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FOREWORD

The Digital Economy is upon us and has brought the future with it. The disruptions caused by digitalization in terms of innovative business models like search engines, social networks, and comparison platforms is comparable to new industrial revolution. As a cross-sectoral issue, disruptive innovation has tremendously transformed processes, for consumers as well as competition.

Digital markets are dynamic and at the same time often highly concentrated, as a result of strong economies of scale as well as direct and indirect network effects. In this backdrop, the Competition Commission of India (***CCI***) is tasked with keeping the digital economy open vis-à-vis dominant enterprises in order to ensure that competition posed by new-comers and smaller competitors thrives. The evolving jurisprudence, in light of the recent *Google* Order, sheds light on the concern that tech giants such as Google, Facebook or Amazon increasingly control the infrastructure of online commerce and other essentials of our lives.

The challenge for CCI in whether or not to intervene in digital markets is not trivial as any assessment of a technology that has discernible consumer and competition benefit which outweighs abstract competition concerns is a daunting task. Nonetheless, the assessment approach of CCI invariably shows that competition enforcement is flexible enough to deal with the new issues of digital markets. The defining aspect is how to sharpen and refine the existing tools and adapt the methods to take account of the specifics of digital markets. In this light, *Google* Order clarifies that services where no monetary consideration is paid can also constitute a market and fall within the competition scrutiny. Also, the decisional practice has incorporated aspects that are critical for the market power of platforms such as access to user-data and network effects as additional factors of gauging dominance. On the other hand, as market shares may turn out to be ephemeral in high-tech markets, similarly the existing turnover thresholds also turn out to be insufficient to cover all relevant mergers and acquisitions in the digital economy and other innovative sectors. Given this background, the focal point should be definition of transactional value based on the significant nature of activities in Merger Control. In fact, the mergers which dodge the turnover focused merger tests, might eliminate the kind of enterprises that someday could challenge the tech sector's dominant firms with a better product or service.

Another issue which is argued from several quarters, specifically post-*Google* Order, is the role of Algorithms in Competition Law. The answer is only simple in that enterprises cannot hide behind

algorithms that they use. From an enforcement perspective, the grey area is – when pricing and price monitoring are being increasingly supported by the use of software, then in what situations can Algorithms facilitate tacit collusion?

In sum, not all challenges of the Digital Economy will be easy to solve and it remains to be seen how jurisprudence evolves in this direction. The key to effective regulation is in soundly understanding the changes in markets and grappling to evolve accordingly. We have come a long way from cartels in smoke-filled rooms to disputes over the dominance of internet browsers and now to a world where the prices are determined by algorithms. Digital markets are merely the next step of evolution and not a panacea.

- The Editorial Team

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DIGITAL DISRUPTIONS: A COMPETITION LAW PERSPECTIVE-

Bharat Budholia[1]

INTRODUCTION

With speed becoming the new currency of doing business, digitalization and innovation have presented significant opportunities for developing nations and transformed traditional market structures. Particularly in India, it is safe to say that the last decade has witnessed a digital revolution–so much so that it has woven itself inextricably into every sector of our economy and almost all aspects of our lives. For instance, e-commerce platforms such as Amazon, Flipkart and Myntra have swept the market and practically replaced traditional retailers/brick and mortar shops; app-based taxi services such as Uber and Ola have transformed the transportation market; Paytm has enabled the growth of a cashless economy; internet television networks such as Netflix and Hotstar have replaced traditional video home rental services; Whatsapp, Facetime, Google Duo and Skype have altered conventional means of communication; Airbnb has changed the hotel market; Cleartrip, MakemyTrip and OYO have disrupted the traditional hotel reservation market and Scootsy and Swiggy have transformed the online food delivery market. Thus, the transition into a digital economy has been marked by such "disruptive innovations" that have changed the dynamics of marketplaces and resulted in the creation of new markets which are far more efficient, where everything is done with a click of a mouse or swipe of a finger. As a result, it is not surprising that this has led to the displacement of incumbent products, firms or even industries in some cases. While such innovative competition has provided ample opportunities and has required market players to adapt for the benefit of consumers, it has also led to an increase in opposition from incumbent operators given the apparent impact on competition in the market place. Thus, laying the foundation for several interesting antitrust discussions. At the heart of these discussions, lies the role of antitrust/competition authorities in being able to find a fine balance- by regulating such disruptions in a digital economy, in a manner that will not only promote "new and innovative forms of competition" but also address any potential anti-competitive concerns that may arise as a consequence.

This note seeks to highlight the effects of such disruptive innovations in India's increasingly digital economy, while focussing on the Competition Commission of India's ("**CCI**")decisional practice

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in assessing competition concerns in innovation driven/high technology markets and as a result, its contribution to the evolution of such markets and the economy on the whole.

COMPETITIVE EFFECTS IN A DIGITAL ECONOMY

Considering that innovations in a digital economy are "consumer centric" and predominantly focus on providing more efficient products/services, not only in terms of quality but also in terms of cost and convenience, they receive significant attention within a short span of time and by virtue of the *networks effect*[2] become increasingly popular. Consequently, the first-mover/innovator usually has the advantage and rapidly garners market power- thus, assuming a seemingly "dominant position".

