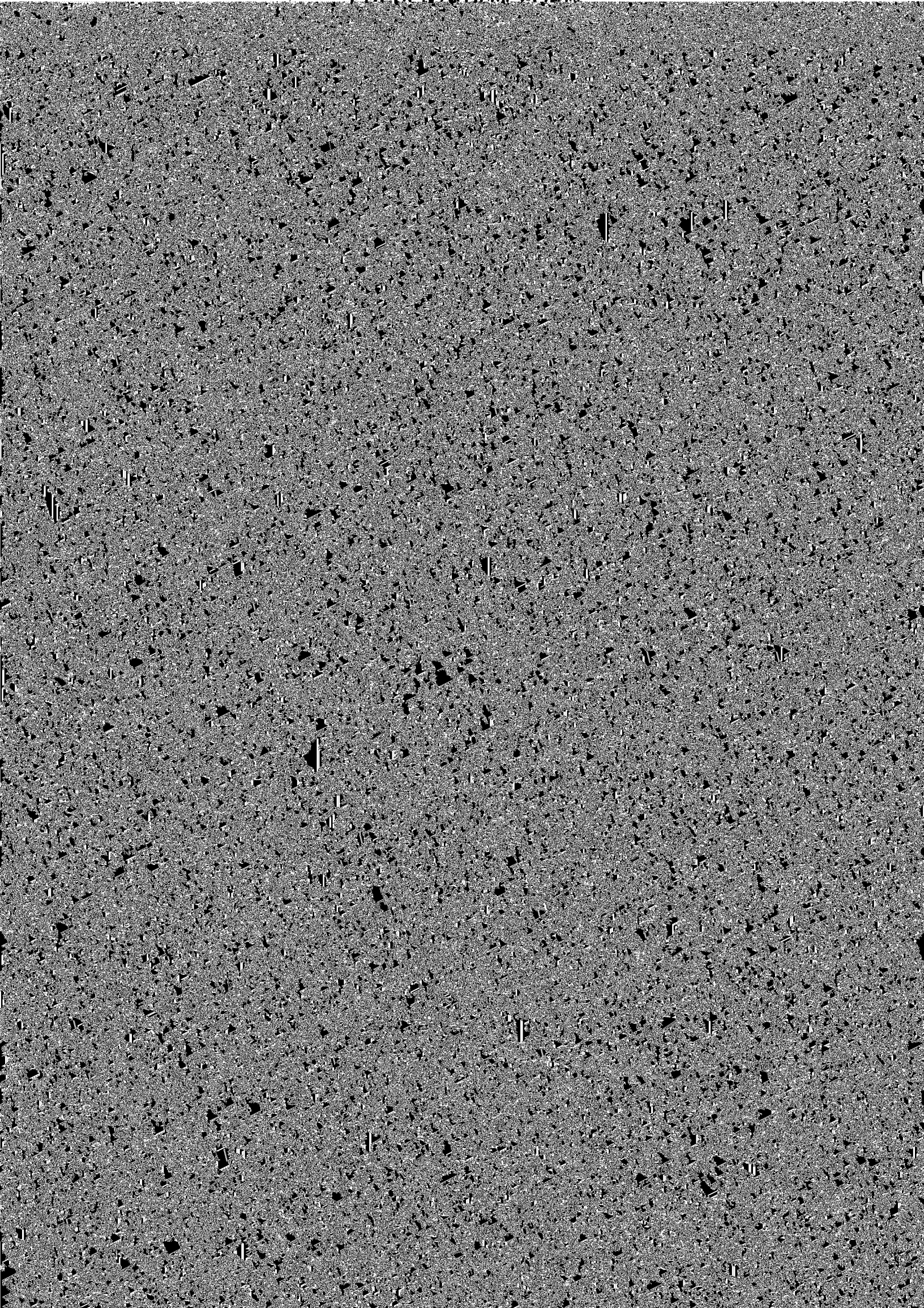


IN THE HIGH COURT OF KARNATAKA AT BENGALURU

PRESENTATION FORM



IN THE HIGH COURT OF KARNATAKA AT BENGALURU
[ORIGINAL JURISDICTION]

WRIT PETITION NO. /2020 (GM)

IN THE MATTER OF:

AMAZON SELLER SERVICES PRIVATE LIMITED
.....PETITIONER

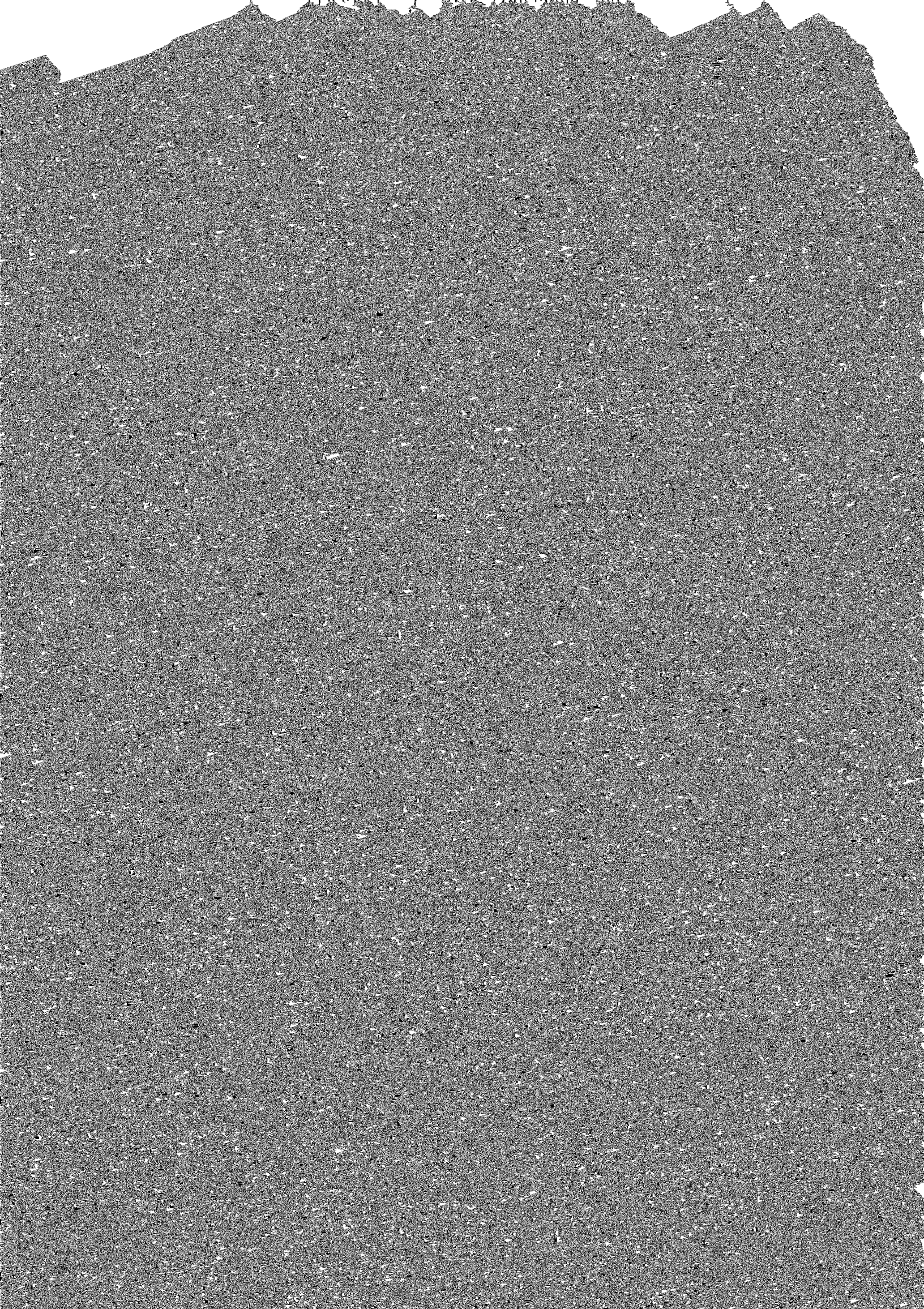
VERSUS

COMPETITION COMMISSION OF INDIA & ORS.
.....RESPONDENTS

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3.	Verifying Affidavit supporting the	

8. Copy of the Information dated
October 25, 2019, containing the



IN THE HIGH COURT OF KARNATAKA AT BENGALURU
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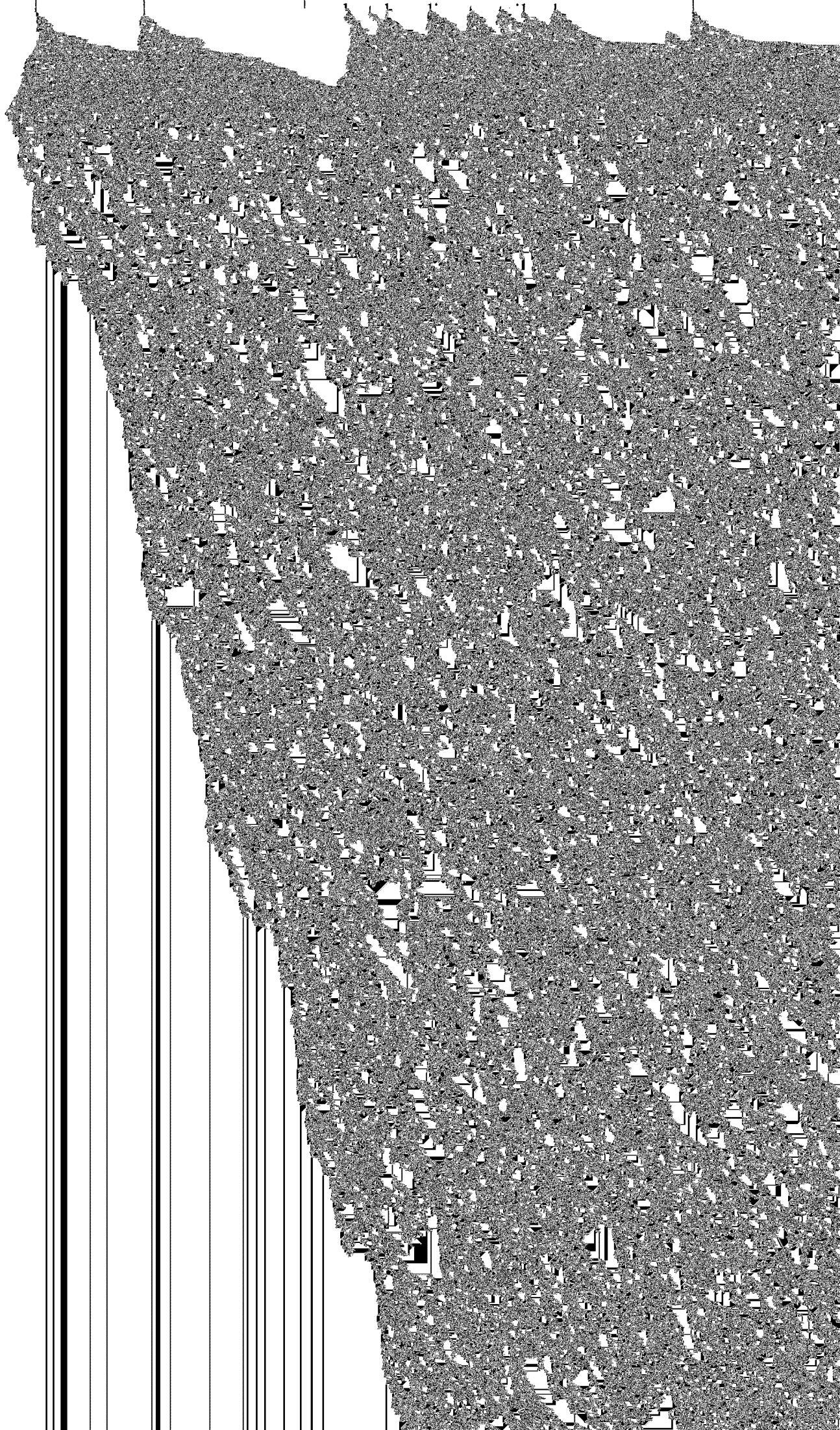
COMPETITION COMMISSION OF INDIA & ORS.
....RESPONDENTS

