com-

⁹² As a corollary, the Reuters report although based on Amazon's conduct in India has been relied upon to demand that the investigation against Amazon be expanded in the EU and the U.S. Congress has also relied upon it to demand an explanation from the company. See (n 43-44) and accompanying text.

⁹³ 'Amazon: EC Investigation to Focus on Whether Amazon uses Data to Develop and Favour Private Label Products; Former Employees say Data Key to Private Label Strategy' (*The Capitol Forum*, 5 November 2018) <<https://thecapitolforum.com/wp-content/uploads/2018/11/Amazon-2018.11.05.pdf>> accessed 6 December 2021.

⁹⁴ Dana Mattioli, 'How Amazon Wins: By Steamrolling Rivals and Partners' *The Wall Street Journal* (22 December 2020) <<https://www.wsj.com/articles/amazon-competition-shopify-wayfair-allbirds-antitrust-11608235127>> accessed 6 December 2021.

⁹⁵ *The Capitol Forum* (n 91).

⁹⁶ *ibid*; Dana Mattioli, 'Amazon Scooped up Data from its Own Sellers to Launch Competing Products' *The Wall Street Journal* (23 April 2020) <<https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>> accessed 6 December 2021 (Based on revelations made in these reports Amazon has stated that it has launched an internal investigation. However, nothing is known yet about the progress or outcomes of these supposed internal investigations).

⁹⁷ 'Amazon: By Prioritising its Own Fashion Label Brands in Product Placement on its Increasingly Dominant Platform, Amazon Risks Antitrust Enforcement by a Trump

peting products have higher customer ratings and more sales.⁹⁸ This was frequently achieved through ‘search seeding’ and the use of ‘search sparkles’.⁹⁹ Additionally, it seems that Amazon has recently optimized its search algorithm so that instead of showing customers primarily the most relevant and best-selling listings the site also gives a boost to items that are more profitable for the company – a move which has been claimed to favour Amazon’s private labels.¹⁰⁰ Frequently private labels or products sold by its preferred sellers are labelled as “best seller” or “Amazon’s choice” – titles which could potentially drive up sales.¹⁰¹ Amazon also allegedly puts several restrictions on the advertisements that rival device manufacturers could buy on its website.¹⁰²

In the light of all the evidence and information already in the possession of the CCI regarding Amazon’s anti-competitive conduct and subsequent material, studies and evidence reported by various sources, the standard of proof required for the grant of interim relief has been met. The elements of section 3(4), namely, the existence of a vertical agreement which causes or is likely to cause an ‘appreciable adverse effect on competition’ have been proven to a ‘higher than *prima facie*’ threshold.

B. Element 2: Necessary to Issue an Order of Restraint

The second leg of the *Steel Authority of India Ltd.* test to grant interim relief under section 33 involves an evaluation of the balance of convenience¹⁰³ and whether justice would be best served by passing the interim order- whether the extant position can be restored at a later stage or the likely damages be

Administration’ (*The Capitol Forum*, 13 December 2016) <<https://thecapitolforum.com/wp-content/uploads/2016/07/Amazon-2016.12.13.pdf>> accessed 6 December 2021.

⁹⁸ Adrienne Jeffries & Leon Yin, ‘Amazon Puts its Own “Brands” First above Better-rated Products’ (*The Markup*, 14 October 2021) <<https://themarkup.org/amazons-advantage/2021/10/14/amazon-puts-its-own-brands-first-above-better-rated-products>> accessed 6 December 2021 (the Markup study has even claimed that- “When we analyzed star ratings and number of reviews, neither could predict much better than a coin toss which product Amazon placed first in search results”).

⁹⁹ Kalra & Stecklow, ‘The Imitation Game’ (n 3).

¹⁰⁰ Dana Mattioli, ‘Amazon Changed search algorithm in ways that boost its own products’ *The Wall Street Journal* (16 September 2019) <<https://www.wsj.com/articles/amazon-changed-search-algorithm-in-ways-that-boost-its-own-products-11568645345>> accessed 6 December 2021.

¹⁰¹ *The Capitol Forum* (n 95); Shane Shifflett and others (n 33).

¹⁰² Dana Mattioli and others, ‘Amazon Restricts How Rival Device Makers Buy Ads on its Site’ *The Wall Street Journal* (22 September 2020) <https://www.wsj.com/articles/amazon-restricts-advertising-competitor-device-makers-roku-arlo-11600786638?mod=article_inline> accessed 6 December 2021; Adrienne Jeffries & Leon Yin (n 98).