Once a dominant position has been established, it may be argued that there is a greater likelihood of such dominant position being abused, including through predatory pricing to drive out existing players from the market or excessive pricing once the existing players have been driven out of the market. However, it must be appreciated that since these business models are premised on greater innovation, they face the constant threat of "creative destruction" and of being outdated, continually. Therefore, such business models despite garnering market power may face competition not only from smaller companies (in terms of market shares) which may have better technology but also from traditional incumbents who may displace the disruptive business models if the latter fail or do not stabilise in the long run. In fact, the threat of being replaced by a potential entrant with newer and better technology acts as a deterrent on the disruptive technology based models from engaging in anti-competitive practices. Arguably, the transient nature of the disruptive business models in itself acts as a pro-competitive factor in the market. Therefore, in high technology markets, the players have to *run as fast as they can just to stand still.*[3]

It is thus evident that the pro-competitive effects of disruptive innovations often outweigh their potential anti-competitive concerns. In the above context, it is also important to highlight that Section 4 of the Competition Act, 2002 ("**Act**") does not penalize the existence of a dominant position, i.e., big is not bad. What is, in fact, prohibited under the Act, is only the abuse of such dominant position. It is, therefore, imperative for regulators, particularly, antitrust regulators to undertake a nuanced analysis of disruptive models of business, before brushing the first mover as

[2] An effect wherein usage of a product/service by one customer only increases its usage by other customers.

[3] This is called the *Red Queen Game* phenomena. WJ Kolasky, "*What is Competition? A Comparison of US and European Perspectives*" ANTITRUST BULLETIN 32 (2004).

dominant and as a consequence, stifling innovation. Having said that, with *innovation* replacing traditional infrastructure in markets, it is also important to ensure that such dominant entities do not have the ability curtail innovation. Thus, with the increasing prominence of innovation, antitrust authorities, including the CCI are seen to be dedicating more time in assessing/investigating digital industries and dealing with complex questions arising from the same.

CCI'S DECISIONAL PRACTICE

With the power to impose the highest economic penalties and stringent behavioural prohibitions having grave consequences, the role of the CCI has been pivotal in the development and process of digital disruption. Tracing the decisional practice of the CCI, particularly its recent stance in the *Google Case*[4], it is safe to say that the CCI, has attempted to adopt a nuanced and balanced approach while dealing with such high technology industries/business models.

For instance, starting with the early cases of *In Re:Mr. Ashish Ahuja and Snapdeal.com &Anr.*[5] and *In Re: Mr. Deepak Verma and Clues Network Private Limited &Ors.*[6], the CCI held that online channels and brick and mortar shops were merely two distinct distribution channels of the retail sector in India and hence did not constitute distinct (narrow) relevant markets for the purposes of the Act. Further, while delineating the scope of relevant product market in *In Re: Bharti Airtel Limited and Reliance Industries Limited & Reliance JioInfocomm Limited*[7], the CCI opted for a broad definition encompassing the entire wireless telecommunication services market as opposed to the narrow market of 4G services only, on the basis that "*in this ongoing process of evolution, it is not appropriate to differentiate wireless telecommunication services based on technologies used for providing such services*". However, the CCI has also used innovation as a distinguishing factor in the Google Case, wherein after taking into account the reach of the services to the consumers, pricing and the monitoring mechanism, the CCI came to a conclusion that the online and offline modes of advertising were not part of the same relevant market. Therefore, it is clear that the CCI has steered away from a mechanical application of traditional tools in dealing with innovation driven markets and has taken cognizance of the market realities on a case-by-case basis.

Further, in light of the changes in the market structure introduced by the digital economy, not only has the CCI considered "standard business practices" as an important factor in its competitive

[4] Matrimony.com Limited v. Google &Ors., Case No. 7 & 30 of 2012. ("**Google Case**") The CCI held Google liable only for three out of the various counts raised by the informant.
[5] Case No. 17 of 2014.
[6] Case No. 34 of 2016.
[7] Case No. 3 of 2017.

assessment[8], it has also acknowledged the pro-competitive effects arising from disruptive innovation. For instance, in *In Re: Mr.MohitManglani and Flipkart&Ors.*[9], dismissing allegations in relation to whether exclusive agreements entered into between e-portals and manufacturers were anti-competitive, the CCI noted that *with new e-portals entering the market, competition was only increasing and thus, the exclusive agreements did not prima facie create entry barriers*. It was further observed that distribution through the online channel only provided an opportunity to the consumers to compare the prices as well as the pros and cons of the product. Through the option of delivery right at their door steps, consumers were provided the opportunity to accept the goods at their convenience.

The importance of the *disruptive* factor is also evident from the CCI's assessment in abuse of dominance cases. Thus, while rejecting allegations of abuse of dominance by Ola Cabs in Bengaluru, the CCI reiterated this position, by noting that in high technology markets, *high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral*. Considering that such markets function on the principle of *networks effect*, market leadership position can be fragile or transient during the initial stage of evolution of the market, being the stage for *network creation*.[10] While the transitory nature of market shares in high technology markets has also been recognised by the CCI in the Google Case, the CCI still considered Google to be dominant since its market shares "*have been consistently high, which suggests that it has got other advantages, besides technical advantages, which insulate its market position*", thereby indicating that the CCI seems to be distinguishing between emerging and established technology markets.

Taking its pro-innovation approach a step further, in *In Re: M/s. Mega Cabs Private Limited and ANI Technologies*[11],the CCI ruled *that inability of the traditional players to compete with the efficiency of the new entrant (innovator) did not equate to creation of entry barriers within the meaning of the Act*. Thus, acknowledging that the objective of competition law is to *preserve competition* and not *protect competitors*. Similarly, in the Google Case, the CCI clarified that *intervention in such markets should be targeted and proportionate*.

Keeping with the approach of recognising market realities and innovation, while dealing with an allegation of predatory pricing in *In Re: Bharti Airtel Limited and Reliance Industries Limited & Reliance*

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[8] In re: Shri Vinod Kumar Gupta and Whatsapp Inc., Case No. 99 of 2016; In re: Fx Enterprise Solutions India Pvt. Ltd. vs. Hyundai Motor India Limited, Case No. 36/2014.
[9] Case No. 80 of 2014.
[10] In Re: Fast Track Call Cab Pvt. Ltd, Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015.
[11] Case No. 82 of 2015.