SYNOPSIS AND LIST OF DATES AND EVENTS

<u>Sl. No.</u>	<u>Date</u>	<u>Particulars</u>
1.	June, 2013	The Petitioner commenced the operation of www.amazon.in (“Amazon Marketplace”), an online marketplace which works with third party sellers (“sellers/vendors”), who

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Petitioner neither holds inventory nor



		(“Respondent No.1” or “the Commission”). This information was filed against Flipkart India Private Limited and Flipkart Internet Private Limited (Flipkart Internet Private Limited is “Respondent No.3” in this petition and collectively the two entities are referred to as “Flipkart”) in respect of the business practices of: a) Deep discounting, whereby Respondent No.3 would sell goods to related companies like WS Retail Services Private Limited at discounted prices, for further resale on the online marketplace operated by Flipkart; b) Preferential treatment accorded to certain sellers such as WS Retail Services Private Limited; and
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		c) Leveraging its dominant position to promote its private labels such as “Smartbuy” and “Billion”. AIOVA alleged that Respondent No.3 was dominant in the market for services provided by online marketplace
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5

	queries relating to the allegations made
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		(relating to the allegation of preferential treatment accorded to certain preferred sellers). iii. Details of the top five vendors on the platform in terms of revenue (relating to the allegation of marketplaces having certain preferred sellers). iv. The percentage of sales, in terms of revenue, of the top five vendors (relating to the allegation of
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		<i>the top revenue generating category? Who are the top five vendors in this category? (relating to the allegation of marketplaces having certain preferred sellers); and</i> <i>vii. Do you sell your own branded products on your platform? If yes, provide details (relating to the allegation of marketplaces promoting their private labels)."</i>
5.	September 11, 2018	The Petitioner replied to the queries posed by the Respondent No. 1 in its notice dated July 23, 2018 by a detailed written response. With a view to assist the Respondent No. 1 in appreciating the nuances of e-commerce for assessing the allegations levelled by AIOVA, the Petitioner submitted a wealth of sensitive and confidential information spanning over 124 pages

		(including annexures) to the Respondent No.1 for its consideration. These detailed submissions contained a three-part response: Part I contained the Petitioner's characterisation of the market conditions and its views relating to the competitive landscape in the Indian retail market. Part II disclosed details regarding the Petitioner's business strategies, decision-making process, business activities in India and the business activities of its overseas affiliates. Part III described the Petitioner's business model. It contained information relating to contractual arrangements with third party sellers, the fee charged to such sellers, and the sales and revenue generated by such sellers. Further, details relating to the ranking of search results on the Amazon
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		Marketplace was also submitted in Part III. In addition, information relating to the different product categories on the Amazon Marketplace (including the top revenue generating category and its private labels) were also made available. The Petitioner also requested to be granted an opportunity for hearing before the Respondent No. 1 to explain the difference between its own business model and that of Respondent No.3 and comprehensively address the queries raised by the Respondent No. 1. This clearly evidences the bona fide conduct of the Petitioner.
6.	October 9, 2018	The Respondent No.1 heard AIOVA, Respondent No. 3 as well as the Petitioner in a preliminary conference.

		Competition Act, finding no <i>prima facie</i> violation of the Competition Act. The said order was passed after hearing AIOVA, Respondent No. 3 (against whom allegations were levelled by AIOVA) as well as the Petitioner (who was not originally a party to the information therein) on October 9, 2018. The Respondent No. 1 made the following significant observations which demonstrate its understanding of the nature of the Petitioner's business: <i>"....However, at this stage, it may be appropriate to note that there is a difference between online retail store and online marketplace platform...."</i> (Paragraph 24) It was further stated that: <i>"....Further as per the guidelines</i>
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is permitted in marketplace model of e-commerce....".

(Paragraph 24)

Under these circumstances, the Respondent No. 1 arrived at the conclusion only a few months before it passed the Impugned Order that there is no case for the CCI to proceed. It is pertinent to note that while dismissing the information filed by AIOVA, observed the following:

"....the marketplace-based e-commerce is still a relatively nascent and evolving model of retail distribution in India and the Commission is cognizant of the technology-driven nature of this model. Recognizing the growth potential as well as the efficiencies and consumer benefits that such models...

		It was under these circumstances that the Respondent No. 1 concluded correctly, in accordance with the submission of the Petitioner, that there was “no case” for the CCI to proceed.
8.		At least four different proceedings across two High Courts were initiated on the same subject matter as the information filed before the Respondent No. 1. Material particulars of the said proceedings are as follows: 1. While the information filed by AIOVA was pending before the Respondent No. 1, the Confederation of All India Traders (“CAIT”), an entity connected with the Respondent No. 2, filed a writ petition before the High Court of Delhi bearing <i>WP (C) No. 9332 of 2018 CAIT v. Union of India</i> containing similar allegations. Only

	Respondent No. 3 was made a party to this writ petition. The Hon'ble High Court of Delhi did not grant any indulgence to CAIT and disposed of the writ petition. The said writ petition was based upon Press Note No. 3 of 2016 dated March 29, 2016. 2. In another writ petition numbered <i>WP(C) No. 7907/2018</i> filed by Telecom Watchdog before the Hon'ble High Court of Delhi, the Petitioner was made a party. Upon being informed that an enquiry on similar issues was pending, the High Court of Delhi <i>vide</i> its order dated March 18, 2019, disposed of this writ petition. 3. In what appears to be an attempt to re-agitate the same issues and engage in forum shopping, CAIT filed a second <i>Writ Petition bearing no. 14400 of 2019</i> before the Rajasthan High Court in
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		October 2019, <i>inter alia</i>, praying for an injunction on the Diwali Sale of Flipkart and Amazon: Vide the last order dated October 15, 2019 in this matter, the Petitioner, Flipkart and the Union of India were given time to file replies and the matter has been adjourned since then from time to time and is tentatively scheduled to be listed next on May 1, 2020. 4. Upon failing to secure an injunction in the above writ petition filed by CAIT, another <i>Writ Petition bearing no. 15570 of 2019</i> was filed by the Marwar Chamber of Commerce and Industry ("MCCI") before the Rajasthan High Court, re-agitating the same issues raised in CAIT's writ petition. Vide the last order in this matter dated October 15, 2019, the Petitioner, Flipkart and the Union of India were given time to file replies and the matter has been adjourned since then from time to time.
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9.	December 2018	After the Delhi High Court disposed of the writ petition (filed by CAIT) on September 5, 2018, the Government of India, through the Department of Industrial Policy and Promotion (“DIPP”) (now known as DPIIT), Ministry of Commerce & Industry, issued Press Note No.2 (2018 series) (“Press Note 2”) with a view to abundantly clarify the nature of e-commerce and its permissibility with reference to FDI.
10.	April, 2019	The Respondent No. 1 launched a market study titled ‘ <i>Market Study on E-commerce in India</i> ’ <i>inter alia</i> , to understand the rising importance of e-commerce in the retail sector. This market study was a combination of secondary research, questionnaire survey, focused group discussions, one-to-one meetings, a multi-stakeholder workshop and written submissions of stakeholders which covered the three

		broad categories of e-commerce in consumer goods (mobiles, lifestyle, electrical and electronic appliances and
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		queries) pertaining to the Petitioner's business model (including details of the top sellers on the marketplace, terms and conditions for providing marketplace services, inventory management, listing of products and private labels). The petitioner has provided detailed responses to the queries from time to time.
12.	October 25, 2019	The present information dated October 25, 2019 ("Information") was filed against the Petitioner and Respondent No. 3 by the Informant/Respondent No. 2. A banker's cheque dated October 23, 2019, submitted along with the Information is drawn on HDFC Bank in the name of CAIT. This Information was filed with certain technical defects which were

		subsequently cleared by Respondent No. 2. In the Information, Respondent No. 2 alleged the following: a) The relevant market is the market for smartphones sold on online
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		preferential listing on the initial pages of the search results on the online marketplaces and by lending terms such as "Fulfilled by Amazon" iv) use of data relating to customer preference and search behavior to promote its own private labels, which are sold through these preferred sellers. d) Flipkart and the Petitioner have violated Section 3(4) of the Competition Act by entering into vertical agreements with preferred sellers in relation to the conduct in (c) above. The allegations made in the information are evidently substantially similar to the allegations made repeatedly in the Writ Petitions filed earlier.
13.	November 4, 2019	The technical defects in the filing of the Information were cleared by the Informant/Respondent No. 2.

14.	November 28, 2019	The Information was considered by the Respondent No. 1 internally in an ordinary meeting. The order states as follows: <i>"1. The present information was filed on November 4, 2019 under Section 19(1)(a) of the Competition Act, 2002"</i>
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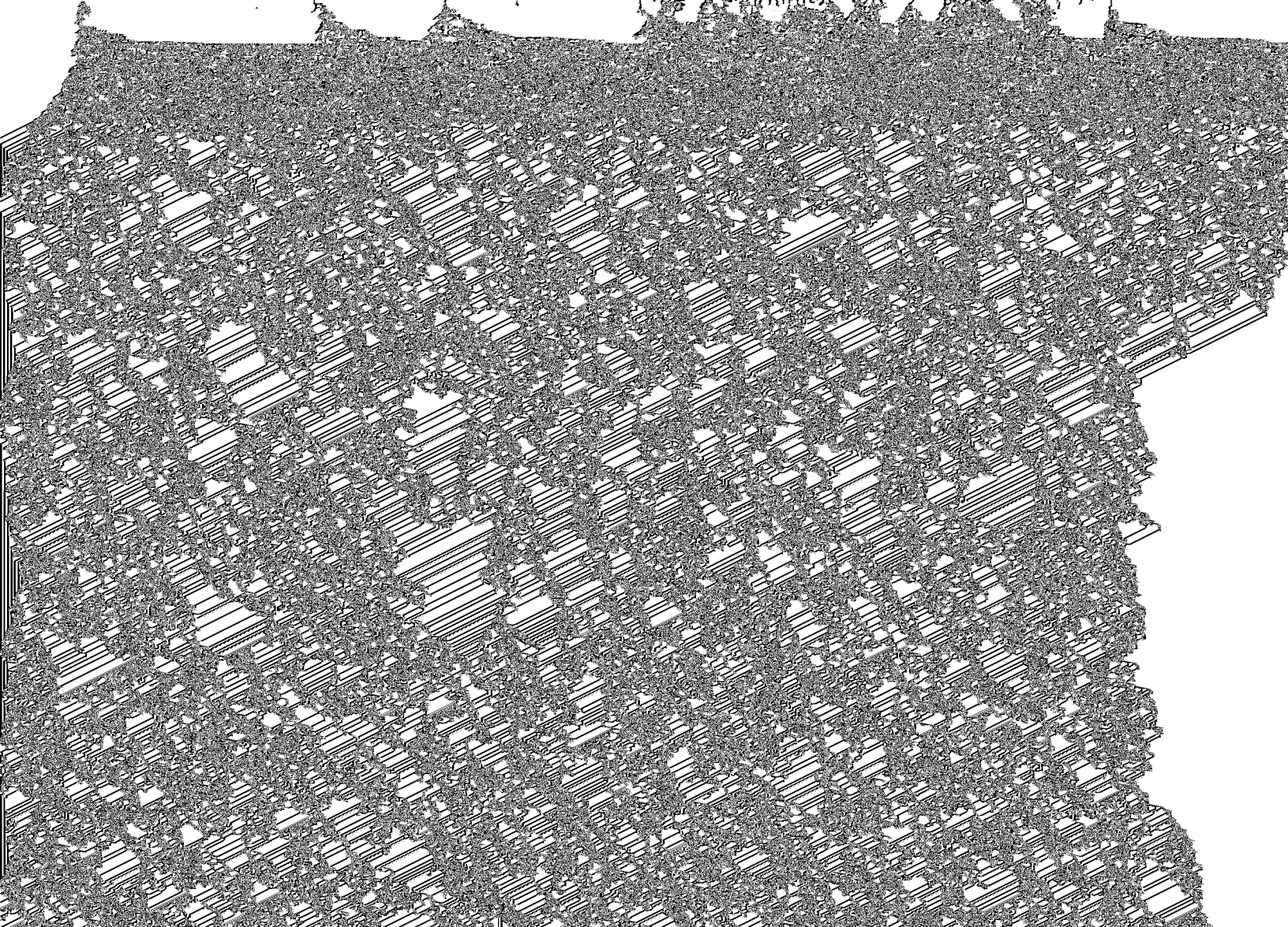
		No. 1. Again, none of the affected parties were called for a personal hearing, in a departure from the procedure followed by the Respondent No. 1 (barely a year ago) in relation to the information received from AIOVA. The order states as follows: <i>“1. The information filed in the matter was considered at the ordinary meeting held today. The Commission, at the outset, noted that the informant has not filed an <u>affidavit as is required under Section 65-B of the Indian Evidence Act, 1872 in respect of certain documents annexed with the information</u> and directed the informant to file the same within 7 days from receipt of this order. The Commission decided that post the receipt of such an affidavit as is required, appropriate order shall be passed in due course in the matter.</i> <i>2. The secretary is directed to inform the informant accordingly.”</i>
16.	December 16, 2019	The order of the Respondent No.1 dated December 12, 2019 was communicated to the Informant/Respondent No. 2