¹⁰³ *Federation of Hotel & Restaurant Associations of India v MakeMyTrip India (P) Ltd* 2021 SCC OnLine CCI 12 (India) [106].

compensated.¹⁰⁴ Amazon is a multi-sided platform which services two broad categories of 'consumers': (i) end-consumers who purchase products on the platform; and (ii) sellers or retailers who utilize the platform for selling their products and reaching the consumer. Notwithstanding the Neo-Brandeisian critique of the 'consumer welfare' standard,¹⁰⁵ even the conventional narrow notion of 'consumer welfare' would examine the impact of Amazon's conduct on both categories of consumers, that is, end-consumers as well as retailers.¹⁰⁶ A common mistake often committed in competition assessment of Amazon's conduct is omitting to include retailers as a category of 'consumer' while assessing 'consumer welfare.' Such inadvertent exclusion of retailers from the category of 'consumers' allows Amazon to over-emphasize the benefits that Amazon brings to end-consumers such as wide choice, discounted prices, ease of access etc. Apparent damage to retailers is excluded from 'consumer welfare' assessment by painting them as 'competitors' rather than 'consumers.' However, it must be remembered that at its core, Amazon is a platform connecting sellers to buyers. Retailers on Amazon's platform are Amazon's 'consumers' first and only in certain scenarios do they become competitors which in turn creates the conflict of interest that incentivizes Amazon to engage in anti-competitive conduct. Thus, when determining

¹⁰⁴ *Confederation of Real Estate Developers Assn of India v Department of Town and Country Planning, Government of Haryana* 2018 SCC OnLine CCI 6 (India) [22].

¹⁰⁵ This presupposes that competition law is concerned with harm to 'consumer welfare'. This premise is now the subject of much debate and has been questioned by Neo-Brandeisian scholars who claim that traditional notions of 'consumer welfare' are too narrow and that competition law should be concerned more broadly with concentration of power or market structure. Without expressing an opinion on whether 'consumer welfare' is or should be the basis of Indian competition law assessment- this article argues that even if competition law is narrowly concerned with 'consumer welfare', a consumer welfare assessment would also need to account for the impact on retailers as they are also consumers of Amazon. For an overview of primary Neo-Brandeisian ideas see Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (2018); Lina M Khan, 'Amazon's Antitrust Paradox' (2016) 126 *Yale Law Journal*.

¹⁰⁶ The definition of 'consumer' under the Competition Act 2002 is broad and would cover both end-consumers and retailers. See the Competition Act 2002, s 2(f):

"consumer" means any person who –

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use.

the necessity of interim relief even the conventional stringent standard of ‘consumer welfare’ would analyse the impact of Amazon’s conduct on both categories of consumers, namely, end-consumers and retailers.

IMPACT ON END-CONSUMERS

Through preferential treatment of private labels and preferred sellers, end-consumers are denied choice and access to potentially higher-quality or even cheaper products that are suppressed in the ranking.¹⁰⁷ Especially when preferentially placed products are not identified as such then their prominent placement might run antithetical to consumers’ belief that the ranking of products on Amazon’s results page is done on the basis of relevance or price or quality of the product. Thus, end consumers might even be unaware of the harm being inflicted on them. Additionally, by suppressing and eventually excluding sellers and retailers, Amazon potentially dampens innovation and affects choice and quality of future products for end consumers.

IMPACT ON RETAILERS

On the other side of the platform, Amazon’s conduct harms the sales and profit margins of small retailers and sellers and even results in their exclusion. As its power grows and it becomes an unavoidable trading partner for many retailers, Amazon’s ability to inflict damage on them and the severity of such damage by preferential treatment of private brands also increase. The gradual diminution of profits and market share as well as eventual exclusion from the market are potentially irreversible for smaller players. Amazon creates an uneven playing field and builds entry barriers through preferential treatment which cannot be overcome by an equally efficient or even superior retail competitor of Amazon’s private labels. The true extent of the damage might be impossible to calculate as some of Amazon’s brands or its association with certain retailers are unknown and even otherwise difficult to discern.¹⁰⁸

Thus, Amazon’s anti-competitive conduct harms consumers on both sides of its platform.

¹⁰⁷ Adrienne Jeffries & Leon Yin (n 98).

¹⁰⁸ Julie Creswell (n 34).

POTENTIAL BENEFITS OF AMAZON?