JioInfocomm Limited[12], the CCI emphasised that *Reliance Jio was a new entrant*, and in a competitive market scenario marked by the presence of big incumbent players, *it would not be anticompetitive for an entrant to incentivise customers towards its own services by giving attractive offers and schemes*. However, the CCI also recognised the flip side to the technology markets in the Google Case (wherein the CCI held that Google had abused its dominant position under Section 4 of the Act *inter-alia* by promoting the use of its own vertical flight search services and thereby indulging in search bias), by noting that by virtue of *network effects*, "*in the digital economy, players with strong market position often enjoy virtual hegemony, due to the "winner takes all" phenomenon*". Therefore, in its attempt to strike a balance, the CCI held that in order to accurately assess whether a dominant enterprise in the digital space is abiding by special responsibility, it is important to take cognizance of fast-moving innovation, the novel products and services at issue, and the nature and extent of network effects that might exist. Such observations of the CCI also demonstrate its attempt to steer away from applying traditional tools of assessment to innovation driven markets in a digital economy. The CCI's approach is reinforced by its recognition of access to information as a mode of consideration in the Google Case. The CCI noted that while Google provided its search services free of cost to the users (in the traditional sense), the users offered indirect consideration to Google by: (a) providing their attention or "eyeballs" to the Search Engine Results Page; and (b) allowing Google to collect and use their information, resulting in attraction of more advertisers and generating revenue.

Additionally, the CCI's assessment of impact on innovation, though evolving, is also evident in its review of mergers and acquisitions. Pertinently, "nature and extent of innovation" is also stipulated as a factor under Section 20(4) of the Act.[13]For instance, in *Denali/EMC Corporation*[14], while dealing with the information systems sector, the CCI noted that the said combination does not give rise to anti-competitive effects since the relevant market would remain competitive post combination on grounds of being marked by *technical innovation* with low barriers to entry. Similarly, in dealing with the TV broadcasting sector, the CCI took into account the ease of entry in the market and the sufficient scope of innovation and competition, while clearing the transaction.[15]It is important to highlight that in the international context as well, competition authorities have started to

[12] Case No. 3 of 2017.
[13] Please note that Section 20(4) of the Act provides factors to be taken into account by the CCI in assessing the likelihood of an appreciable adverse effect on competition arising from the merger/acquisition under review.
[14] Combination Registration No. 2016/01/370.
[15] Independent Media Trust/RB Mediasoft, Combination Registration No. C-2012/03/47.

consider loss of an "*independent innovator*" from the market as a fit case for seeking divestments from the merging parties.

As such, with the level of existing and potential innovation gaining prominence in the CCI's assessment of mergers and acquisitions, seemingly benign transactions which may have the effect of stifling innovation, may also be heavily scrutinised by the CCI. However, as a necessary corollary, a merger of the top two competitors in a digital economy may not be considered as problematic so long as it can be demonstrated that there is a likelihood of other entities entering the market and displacing this merged entity by virtue of technological superiority.

CONCLUSION

Owing to the transition of the Indian economy into a digital economy and the government's increasing focus on promoting *ease of doing business* by providing varied incentives, the reality is that India is all set to embrace and accelerate digital disruption. In fact, India has been ranked third in terms of showcasing promise for maximum disruptive technology breakthroughs. However, in order for this to be a *turning point* for traditional industries in India, a lot depends not only on economic reforms but also on the ability of law makers/regulators to provide a focused government policy and stable regulation. As such, the role of the CCI, in particular, is extremely critical since, by virtue of the policy it adopts, it can either bolster or impede the development of a market/industry.

To its credit, in under ten years of commencement of the Act, the CCI has aligned itself with international best practices since it has so far adopted a balanced approach and refrained from premature intervention in innovation driven/high technology markets, and intervened only when necessary, thus providing necessary headroom for disruptive innovations in India.

E-COMMERCE AND COMPETITION LAW: CHALLENGES AND THE WAY AHEAD-

Sameer Jain[1]

INTRODUCTION

The Indian Industry Department, some time back, in order to streamline the ever-growing field of e-commerce, was planning to define the term 'marketplace' and also elaborate as to what constitutes retail and wholesale trading on such platforms.

Along with e-commerce and high profile startups, this move of the Government is likely to decide the course of traditional brick-and-mortar retailers who have long complained that these e-commerce marketplaces have made inroads into retail as well and, as such, the business of traditional retailers is being affected.

In addition, the e-marketplaces also get the support from billions of dollars which have found their way into the same in the form of venture capital. This move of the Government has put this foreign funding also at stake.

Marketplaces in question are in the form of websites that connect buyers to sellers offering services such as warehousing, logistics and payments (B2B e-commerce). It is to be noted that foreign investment is allowed in such firms but not in the firms engaged in retail.

An online marketplace is a type of e-commerce site where information about a product of service is provided by multiple third parties whereas transactions are processed by the marketplace operator. Online marketplaces are primary type of multichannel commerce.

The transactions are processed by the marketplace operator and, subsequent thereto, the delivery is effected by the participating retailers or wholesalers.

The 'marketplace model' precisely means that the e-commerce company does not own any inventory. They only connect buyers and sellers to transact with each other.[2]

Owing to a large number of retailers and wholesalers in the marketplace offering the same product to the customers, choice and quality of suppliers is wider, availability of the product is more and,

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[2]Guest Author, *Ecommerce Marketplaces: Not all that rosy for sellers [An open letter]* (2015) http://www.nextbigwhat.com/india-eommerce-marketplace-seller-issues-297/

it goes without saying that, the prices are more competitive as opposed to a vendor-specific online store.

Since 2014, marketplaces are abundant as customers are more inclined towards organized marketplaces. Difference lies, however, in the fact that some marketplaces provide a wide array of products and cater to the public in general whilst others are consumer-specific and deal with a specific segment of customers. [3]

Qua the functioning of these marketplaces, it should be understood that the discounts by the sellers on the websites are duly compensated back to them by the marketplace and, as such, it tends to be a profitable transaction for both the sellers and customers, in that, the customers are getting to purchase the product on a discounted price and the seller is able to cater to a larger consumer base.

