



COMPETITION COMMISSION OF INDIA

Case No. 09 of 2020

In Re:

Lifestyle Equities C.V.

Prins Bernhardplein 200, 1097 J.B. Amsterdam,
Netherlands

Informant No. 1

Lifestyle Licensing B.V.

Prins Bernhardplein 200, 1097 J.B. Amsterdam,
Netherlands

Informant No. 2

And

Amazon Seller Services Private Limited.

No.26/1 ,8th floor, Brigade Gateway
Dr. Raj Kumar Road Malleshwaram (West),
Bengaluru- 560055, Karnataka

Opposite Party No. 1

Amazon Export Sales LLC

330 Boren Ave N, Seattle,
Washington - 98119, USA

Opposite Party No. 2

Cloudtail India Private Limited

Ground Floor Rear Portion, H-9,
Block B- 1 Mohan Cooperative Industrial Area,
Mathura Road, New Delhi-110044

Opposite Party No. 3

CORAM

Mr Ashok Kumar Gupta
Chairperson

Ms Sangeeta Verma
Member

Mr Bhagwant Singh Bishnoi
Member



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

1. The instant information is filed by Lifestyle Equities C.V. (hereinafter, ‘**IP-1**’) and Lifestyle Licensing B.V (hereinafter, ‘**IP-2**’) (both collectively referred to as Informants) being Dutch Companies, through their duly constituted attorney, under Section 19(1)(a) of the Competition Act, 2002. (hereinafter, the ‘**Act**’) alleging contravention of relevant provisions of Sections 3(4) read with Section 3(1) and Section 4(2) read with Section 4(1) of the Competition Act, 2002 (“**Act**”) by Amazon Seller Services Private Limited (hereinafter, ‘**OP-1**’), Amazon Export Sales LLC (hereinafter, ‘**OP-2**’) and Cloudtail India Private Limited (hereinafter, ‘**Cloudtail/OP-3**’) and collectively referred to as ‘**Opposite Parties/OPs**’.

Background of the Parties

2. Lifestyle Licensing B.V. (IP-2) is the proprietor of the brand under the name and style of Beverly Hills Polo Club (hereinafter, the ‘**BHPC Brand**’). Lifestyle Equities C. V. (IP-1), a licensee of IP-2, is in the business of licensing the use of the BHPC Brand, appointing distributors, manufacturers and franchises around the world, for sale of products, and conducts its business activities under the name of the said Brand. IP-2, for the Indian region, has appointed an exclusive licensee, namely Major Brands India Pvt. Ltd. (hereinafter, ‘**Major Brands**’) to make sales of products under the BHPC brand through offline and online channels in India.
3. Amazon Seller Services Private Limited (OP-1) is a private limited company, engaged in the business of managing and operating an online sales website, namely, www.amazon.in. OP-1, through its affiliates, directly and/or indirectly, stocks and sells/fulfills orders of various categories of products, including fashion and lifestyle products on its platform.
4. Amazon Export Sales LLC (OP-2) is a limited liability corporation incorporated and residing in the United States of America. OP-2 is a seller/retailer of products that supplies/fulfills orders placed by customers on the website of OP-1 from Amazon's global store till very recently.



सत्यमेव जयते



5. Cloutail India Private Limited (OP-3) is a company incorporated in India. The Informants state that it is a 'preferred seller' on OP-1's platform and an affiliate and/or group entity of the same. It is stated to be one of the largest sellers on OP-1's online platform, in which OP-1 allegedly has significant investment interest and/or is the related party of the same.

Facts and Allegations as stated in the Information

6. The Informants have stated that there are instances of unfair and anti-competitive practices by the OPs and their affiliate entities worked out through their inter-se agreements, which have caused an exclusionary effect on the Informants' overall online business operations in India, by adversely impacting the visibility of the Informants' fashion products sold under the Beverly Hills Polo Club Brand and its online retail sales, leading to debilitating effect on competition. Further, the Informants have alleged abuse of dominance, especially by OP-1, leading to foreclosure of competition by hindering entry into the market. The Informants stated that there had been a positive correlation year-on-year between the expenditure and revenue of OP-1 during the period FY 2017-18 to 2018-19.