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	evidence along with the Information, the Informant/Respondent No. 2 was required to certify such electronic evidence in terms of Section 65-B of the Indian Evidence Act. Among other things, the electronic evidence submitted by the informant/Respondent No. 2 included an email from the Petitioner to third party sellers pertaining to a limited period promotional rate being offered on the referral fee charged by the Petitioner (from all the third party sellers who subscribe to the 'Fulfilled by Amazon' program of the Petitioner) for the 'Gym Equipments' product category. This promotional rate was available only on the products of certain specified brands. This e-mail has been relied upon by the Informant/Respondent No. 2 to allege
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		deep discounting practices by the Petitioner in the smartphones category.
17.	December 23, 2019	An application requesting extension of time to submit the affidavit in accordance with the provisions of Section 65-B of the Indian Evidence Act, 1872 was filed by the Informant/Respondent No. 2.
18.	January 7, 2020	A second application requesting for extension of time to submit the affidavit in accordance with the provisions of Section 65-B of the Indian Evidence Act, 1872 was filed by the informant/Respondent No. 2.
19.	January 8, 2020	The Respondent No. 1 made public its finding and recommendations pertaining to the market study undertaken (in April 2019) in relation to e-commerce. The e-commerce market study report contained the observations of the Respondent No. 1 in relation to the

		business practices of the Petitioner and the Respondent No. 3 (based on the responses provided by various stakeholders who were consulted by the Respondent No. 1 as part of the market study). The Petitioner assisted the Respondent No. 1 during the course of the e-commerce market study and participated in the questionnaire survey, focused group discussions, one-to-one meetings, multi-stakeholder workshops, conferences and seminars organized by the Respondent No. 1 from time to time.
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		sharing of data, user review and rating mechanism, contract terms and discount policy, were prescribed as self-regulatory measures. While the Petitioner was in the process of reviewing the findings and recommendations contained in the e-commerce market study report, to the utmost shock and dismay of the Petitioner, the Respondent No. 1 passed an impugned order dated January 13, 2020. It was the legitimate expectation of the Petitioner that since the self-regulatory measures were prescribed in the e-commerce market study report, online marketplaces such as the Petitioner would be granted a reasonable period of time to review, assess and implement them. This is especially when the above noted self-regulatory measures prescribed by the Respondent No. 1 in the e-commerce market study report
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		were based, <i>inter alia</i> , on the inputs provided by the Petitioner (relating to its business model). The Petitioner is of the view that its business practices are aligned with the recommended self-regulatory measures insofar as they are applicable to e-commerce in retail.
20.	January 10, 2020	The affidavit in accordance with the provisions of Section 65-B of the Indian Evidence Act, 1872 was submitted by the Informant/Respondent No. 2.
21.	January 13, 2020	The Respondent No.1 passed a <i>prima facie</i> order in terms of Section 26(1) of the Competition Act, directing an investigation against Respondent No. 3 and the Petitioner (“Impugned Order”). Having heard none of the affected parties, the Impugned Order found that: a) There is no <i>prima facie</i> case of violation of Section 4 of the Competition Act;

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		b) There is a <i>prima facie</i> case of violation of Section 3(4) of the Competition Act. Based on the averments made by the Informant and certain public news reports, the Respondent No.1 inferred that there is an 'agreement' between smartphone manufacturers and the Petitioner to launch certain models of smartphones exclusively on the online marketplace of the Petitioner. The Respondent No.1 then proceeded to find that deep discounting and preferential listing for certain preferred sellers could be an element of the exclusive tie-ups and therefore, also merited an investigation.
		Hence, this writ petition.

SYNOPSIS OF ARGUMENTS

The Impugned Order is liable to be quashed and set aside for the following reasons:

- (i) Barely a year ago, the Respondent No. 1 dismissed an

While the Petitioner was in the process of reviewing the findings and recommendations contained in the e-commerce market study report, to the utmost shock and dismay of the Petitioner, the Respondent No. 1 passed an impugned order dated January 13, 2020. It was the legitimate expectation of the Petitioner that since the self-regulatory measures were prescribed in the e-commerce market study report, online marketplaces such as the Petitioner would be granted a reasonable period of time to review, assess and implement them. This is especially when the above noted self-regulatory measures prescribed by the Respondent No. 1 in the e-commerce market study report were based, *inter alia*, on the inputs provided by the Petitioner (relating to its business model). The Petitioner is of the view that its business practices are aligned with the recommended self-regulatory measures insofar as they are applicable to e-commerce in retail.

- (iii) It is pertinent to note that the e-commerce market study report makes several exculpatory observations relating to the business activities of e-commerce entities. In fact, the report (at several places) acknowledges the efficiencies of e-commerce, including improved competition, enhanced consumer convenience and larger participation by MSME

sellers, etc. The e-commerce report also expressly acknowledges that exclusivity arrangements are not *per se* anti-competitive and in fact can also generate efficiencies and improve competition.

- (iv) Although the e-commerce market study report was published prior to the Impugned Order, the Impugned Order fails to consider the Respondent No. 1's findings in the e-commerce market study. This clearly demonstrates the Respondent No. 1's lack of awareness of its own market study.

Whilst expressly acknowledging that exclusivity arrangements are not *per se* anti-competitive, the e-commerce market study report notes that the conduct of e-commerce entities under Section 3(4) of the Competition Act have to be

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business model) barely a year ago in the context of the complaint filed by AIOVA.

Filed by:

P&A
LAW OFFICES

P&A LAW OFFICES
WEWORK GALAXY 43 RESIDENCY ROAD
BENGALURU 560025

PLACE: BENGALURU
DATED: 10.02.2020

ADVOCATE FOR THE PETITIONER

(N. ANIL KUMAR)

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

(ORIGINAL JURISDICTION)

WRIT PETITION NO. /2020 (GM) :

IN THE MATTER OF:

AMAZON SELLER SERVICES PRIVATE LIMITED

Registered Office:

8th Floor, Brigade Gateway, 26/1

Dr. Rajkumar Road

Bengaluru – 560055

Represented by its authorized signatory

Mr. Rahul Sundaram aged about 46 years

Petitioner

Versus

1. Competition Commission of India

9th Floor, Office, opposite Ring Road, Block - 1,

East Kidwai Nagar, Kidwai Nagar,

New Delhi, Delhi 110023.

Through the Chairperson

Respondent No. 1

2. Delhi Vypaar Mahasangh

877, 1st Floor, Qutab Road,

Sadar Bazar, Delhi 110006.

Represented by _Dev Raj Baweja

Respondent No. 2

3. Flipkart Internet Private Limited

1. That the Petitioner has preferred the present Petition under Article 226 and 227 of the Constitution of India read with Section 151 of the Code of Civil Procedure, 1908 (“CPC”) for quashing the Impugned Order dated January 13, 2020 and any proceedings emanating from Case No. 40 of 2019 (“Proceedings”), with respect to the alleged contravention of the provisions of the Competition Act, purported to have been committed by Amazon Seller Services Private Limited (“Petitioner”), before the Competition Commission of India (“Commission” or “Respondent No. 1” herein) on grounds amongst others that the Impugned Order is passed without application of mind, that it is perverse, unreasonable, unjust, arbitrary, untenable in law and that it will cause serious prejudice to the Petitioner. A copy of the Impugned Order dated January 13, 2020 is annexed herewith as ANNEXURE [A].

FACTS

2. That the facts and circumstances of the cases leading to preference of the above petition are detailed hereinunder:

I. Background of the Petitioner:

- (a) That the Petitioner herein, i.e., Amazon Seller Services Private Limited is a private limited company incorporated on April 16, 2010. It is classified as a non-government company

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and is registered with the Registrar of Companies, Bengaluru.

The Petitioner operates the Amazon Marketplace, an online marketplace which works with third party sellers, who offer for sale to customers a wide variety of products, forming part of the Indian retail market. The Amazon Marketplace also provides certain support services to third party sellers to facilitate the sale of goods. These support services are integral to and non-separable from retail trade and include warehousing, packing, shipment, delivery/return of products, centralized payment processing, transactional support services, promotion/advertising, refund and replacement services. The Petitioner is a pure play online marketplace on which the products listed for sale are owned and sold by third party sellers.

II. Background of the Respondent No.1

- (b) That the Respondent No. 1 is the Competition Commission of India, which has been established by the Central Government with effect from October 14, 2003 under the Competition Act. The Respondent No. 1 consists of a Chairperson and currently 2 Members appointed by the Central Government. The Respondent No. 1 is required to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of

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consumers and ensure freedom of trade in the markets of India. The Respondent No. 1 is also required to give opinion on competition issues on a reference received from any statutory authority and to undertake competition advocacy, create public awareness and impart training on competition issues.

III. Background of the Respondent No. 2

(c) Respondent No. 2 i.e. Delhi Vyapar Mahasangh is a society comprising of Micro, Small and Medium Enterprises (“MSMEs”) registered under the Societies Registration Act, 1860. Respondent No. 2 has filed the information seeking directions for investigation under Section 26 (1) of the Competition Act and further alleging contravention of Section 3(4) read with Section 3(1) and Section 4(1) & 4(2) of the Competition Act by the Petitioner and the Respondent No. 3 and seeking directions for investigation under Section 26 (1) of the Competition Act.

IV. Background of the Respondent No. 3

(d) That the Respondent No. 3 i.e. Flipkart Internet Private Limited is an e-commerce portal operating as a platform facilitating third party sellers to sell their goods to

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consumers on its online marketplace and having its registered office in Bengaluru.

V. Brief Overview of the Impugned Order

- (e) Based on the information filed by the Respondent No. 2, a traders' body, in terms of Section 19(1)(a) of the Competition Act, the Respondent No. 1 passed the Impugned Order, *inter alia*, making the following observation:

"26. Thus, the Commission observes that the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms, as demonstrated in the information, coupled with the allegation of linkages between these preferred sellers and OPs [i.e., the Petitioner and the Respondent No.3] alleged by the Informant merits an investigation. It needs to be investigated whether the alleged exclusive arrangements, deep-discounting and preferential listing by the OPs are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition contravening the provisions of Section 3 (1) read with Section 3(4) of the Competition Act."

- (f) The relevant provisions of the Competition Act are reproduced below:

"Section 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;

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- (d) refusal to deal;
- (e) resale price maintenance,

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

Therefore, the Commission need not deliberate further on allegations on account of joint dominance as the same being untenable under the Act."

- (h) The relevant provisions of the Competition Act are reproduced below:

"Section 4. Abuse of dominant position. -

- (1) *No enterprise shall abuse its dominant position.*
- (2) *There shall be an abuse of dominant position under sub-section (1), if an enterprise, -*
 - (a) *directly or indirectly, imposes unfair or discriminatory -*
 - (i) *condition in purchase or sale of goods or services; or*
 - (ii) *price in purchase or sale (including predatory price) of goods or service; or*

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in rule 41.

- (i) *operate independently of competitive forces prevailing in the relevant market; or*
- (ii) *affect its competitors or consumers or the relevant market in its favour;*
- (b) *“predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.”*

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Act”) before the Respondent No.1. This information was filed against certain business practices of Flipkart such as:

- (i) Deep discounting, whereby Flipkart would sell goods to related companies like WS Retail Services Private Limited at discounted prices, for further resale on the online marketplace operated by Flipkart;
- (ii) Preferential treatment accorded to certain sellers such as WS Retail Services Private Limited; and
- (iii) Leveraging its dominant position to promote its private labels such as “Smartbuy” and “Billion”.