The Industry Department would, inter alia, define as to what would be considered retail e-commerce (B2C) and wholesale trading (B2B) within the marketplace model.

Although, Indian Government is trying to carve out a distinction between the B2C and B2B e-commerce, there is no other country in the world which is doing the same.

WHAT IS E-COMMERCE

Since e-commerce is the genesis, it is very important to understand as to what it means and the implications thereof.

For the last over a decade, the way of communication has undergone a sea change due to the advent of internet and, as such, gradual development thereof also transformed the manner in which the business transactions are undertaken. This radical change in business transactions over the internet is called electronic commerce or e-commerce.

According to the *UK Department of Trade and Industry*, e-commerce is the exchange of information across electronic networks, at any stage in the supply chain, whether within an organization, between businesses, between businesses and consumers, or between the public and the private sectors, whether paid or unpaid.

[3] Guest Authors, *Online Marketplace*, https://en.wikipedia.org/wiki/Online_marketplace (last updated on 18-01-2018)

According to a lecture delivered at *Yale University*, it can, further, be defined as a set of technologies, applications and business processes that link business, consumers and communities for buying, selling and delivering products or services and for integrating and optimizing processes within and between participant entities.[4]

Further, according to Organization for Economic Co-operation and Development (OECD), e-commerce is the business occurring over networks using non-proprietory protocols established through an open standard setting process.[5]

With the growth of internet, prospects of e-commerce are also growing rapidly. In September, 1999, there were around 200 million internet users worldwide. In the USA, e-commerce is quite developed. Inter-business transactions in the USA were expected to reach USD 1.5 Trillion by 2003 itself which was 14 times the size of B2C transactions. On the same lines, in the UK, there were about 12.5 million internet users in September, 1999. In mere two (2) years, consumer spending at UK sites increased from GBP 9.7 million to GBP 118 million in 1999 and was projected to increase 10-fold by 2005. Total revenue from all forms of e-commerce increased from GBP 2.8 billion in 1999 to GBP 29 billion in 2002.[6]

According to Yale University, further statistic of e-commerce retail sales are as follows:[7]

a) In the USA:

- 4th quarter of 1999 – USD 5.1998 billion
- 4th quarter of 2000 – USD 8.686 billion

b) Worldwide B2C e-commerce revenues:

- In the year 2000 – USD 59.7 billion

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[4]https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CEkQFjAGahUKEwjap7-Xv_nHAhUCSo4KHQPxDiE&url=http%3A%2F%2Fwww.cs.yale.edu%2F~jf%2Fe-commerce17.ppt&usg=AFQjCNE07wYLAzHKnrlD-lrrcmwKMsJIVA&sig2=5JvH1JFM3t7o7SxZ2CyjAA&bvm=bv.102537793,d.c2E

[5]Directorate For Financial, Fiscal And Enterprise Affairs Committee On Competition Law And Policy, *Policy Roundtables, Competition Issues in Electronic Commerce* (2000) http://www.oecd.org/regreform/sectors/1920373.pdf

[6] http://cci.gov.in/images/media/ResearchReports/E-Commerce%20and%20Competition%20Law.pdf

[7]https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CEkQFjAGahUKEwjap7-Xv_nHAhUCSo4KHQPxDiE&url=http%3A%2F%2Fwww.cs.yale.edu%2F~jf%2Fe-commerce17.ppt&usg=AFQjCNE07wYLAzHKnrlD-lrrcmwKMsJIVA&sig2=5JvH1JFM3t7o7SxZ2CyjAA&bvm=bv.102537793,d.c2E

- In the year 2004 – USD 428.1 billion (projected)

However, one cannot overlook the fact that, at present, the e-commerce market is not as profitable as it was in its initial years and is suffering from high volatility which is evident from the constant fluctuation in the stock values. Apart from a handful of firms, none of the e-commerce players are reaping profits.

Particularly for sellers on e-commerce, the picture is grim as the net result of their business ends up more in loss than in profits. As a rough estimate, a seller is, inter alia, supposed to incur the following fixed charges on every transaction:

- Marketplace commission – 15%
- Domestic shipping per kg – Rs. 30/-
- National shipping per kg - Rs. 45/-
- Fixed commission per order – Rs.10/- (for orders above Rs. 250/-)[8]

Further, we also need to be conscious of two defining aspects of e-commerce which are as follows:

a) Certain characteristics of e-commerce are likely to facilitate entry and reduce costs with the benefits of greater competition being passed on to consumers.

b) First mover advantage, network externalities, switching costs and other barriers to entry may confer market power to a small group of large players, thereby, reducing competition.

All across the world, an effort is being made to harmonize the e-commerce and competition laws so that competition therein is not affected and maximum benefit is passed on to the consumers. In other words, consumer benefits are being emphasized on without hindering the new and innovative forms of competition.[9]

Since the article in live mint (supra foot note 1) emphasized upon the definition of B2C e-commerce, it would be important to delve into the meaning and concept of the same. B2C commerce is the interaction relating to purchase and sale of goods and services between a business and consumer which, put simply, is a retail transaction. The novelty of this is that the transaction

[8] http://www.nextbigwhat.com/india-eommerce-marketplace-seller-issues-297/
[9] http://cci.gov.in/images/media/ResearchReports/E-Commerce%20and%20Competition%20Law.pdf

is done on the internet rather than a traditional brick and mortar store location. The revenue model of B2C commerce precisely is that the online portal sells the goods and services of the retailer and, inter alia, takes a cut of its own and transaction fees.[10]

In traditional commerce, there are intermediating agents like wholesalers, distributors, retailers between manufacturers and consumers. However, in B2C website, manufacturer can sell products directly to consumers. This process of removal of business layers responsible for intermediary functions is called *disintermediation.* But with the development of e-commerce, a new breed of intermediary is emerging like e0mall or product selection agents. This process of shifting of business layers responsible for intermediary functions from traditional to electronic medium is called *reintermediation.*[11]

NATURE AND DEVELOPMENT OF E-COMMERCE

With the ever-increasing pace of technology, it is all the more important for the laws to adapt to the changes, in its letter and sweep, in order to effectively tackle the complexities put forth before it by the new circumstances.