Amazon, for its part, claims that it connects small sellers to consumers and in fact, helps consumers on both sides of the platform. It helps retailers and entrepreneurs grow their business¹⁰⁹ and brings several benefits to the end-consumer in the form of wider choice, discounted products, ease of shopping (especially during the pandemic) etc.¹¹⁰ However, this claim obfuscates the illegality of certain selected practices of Amazon behind the overall utility of the platform. Overall, the benefits which Amazon brings as an e-commerce platform are conspicuous and, in that sense, Amazon's appeal

¹⁰⁹ 'Amazon enables digitization of over 1 million small businesses in India' *Business Standard* (21 December 2020) <https://www.business-standard.com/article/companies/amazon-enables-digitisation-of-over-one-million-small-businesses-in-india-120122000674_1.html> accessed 6 December 2021; 'Amazon Small Business Days 2021 Sees Record Sales for 84,000 SMEs' *The Economic Times* (12 July 2021) <<https://economictimes.indiatimes.com/small-biz/sme-sector/amazon-small-business-days-2021-sees-record-sales-for-84000-smes/helping-smes/slideshow/84336483.cms>> accessed 6 December 2021; 'Amazon India Ramps up SMB Participation for Prime Day, Calls Ecommerce an 'Amplifier' for Small Businesses' *The Economic Times* (20 July 2021) <<https://economictimes.indiatimes.com/small-biz/sme-sector/amazon-india-ramps-up-smb-participation-for-prime-day-calls-ecommerce-an-amplifier-for-small-businesses/articleshow/84573900.cms>> accessed 6 December 2021; Manish Singh, 'Amazon to Invest \$1 Billion to Help Digitize Small Businesses in India' (*TechCrunch*, 15 January 2020) <<https://techcrunch.com/2020/01/14/amazon-to-invest-1-billion-to-digitize-small-businesses-in-india/>> accessed 6 December 2021; See also 'Amazon's Impact on Economic Growth in India' (*Amazon*) <<https://www.aboutamazon.in/impact/economy/growth>> accessed 6 December 2021; 'Amazon SMB Impact Report Highlights Success of Indian Small and Medium Businesses Despite Covid-19' (*Amazon*, 20 December 2020) <<https://www.aboutamazon.in/news/small-business/amazon-smb-impact-report-highlights-success-of-indian-small-and-medium-businesses-despite-covid-19>> accessed 6 December 2021.

¹¹⁰ Vijay Govindrajan & Anita Warren, 'How Amazon Adapted its Business Model to India' (*Harvard Business Review* 20 July 2016) <<https://hbr.org/2016/07/how-amazon-adapted-its-business-model-to-india>> accessed 6 December 2021; Nidhi Singal, '65% Customers Order from Tier 2 and Beyond on Amazon India, Says Amazon India V-P' *Business Today* (11 October 2021) <<https://www.businesstoday.in/latest/corporate/story/65-customers-order-from-tier-2-and-beyond-on-amazon-india-says-amazon-india-v-p-309065-2021-10-11>> accessed 6 December 2021; Digbijay Mishra, 'Business Back to Normal, Non-metros Driving Growth, New Customer Addition: Amazon's Tiwary' *The Economic Times* (9 July 2021) <<https://economictimes.indiatimes.com/tech/technology/business-back-to-normal-non-metros-driving-growth-new-customer-addition-amazons-tiwary/articleshow/84248760.cms?from=mdr>> accessed 6 December 2021; See also 'Price Gouging has no Place in Our Stores' (*Amazon*, 24 March 2020) <<https://www.aboutamazon.com/news/company-news/price-gouging-has-no-place-in-our-stores>> accessed 6 December 2021; 'How Amazon is Supporting India in Response to COVID-19' (*The Amazon Blog*, 4 May 2021) <<https://blog.aboutamazon.co.uk/company-news/how-amazon-is-supporting-india-in-response-to-covid-19>> accessed 6 December 2021; 'Amazon to Airlift, Import and Donate 100 ICU Ventilator Units from the US to Ramp up India's Supplies for Fighting COVID-19' (*Amazon*, 27 April 2021) <<https://www.aboutamazon.in/news/company-news/amazon-to-airlift-import-and-donate-100-icu-ventilator-units-from-the-us-to-ramp-up-indias-supplies-for-fighting-covid-19>> accessed 6 December 2021.

to the consumers and to retailers which has resulted in its unprecedented rise is a testament to the utility of the platform. However, while considering the anti-competitive nature of certain specific practices of Amazon (namely, its vertical agreements with preferred sellers or retailers selling private labels, preferential treatment etc.), one cannot consider the utility of the entire platform. As per this logic, there would never arise any finding of appreciable adverse effect on competition since all products or services available in the market are of some utility to the consumers- the question which needs to be asked is whether the specific practices in question (such as self-preferencing or exclusive tie-ups etc.) bring any benefits to the consumer and not whether the overall product or service (i.e., Amazon's online marketplace) is of utility to the consumer. The anti-competitive impact of Amazon's practices as a seller must be considered in isolation and should not be confused with the benefits which may arise when Amazon operates in a different role that of a marketplace platform. Even the proposed interim relief is limited to curtailing only specific anti-competitive practices of Amazon without prohibiting or affecting its operations as a marketplace platform in any way. Thus, any benefits brought to end-consumers and retailers through Amazon's overall marketplace platform cannot be part of the equation while judging the anti-competitive impact of specific practices.