Allegation of Section 4: Abuse of Dominance

7. The relevant market proposed by the Informants is '*online fashion retail in India*'. Relying on certain reports, the Informants have alleged that the combined market share of OP-1 and Flipkart India Private Limited is almost 62% of the entire online retail space and allegedly OP-1 holds about 31.1% share in the online fashion retail space. It is further alleged that, in terms of Gross Merchandise Value (GMV), OP-1 is leading with gross sales of \$7.5 billion in the financial year ended on March 31, 2018, while Flipkart's sales are at \$6.2 billion. Based on the reports, *inter alia*, the Informants have alleged that OP-1 holds significant market share in online retail and thus enjoys position of strength. It was further stated that the capital expenditure incurred by the OPs on appropriation of the relevant market, despite incurring losses running into thousands of crores, depicts the dominance of the said OPs. Thus, the new entrants in the market not having capital to spend on discounts and incentives, get stifled and eventually get eliminated on account of the exclusionary conduct of the OPs.



सत्यमेव जयते



8. The Informants have stated that they do not sell or offer for sale any of their fashion products under the BHPC Brand on OP-1's e-commerce platform and such products are available for sale only on Informants' own website (now) or its licensee's website (earlier), or in brick and mortar stores. The *modus operandi* followed by the OPs of selling/offering for sale counterfeit/unlicensed/unauthorized products bearing Informants' BHPC Brand at unfair and discriminatory prices, including predation model, which is supported by their deep pockets and funding, has affected the relevant market in OPs' favour. The OPs are resorting to the strategy of growth over profit by offering deep discounts to establish a network for attracting users on-board. Because of the abusive conduct of OPs in selling counterfeit products of the Informants at abysmally low prices, the Informants have been unable to compete in the online retail space.
9. The Informants also alleged that many other brands similar to those of the Informants have also got affected due to anti-competitive activities of the OPs.
10. The Informants averred that in 2017 they acquired knowledge that the OPs offered counterfeit/unlicensed/unauthorised products of the Informants at 'unfair, discriminatory and/or predatory prices'. This led to diversion of online traffic from the website of the Informants (from 2019) and Major Brands (2017-2018) to the website of OP-1 (www.amazon.in) for the Informants' or Major Brands' products. This not only caused confusion due to visibility of excessive discounting of products under the BHPC brand than the prices of genuine products sold on Informants' own website, but also resulted in the delivery of inferior counterfeit/unlicensed/unauthorised products of the Informants, by the OPs and caused it immense reputational harm. Such alleged conduct of imposing unfair pricing upon the sale of goods is anti-competitive because the Informants would never be able to match the pricing levels of the counterfeit/unlicensed/unauthorised products sold by OP-1 and fulfilled by OP-2. Moreover, it precluded the Informants from selling their own products through their own website (now) or through their licensees (earlier) unless they sold at unviable rates.
11. Sale of counterfeit/unlicensed/unauthorised products caused an appreciable reduction of the Informants' brand appeal which directly benefited the Informants' competitors such as *US Polo Association* which sold through preferred sellers of OP-1. Due to such



सत्यमेव जयते



anti-competitive activity of the OPs, the online sales of the Informants allegedly got affected. The Informants apprehended that the OPs are engaged in similar activities with respect to other brands in the online fashion retail as well and it is not just the Informants who have suffered from the anticompetitive activities of the OPs. According to the Informants, such conduct would lead to closure of all other fashion retail websites and all brands including the Informants' brands as they would be forced to sell on the online website of OP-1 alone.

