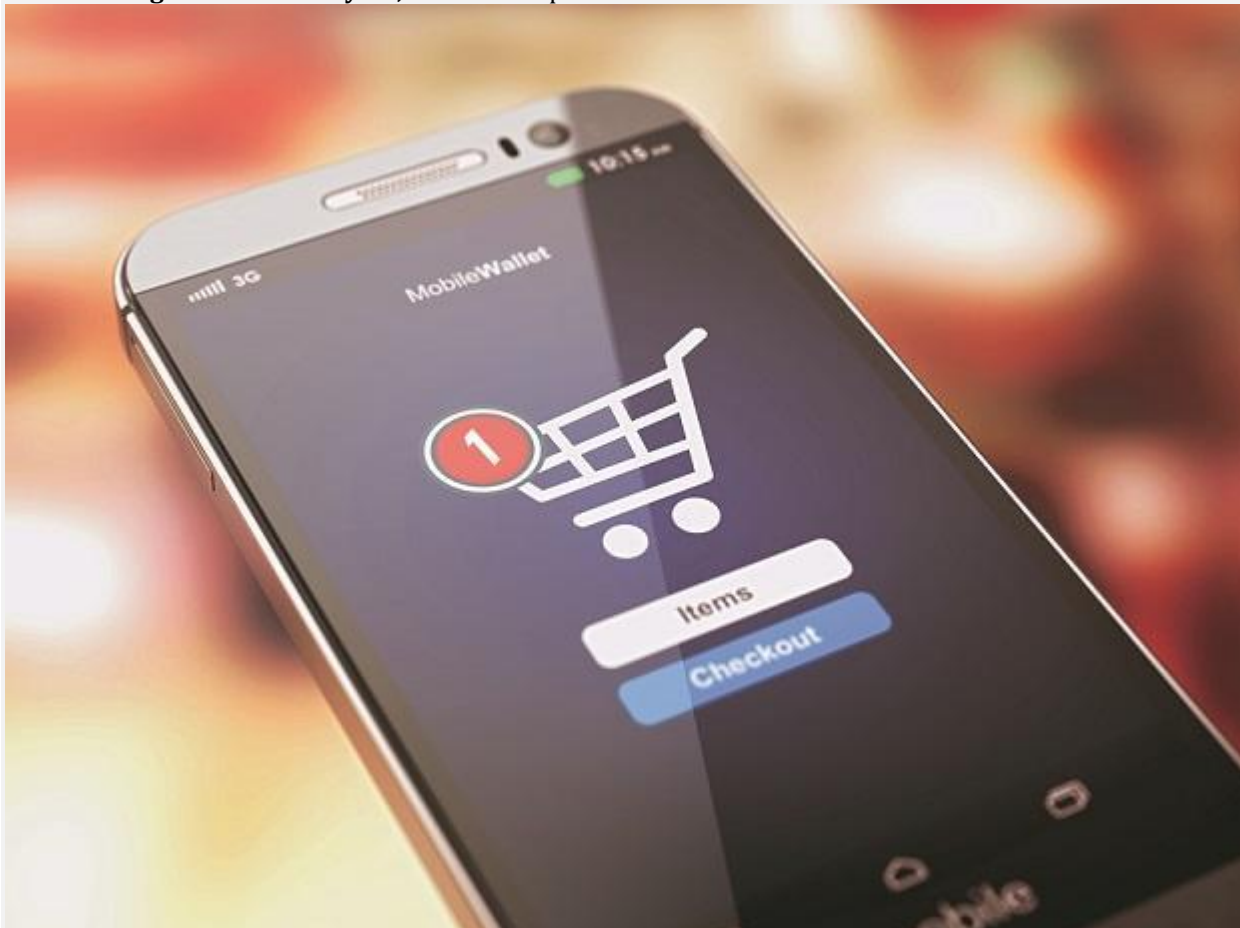


# Business Standard

## CCI vs Amazon and Flipkart: A test case for Indian e-commerce platforms

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Akanshha Agrawal February 23, 2020 Last Updated at 20:03 IST



Finally, there are pending investigations by other regulators concerning the definition of e-commerce. The Competition Commission of India's (CCI's) investigation against Amazon and Flipkart and the legal challenge to this move by the two companies are likely to set a precedent for the competition watchdog's approach towards business models of e-commerce platforms. The decision is also likely to affect other markets based on similar models, such as radio taxi services and food service aggregators, said competition law experts.

In its January 13 order, the Competition Commission argued that the business models of the e-commerce platforms under investigation threaten to cause "appreciable" adverse impact on competition.

The order said that "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." The CCI, in the past, had taken a contrary stance against practices, such as exclusive agreements and deep discounting, creating confusion regarding the required compliance for e-commerce platforms.

In its petition in the Karnataka High Court challenging the CCI order, Amazon argued the investigation would cause "irreparable loss or injury". The company's lawyers said the CCI order came without any application of mind and dubbed it an "open-ended fishing expedition".

Senior Counsel Harish Narasappa, appearing for the CCI, argued that Amazon's claim of right to notice or hearing was not maintainable. It was merely a prima facie order and the parties cannot claim a right to notice or hearing.

However, in a much-needed relief for the e-commerce giant, the Karnataka High Court recently granted an interim stay on the investigation.

Lawyers have pointed out that the CCI placed reliance on text messages sent by mobile operators to their customers to establish exclusive agreements between e-commerce platforms and sellers. Lawyers representing the e-commerce majors argued that the CCI had the burden of establishing the existence of an agreement and analyse if this agreement caused an appreciable adverse impact on competition. For this, reliance cannot be on text messages by mobile operators, they said.

Though the high court has granted an interim stay on the investigation, experts are unsure if this will reflect in the stance taken post hearing of arguments. "In theory, the grounds are the tests of prima facie case, the balance of convenience, and irreparable injury. In practice, much depends on the arguments by counsel," said Rahul Singh, professor of competition law at National Law School of India University, Bengaluru.

Referring to the present proceedings, Payel Chatterjee, Leader of International Disputes at Nishith Desai Associates, points out that the High Court granted the stay on three grounds. "First, the CCI failed to stand the test of establishing a prima facie case as laid down under the Star India ruling by the Bombay High Court. In the absence of the CCI establishing prima facie finding, the mandatory jurisdictional pre-requisite is not fulfilled," she said.

Chatterjee said the CCI failed to issue notices to the online players and give an opportunity of hearing, having done so in several cases in the past. Finally, there are pending investigations by other regulators concerning the definition of e-commerce.

While the Karnataka High Court has granted eight weeks to the parties to file counter before the hearing resumes, Chatterjee is of the view that the court may need to take a pragmatic view on whether multiplicity of proceedings and investigations by different regulators will lead to more confusion, rather than providing clarity on how e-commerce platforms should be regulated.

"Based on precedents in the auto spare parts and telecom sectors, it appears to be a temporary reprieve. It is likely that the case will shift to either the CCI or the Director General's office in a few months, if not weeks," said Singh.

The Confederation of All India Trades and the Delhi Vyapar Mahasangh have already said they would challenge the high court's order. With Flipkart also challenging the CCI order, the issue is expected to hog headlines for some time.