AIOVA alleged that Flipkart was dominant in the market for services provided by online marketplace platforms for selling goods in India and the aforementioned allegations amounted to abuse of dominance, in contravention of Section 4 of the Competition Act. It is pertinent to note that the allegations made by AIOVA were only levelled against Flipkart (which included Respondent No. 3 herein).

3. That although AIOVA did not raise any specific allegations against the Petitioner, the Respondent No. 1, with a view to “comprehend the nuances of the online retail sector”, directed the Petitioner to provide its responses to certain queries relating to the allegations made by AIOVA against Flipkart.

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On July 23, 2018, the order passed by the Respondent No. 1 in its preliminary conference dated July 18, 2018 was communicated to the Petitioner, seeking information from the Petitioner in respect of the following queries:

- (i) *“Details of joint ventures with wholesalers/ retailers, if any (relating to the allegation of marketplaces having certain preferred sellers).*
- (ii) *Platform fees charged from different categories of online sellers including joint venture retailers (relating to the allegation of preferential treatment accorded to certain preferred sellers).*
- (iii) *Details of the top five vendors on the platform in terms of revenue (relating to the allegation of marketplaces having certain preferred sellers).*
- (iv) *The percentage of sales, in terms of revenue, of the top five vendors (relating to the allegation of marketplaces having certain preferred sellers).*
- (v) *Names of the top five vendors that appear the most number of times on the first page of search (relating to the allegation of preferential treatment accorded to certain preferred sellers).*
- (vi) *Which category of products (such as mobile phones, computer accessories, consumer goods etc.) is the top*

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revenue generating category? Who are the top five
vendors in this category? (select 1)

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confidentiality was sought by the Petitioner. The information relating to the Petitioner's business model was made available in Part III of the response. Part III inter alia contained information relating to contractual arrangements with third party sellers and the fee charged to such sellers. Further, the information relating to the revenue generated by third party sellers was made available in Part III. Furthermore, the information pertaining to sales and revenue attributable to third party sellers and the fees charged by the Petitioner for the provision of marketplace related services was also made available in Part III. Further, details relating to the ranking of search results on the Amazon Marketplace was also submitted in Part III. In addition, information relating to the different product categories on the Amazon Marketplace (including the top revenue generating category as well as the private labels) were also made available in Part III. However, considering the sensitivity surrounding this information, confidentiality was rightly claimed by the Petitioner. It must, therefore, be clearly noted that the detailed response made available by the Petitioner to the Respondent No. 1 which ran into 124 pages (including annexures) was taken into account by the Respondent No. 1 clearly for the purpose of understanding the

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nature of the online business as well as the dismissal of the AIOVA complaint.

5. That on October 9, 2018 the Respondent No. 1 held a preliminary conference where Respondent No. 1 heard AIOVA and Respondent No. 3 along with the Petitioner. After hearing all the parties to the information filed by AIOVA, as well as the Petitioner (who was not originally a party to the information), the Respondent No.1 passed an order dated November 6, 2018 dismissing the information filed by AIOVA in terms of Section 26(2) of the Competition Act, (“AIOVA Order”) as it found no *prima facie* case of violation of the Competition Act.

The said order was passed after hearing AIOVA, Respondent No. 3 (against whom allegations were levelled by AIOVA) as well as the Petitioner (who was not originally a party to the information therein) on October 9, 2018.

The Respondent No. 1 made the following significant observations which demonstrate its understanding of the nature of the Petitioner’s business:

“....However, at this stage, it may be appropriate to note that there is a difference between online retail store and online marketplace platform....”.

(Paragraph 24)

It was further stated that:

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"....Further as per the guidelines of Foreign Direct Investment (FDI) on e-commerce issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, FDI is not permitted in inventory based model of e-commerce. However, 100% FDI under automatic route is permitted in marketplace model of e-commerce...."

(Paragraph 24)

Under these circumstances, the Respondent No. 1 arrived at the conclusion only a few months before it passed the Impugned Order that there is no case for the CCI to proceed.

It is pertinent to note that while dismissing the information filed by AIOVA, observed the following:

"....the marketplace-based e-commerce is still a relatively nascent and evolving model of retail distribution in India and the Commission is cognizant of the technology-driven nature of this model. Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation."

(Paragraph 34)

The said conclusion was arrived at by the Respondent No. 1 in view of cogent material submitted by the Petitioner.

It was under these circumstances that the Respondent No. 1 concluded correctly, in accordance with the submission of the Petitioner, that there was "no case" for the CCI to proceed.

A copy of the AIOVA Order has been annexed herewith as **ANNEXURE [B]**.

6. In addition to the information filed before the Respondent No. 1, it is evident that the Petitioner was being subjected to untold

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harassment by the various petitions filed before the various High Courts, the first instance being the Delhi High Court (where two writ petitions were filed and the Petitioner was made a party in one of these petitions) and the second instance being Rajasthan High Court (where two writ petitions were filed and the Petitioner was made a party in both the petitions). Copies of: (a) various writs, (b) the reply submitted by the Petitioner and (c) the orders passed by the High Courts in these matters are annexed herewith as ANNEXURE [C] Colly.

7. That in September 2018, while the information filed by AIOVA was still pending before the Respondent No. 1, the Confederation of All India Traders ("CAIT"), which is also connected with the Respondent No. 2 (the Informant herein) had filed a writ petition under Article 226 of the Constitution of India alleging a violation of the FDI policy and the said writ petition was numbered as writ petition before the High Court of Delhi bearing *WP (C) No. 9332 of 2018 CAIT v. Union of India*. The writ petition filed by the CAIT was based fundamentally upon Press Note No. 3 of 2016 dated March 29, 2016 issued by DIPP. It is pertinent to note that Respondent No. 3 was made a party to this writ petition but the Petitioner was not. The High Court of Delhi by an order dated September 5, 2018 disposed of the said writ petition noticing that the

It may also be noted that the High Court of Delhi abundantly clarified that:

8. The writ petition filed by CAIT was based fundamentally upon Press Note 3 of 2016 dated 29, 2016. After the disposal of the writ petition (filed by CAIT) by the Delhi High Court on September 5, 2018, the Government of India, through the DPIIT, Ministry of Commerce and Industry, with a view to abundantly clarify the nature of e-commerce and its permissibility with reference to FDI, issued Press Note No. 2 (2018 series) ("**Press Note 2**"). . A perusal of the said Press

Note would clearly indicate that paragraph 5.2.15.2.2 b.1.

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There are two models - one being inventory-based model of e-commerce and the other is the marketplace-based model of e-commerce. Marketplace-based e-commerce is defined as follows:

"....Marketplace-based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller....".

In terms of para 5.2.15.2.3, it was clearly mentioned that:

"....100% FDI under automatic route is permitted in marketplace model of e-commerce....".

In para 5.2.15.2.4, it was expressly provided that:

"....E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services....".

It may also be noted that in paragraph 5.2.15.2.4 (ix), it was observed that:

"....E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field....".

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A copy of Press Note 2 dated December 26, 2018 is attached herewith as ANNEXURE [D].

In another writ petition numbered *WP(C) No. 7907/2018* filed by Telecom Watchdog before the High Court of Delhi on July 28, 2018, the Petitioner was made a party. Upon being informed that an enquiry on similar issues was pending, the High Court of Delhi vide its order dated March 18, 2019, disposed of this writ petition.

9. The CAIT filed yet another writ petition this time before the Rajasthan High Court namely, S.B. Writ Petition No.14400 of 2019. Incidentally, the present Petitioner was made a party before the Rajasthan High Court. It may be noted that the present Petitioner clearly stated that the petition filed by CAIT itself was not only non-maintainable but denied all its allegations.. In the reply which was filed by the present Petitioner before the Rajasthan High Court, it was expressly stated as follows:

“i. Petitioner has filed this Petition under Article 226 of the Constitution of India, 1950 (“Constitution”) levying allegations of violations of the FDI Policy by e-commerce entities, inter alia, by ASSPL. The Petitioner has sought the following prayers in the Petition:

"a. That the Respondent No. 1 be directed to take immediate measures to ensure that e-commerce entities do not circumvent the provisions of the FDI Policy as clarified by Press Note 2, and the provisions of Press Note 2 are followed in both letter and spirit;

b. That in the interim, inter alia, ASSPL be enjoined from indulging in deep discounting practices during the upcoming Diwali." (paragraph 5(i))

It may also be noted that the allegation which was made before the Rajasthan High Court was as follows, which was denied:

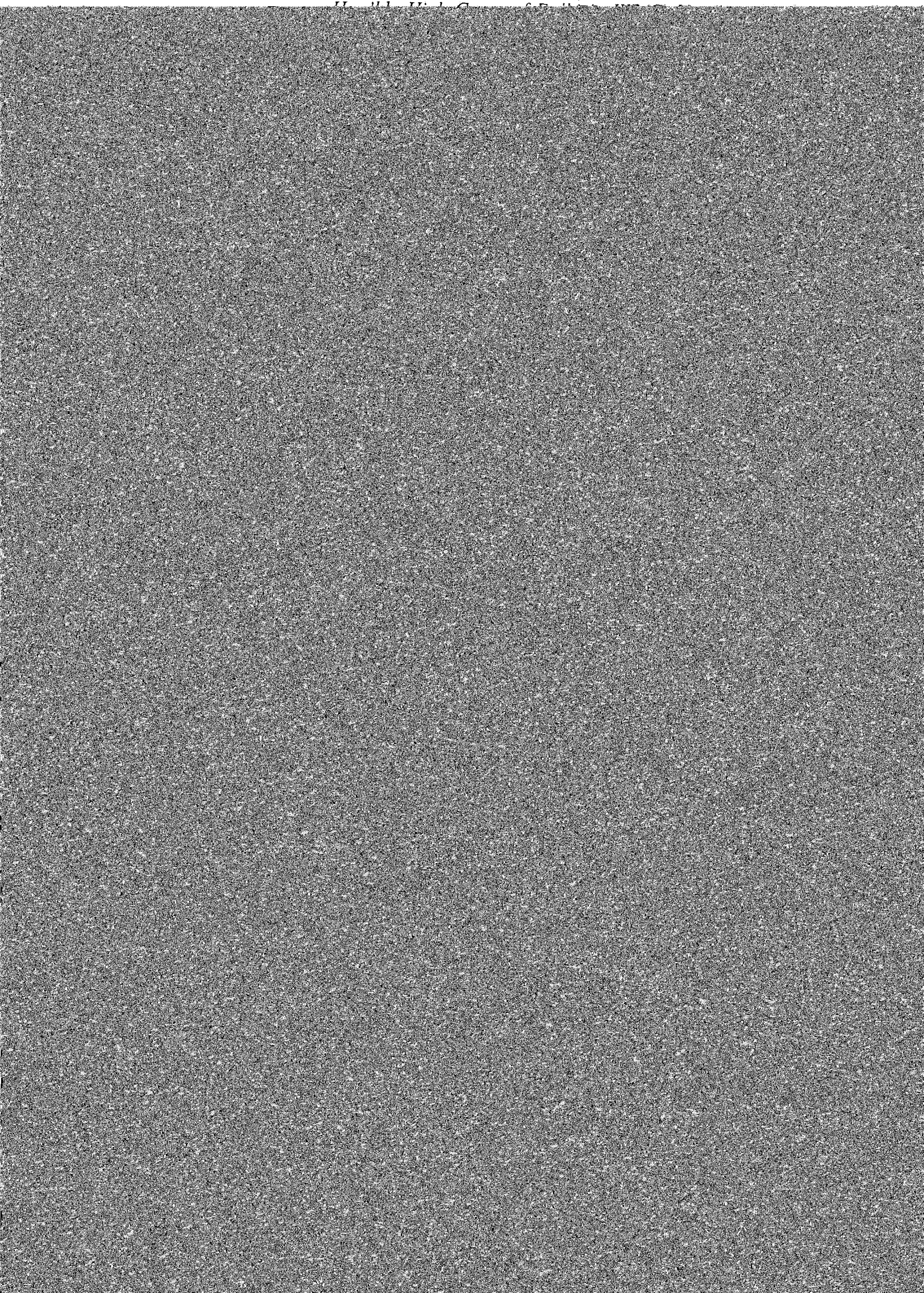
"ii. That the alleged case of the petitioner against ASSPL and other e-commerce entities is that they influence the price of products sold on their respective online marketplace and hold inventories; an act which allegedly amounts to a