12. The Informants have further stated that any seller's access to customers on online platforms/websites is significantly dependent on the sellers' ranking on such platforms. Instead of acting as a neutral marketplace, OP-1 has leveraged its control on its platform in favour of own/preferred sellers/label by giving them higher search ranking and positive customer review, to the disadvantage of other sellers. Further, such search ranking and customer review mechanism of OP-1 is alleged to be opaque.
13. Thus, based on the above allegations, the Informants stated that the actions of OPs especially OP-1 has resulted in creation of barriers to new entrant in the relevant market and has driven existing competition from the relevant market. The OPs have adopted a model with the aim to give 'astronomical and accelerated incentives' with the only objective of centralizing the supply chain coupled with discounts to consumers to lock-up demand and stifle competition in the relevant market.

Allegation of Section 3(4): Anti-Competitive Agreements

14. The Informants have levelled similar allegations against the OPs under the scheme of the provisions of Section 3(4) of the Act. The Informants alleged that the *inter se* agreements of OP-1 with OP-2 and OP-3 to sell counterfeit/unlicensed/unauthorised products are anti-competitive which have created significant entry barriers, and foreclosed the market for other competitors and have had a debilitating effect on competition in India.
15. The Informants alleged that though OP-1 claims to be working on a market place model, however, under the garb of being a market place it is in fact indulging in inventory-based e-commerce service as a result of the anticompetitive agreements inter



सत्यमेव जयते



se with the other OPs, which enables OP-1 to cross subsidize its product on its website by adopting either or all of the following things:

15.1 OP-1, through OP-2, is selling and has sold counterfeit/unlicensed products of the Informants. By virtue of being counterfeit/unlicensed, such products are lower in price as compared to genuine products and are pushed for sales on OP-1's website and thus, gain undue advantage to the detriment of genuine sellers in the online fashion retail market.

15.2 OP-1's own private label, 'Symbol' is sold in the same segment as the Informants. According to the Informants, 'Symbol' is shown to have higher ranking and better customer reviews than the other brands offered on online website of OP-1 which, *inter alia*, creates an anticompetitive effect based upon customer reviews. Further Informants allege that to incentivize the online retail space and to create high entry barriers, OP-1's products are sold by preferred sellers, including OP-3, at highly subsidized/discounted rates resulting into appreciable adverse effect on competition in India.

15.3. The Informants have stated that OP-2 and OP-3 are affiliates of or related entities of OP-1. OP-1 leverages its control over the marketplace, to benefit its related entities and preferred sellers. The Informants claim that the products of these sellers get higher search ranking and customer reviews (owing to special arrangement between OP-1 and the Preferred Sellers). The Informants have submitted that OP-1 offered deep discount, at its own cost on the products sold by its preferred sellers, thus as a result the same brand/ product sold by an unrelated and/or other seller of OP-1 is priced much higher than the price offered by Preferred Sellers such as OP-2 and OP-3, foreclosing competition. It is, therefore, alleged that, owing to such factors, many manufacturers sell on OP-1's platform exclusively through the preferred sellers of OP-1.

16. The Informants made trap purchases of products sold under the Informants' BHPC brand from the website of OP-1 and concluded that low prices of such products are not



सत्यमेव जयते



possible but for OP-1 and OP-2 using their capital and deep discounting methods to cross subsidise sales on OP-1's website.

17. The Informants have also stated that even the large brands are dependent on OP-1's website, for their online retails, owing to OPs' dominance and market power. Resultantly, if the Informants or any other entity is desirous of selling the products on the website of OP-1, then they would be constrained to sell the products only through *Preferred Sellers* to have brand visibility and have effective access to online consumers. This also creates huge and significant entry barriers for brands to sell their products from their self-owned websites.
18. The Informants alleged that OP-1, through its anti-competitive agreements, *inter alia*, with OP-2 and OP-3 has created an exclusionary effect for the other non-preferred sellers and has concentrated and amalgamated the sellers with which it has, exclusive tie-in arrangements, thereby limiting the number of suppliers and distorting competition based on preferential treatments. It also alleged that OPs gather data on consumer preferences to their own advantage.
19. Besides the above, the Informants have averred that the OPs should be investigated for contravention of Section 3(3) of the Act by stating that the OPs are controlled by the same management and thus form part of a single economic entity.
20. Based on the aforesaid facts and allegations, the Informants have prayed to cause an investigation into the matter under the provisions of Section 3 and Section 4 of the Act and have sought a direction against the OPs to cease and desist from the alleged anticompetitive activities.
21. On 13.04.2020, the Commission directed the Informants to file affidavit under Section 65B of the Indian Evidence Act, 1872 and to furnish certain additional information, if any. The response of the Informants received on 16.05.2020 through email and later the same in hard copy on 22.06.2020 is briefly summarised as under:

21.1 Horizontal platforms like Amazon, Flipkart, Tatacliq facilitate sales of fashion products online. Fashion-only platform in India selling multi-brand products is



सत्यमेव जयते



Myntra (owned by Flipkart). The Informants have no access to show exact market share of the above platforms in the online fashion retail segment.

21.2 OP-1's share in the total online fashion sale in India is not in the knowledge of the Informants. It is reiterated that OP-1 has the largest market share in online retail sale of fashion in India, which is sufficient to form a *prima facie* opinion in this case.

21.3 As OP-1 is dominant in the online retail fashion segment, the fashion retailers/sellers/brands are compelled to sell on OP-1's platform for establishing online presence. Such brands and sellers who intend to sell or are selling on OP-1's platform do not have countervailing power and are dependent on it since they are not able to effectively go offline even if the contract terms imposed by OP-1 are abusive and unacceptable.

21.4 There is a difference between selling through a preferred seller and a non-preferred seller on OP-1's platform. The Retailers or brands selling on OP-1's platform but not through preferred sellers do not have a level playing field to compete with competitors/ sellers/brands selling on the platform through preferred sellers. This is because of preference agreement between OP-1 (Amazon) and OP-3 (Cloudbtail). Selling through non-preferred sellers will not achieve and/or likely to achieve equivalent sales and market exposure as against selling through preferred sellers.

21.5 Even though there is no express restriction or imposition, the restrictive and preferential conduct of OP-1 and the arrangement between OP-1 and its preferred sellers compels or has an implied imposition on the sellers/retailers/brands to sell on OP-1's platform only through preferred sellers of OP-1. The preferred sellers like OP-3 enjoys high user/peer review ratings on the platform creating a lock-in effect from consumer viewpoint even if the same product is sold at identical prices by another seller. *US Polo Association* (direct competitor of the Informants) sells its products on OP-1 platform through a preferred seller (OP-3)



सत्यमेव जयते



as well as non-preferred seller. However, when compared on price between the two types of sellers selling same product, OP-3 gets a higher search listing and customer reviews. Due to this, customer prefers to purchase from OP-3.

21.6 The Informants neither sell on OP-1's platform nor any other third-party online marketplace platform nor on inventory-based platform in India. The Informants are selling their fashion products only through their own website www.bhpoloclub.in and in the past sold through exclusive licensee and Tatacliq. These platforms never had any significant market share in online fashion retail segment in India.

21.7 It is in fact the grievance of the Informants that they are not selling through any other online marketplace platform including OP-1's website because of anti-competitive activities of OP-1 as it is in a dominant position in the relevant market. The availability of counterfeit/unlicensed products of the Informants on OP-1's platform eclipsed/prevented any possibility of the Informants to compete with such counterfeit/unlicensed products being sold on the website of OP-1. The prices of such products are almost 3 times lesser than the actual price of the Informants' products.

21.8 The ordinary consumer cannot differentiate between the counterfeit product sold by OP-1 and the authentic/genuine products which are available on its own website and the consumer places the order on OP-1's website, fulfilled by OP-2, assuming it to be an authentic product of the Informants on discounted prices. This has affected the online sales of the Informants. The lower price parity of the counterfeit products *vis-à-vis* genuine products of the Informants, available on OP-1's platform, sold and fulfilled by OP-2, prevented and prohibited the entry of the Informants on OP-1's platform which promoted and sold/offered for sale such counterfeit/unlicensed products through OP-2. Thus, OP-1 has foreclosed the entry of the Informants on any marketplace platform in India unless they agree to sell on OP-1's platform through its preferred sellers.