Relationship between law and technical innovation has to be interactive, dynamic and complex. As opposed to technology, which is fast paced in order to meet the need of the hour, process of law making is slow. This leads to a gap between technology and relevant legal coverage. At one hand, this situation leads to uncertainty qua the rights and liabilities of parties concerned and the implications of violations and, at the other hand, it provides an opportunity for lawmakers to thoroughly analyze the ground reality and practicalities and enact a law that effectively circumscribes all possible facets of legal complexities of technology.[12]

The development of e-commerce has led to clashes between the traditional brick and mortar stores and e-commerce companies with traditional stores leveling allegations of predatory pricing against e-commerce companies and stating that e-commerce players are trying to grab a larger share of the retail market.

One imminent outcome of e-commerce is the fierce price competition between sellers so as to earn the patronage of the vast consumer base and this leads to more discounts and offers to the

[10]https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CEkQFjAGahUKEwjap7-Xv_nHAhUCSo4KHQPxDiE&url=http%3A%2F%2Fwww.cs.yale.edu%2F~jf%2Fe-

[11]Tutorials Point Simple Easy Learning, *E-commerce – B2C Model,* http://www.tutorialspoint.com/e_commerce/e_commerce_b2c_mode.htm

[12] M.M.K. Sardada, *Evolution of E-commerce in India: Challenges Ahead (Part 2),* http://www.isid.org.in/pdf/DN1408.pdf

customers. Although this may be favourable from a consumer point of view, it may not be liked by physical retailers who are trying to protect margins by restricting price competition online so that they can continue to compete on non-price elements like service and in-store presentation. On the other hand, incumbents defend their territory by efficiency arguments based limiting free riding, improving service etc. This has given rise to difficult questions of balancing efficiency, exclusivity and exclusion in other jurisdictions and are likely to seep into Indian context as well.[13]

Online portals are supposed to provide use of their platform on FRAND terms so as to benefit end consumers with lower prices. As such, there might be genuine contractual issues, wherein, existing physical retailers would be trying to use online platform to mitigate declining profits and online portals trying to resist the same.[14]

As a global body, the UN Commission on International Trade Law (UNCITRAL) was used as a forum by the Government to develop uniform law standards for e-commerce.

However, some brick and mortar retailers feel that the only difference between and e-commerce and a traditional marketplace is 'smart accounting'. According to Mr. Kishore Biyani, the founder of Future Group, both real and virtual retailers source almost all goods from manufacturers and suppliers and store them in their warehouses. Difference lies in the treatment of this inventory in the financial accounts. Some account it on their own balance sheet while others do it on the supplier's balance sheet. Despite being essentially the same, traditional brick and mortar stores face curbs when it comes to foreign investments and this is one of the major cause of clashes between the two media of business as there is 100% FDI in the marketplace model which means the online retailers setting themselves up as platform for other retailers to sell their products whereas FDI in an e-commerce venture selling directly to consumers is barred in India. This essentially means that these companies are selling to consumers and this does not count as wholesale trading.[15]

COMPETITION LAW AND E-COMMERCE

[13] M.M. Sharma, *India: Do Online Markets Effect Competition* (Nov. 14, 2014), http://www.mondaq.com/india/x/353986/Trade+Regulation+Practices/Do+Online+Markets+Effect+Competition

[14] M.M. Sharma, *India: Do Online Markets Effect Competition* (Nov. 14, 2014), http://www.mondaq.com/india/x/353986/Trade+Regulation+Practices/Do+Online+Markets+Effect+Competition

[15] ChaitaliChakravarty&RasulBalay, *Marketplace Model adopted by e-commerce companies just smart accounting: Kishore Biyani, Future Group,* (May 27, 2015), http://articles.economictimes.indiatimes.com/2015-05-27/news/62719093_1_kishore-biyani-marketplace-model-online-retailers

Although, e-commerce is a novel development in the field of commercial transactions and has drastically transformed the way the business transactions are undertaken the world over, it is not without its own set of legal concerns, the most pertinent being in the field of competition law.

A news article dated 16-10-2014 in The Financial Express presented a picture of the state of affairs qua the perceivable anti-competitive practices being resorted to by the online retailers. According to the article, offline retailers have accused the online retailers like Flipkart, Amazon and Snapdeal of indulging in predatory pricing in order to grab a larger share of the USD 525 billion retail market.

A comprehensible question that crops is whether the threat to competitors may be considered as a threat to competition? Conceptually, competition law is aimed at preventing competition and not competitors.

End consumer is indifferent whether the medium for shopping is online or offline. It is to be noted that, in metros, the shopping is majorly undertaken on online channels but, lately, the difference between the two is fading out, in that, the customer conducts an initial research in the physical space and, then, scouts the online forums for better prices and offers on the same product. This trend amongst the customers has not gone unnoticed and, as such, the firms are marking their presence both in the traditional and online marketplace. This has, undoubtedly, led to a fierce price competition. As stated supra, this may be favourable to customers but it has also let to perceivable competition law concerns.

Difficult price comparison - Internet has made it easier for the customers to conduct a research on the product they intend to buy and has also lowered the search costs but not to zero as customers also have related costs. Firms, strategically, adopt means to make the comparison of prices difficult for the customers to prevent them from making a switch.