In addition to the potential harm done to both categories of consumers, the need for interim relief becomes even more evident in light of the protracted and time-consuming nature of competition investigation and proceedings in India. The Commission itself has noted in the past that cases where the inquiry is expected to take time thereby exaggerating the risk of irreparable and irretrievable consequences are especially suited for the passing of interim orders.¹¹¹ Although the competition investigation against Amazon commenced in 2020, the investigation by the Director General itself is still continuing and will take some time especially given the technical and complex nature of the issues involved. Unlike some other jurisdictions, the Indian competition regulator does not yet have the power to settle the case or other tools (such as commitments) to avoid the protracted investigation and litigation process. In jurisdictions such as the European Union where such mechanisms exist, Amazon is reportedly already in talks to settle its anti-trust cases.¹¹² In India where none of these mechanisms are yet available, the

¹¹¹ *Confederation of Real Estate Developers Association of India* (n 102) [23]; *Nuziveedu Seeds Ltd v Mahyco Monsanto Biotech (India) Ltd* 2016 SCC OnLine CCI 48 (India) [24].

¹¹² Foo Yun Chee, 'Amazon Seeking to Settle EU Antitrust Investigations, Sources Say' *Reuters* (9 November 2021) <<https://www.reuters.com/business/retail-consumer/exclusive-amazon-seeking-settle-eu-antitrust-investigations-sources-say-2021-11-09/>> accessed 6 December 2021.

investigation will be followed by written and oral submissions of all parties and multiple hearings before the Commission.¹¹³ Altogether it would take a few years for the Commission to give its final order and several more years for the (inevitable) appeals to be concluded.¹¹⁴ The extensive use of appeals and associated delay is already on display in the case of Amazon where even the CCI's *prima facie* order initiating investigating was subjected to a string of appeals going all the way up to the Supreme Court.¹¹⁵ These appeals have already delayed the investigation. Even after the issuance of the final order and conclusion of appeals, enforcement of the order and litigation around enforcement could still take many more years. Too much (unquantifiable and irreversible)¹¹⁶ harm might already have been inflicted on both the end consumers and the retailers if we were to wait for the final order against Amazon. Thus, there exists an urgent need for interim relief.

C. Element 3: Likelihood of Irreparable and Irretrievable Damage or Definite Apprehension of Adverse Effect on Competition

As per the third leg of the *Steel Authority of India Ltd.* test, while granting interim relief under section 33, the CCI would consider the balance of convenience and look at the consequences of granting such relief on both parties.¹¹⁷ Which interests if harmed can be subsequently compensated and which interests will be irreparably harmed and hence need to be protected through interim measures. The CCI recently in *FHRAI v MMT* noted that the third element of the *Steel Authority of India Ltd.* test consists of two limbs and the satisfaction of either of these two conditions is sufficient to make a case for interim relief.¹¹⁸ Either there should be a likelihood of irreparable and irretrievable harm or there should be a definite apprehension of adverse effect on competition in the market. In the case against Amazon, it is clear as discussed above that the second limb has been satisfied and there is

¹¹³ The Competition Act 2002, s 36; The Competition Commission of India (General) Regulations, regs 36, 20, 21, 29, 44, 45, 48.

¹¹⁴ The final order of the CCI can be appealed to the National Company Law Appellate Tribunal and the Supreme Court. See The Competition Act 2002, ss 53B, 53T.

¹¹⁵ *Amazon Seller Services (P) Ltd v CCI* 2021 SCC OnLine Kar 12626, High Court of Karnataka (India); *Flipkart Internet (P) Ltd v CCI* SLP (C) No. 11558 of 2021 decided on 9-8-2021, Supreme Court of India.

¹¹⁶ See Part C titled 'Element 3: Likelihood of irreparable and irretrievable damage or definite apprehension of adverse effect on competition'.

¹¹⁷ *Nuziveedu Seeds Ltd v Mahyco Monsanto Biotech (India) Ltd* 2016 SCC OnLine CCI 48 (India) [25]; *Federation of Hotel & Restaurant Associations of India. MakeMyTrip India (P) Ltd* 2021 SCC OnLine CCI 12 (India) [106].

¹¹⁸ *Federation of Hotel & Restaurant Associations of India v MakeMyTrip India (P) Ltd* 2021 SCC OnLine CCI 12 (India) [108].

a definite apprehension of adverse effect on competition by making the field uneven through unfair and preferential treatment.