सत्यमेव जयते



21.9 It has been alleged that OP-1 through OP-3 (Cloudbtail) entered into similar anticompetitive agreements with various brands/manufacturers wherein it offers for sale the products which are cognate and substitute to those of the Informants at highly anti-competitive and subsidized/discounted rates. Thus, there is an implied imposition on brands/manufacturers including the Informants to sell through preferred sellers.

21.10 OP-1 as a marketplace has access to sensitive commercial data such as pricing, trends in respect of the products sold by retailers on the platform and uses this data to the competitive advantage of the preferred sellers such as OP-3. *Allen Solly* prefers to sell only through OP-3 (Cloudbtail) as non-preferred sellers cannot offer deep discounts and other host benefits associated with the preferred seller. Thus, there is an attempt by OPs to limit and concentrate the number of suppliers/sellers on its platform and stifle the competition amongst the sellers and distort the competition based on preferential treatment and limiting the choice of sellers available to the consumers. Hence, the Informants do not sell or offer for sale its apparel products on the online marketplace platforms, especially of OP-1, which is dominant.

21.11 The Informants submitted that the percentage of its online sales *vis-à-vis* its total sales in India for the last 3 years is 0.44% (from the website of exclusive licensee and Tatacliq). After August 2018, the Informants pulled out from selling on online platforms due to anti-competitive activities of OP-1 as it always had been in a dominant position.

21.12 The Informants are not in possession of the commercial details of other companies about how they are similarly affected by anti-competitive activities of OP-1 and is a matter of investigation. However, the Commission may take a judicial notice of the trend where several large brands across all sectors which used to sell their products through their own websites have started selling on OP-1 platform through its preferred sellers.



सत्यमेव जयते



- 21.13 The tie-ups of OP-1 with brands such as *Allen Solly, American crew, US Polo Association and Adidas etc.* are not exclusive in nature and the products of these brands are available on other online market platforms such as Flipkart. However, the operation of these brands is identical on each online marketplace platform (selling through preferred seller). *US Polo Association* sells through *Retail Net* (preferred seller of Flipkart).
22. The Commission has carefully perused the information including additional information, documents filed by the Informants and relevant information available in the public domain.
23. The Commission shall deal with the allegations of the Informants as regards the dominant position of OP-1 in the first instance. For the said purpose, the Informants have defined the relevant market as '*online fashion retail in India*' and have stated that OP-1 is dominant in the relevant market as it holds 31.1 % market share and has the largest GMV in India. After perusal of the information provided by the Informants, the Commission notes that OP-1 is a platform that facilitates trade between buyers and sellers. In the past cases decided by the Commission, it has noted the distinguishing characteristics of these platforms where the sellers would be interested in selling when increasingly high number of buyers visit such online platform and *vice versa* thus, characterising the online platforms with cross-side network effects. Accordingly, in the present case the relevant market can be defined as the '*market for services provided by online platforms for selling fashion merchandise in India*'.
24. As per *Red Seer Report June 2019*¹, the online fashion segment consists of many players which includes large horizontals like Amazon and Flipkart and verticals like Myntra, Ajo, Koovs *etc.* As per the Report, the fashion marketplaces'/verticals' collective share is estimated to be around 50% and that of the large horizontal/multi-product marketplaces such as Amazon and Flipkart to be around 35%.
25. For the assessment of dominance, it is noted that there are multiple players operating in the relevant market for services provided by online platforms for selling fashion

¹ <https://redseer.com/newsletters/online-fashion-market-updates-june18/>



सत्यमेव जयते



merchandise in India. As per the information available in public domain, it appears that presently Flipkart and Amazon are close competitors with comparable market position and resources. In addition, there are other players like *Paytm Mall*, *SnapDeal*, *Shopclues etc.* providing intermediation services in the relevant market. Thus, looking at the present market construct, it does not appear that any one platform is occupying a dominant position in the relevant market, as envisaged under Section 4 of the Act.