Information asymmetry - Although, internet being a medium without boundaries, geographic markets tend to have been expanded but customers still prefer to transact within limited distances owing to cultural and security reasons. E-commerce has lowered the distribution costs as manufactures can directly transact with the customers, thereby, elimination the need of the players in the middle of the chain and also because online retailers can provide for a wider variety of products online. However, this leads to an information asymmetry as the consumers are not able to test the product before buying the same and, hence, it is all the more difficult for the retailer to build a reputation. Hence, price competition is getting fiercer, geographic markets are widening and consumers are able to buy the products which were hitherto not available in physical markets.

Resale Price Maintenance (RPM) – One of the issues which are being faced globally is that of RPM which is, in fact, common to both physical and online stores. This is taken seriously all across the world as this amount to an infringement by 'object'. By its very nature, it has a high potential for restricting competition and the consumer may end up paying more than what was required.

Internet Minimum Advertised Pricing (IMAP), dual pricing, price ceilingetc – Apart from the above, there are some issues which are specific to e-commerce. IMAP is acting to set a price floor online. IMAP and other vertical restraints that prohibit advertising of any prices online or place an outright ban on online sales have also been a concern. IMAP restrictions affect intra-brand competition, affect discounting of prices and end up being higher prices for customers. As regards dual pricing, the same is under the scanner as setting higher prices for the internet may be a way of restricting passive sales. Further, restraints setting price ceilings can soften price or commission or competition on platforms and resulting cost of sales may be passed on by a trader to consumers. Instances of Price parity and price relativity agreements between parties have come up and been investigated in various jurisdictions the world over. [16]

Another such practice which can cause competition law concerns is preventing selective distributors from selling online. A real life experience of the same was observed in the case of SanDisk/Snapdeal[17] when the online sale of a physical market trader was scrapped in the year 2014. The trader was engaged in selling of pen drives, laptops etc and had started selling the same through Snapdeal but, subsequently, his online sales were scrapped by Snapdeal because it was not in the list of 'authorized online channel partners' of SanDisk who was also engaged in the similar business and, as such, was a competitor of the complainant. There was seemingly an agreement between Snapdeal and Sandisk, whereby, the understanding was to market latter's products online for Indian consumers. The Information under Section 3 and 4 of the Competition Act was based on the grounds that, by this agreement of theirs, both the parties had tried to prevent the Informant to offer competitive prices. CCI, however, closed the matter while observing that, owing to the presence of other online e-commerce players, Snapdeal cannot be termed as being dominant and, in absence of dominance, the conduct cannot be abusive. Further, the CCI observed that the conduct of SanDisk in restricting the market to its authorized dealers alone cannot, prima facie, be termed as a violation of Section 3 of the Act. The appeal against the aforesaid order bearing

[16] M.M. Sharma, *India: Do Online Markets Effect Competition* (Nov. 14, 2014), http://www.mondaq.com/india/x/353986/Trade+Regulation+Practices/Do+Online+Markets+Effect+Competition

[17] http://www.cci.gov.in/May2011/OrderOfCommission/262/172014.pdf

number 54/2014 was preferred by the Informant, wherein, although COMPAT was, prima facie, satisfied that the Hon'ble CCI was not justified in summarily disposing off the Information mainly on conjectures[18], the Appeal stood dismissed on 13-02-2015 owing to technicalities in the matter and no arguments on merit could take place and, hence, the question is still open to be decided by the CCI.[19]

Many other practices which are amenable to competition law inquiries are access to platforms, online targeted advertising, Most Favoured Nation clauses, price parity or price agreements between sellers and electronic trade platforms under which a physical seller undertakes not to charge on that platform a price higher than the price he charges on other platforms like. For ex: Apple e-book case. Under Indian competition law, these practices would attract the attention of CCI only if the party is considered dominant in the relevant market.[20]

DIFFERENCE IN COMPETITION CONCERNS POSED BY E-COMMERCE AND TRADITIONAL MARKETPLACES

A question that is consistently faced by the authorities across various jurisdictions is whether, owing to the fact that e-commerce and traditional brick and mortar stores are different in their nature and approach, they pose competition concerns different from each other?

All jurisdictions are anonymous that, although, they both may be different in their nature and approach, the competition concerns put across by them are, for the most part, similar, save for a few as stated supra.

One peculiar aspect of e-commerce is strong *network effects,* which means that the value of product or service increases with each added user and, as such, the variable cost for large players like Facebook and Google is almost nil. Like economies of scale, network effects also make it difficult for a new firm to enter the market where minimum viable scale of network is large compared to the size of market. However, it is believed that online markets with network effects marked by these inherent entry barriers are due to the first mover advantage which allowed the incumbent firms to establish a strong consumer base for their products and services and they cannot be blamed for that.

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[18] http://compat.nic.in/upload/PDFs/octordersApp2014/08_10_14.pdf

[19] http://compat.nic.in/upload/PDFs/feb-judgement-orders-2015/13-02-2015%20appeal%20No.54_2014.pdf

[20] M.M. Sharma, *India: Do Online Markets Effect Competition* (Nov. 14, 2014), http://www.mondaq.com/india/x/353986/Trade+Regulation+Practices/Do+Online+Markets+Effect+Competition

But network effects could also be a result of interconnection arrangements. For that to be a viable alternative, however, there would have to be a great degree of standardization in the software employed by the e-marketplace. Larger networks might prove reluctant to provide interconnection to smaller networks even though both might stand to gain roughly the same amount in the short run through these arrangements.[21]

However, other than the aforesaid, there are other non-price predatory behaviours like excluding rival firms from network software, as in the case of SanDisk/Snapdeal case supra, are concerning the competition authorities.[22]