A case can be made that the first limb has also been satisfied as there is a likelihood of irreparable and irretrievable damage. The CCI has previously noted that where damage cannot be quantified in terms of money, interim relief ought to be granted.¹¹⁹ In this case, it is extremely difficult to measure the extent or quantum of damage being inflicted on end-consumers through preferential ranking and the damage done to sellers by making the playing field uneven. For instance, if Amazon is found to have engaged in preferential treatment of products sold by certain preferred sellers, then how does one measure the damage done to the end-consumer as a result of such preferential treatment. Final penalty orders even if they were to prescribe behavioural changes would be unable to reverse the damage already done given the dynamic nature of the market. Importantly, the Indian competition regime in addition to penalizing enterprises engaging in anti-competitive conduct also envisages compensation for the victims.¹²⁰ However, computing compensation even after the issuance of the final order in such a case would be potentially futile and would probably underestimate the extent of the damage.¹²¹ Identifying even the direct victims of Amazon's anti-competitive conduct (end-consumers and sellers) would be almost impossible. Formulation of acceptable damage quantification techniques and eventual disbursement of monetary compensation to victims also seems extremely difficult if not entirely unfeasible. For instance, even if preferential treatment by Amazon is established, would all customers and sellers on Amazon's platform during that time period be eligible to be compensated and how could the damage done to customers or sellers by repression of the more relevant results in the ranking be calculated. All of this indicates the unquantifiable and irreparable nature of the damage that is caused by Amazon's anti-competitive conduct which cannot be *post facto* adequately calculated or compensated and must be curtailed at the earliest through the issuance of interim relief.

On the other hand, prohibiting Amazon from operating in the capacity of seller at the interim stage would not cause irreparable damage to the enterprise. Even if the conduct in question is finally determined to not have been anti-competitive, the underlying infrastructure, big data, supply and

¹¹⁹ *Indian National Shipowners' Assn v ONGC Ltd* 2018 SCC OnLine CCI 48 (India),[11]; *Fast Track Call Cab (P) Ltd v ANI Technologies (P) Ltd* 2017 SCC OnLine CCI 36,[14].

¹²⁰ The Competition Act 2002, s 53N.

¹²¹ cf as an example see the discussion around identification of affected class of consumers and problems of quantification of damages in *Mastercard Incorporated v Walter Hugh Merricks*, (2020) UKSC 51.

distribution chains etc. which have enabled Amazon to expand its private label business would continue to exist and could be leveraged at a later point, making it easier for the company to re-enter as a seller. Thus, the balance of convenience lies in favour of granting interim relief and protecting retailers and end-consumers from irreparable and irretrievable damage.

VI. OPERATIONALIZATION OF INTERIM RELIEF

While the proposed interim relief which prohibits Amazon to act in the capacity of a seller on its own marketplace is easy to prescribe in principle, the exact phrasing and operationalization of this interim relief might admittedly pose some issues. For instance, Amazon could ensure that it is not directly selling on its own platform but is doing so through other entities whose association with Amazon is hidden behind several layers of complex corporate structures. In fact, the foreign direct investment rules in India have already encountered this problem on numerous occasions while attempting to prohibit FDI in inventory-based e-commerce.¹²² The rules prohibiting FDI in inventory-based e-commerce should have had the same effect as the proposed interim relief of prohibiting Amazon from holding inventory and operating as a seller on its platform.¹²³ However, these FDI rules have failed to have the desired effect and several instances have been brought to light where e-commerce companies have devised creative corporate restructuring techniques to bypass the FDI rules.¹²⁴

To avoid a similar fate, the interim relief could be made clearer by specifying that neither Amazon nor its associate companies nor its subsidiary companies directly or indirectly operate as sellers on its platform and by emphasizing that the prohibition should be followed in letter and in spirit. However, even then Amazon could dilute its investment in the sellers or make other structural changes just to create enough wriggle room to subsequently argue that the sellers on its platform do not fall within the definition

¹²² 'India Plans Foreign Investment Rule Changes that Could Hit Amazon' *Reuters* (19 January 2021) <<https://www.reuters.com/world/india/exclusive-india-plans-foreign-investment-rule-changes-that-could-hit-amazon-2021-01-19/>> accessed 6 December 2021; 'Amazon Changes Business Structure in India After New E-commerce Rules' *The Hindustan Times* (7 February 2019) <<https://www.hindustantimes.com/business-news/amazon-changes-business-structure-in-india-after-new-e-commerce-rules-report/story-CxRClbBM-r1kv5feZEGXh2N.html>> accessed 6 December 2021.