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iv. The petitioner in a writ petition before the Hon'ble Delhi High Court bearing number WP(C) No. 9332/2018, titled as Confederation of All India Traders vs. Directorate of Enforcement & Ors., had prayed for a writ of mandamus to the ED to initiate an enquiry against Respondent No. 2 and 3 herein on the same cause of action. In the said writ petition, the Petitioner has alleged that the e-commerce entities held inventories and influence the pricing of goods on their online marketplace. On this ground, the petitioner therein had sought a direction from the Hon'ble High Court of Delhi to issue a writ of mandamus to the ED to initiate an enquiry against e-commerce entities...

v. The Hon'ble High Court of Delhi disposed of the said writ petition, by its order dated September 05, 2018. After noting the submissions of the counsel for the ED that the relevant branch of the ED, at Bangalore, may examine the issues raised and on finding a necessity, appropriate action may be taken, the Hon'ble Delhi High Court held as under:

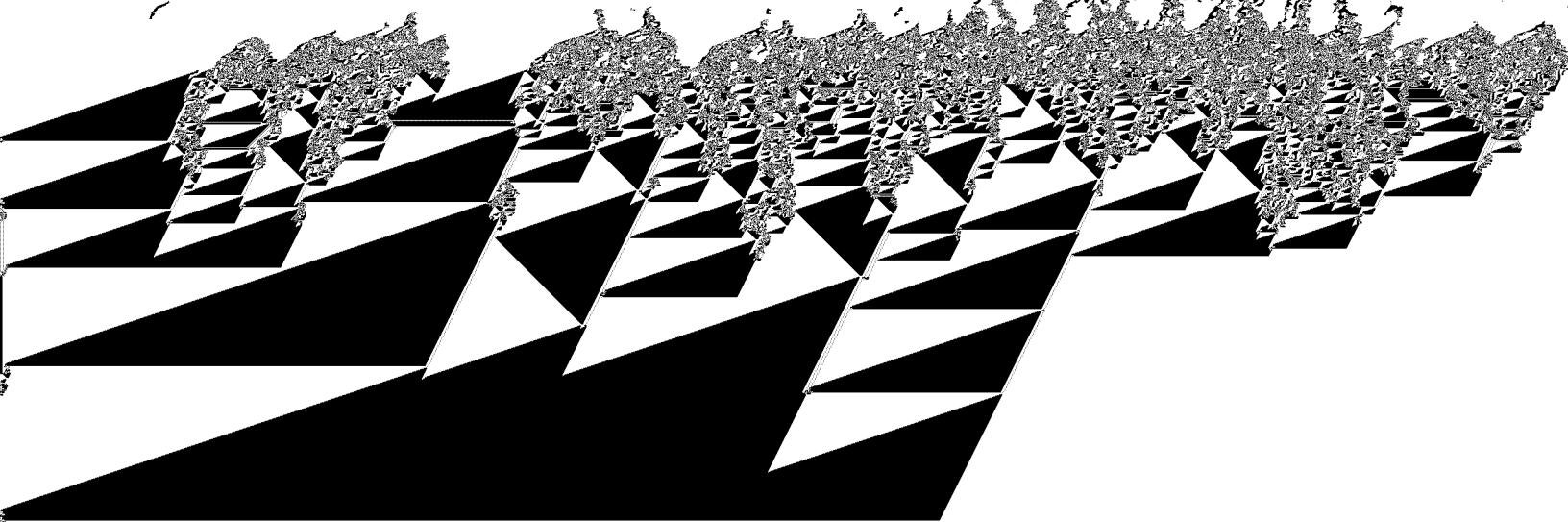
"... no further orders are required to be passed in this petition, the same is accordingly, disposed off."



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note that the CCI also observed that the e-commerce industry in India was at a nascent stage and any unwarranted intervention at this stage is likely to stifle innovation in the industry..." (paragraph 7)

Thus it is clear that the Petitioner was being subjected to untold harassment by various information petitions which were first filed before the Respondent No. 1 and also before the various High Courts, the first instance being the Delhi High Court (where two writ petitions were filed and the Petitioner was made a party to one such petition) and the second instance being Rajasthan High Court (where two writ petitions were filed and the Petitioner was made a party to both these



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expedient to direct Mr. Sanjeet Purohit to accept notice on behalf of the respondents nos. 1 and 1/A.

Learned counsel for the respondents pray for and are granted two weeks' time to file reply/counter affidavit...

This matter is tentatively scheduled to be listed next on May 1, 2020.

10. Upon failing to secure an injunction in the above writ petition, another Writ Petition *bearing no. 15570 of 2019* was filed by the Marwar Chamber of Commerce and Industry ("MCCI") before the Rajasthan High Court, re-agitating the same issues raised in CAIT's writ petition No. 14400 of 2019. In this writ petition, MCCI annexed a copy of the order dated September 5, 2018, passed by the High Court of Delhi in Writ Petition (Civil) No. 9332 of 2018 (as Annexure 9 to the said writ petition) and a copy of the order dated January 15, 2019 passed by the Respondent No. 1 in Case No. 61 of 2014, *Jasper Infotech Pvt. Ltd. v. Kaff Appliances India Pvt. Ltd.* (as Annexure 10 to the said writ petition). It is thus clear that the various disgruntled trader lobbies were taking recourse to the legal process before the High Courts as well as the Respondent No. 1 by invoking their jurisdiction simultaneously.

In this writ petition, the Petitioner was impleaded as the fifth respondent, Flipkart India Private Limited was impleaded as

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the third respondent while the Respondent No. 3 herein was impleaded as the fourth respondent. It may be noted that the allegations raised by MCCI as mentioned in paragraph 7 of the writ petition are as follows:

"....That in light of the above, the Petitioner is filing the present writ petition against the persistent inaction of Respondent 1 and 2 to curb the blatant and serious contraventions of the Policy in relation to Foreign Direct Investment to India by Respondent No.3 to Respondent No.5 which have consistently been indulging in predatory pricing and flooding the markets with artificially cheap products thereby adversely affecting the members of the Petitioner....".

It may be noted that the petition itself alluded to Press Note No.2 of 2018 in the following words and acknowledged that the said Press Note lent clarity to the existing FDI policy of 2017:

"That after hearing representations from several stakeholders, the DIPP published Press Note 2 of 2018 (hereinafter referred to as "Press Note") on 26th December, 2018 to lend clarity to the existing FDI Policy of 2017 and to further curb discriminatory practices by e-commerce marketplaces. The Press Note has come into

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effect as of 1st February, 2019 and replaced Paragraph 5.2.15.2 of the Consolidated FDI Policy of 2017..." (paragraph 9)

It was further stated in the said Writ Petition as follows:

"That the Press Note preliminary laid down some basic conditions for compliance by e-commerce marketplaces which included the fact that e-commerce companies cannot engage in practices which determine the sale prices. Other conditions included (i) E-commerce marketplaces being able to enter into B2B transactions with the sellers on their platform; (ii) E-commerce marketplaces providing support services such as warehousing and logistical services to the sellers on their platform; (iii) E-commerce marketplaces shall not exercise ownership or control over the inventory; (iv) if 25% or more of the purchases of a single vendor come from the platform or its group companies, it will be deemed be an inventory-based model and not be permitted; (v) Sellers in whom the marketplace or its group companies have equity participation or whose inventory is controlled by the marketplace, cannot sell on the platform,; (vi) The name, address and contact details of the seller should be clearly stated on the platform; (vii)

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post sales delivery and customer satisfaction shall be the
seller's responsibility; (viii) warranty or guarantee of the
goods/services shall be the responsibility of the seller; (ix)
E-commerce entities providing services to vendors in

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restaurants and 7 payment system providers from across India participated in the study....”.

Incidentally, the Petitioner herein cooperated with the Respondent No. 1 by making available the relevant information as and when requested by the Respondent No. 1 so as to enable the Respondent No. 1 to prepare the market

study report

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encourage such foreign direct investment, the Ministry of Commerce and Industry has taken initiatives to ensure total transparency in the matter of publication of appropriate FDI notes and also to understand effectively the business models of all participants. In view of this engaging enterprise by the Union of India in a fair and transparent manner consistent with constitutional principles, it is entirely out of place for the Respondent No. 1 to have assumed jurisdiction in this regard.

13. That on October 25, 2019, the Respondent No. 1 received a physical copy of the Information (with certain defects) filed by the Respondent No. 2, a society registered under the Societies Registration Act, 1860 ("**Informant**") under Section 19(1)(a) of the Competition Act against the Petitioner as well against the Respondent No. 3, alleging contravention of the relevant provisions of Section 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1) of the Competition Act by the Petitioner and the Respondent No. 3. The allegations included:
- a) The relevant market is the market for smartphones sold on online marketplaces in India;
 - b) In this relevant market, both the Respondent No. 3 and the Petitioner are jointly dominant;
 - c) Both the Respondent No. 3 and the Petitioner have abused their dominance by indulging in: i) exclusive tie-

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ups with smartphone manufacturers; ii) providing deep discounts to certain preferred sellers (who are affiliated with or controlled by the Respondent No. 3 or the Petitioner, respectively); iii) preferential treatment to these preferred sellers in terms of preferential listing on the initial pages of the search results on the online marketplaces and by lending terms such as "Fulfilled by Amazon"; iv) using data relating to customer preference and search behavior to promote its own private labels, which are sold through these preferred sellers.

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16. In an ordinary meeting held on November 28, 2019, the Respondent No.1 considered the Information provided by the Informant internally without calling any party involved in the Information or the Informant to be heard. *Vide* an order dated November 28, 2019, Respondent No.1 held the following:

"1. The present information was filed on November 4, 2019 under Section 19(1)(a) of the Competition Act, 2002.

2. Today the Commission considered the matter in its ordinary meeting and directed to relist the same in one of the ensuing meetings."

A copy of the order dated November 28, 2019 is annexed herewith as ANNEXURE [F].

It is important to note that the Respondent No. 1 decided against giving a personal hearing to either the informant/Respondent No. 2 or the Opposite Parties (i.e., the Respondent No. 3 or the Petitioner). This is in stark contrast to the Respondent No. 1's approach in the AIOVA Matter, wherein, the Petitioner was granted an opportunity for hearing despite not being named as a party in the information filed by AIOVA.

17. That the Information was considered again in another ordinary meeting of the Respondent No. 1 held on December 12, 2019, wherein, the Respondent No. 1 held that:

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"1. The information filed in the matter was considered at the ordinary meeting held today. The Commission, at the outset, noted that the informant has not filed an affidavit as is required under Section 65-B of the Indian Evidence Act, 1872 in respect of certain documents annexed with the information and directed the informant to file the same within 7 days from receipt of this order. The Commission decided that post the receipt of such an affidavit as is required, appropriate order shall be passed in due course in the matter.