26. Based on the above analysis and the available information at disposal, OP-1 does not seem to be a dominant entity in the relevant market. In the absence of dominance, the question of abuse of dominant position does not arise.
27. Before proceeding further, the Commission finds it imperative to clarify that the aforesaid assessment of dominance is specific to the relevant market delineation owing to the product focussed allegations of the present case. Delineation of relevant market and competitive assessment are based on market realities as they exist at the time of assessment, keeping in view the facts and allegations. In rapidly changing markets in particular such as the one in the present case, market assessment cannot have a static approach.
28. The Informants' primary allegation pertains to counterfeiting/unlicensed/unauthorised selling of its products on the OP's platform at a price which allegedly is significantly lower than the price of the original product. Though it is understood that online sale of counterfeits could be a matter of concern for brands and consumers alike, given that OP-1 is not dominant in the relevant market, the issue does not lend itself to antitrust scrutiny. The Commission observes that besides antitrust law, the issue of alleged sale of counterfeits on online platforms is amenable to be addressed through other legal/regulatory instrumentalities as well. Thus, though the Commission is statutorily constrained from looking into this issue because of the absence of OP-1's dominance, the issue of counterfeit may be addressed through other regulatory instruments in view of the adverse implications it has on sellers and buyers in general.
29. The specific allegations levelled by the Informants under Section 3(4) of the Act are with respect to exclusive arrangements, deep discounting and preferential listing by the OPs. The issue of exclusive agreements between the OPs and fashion brands was



सत्यमेव जयते



alleged in the information. However, in their response to the additional information request, it has been clarified by the Informants that the contracts of OP-1 with brands such as *Allen Solly*, *American crew*, *US Polo Association* and *Adidas etc.* are not exclusive in nature. As noted, exclusive tie ups between platforms and fashion brands do not seem to exist and there are plenty of channels of intermediation available for fashion brands, sellers/retailers and consumers to access/reach each other.

30. The Commission notes that the Informants have relied upon the observations of the Commission made in the order dated 13.01.2020 in Case No. 40 of 2019 *i.e. Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors.* for similar issues of vertical agreements entailing preferential listing, discounts *etc.* in the online smartphone market. However, *prima facie*, there appears to be differences between the two cases in terms of the potential effect on competition. *Firstly*, the online market structures for smartphones and fashion products in India are different with fashion being more diverse and dispersed. Besides the horizontal, multi-product platforms such as Amazon and Flipkart, there are a number of vertical, fashion-only platforms which provide significant avenues for fashion brands and retailers to place their offerings before online consumers. This fact is reflected in the combined market share of Amazon and Flipkart in online fashion sales in India, which is estimated to be around 35%, while the fashion verticals collectively account for an estimated 50% (as per *Redseer Report* cited above). In the case of smartphones, besides the brand-owned, single-brand websites, the only third party, multi-brand platforms available for brands and retailers to access online consumers are Amazon and Flipkart, with their collective share relatively much higher. *Secondly*, the instant information, as clarified by additional information, does not allege platform-specific exclusive launch of fashion products by brands unlike the smartphone case, thereby not having the same effect on consumer choice and inter-platform competition. Thus, the *prima facie* observations and findings of the Commission in Case No. 40 of 2019 are not applicable to the facts of the present case.
31. Even otherwise, given the market dynamics as aforementioned, it seems unlikely that the alleged conduct would have the alleged appreciable adverse effect on competition, to conclude a *prima facie* case of contravention.



सत्यमेव जयते



32. Based on the foregoing discussion, the Commission is of the view that no case is made out in the given facts and circumstances of the present case and the information is directed to be closed forthwith against the OPs under Section 26(2) of the Act.
33. The Secretary is directed to communicate to the Informants, accordingly.

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

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

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

**New Delhi
Date: 11/09/2020**