¹²³ Note that although import of the existing FDI regulations and the proposed interim relief might be the same, the two would be in response to very different regulatory objectives. The proposed interim relief would be in direct response to Amazon's anti-competitive practices and in exercise of the Commission's powers to curtail such practices.

¹²⁴ See (n 120).

of ‘associate company’¹²⁵ or ‘subsidiary company’.¹²⁶ Thus, in spite of best efforts at precision, there is always a chance that corporate restructuring or creative interpretation could be used to subvert the essence of the prohibition.

However, even if precise drafting of interim relief is difficult and there is a risk of subversion of interim order in spirit through corporate restructuring, the interim relief should nevertheless be issued. At the very least it would compel Amazon to change its practices to avoid the most direct and obvious infringements of the prohibition. Even otherwise, mounting regulatory pressure through the issuance of an interim order might have an important signaling effect and might influence Amazon to refrain from engaging in the use of corporate restructuring or other techniques to subvert the essence of the order. For instance, ongoing investigations by the Enforcement Directorate and the CCI have already resulted in some domestic entities announcing that they will discontinue their joint ventures with Amazon even as they assert that these partnerships have always been ‘technically compliant’ with Indian laws.¹²⁷ Thus the threat of regulatory intervention seems to have at least some effect on the practices of these companies. Hence, even if there exists a risk that Amazon would try to subvert the interim order through corporate structures, the order should nevertheless be issued.

VII. SUO MOTO ACTION TAKEN BY THE CCI ON THE BASIS OF THE REUTERS REPORT

It is notable that the CCI recently took *suo moto* cognizance of the Reuters report but ultimately decided not to pursue an inquiry purely on the basis of the submissions made by Amazon in its affidavit.¹²⁸ Primarily, Amazon raised corporate structuring defences which obfuscated Amazon’s interests in the sale of products carrying its own brand name. Amazon submitted an affidavit that Amazon Seller Services Pvt. Ltd. (“ASSPL”), the entity engaged in operating Amazon’s online marketplace in India does not directly or indirectly sell anything on its own marketplace. Instead, Amazon.com, Inc., the

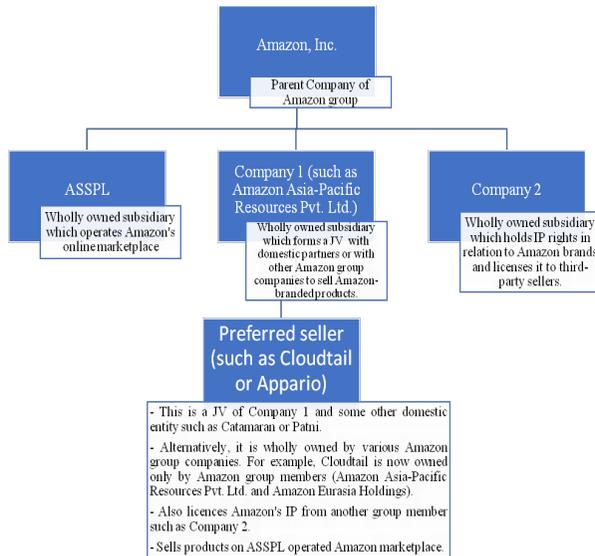
¹²⁵ The Companies Act 2013, s 2(6).

¹²⁶ The Companies Act 2013, s 2(87).

¹²⁷ ‘Amazon, Catamaran to End Cloudtail Joint Venture Next Year’ *The Times of India* (9 August 2021) <<https://timesofindia.indiatimes.com/business/india-business/amazon-catamaran-to-end-cloudtail-joint-venture-next-year/articleshow/85181383.cms>> accessed 6 December 2021; ‘Amazon May not Renew Venture with Patni Group’ *The Hindu Business Line* (11 November 2021) <<https://www.thehindubusinessline.com/companies/amazon-may-not-renew-venture-with-patni-group/article37424077.ece>> accessed 6 December 2021.

¹²⁸ *Amazon India Marketplace, In re* 2022 SCC OnLine CCI 19.

parent company, has two other wholly owned subsidiaries which license the IP of Amazon brands to third-party sellers that sell these Amazon branded products on the online marketplace.¹²⁹ This obfuscates the fact that the biggest third-party sellers of Amazon-branded products, such as Cloudtail and Appario are the result of Amazon's joint ventures with domestic players. Undoubtedly, the Amazon entity entering into a joint venture to operate Cloudtail and Appario would also not be directly related to ASSPL, the entity operating the online marketplace, but it would still be a part of the Amazon group. For instance, it is evident from recent combination review filings before the CCI that another wholly owned subsidiary of Amazon.com, Inc., Amazon Asia-Pacific Resources Pvt. Ltd. owns the majority share in Cloudtail, a major third-party seller on the Amazon marketplace (see Fig.1 below).¹³⁰ Thus, it is clear that all entities, the one operating Amazon's marketplace (ASSPL) or the one selling Amazon-branded products on the marketplace (such as Cloudtail) are directly or indirectly related to the ultimate parent entity of the Amazon group i.e., Amazon.com, Inc. The inherent conflict of interest (discussed in Section V) doesn't just arise when ASSPL (the entity operating the online marketplace) itself sells Amazon-branded products. It persists even when the entities involved are legally distinct but are still part of the same group and have unified economic goals and interests.