Some common issues that are found in both the channels are as follows:[23]

a) *Exclusivity Arrangements*: The issue of exclusive distribution agreements between the retailers and the online retail portals was brought before the CCI in the case of MohitManglani[24] wherein the Information was filed, inter alia, against Flipkart, Snapdeal and Amazon while alleging that the opposite parties had entered into exclusive distribution agreements with their retailers, whereby, certain products were available only on these portals and nowhere else. Although, the CCI did not find any anti-competitive conduct and closed the case, it, nevertheless, exposed the possible concerns which might come to fore in future where interference might be warranted.

b) *Predatory Pricing:* As stated supra, the primary attraction of customers toward online portals is on account of the huge discounts offered by them. Although, such discounts are welcomed by the customers, they are equally frowned upon by the traditional players who have constantly alleged that the same is a tactic to scuttle the competition in the market. They have also approached the CCI but CCI observed that online portals cannot be said to be dominant in the relevant product market and, as such, their conduct cannot be said to affect the competition therein.

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[21] Directorate For Financial, Fiscal And Enterprise Affairs Committee On Competition Law And Policy, *Policy Roundtables, Competition Issues in Electronic Commerce* (2000), http://www.oecd.org/regreform/sectors/1920373.pdf

[22] M.M. Sharma, *India: Do Online Markets Effect Competition* (Nov. 14, 2014), http://www.mondaq.com/india/x/353986/Trade+Regulation+Practices/Do+Online+Markets+Effect+Competition

[23] Divye Sharma, *India: Competition Law and E-commerce: A concern for the future, (May 27, 2015),* http://www.mondaq.com/india/x/400368/Antitrust+Competition/Competition+Law+And+ECommerce+A+Concern+For+The+Future

[24] http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf

In order to prove predatory pricing, it would first have to be established that the intention of the online players was to foreclose the market and create an entry barrier which, owing to the fact that online channels constitute only 0.5% of the total retail market in India, cannot be the case as the online players cannot be said to be dominant and, further, the retail market is so broad that there cannot possibly a comprehensible AAEC in the market.

c) *Market Operating Price*: There is being witnessed a new trend of 'Caution Notices' which are being published by manufacturers, inter alia, on their websites, whereby, it is intimated to the public at large that the online retail portals are not a part of their authorized distribution channel and, as such, the credibility of the products thereon is doubtful. A similar caution notice was published by Kaff Appliances wherein they stated that products purchased from Snapdeal are not genuine and, as such, the warranties would not be honoured. It was brought out that the reason for the same was because Snapdeal was selling the product at a price which was below the market operating price.

   Aggrieved by the same, Snapdeal approached the CCI while alleging that the manufacturer was preventing its authorized distributor from selling the products through online channel and was also imposing anti-competitive conditions by preventing them from selling the goods on a discount without a prior permission from it. CCI, prima facie, observed that the manufacturer cannot dictate the prices as the same would hinder the process of competition. Accordingly, CCI ordered an inquiry into the matter under Section 26(1).[25]

The author of this research also personally witnessed the same when, few years ago, a leading camera brand published a caution notice on its website intimating the public about its products listed on an online retail portal and stating that the same are probably not genuine. These caution notices have a ripple effect as, being unknown about the genuineness and, with a fear of losing the warranty, public refrains from buying the product online.

A perusal of the above would show that e-commerce and traditional markets are more or less the same when it comes to the competition concerns before the authorities. However, the complexities of the technology, along with other hitherto undecided questions, do make it a bit difficult to analyse the circumstances and effectively deal with the issue.

[25] http://www.cci.gov.in/May2011/OrderOfCommission/261/612014.pdf

E-COMMERCE AND EUROPEAN COMPETITION LAW[26]

Over a period of time, a number of decisions of European Commission and ECJ have had a direct bearing upon mutual relevance of EC competition law and e-commerce. They have reflected the logical extension of competition regime from traditional trading to the coming-of-age world of e-commerce.

As stated supra, even there, a question that arose was whether the existing rules of competition law can be squarely applicable to e-commerce or whether a new set of rules will have to be developed to deal with specific technicalities.

If the advent of e-commerce will lead to the development of new set of rules, the authorities and the government will have to coin new terms relevant to the sector or relevant explanations will have to be ascribed to the existing terms. Some pertinent questions which also would need to be answered are, **a)** What will be the content of the term 'market' with reference to e-commerce, **b)** How is an e-commerce relevant market to be assessed and delimited, **c)** What will be the definition of products in terms of e-commerce etc.

Qua the EU, the development suggests that competition in e-commerce will challenge in the European Commission (EC), inter alia, the extent of the validity of IPRs. Existing scope of protection of IPRs will have to re-assessed in the context of e-commerce and benefits of necessary competition in e-commerce in the EC will have to reconciled and harmonized with the protection of IPRs anchored in municipal legal systems in the EU.

The e-commerce has led to the reduction in traditional significance of time and distance in commercial transactions as it can integrate millions of buyers and sellers into a huge, closely knit market of goods and services. Further, unquestioned validity of geographical and jurisdictional boundaries is also challenged by imperatives of fair competition in e-commerce.

Regarding the possible competition law concerns, the relevance of the EC competition law may assert itself, beyond horizontal agreements and market dominance, also in relation to mergers and

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[26]Dennis Campbell & Susan Woodley, E-Commerce: Law and Jurisdiction, The comparative law yearbook of international business, 79-81, (Special Issue 2002) https://books.google.co.in/books?id=tgEz5rLi7dYC&pg=PA79&lpg=PA79&dq=e+commerce+and+competition+law&source=bl&ots=rTqnWrCdEl&sig=_xJlEMeo67hGIP4aSsgueu1LiwU&hl=en&sa=X&ved=0CEMQ6AEwBmoVChMIx4erl4ztxwIVg0qOCh05kQpY#v=onepage&q=e%20commerce%20and%20competition%20law&f=false

state aids. However, area of EC competition law dealing with state aid is complex and needs to be discussed and its effects evaluated in the light of changing overall policies.