2. The secretary is directed to inform the informant accordingly."

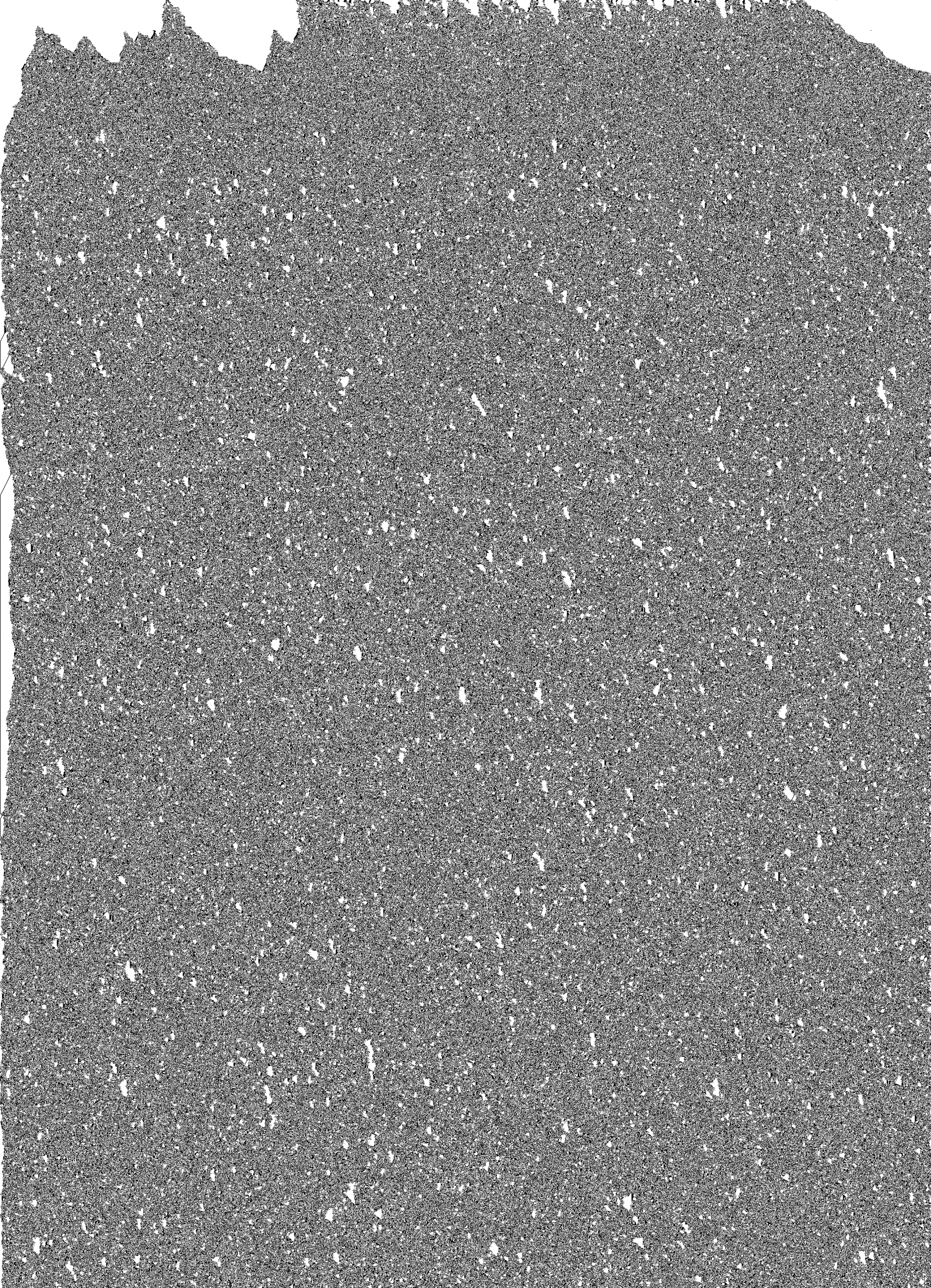
A copy of the order dated December 12, 2019 has been attached herewith as ANNEXURE [G].

18. It is pertinent to note that even in this meeting, the Respondent No. 1 decided against giving a personal hearing to either the informant/Respondent No. 2 or the Opposite Parties (i.e., the Respondent No. 3 or the Petitioner). This is despite the fact that barely a year ago, the Respondent No. 1 had heard the Petitioner in relation to an information containing similar allegations against Respondent No. 3, even though no specific allegations were levelled against the Petitioner.

19. That on December 16, 2019, the order of the Respondent No. 1 dated December 12, 2019 was communicated to the

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Informant The order of the Respondent No. 1 dated December



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21. That on January 8, 2020, the Respondent No. 1 made public its finding and recommendations pertaining to the market study undertaken (in April 2019) in relation to e-commerce entities operating in online retail. In fact, the Petitioner had assisted the Respondent No. 1 during the course of the e-commerce market study and participated in the questionnaire survey, focused group discussions, one-to-one meetings, multi-stakeholder workshops, conferences and seminars organized by the Respondent No. 1, from time to time. While the Petitioner was in the process of reviewing the findings and recommendations contained in the e-commerce market study report, to the utmost shock and dismay of the Petitioner, the Respondent No. 1 passed an impugned order dated January 13, 2020.

It was the legitimate expectation of the Petitioner that since the self-regulatory measures were prescribed in the e-commerce market study report, online marketplaces such as the Petitioner would be granted a reasonable period of time to review, assess and implement them. This is especially when the above noted self-regulatory measures prescribed by the Respondent No. 1 in the e-commerce market study report were based, *inter alia*, on the inputs provided by the Petitioner (relating to its business model). The Petitioner is of the view that its business practices

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are aligned with the recommended self-regulatory measures

insofar as they are applicable to a company's business.

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penetration and access to internet, the growth of e-commerce has been enabled through introduction of cash on delivery at a time when Indians were still adapting to digital payments. Discounts and deals offered by the marketplaces, faster deliveries including one-day delivery and access to a large product range, especially in tier II and tier III cities where choices were limited, revolutionised retail as well as service delivery."

(paragraph 12)

23. It may be noted that the Respondent No. 1 had already noticed that the maximum number of e-commerce companies have peaked in the year 2015 and at present there are 4,757 e-commerce start-ups which are active in the country. The following paragraph from the market study report published by the Respondent No. 1 would itself disprove the need for any inquiry into Section 3(4) of the Competition Act:

"E-commerce in India has attracted significant investments from foreign and domestic investors. The market is highly competitive and the number of e-commerce companies has increased significantly over the years. The market is expected to continue to grow in the coming years."

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companies started to enter the market since 2009. Maximum number of new e-commerce companies i.e. 1650 were formed in 2015. At present around 4757 e-commerce start-ups are active in India.” (paragraph 13)

24. The e-commerce market study report also expressly acknowledges that exclusivity arrangements are not *per se* anti-competitive and the conduct of e-commerce entities under Section 3(4) of the Competition Act have to be examined on a case by case basis in a rule of reason framework. However, the Respondent No. 1 directed an investigation against the Petitioner while primarily relying on evidence relating to the Respondent No. 3. Directing an investigation against the Petitioner in relation to an alleged violation of Section 3(4) of the Competition Act primarily relying on the evidence relating to Respondent No. 3 fails to meet the standards of the rule of reason framework. This also shows the failure of the Respondent No. 1 to consider the detailed submissions made by the Petitioner (relating to its business model) barely a year ago in the context of the complaint filed by AIOVA as well as the submissions made by the Petitioner in relation to the e-commerce market study exercise undertaken by the Respondent No. 1.

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25. Although the e-commerce market study report was published prior to the Impugned Order, the Impugned Order fails to consider the Respondent No. 1's findings in the e-commerce market study. This clearly demonstrates the Respondent No. 1's lack of awareness of its own market study.
26. That the Respondent No. 1, without granting a single opportunity to the Petitioner to respond to the allegations and explain its position, passed the Impugned order directing the Director General ("DG") to cause an investigation to be initiated against the Respondent No. 3 and the Petitioner. It is submitted that the Impugned Order passed by the Respondent No. 1 is arbitrary and without application of mind, due to the following reasons discussed below.

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GROUND

At the outset, it is submitted that all the grounds stated herein must be read in the alternative and without prejudice to one another:

Arbitrary & Perverse order passed by the Respondent No.1

27. **BECAUSE** the Impugned Order involves an exercise of power by a statutory authority which is totally at odds with its constitutional obligations under Article 14 of the Constitution of India. The rule of law principle enshrined in Article 14 of the Constitution constitutes an injunction against arbitrariness and unreasonable exercise of power, irrespective of whether the said power is guided by the statute or is discretionary in nature. The Supreme Court has held that Article 14 takes in a guarantee against arbitrariness in *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 as follows: "... The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against

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and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14"

28. **BECAUSE** the action of the Respondent No 1 in initiating

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Petitioner has also actively participated in the e-commerce market study undertaken by the Respondent No. 1, pursuant to which, a report was published by the Respondent No. 1, on January 8, 2020.

30. **BECAUSE** the Impugned Order is perverse and arbitrary as the Respondent No. 1 proceeded to direct an investigation against the Petitioner under Section 26(1) of the Competition Act, despite the fact that the recommended self-regulatory measures contained in the market study report were formulated, *inter alia*, on the basis of the inputs provided by the present Petitioner (including in the matters of transparency in relation to the main search ranking parameters, clear indication of any influence of direct or indirect sponsorships on such results, non-disclosure of algorithms, transparent policy relating to the collection, use and sharing of data, adequate user review and rating mechanism, timely notification of any changes in the proposed terms and conditions). It is the Petitioner's view that its business practices are aligned with the recommended self-regulatory measures insofar as they are applicable to e-commerce in retail.

31. **BECAUSE** the Impugned Order is unreasonable and thus arbitrary in its failure to notice the decisive factor of the informant and related parties' antecedent conduct and proceeds to order an open-ended fishing expedition of grave consequences

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to the Petitioner solely on the strength of the informant's allegations. It is respectfully submitted that this Hon'ble Court in the exercise of its jurisdiction under Article 226 is very well empowered to examine whether the Respondent No. 1 has acted illegally, has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether its view is one which no reasonable person could have arrived at. It is respectfully submitted that even a *prima facie* order must be founded principally on good faith, due application of mind, and must show adequate consideration to antecedent conduct of the parties before it. It is respectfully submitted whether viewed from a doctrinaire point of view or whether viewed from a purely pragmatic point of view, the Impugned Order is a misuse or an oblique use of statutory power vested for *bona fide* purposes under the Competition Act, 2002. It is further respectfully submitted that the question as to whether the Impugned Order is 'rational' or 'reasonable', still has to pass the *Wednesbury* test and cannot await a fishing expedition by the Director General in exercise of the powers conferred under the Act. It is well settled that having regard to the publicity as well as the degree of irreparable harm which would be caused to the Petitioner not only in India but the world over by referring to an antitrust

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inquiry in the Indian jurisdiction when no grounds exist, would create serious civil consequences.

32. **BECAUSE** the Impugned Order is perverse and arbitrary as the Respondent No. 1 has ignored the fact that the Central Government is the nodal authority for the enforcement of the FDI Policy and as such any allegations pertaining to non-compliance

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34. **BECAUSE** the Impugned Order is perverse and arbitrary as there was no requirement for the Respondent No. 1 to have exercised its statutory powers under Section 26(1) of the

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26(1) of the Competition Act while attempting to fit the case of the Informant under Section 3(4) of the Competition Act is entirely fallacious for not having had due regard to the recent e-commerce market study report (published by the Respondent No. 1 itself) which indicates that there is no formal determination of a violation of competition law (prima facie or otherwise) which is required to be established before directing an investigation under Section 26(1) of the Competition Act. The Respondent No. 1, in paragraph 112 of the e-commerce market study report, observed as follows:

"Thus, without a formal determination of violation of competition law, the Commission is of the view that improving transparency over certain areas of the platforms' functioning can reduce information asymmetry and can have a positive influence on competition outcomes. The e-commerce marketplace platforms in goods, online travel agencies and food delivery platforms may devise means to govern certain aspects of their functioning and their commercial relations with the business users of the platforms. The platforms in each of these categories, may, put in place a framework for adequate transparency and define basic conditions for platform-to-business contracts. It is appropriate to clarify that the specific conditions

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inherent to each contract should be the prerogative of the parties involved.” (paragraph 112)

37. **BECAUSE** the Impugned Order is arbitrary as, prior to its passage, the Respondent No. 1 has failed to note the lack of *bona fides* of the Informant/Respondent No. 2, a party which has participated in what the Hon'ble Supreme Court has discountenanced in very strong language as forum shopping, and more stringently as abuse of process and vexatious litigation. Respondent No. 1 did not account for the fact that, CAIT either by itself or by lending its support to other traders associations, has filed several petitions and complaints re-agitating similar issues to those before the Respondent No. 1. CAIT has also assisted the Delhi Vyapar Mahasangh (Informant/the Respondent No. 2 herein) to file the Information before the Respondent No. 1, which is evident from the fact that the banker's cheque dated October 23, 2019, submitted along with the Information, appears to be drawn on the HDFC Bank in the name of CAIT. It is thus clear that the CAIT and the other traders associations (who were the writ petitioners before the various

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not committed any breach thereof, as till date, neither has the ED nor the Central Government has found any breach hitherto.

38. **BECAUSE**, by the Impugned Order, taken as a whole, the unavoidable conclusion is that the Respondent No. 1 adopts a completely unreasonable and arbitrary course of action, initiated on the basis of information tinged with *mala fides*. Having regard to the fact that the Petitioner was responsible for assisting the Respondent No. 1 while arriving at the decision in the AIOVA information and had also enabled the Respondent No. 1 to make recommendations which are a part of the e-commerce study report, it is inconceivable that the Petitioner who is following all the recommendations (as applicable to e-commerce in retail) and actually prompted the Respondent No. 1 to make it a part of its report must be visited with an order under Section 26 of the Competition Act. It is respectfully submitted that there are two different models of e-commerce entities which are covered by the Central Government's FDI Policy – one of which is the inventory based model and the other is the marketplace model. It is only in respect of the inventory based model that questions relating to deep discounting, as well as preferred sellers as well as private labels could in fact arise. In respect of marketplace model,

attempted in multifarious high court jurisdictions, various peremptory orders seeking law enforcement agencies to be set against the Petitioner, clearly indicates that the present information itself was tinged with *mala fides* and the Respondent No. 1 ought to have been circumspect before entertaining such a petition.