¹²⁹ *ibid* [5]-[7].

¹³⁰ Acquisition of Prione Business Services Pvt. Ltd. by Amazon Asia-Pacific Resources Pvt. Ltd., Combination Registration No. C-2021/12/893, approved on 9 March 2022 <<https://www.cci.gov.in/combination/order/details/summary/77/0>>; <<https://www.cci.gov.in/combination/press-release/details/17/0>>.

Fig 1: An example of Amazon group companies operating in different capacities on Amazon's online marketplace- although the entity operating the marketplace and the one selling Amazon-branded goods on the marketplace might be legally distinct, the linkages and connections between them are clearly borne out.¹³¹

Quite apart from the direct or indirect stake of these group members in each other, it is also worth examining how these group companies interact with each other in practice. For instance, how does data collection, processing and sharing work across them. Does ASSPL share the data collected on its online marketplace with Company 1 (from Fig. 1 above)? Merely claiming that ASSPL does not share data with Preferred sellers (directly) is insufficient as the same end could be achieved if the data pool of all the group companies is common or ASSPL shares data with Company 1. It is also worth considering the overt and covert influence of the 'Amazon' brand in the ranking on Amazon's marketplace. Even assuming that the entity operating the marketplace and Preferred sellers (selling Amazon-branded products) are not related entities, does retaining the value associated with the 'Amazon' brand incentivize the online marketplace to ensure that these products are amongst the highest-ranked or top-selling products? Further, what is the economic interest (if any) of Company 2, the Amazon group member which acts as the licensor in ensuring that the Amazon-branded products get higher sales, etc. These are just some of the questions which should be examined in greater detail while looking at the interconnections between the different Amazon group companies and their asserted distinct roles on the Amazon marketplace.

The framework of the Competition Act is also no stranger to the idea that group entities could operate together, have common economic goals and parent companies could exercise 'control' over subsidiaries. For instance, section 4 recognizes that dominance could be abused by an enterprise or a group.¹³² Similarly, the concept of 'group' plays an important role in merger review.¹³³ In fact, in a case involving contravention of section 3 or 4, the CCI also has the power to pass an order against other members of the group to which the enterprise in violation belongs.¹³⁴ It could even be argued that the definition

¹³¹ Based on Amazon's affidavit as outlined in the CCI's suo moto order (n 128) and the acquisition of Prione Business Services Pvt. Ltd. by Amazon Asia-Pacific Resources Pvt. Ltd (n130).

¹³² The Competition Act 2002, s 4(1): No enterprise or group shall abuse its dominant position.

¹³³ The Competition Act 2002, s 5.

¹³⁴ The Competition Act 2002, s 27- Proviso.

of 'enterprise'¹³⁵ or 'person'¹³⁶ under the Competition Act is broad enough to cover subsidiaries of the enterprise and therefore, a section 3(4) analysis could look at the group members entering into agreements more holistically and attempt to trace the connections and linkages between the parties involved instead of simplistically noting that the legal entities are separate. Constraints against looking at the role of group members more holistically are neither built into the language of the statute nor is it desirable.

Using corporate structures in this manner to argue that the entity operating the online marketplace and the one that is selling Amazon-labelled products on the marketplace (through a JV) are distinct corporate or legal entities are age-old tactics to evade regulatory scrutiny. Amazon itself has used such corporate restructuring as a workaround for FDI regulations.¹³⁷ A useful lesson also emerges from CCI's recent suspension of a prior approval that it had granted to Amazon's acquisition of Future group's promoter entity.¹³⁸ When the CCI suspended its own prior approval of the combination, it was criticized on the ground that the factual information about Amazon's control over Future's retail arm and all associated agreements had already been filed before the CCI and therefore, the nature and extent of Amazon's control over Future's retail arm should have been apparent to the regulator. Similar to the present case, the control of Amazon over Future's retail arm in that combination too was hiding in plain sight. Instead, even back then the CCI relied purely on Amazon's framing of the narrative and its representations, only to later claim that Amazon had engaged in 'misrepresentation' and 'suppression of information'.¹³⁹ The Amazon-Future Coupon combination suspension raises several interesting legal questions which are outside the scope of this paper. However, the crucial takeaway for the present purpose is that the CCI should be more cautious in perusing the information before it. It should try to unravel the interconnections and linkages which are hiding in plain sight and are deliberately obfuscated by parties through creative corporate structuring or imaginative framing of the narrative.