Non application of mind by the Respondent No. 1

39. **BECAUSE** the Impugned Order is *ex facie* perverse and suffers from non-application of mind and further violates the law laid down by the Hon'ble Supreme Court in *Competition Commission of India v. Steel Authority of India Limited & Anr (2010) 10 SCC 744* wherein it is stated that in consonance with the settled principles of administrative jurisprudence, the Respondent No. 1 is expected to record reasons even while forming a *prima facie* view. The Respondent No.1 has merely relied on the bald allegations made by the Informant based on inaccurate facts, inaccurate characterization of the market and misconstrued evidence to direct an investigation against the Petitioner on four (4) alleged practices of the Amazon Marketplace namely '*exclusive launch of mobile phones*', '*preferred sellers on the marketplaces*', '*deep discounting*' and '*preferential listing*'.

40. **BECAUSE** the Impugned Order suffers from non-application of mind as it does not contain any *prima facie* analysis of how the so called deep discounting, preferential treatment, preferred seller arrangements is a result of an anti-competitive agreement which could violate the provisions of Section 3(4) or any analysis to show that such an 'agreement' causes AAEC in terms of Section 19(3) of the Competition Act, which is a pre-requisite for passing an order under Section 26(1) in view of the law laid down by the Hon'ble High Court of Bombay in *Star India Pvt Ltd v. Competition Commission of India & Anr* (2019 SCC Online Bom 3038).

41. **BECAUSE** the Impugned Order suffers from non-application of mind as it fails to classify the alleged deep discounting, preferential listing and preferred seller arrangements undertaken by the Petitioner under any of the categories of anti-competitive vertical agreements enumerated in Section 3(4) of the Act. Accordingly, it is submitted that the same cannot constitute vertical restraints.

42. **BECAUSE** the Impugned Order suffers from non-application of mind as the Respondent No. 1 has, in fact, completely failed to appreciate that even assuming for the sake of argument that a marketing platform can be treated, in arguendo, as a part of a vertical chain, certain minimal criteria have to be satisfied even

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for passing an order under Section 26(1) of the Competition Act. First, the Respondent No. 1 must have had some basis to believe that an "agreement" existed between the third-party sellers and the marketplaces, which would attract the provisions of Section 3(4) of the Competition Act. There is no such finding in the Impugned Order. Secondly, the consistent stand adopted by the Respondent No. 1 is to examine whether the agreement, even if one existed, under the rule of reason framework in terms of Section 3(4) of the Competition Act. There is no reference to an assessment under the rule of reason framework in terms of Section 3(4) in the Impugned Order. Further, there is no suggestion in the Impugned Order that prices in the market are being affected on account of the alleged actions of the Petitioner. Under these circumstances, no footprints of an analysis under the rule of reason framework (which is required for a *prima facie* finding of contravention of Section 3(4) of the Competition Act) were visible in the Information which had been filed by the Informant/Respondent No. 2. Thus, the entire order passed by the Respondent No. 1 is bereft of any foundation for the purpose of a *prima facie* order in terms of Section 26(1) of the Competition Act.

43. **BECAUSE** the Impugned Order suffers from non-application of mind as it appears to contain no reference to the finding of an

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appreciable adverse effect on competition. However, a sentence exists in paragraph 23 of the Impugned Order, which is so speculative in character that it cannot be even said to be a prima facie observation:-

“....Thus, exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition.....”.

44. **BECAUSE** the Impugned Order suffers from non-application of mind as it ignores the findings of the Respondent No. 1's own e-commerce market study report which contains several exculpatory observations relating to the business activities of e-commerce entities. In fact, at several places in the report, the Respondent No. 1 has expressly acknowledged the efficiencies of e-commerce, including improved competition, enhanced consumer convenience and larger participation by MSME sellers, etc. and that exclusivity arrangements are not *per se* anti-competitive and in fact can also generate efficiencies and improve competition.

45. **BECAUSE** the Impugned Order suffers from non-application of

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market study. This clearly demonstrates the Respondent No. 1's lack of awareness of its own market study.

46. **BECAUSE** the Impugned Order shows complete non-application of mind by the Respondent No. 1 as the Impugned Order (at paragraph 24) inaccurately refers an email from the Petitioner to the third party seller(s) infer that the Petitioner had undertaken to incur a part of the cost during the Great Indian

Festival of Amazon. The De... 21 14

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certain specified brands. It is further clarified in the email that the promotional offer will not be extended to any other product categories/brands not specified in the said email.

48. **BECAUSE** the Impugned Order, without any application of mind, erroneously records at paragraph 7.2.2 that the adding of the words "*Fulfilled by Amazon*" by the Petitioner to certain sellers is an example of preferential treatment and preferential listing. It is clarified that '*Fulfilled by Amazon*' does not tantamount to certification by Amazon. The words "*Fulfilled by Amazon*" are rather added to a seller who subscribes to the FBA program offered by the Petitioner. Under the terms of the FBA program, the sellers list their products on the Petitioner's marketplace and use the Petitioner's warehouses and services for delivery. The marketplace fee charged for FBA subscription is uniformly made available to all sellers across the various product categories who subscribe to the Petitioner's FBA program.

Currently, there are approximately 78,500 FBA sellers on the

by the Petitioner. On the contrary, the success of a seller on the Amazon Marketplace is attributable to the seller's ability to fulfil the following consumer-centric parameters: (a) by the quality of their selection (making available a wide selection of products on a continuing basis on the Amazon Marketplace); (b) in stock i.e. keeping a high demand products in stock on Amazon Marketplace; (c) replication – the inventory replication across various geographies and (d) ensuring delivery of products listed on the Amazon Marketplace to customers across India and at a faster speed (including through the FBA option). It is reiterated and emphasized that Petitioner cannot influence the seller's conduct on the Amazon Marketplace as the Petitioner is not permitted to hold inventory of the goods sold on the Amazon Marketplace, in terms of the extant FDI Policy.

49. **BECAUSE** the Impugned Order suffers from non-application of mind as it comes to a sweeping conclusion in paragraph 24 that “[t]he Commission perused the prices for different smartphone brands sold through Flipkart and Amazon, i.e. original price and discounted price. It was observed that certain smartphone brands/models are available at significantly discounted price on these platforms and are sold largely through the sellers identified, by the Informant, as the platforms’ ‘preferred sellers’”. Firstly, it is submitted that discounting on the products

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is the third-party sellers' prerogative over which the Petitioner has no control and the Petitioner submits that any seller is welcome to be a seller on the Amazon Marketplace subject to entering into a contract or agreement with the Petitioner. Secondly, the Impugned Order fails to record the exact details of which models and how the Respondent No. 1 searched the prices for smartphones on the Petitioner's marketplace thereby denying the Petitioner an opportunity to respond to this sweeping allegation.

50. **BECAUSE** substantial allegations and findings in the Impugned Order relate to the Respondent No. 3 and the Respondent No. 1 has mechanically, without any application of mind, concluded that the same material holds true against the Petitioner. It is submitted that the Petitioner's business model is very different from that of Respondent No. 3 and yet the two have been painted with the same brush.

Lack of personal hearing

51. **BECAUSE** the Respondent No. 1 ought to have exercised its discretion judiciously and heard the Petitioner before passing the Impugned Order. The Respondent No. 1 itself has recognized in its AIOVA Order passed barely a year ago that the marketplace-based e-commerce model is still a relatively nascent and evolving model of retail distribution in India and any

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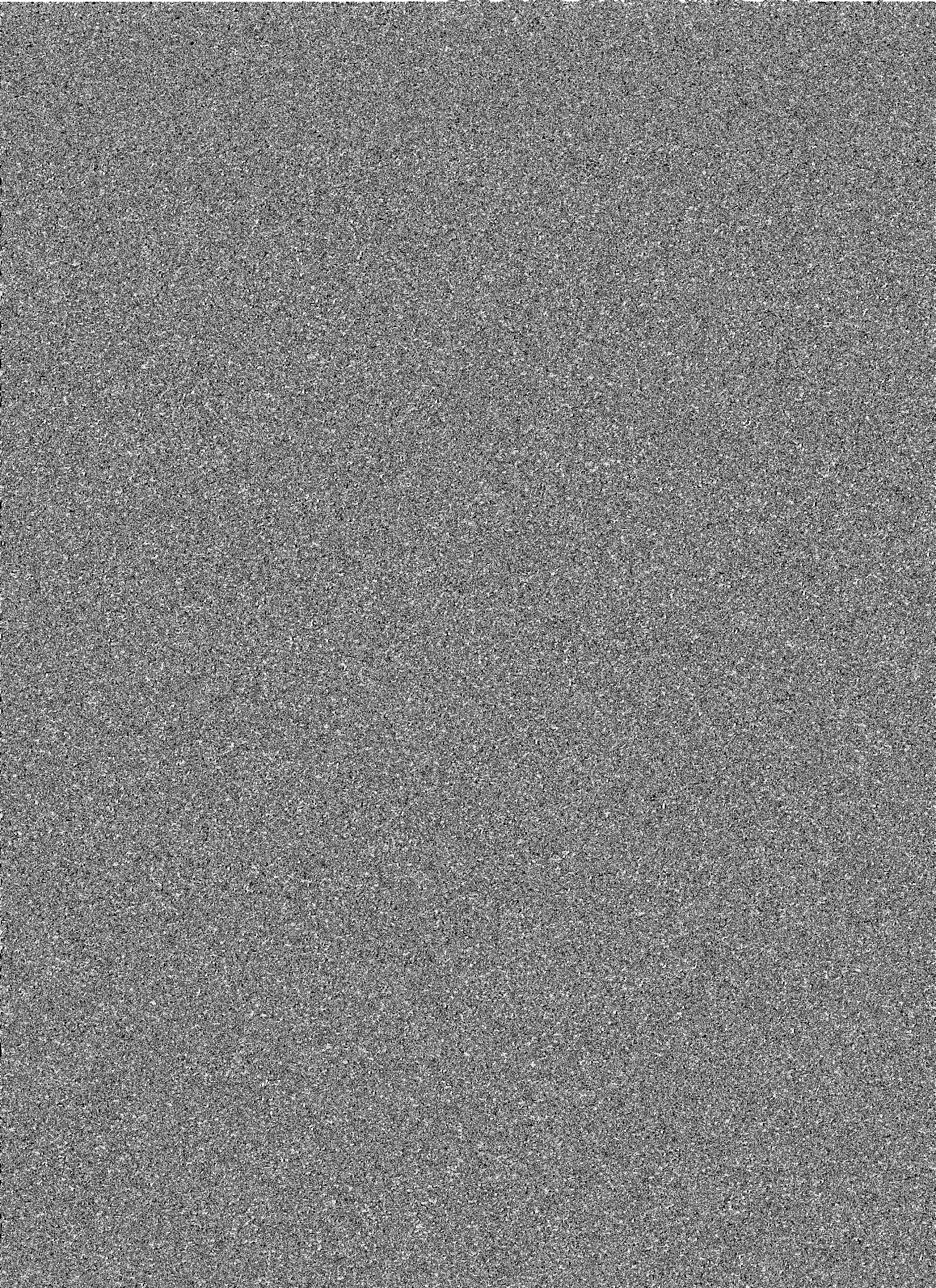
intervention in such markets needs to be carefully crafted lest it stifles innovation. Yet, in complete ignorance of its own order and caution, the Respondent No. 1 has, a year later, directed an investigation without even hearing the Petitioner.

52. **BECAUSE** before passing of the AIOVA Order, the Respondent No.1 deemed it fit to hear the Petitioner on similar allegations despite the Petitioner not being the opposite party in that case.

53. **BECAUSE** the Respondent No.1 has completely ignored the detailed submissions made by the Petitioner (with a view to assist the Respondent No. 1) in the AIOVA proceedings on similar allegations such as deep discounting and preferential treatment

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Petitioner while primarily relying on evidence relating to the



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channels. The purpose of an online channel is not to disable the offline channel from securing access to brands and its products.

58. **BECAUSE** the Respondent No. 1, in its decisions concerning the Indian retail market, has noted that both the offline and online segments are substitutable channels or segments of the overall retail market in India and they do not constitute separate product markets.

In *Ashish Ahuja v Snapdeal and Ors.* (Case No.17/2014), the Respondent No. 1 observed that: "...both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decide accordingly. If the price in the online market increase[s] significantly, then the consumer is likely to shift towards the offline market and vice versa. Therefore, the Commission is of the view that these two markets are different channels of distribution of the same product and are not two different relevant markets..."

In the *Deepak Verma v Clues Network and Ors.* (Case No.34/2016), the Respondent No. 1 noted that: "...that these two markets are only two different channels of distribution and are not two different relevant markets..."

59. **BECAUSE** the Impugned Order ought to have considered that offline stores and channels have thrived despite the presence of the online channel both in India and other jurisdictions. The

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Petitioner has been operating in the United States of America since the 1990s and the offline channel has thrived and posed significant competitive constraints to the online channels.

60. **BECAUSE** the Impugned Order ignores the findings of the Respondent No. 1's own market study which showed that online sales of mobile phones account for around 40% of the total market with the remaining 60% being sold offline. Even within the online channel, direct sales from the smartphone manufacturer's own website cannot be ignored. Therefore, it was impossible that the Petitioner's conduct could result into an AAEC in the market for sale of smartphones.

61. **BECAUSE** the Impugned Order fails to appreciate that the Petitioner enters into a standard contract with the third party sellers (who register on the Amazon Marketplace to list their products for sale to the end consumers) which does not stipulate any exclusivity obligations. Therefore, the question of any exclusivity does not arise. It may be noted that the marketplace services provided by the Petitioner are non-discriminatory in character and are available to all sellers who register themselves with the Amazon Marketplace. It is the sole prerogative of the sellers to decide if they would sell their

62. **BECAUSE** the Impugned Order fails to consider that the exclusive launch of mobile phones is a marketing tool used by a brand/manufacture for sales promotion. The sellers on the Amazon Marketplace procure the products directly from the brand/manufacture or their authorized distributors and offer them to the end-consumers. In fact, the two instances of Viva

smartphones and then take a decision about purchasing the phone. For smartphone manufacturers, this allows them to gauge the response of the consumers, obtain feedback and estimate the likely demand for the phone before delivering the stock to the offline stores. Such exclusive launches on the online channel ultimately boosts sales in the offline channel. This is often called the 'billboard' effect. Thus, it must be noted that effective online marketplaces such as the Petitioner incidentally improve the well-being of the offline channel simultaneously, since all commerce does not take place online.

64. **BECAUSE** such alleged exclusive launches are made only for a very short and limited period of time. This would in any way be the time taken by the smartphone manufacturer to supply products to the offline stores. Moreover, even during this limited period of exclusivity, phones with similar functionalities, features and specifications are widely available in the offline channel. Therefore, there is no possibility of any AAEC as a result of such exclusive launches by smartphone manufacturers on online marketplaces.

65. **BECAUSE** the smartphone manufacturers considered by the Respondent No.1 such as Oppo and Vivo have a significant presence in the offline channel. Therefore, there is no possibility

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that such exclusive launches could have caused AAEC in the sale of smartphones in India.

66. **BECAUSE** the Petitioner has made it abundantly clear to the Respondent No. 1 (in the proceedings relating to the information filed by AIOVA) that subject to the fulfilment of certain conditions, any retailer from anywhere in India may register as a seller on the Amazon Marketplace. In so far as the allegations pertaining to preferential listing are concerned, it is clarified that the search results generated on the Amazon Marketplace take into account how closely search queries match different attributes of the searched products, customer ratings, feedbacks on the products and the seller, delivery timelines, etc. The search results are driven by algorithmic models which draw inputs from the parameters selected by the customers such as brand, price range, time of delivery, average customer reviews, etc.

67. **BECAUSE** the Respondent No. 1 has proceeded upon a fundamental premise that the Petitioner provides intermediation services for the distribution of goods whereas the Petitioner is a marketplace (within the framework laid down under the extant FDI policy) which is working with third-party sellers and, strictly speaking, providing services that are integral to and non-separable from retail trade.

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68. **BECAUSE** the Respondent No. 1, while directing an investigation into a prima facie contravention of Section 3(4) of the Competition Act, fails to appreciate that the services being offered by the Petitioner are neither in the nature of an exclusive supply agreement nor a tying arrangement or exclusive distribution agreement or refusal to deal or resale price maintenance.

69. **BECAUSE** the Petitioner will face immense and irreparable reputational loss if unfounded investigations are allowed to continue. The Supreme Court, in *Rohtas Industries v. S.D. Agarwal* (1969) 1 SCC 325 and the High Court of Calcutta in *New Central Jute Mills Co. Ltd. v. Deputy Secretary, Ministry of Defence AIR 1966 Calcutta 151* has held that “...an investigation against a public company tends to shake its credit and adversely affects its competitive position in the business world even though in the end it may be completely exonerated and given a character certificate and that the very appointment of Inspector (in that case under Section 237(b) of the Companies Act to investigate the Company's affairs) is likely to receive much press publicity as a result of which the reputation and prospects of the Company may be adversely affected...” and thus, an incorrect and arbitrary investigation authorized by a wholly untenable, unreasonable and prejudicial order that was passed

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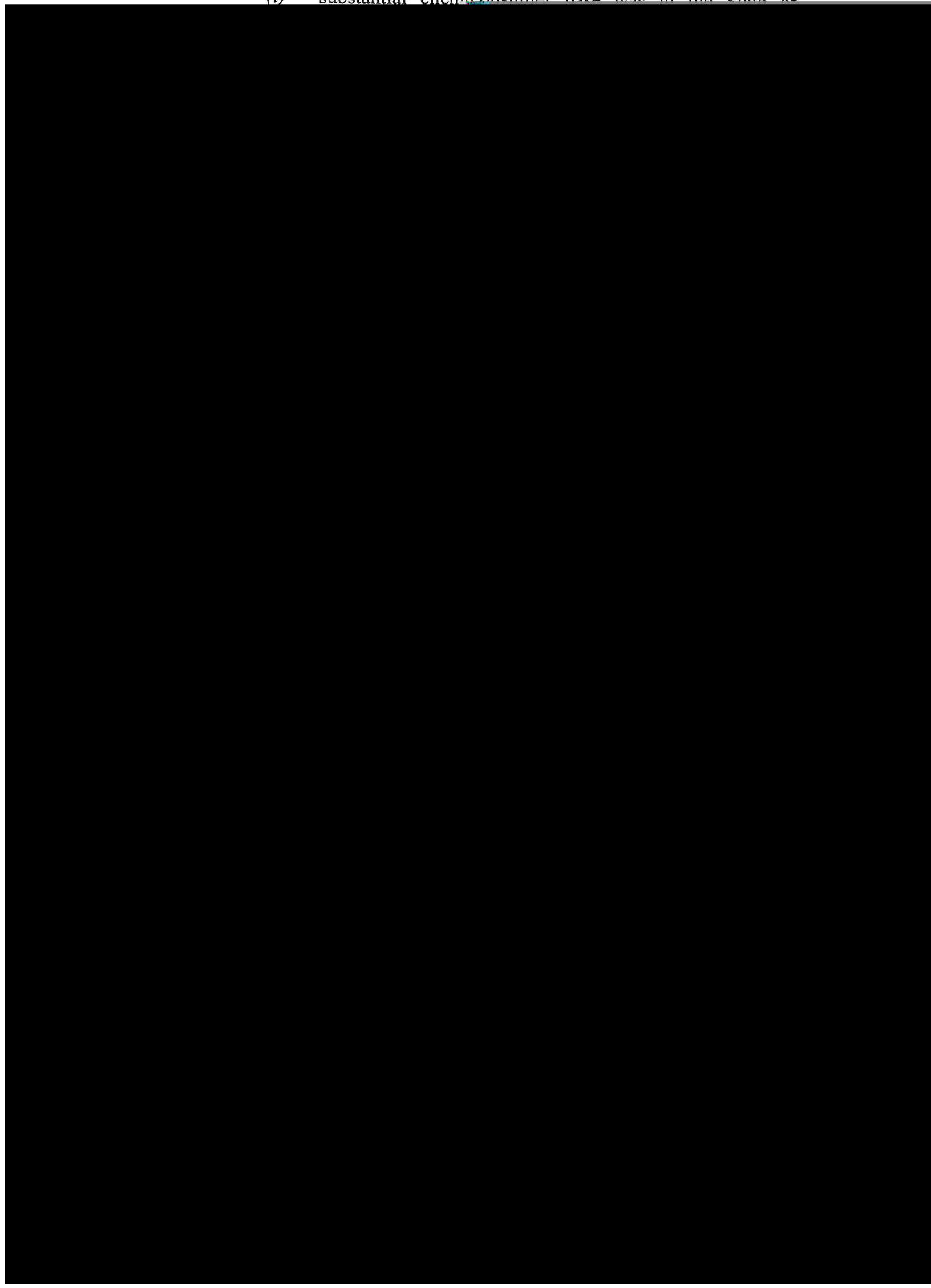
without any opportunity being afforded to the Petitioner to show-cause or clarify the information submitted will cause serious damage to the Petitioner. The investigation also has reputational consequences for the Petitioner, being a global company and a part of the internationally reputed Amazon Group.

70. **BECAUSE** there must be territorial jurisdiction before a writ petition is maintainable under Article 226 of the Constitution of India. To constitute requisite territorial jurisdiction, the Petitioner's registered office must be situated within the territorial jurisdiction of the Hon'ble High Court and the cause of action should have arisen within the territory. It is pertinent to mention that the registered office of the Petitioner is in Bengaluru and that certain agreements between the smartphone manufacturers and the Petitioner (which are intricately connected with the investigation directed by the Respondent No. 1) were signed in Bengaluru.

71. **BECAUSE** the Hon'ble High Court of Bombay in *Vodafone India Limited v. Competition Commission of India & Ors.* bearing Writ Petition no. 8594 of 2017 has held that the Writ Petition filed by Vodafone against an order of the Respondent No.1 under Section 26(1) of the Act was maintainable. The Hon'ble High Court held that the following conditions were to be met in order for the writ to be maintainable:

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(i) substantial client/consumer base was in the State of



GROUNDS FOR INTERIM PRAYER

74. **BECAUSE** there is a strong *prima facie* case for stay in favour of the Petitioner as the Impugned Order has been passed without application of mind, the *balance of convenience* for the stay lies in favor of the Petitioner is a bona fide company and no harm or injury would be caused to Respondent No.1 and inter alia *irreparable loss and injury* would be caused to the Petitioner and its reputation/goodwill if an investigation is allowed pursuant to the Impugned Order.

Thus, from the facts and grounds enunciated above, it is clear that the present Impugned Order has been passed without *prima facie* application of mind and will cause serious prejudice to the Petitioner. Its findings are perverse, arbitrary, untenable in law. The Petitioner has not preferred any other petition(s) before any other Court(s) of law seeking relief against the Impugned Order qua the Petitioner prayed in this petition. An interim stay on the proceedings directed by the Respondent No. 1 insofar as the Petitioner is concerned.

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In view of the foregoing, the Impugned Order is liable to be quashed.

P R A Y E R S

It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to issue writ of Certiorari or such other writ or direction or order:

a) quashing and setting aside the impugned order.

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU
[ORIGINAL JURISDICTION]

WRIT PETITION NO. /2020 (GM)

IN THE MATTER OF:

AMAZON SELLER SERVICES PRIVATE LIMITED

....PETITIONER

VERSUS

COMPETITION COMMISSION OF INDIA & ORS

....RESPONDENTS

VERIFYING AFFIDAVIT

I, N. Anil Kumar, s/o K.S. Nagaraja Rao, aged 47 years, working as Advocate at P&A Law Offices, having its office at WeWork Galaxy, 43 Residency Road, Bengaluru 560025 do hereby solemnly affirm on oath and state as follows:

1. I submit that the verifying affidavit for the writ petition has been sworn in Delhi. As annexures to the writ petition are being sworn in Bengaluru I am submitting this supporting affidavit. I am aware of the facts and circumstances of the case and hence I swear to this affidavit.

2. I state that the contents of the Writ Petition in paragraph nos. 1 to 74 are