¹³⁵ The Competition Act 2002, s 2(h) defines an 'enterprise' as 'a person or a department of the Government, who or which is, or has been, engaged in any activity... **either directly or through one or more of its units or divisions or subsidiaries...** [emphasis added]. Detailed analysis of this for instance, under the Single Economic Entity doctrine is outside the scope of this paper.

¹³⁶ The Competition Act 2002, s 2(h) defines a 'person' as: '...(iii) a company;... (iv) an association of persons.' Thus, an association of companies could fall within the definition of a 'person' and hence group members and their conduct could be analyzed under section 3(4).

¹³⁷ See Section VI: Operationalization of interim relief.

¹³⁸ Proceedings against Amazon.com NV Investment Holdings LLC under Sections 43A, 44 and 45 of the Competition Act 2002, order of Dec. 17, 2021 <<https://www.cci.gov.in/combination/order/details/order/1138/0>>.

¹³⁹ Amazon Future suspension order (n 138).

The CCI order in the Amazon suo moto case also relies solely on the affidavit submitted by Amazon.¹⁴⁰ However, as discussed above the CCI has wide powers and could even call for production of documents which are in Reuters' possession and carry out a more detailed investigation into the working of Amazon.¹⁴¹ The CCI order in the suo moto case initiated on the basis of the Reuter report does not preclude the Commission from reassessing this information. The order itself states that it is not a finding on merits and shall not come in the way of the CCI examining the conduct of ASSPL or any of its related entities.¹⁴² Hence, the CCI should use the Reuters report to expand and reorient the scope of the investigation against Amazon (as argued in Part IV) and to grant interim relief (as argued in Part V).

VIII. CONCLUSION

In recent times, several journalistic reports and studies have emerged which provide substantial evidence about Amazon's anti-competitive conduct. Such conduct stems from Amazon's relationship with its preferred sellers or retailers selling its private labels and appears to be pervasive across product categories. In light of this evidence, this paper has argued for two things. *First*, the competition investigation against Amazon in India should be broadened and should not be limited to only certain product categories. Instead, the investigation should focus on the interactions and vertical agreements between Amazon and preferred sellers/ third-party retailers more broadly and use that as the axle of the investigation. Any variance in competition dynamics across the different product categories could be examined during the course of the investigation. Such an expansion and reorientation of the scope would also be in line with the spirit and elements of section 3(4) of the Competition Act. *Second*, this paper has argued that the test for granting interim relief against Amazon under section 33 has been satisfied. In order to comprehensively address all the competition concerns, the only viable non-redundant interim relief which is available against Amazon is to prohibit it from acting in the dual capacity of marketplace and seller. The paper has shown that necessity and balance of convenience demand that such interim relief be granted.

¹⁴⁰ Amazon suo moto case, (n 128)[14].

¹⁴¹ The Competition Act, 2002, s36(2); The Competition Commission of India (General) Regulations, Regulation- 44 - 45.

¹⁴² Amazon suo moto case, (n 128)[14].

The Indian competition regulator has initiated multiple competition cases and investigations against digital platforms.¹⁴³ In spite of CCI's apparent interest in digital platforms, only one of these cases has till date culminated in a final order,¹⁴⁴ exposing the regulator to potential averments of performative regulation. The Indian competition regulator should break away from the mould of waiting for foreign competition regulators to take action first and then simply follow in their footsteps. Instead, the CCI should compete actively in the competition amongst competition regulators¹⁴⁵ and take expeditious action on its own depending on the requirements of the domestic market and statutory framework. For this, the CCI needs to act fast and go beyond merely initiating investigations to taking concrete action to protect competition in dynamic technology markets.

¹⁴³ The CCI has initiated cases against most big digital platforms including Google, Amazon, Facebook, Apple, Uber etc.

¹⁴⁴ *Matrimony.com Ltd v Google LLC* 2018 SCC OnLine CCI 1 (India).

¹⁴⁵ Ludwig Siegele, 'Antitrust Regulators Face Vibrant Competition- With Each Other' (*The Economist*, 8 November 2021) <<https://www.economist.com/the-world-ahead/2021/11/08/antitrust-regulators-face-vibrant-competition-with-each-other>> accessed 6 December 2021 (notes that the race amongst antitrust regulators to be the best tech regulator is highly competitive although the article refers primarily to regulators in Western jurisdictions and China and unfortunately, does not identify the CCI as a contender in this race at all).