At this juncture, it would be worthwhile to mention that, as opposed to sweep of the competition laws of other jurisdictions qua e-commerce, so far, the only issues that have been raised before the CCI pertain to exclusive distribution agreements and predatory pricing. The trend of the CCI judgments has been that these activities cannot be termed as anti-competitive in view of the fact that e-commerce is still growing and, as such, does not have significant presence. About 93% of the retail market is in unorganized sector and, hence, is unlikely to cause AAEC.[27]

With e-commerce spreading far and wide by the day, IPR may be a major area of importance as has already been foreseen by the EU. Presently, non-material rights and their protection concern the way in which e-commerce functions.

In the EU, IPR are still normatively anchored in the systems of respective fifteen (15) national laws of member states. ECJ is keen to see that competition in the market is not hindered by respective national jurisdictions and, hence, has had to indicate the way in which the existing regime of IPR is to be interpreted in relation to EC competition law.

Articles 81 and 82 of the EC Treaty, dealing with agreements between undertakings conduct involving abuse of dominant position, may restrict the extent to which IPRs may be asserted and exercised. However, an overriding EC law may restrict the applicability of national law normally applicable to such property rights.

Regarding application of Article 82 of the Treaty to a dominant position, a notable case is the one involving IBM.[28] Although, the proceedings initiated against IBM ended without a formal decision, the purpose was accomplished when IBM undertook to offer IBM System/370 CPUs in the EC in such a way so as to enable competing companies to attach the hardware and software to their own design. Goods and services suppliers were expected to benefit from the same as users would have the possibility to choose among different suppliers of the system and be free to choose from a wider selection of products.

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[27]Divye Sharma, *India: Competition Law and E-commerce: A concern for the future, (May 27, 2015),* http://www.mondaq.com/india/x/400368/Antitrust+Competition/Competition+Law+And+ECommerce+A+Concern+For+The+Future

[28] EC Commission: Fourteenth Competition Policy Report (1985)

IBM case dealt with the competition concern at the infrastructural level. Extrapolating therefrom, a no less important point is the fact that expanding e-commerce will make it possible for suppliers and buyers throughout the EC to offer and/or order products and/or services with less and less concerns for physical distances.

Extent or limits of this sweeping approach may be challenged, however, for the implication of IPR protection in the sphere of e-commerce indicate the involvement of complex questions which cannot be readily answered and require an intricate harmonization.

COMPETITION CONCERNS ACCORDING TO OECD[29]

As stated supra, the competition issues posed by e-commerce are, mostly, similar to the traditional brick and mortar stores but certainly, by its very nature, e-commerce tends to traverse beyond the national boundaries and, as such, competition authorities across jurisdictions are required to co-operate with each other on a much larger scale for new investigative powers.

Many of the high profile competition cases on e-commerce relate to the basic infrastructural issues like competitive access to the internet. Such access is vital to ensure that e-commerce delivers its full efficiency enhancing potential. India has already witnessed this scenario in the case of SanDisk/Snapdeal (footnote 16, supra).

Internet, which is the basis of e-commerce, is defined as a network of networks connected by the high speed 'pipes' of the internet backbone providers. But the largest providers indulge in free interconnection amongst themselves but charge fees to smaller operators. This concern became evident in the case of mergers of WorldCom/MCI and WorldCom/MCI/Sprint and it is clear that competition authorities are worried that differential interconnection may threaten competition.

Apart from the above, competition concerns are also qua vertical integration undertaken by last mile connection providers like cable TV, satellite and fixed mobile telephone service providers etc. They, while acting as internet service providers, offer set top access to internet and, at the same, might favour themselves over rivals and businesses allied with them.

Although, not bound by time and place, e-commerce, as opposed to traditional markets, is subtly circumscribed by computer codes. But, in e-commerce, anti-competitive restraints can take

[29] Directorate For Financial, Fiscal And Enterprise Affairs Committee On Competition Law And Policy, *Policy Roundtables, Competition Issues in Electronic Commerce* (2000), http://www.oecd.org/regreform/sectors/1920373.pdf

different forms, as stated above. One such example was the screen bias featured in the early 1990 in the Airline Computer Reservation Case.

Further, there is evidence of price dispersion across B2Cs for similar products which casts doubt on utility of internet search engines and ability of authorities to remove obstacles to the development of e-commerce. It definitely leads to questions about near term effects of e-commerce on widening markets and reducing market power. These questions attain further importance in the light of e-commerce making it easier to quote different prices to different consumers and to use information about buying habits to identify those willing to pay higher prices. But, it is well to remember that e-commerce should eventually widen markets and render them more transparent.

Also, e-commerce opens up new ways to take advantage of the fact that high-income customers accord more importance to time and, as such, may be willing to spend more than what is actually required.

It is not that e-commerce is only emanating anti-competitive concerns for the public and authorities. It would not be out of place to mention that it has a potential to reduce the procurement costs and to increase market liquidity along with other pro-competitive effects. It is also instrumental in reducing costs by reducing errors in filling out and transmitting orders; costs of internally aggregating and approving purchase orders etc.

As a natural result of e-commerce, there is greater liquidity from having a large number of participants in the market.

Efficiencies of e-commerce are beneficial to businesses too small to afford the high fixed costs of creating direct computer links with other businesses. E-commerce could also lower the barriers to entry in the market and render them more competitive.

But e-marketplaces could put forth exclusivity inducements with pro- and anti-competitive effects. It cannot be overlooked that e-marketplaces are created with a huge sunk cost and, as such, the owners probably do all that is possible to recover the maximum of that cost at the earliest. One of the motives of the e-marketplaces can also be to prevent free-riding. Exclusivity inducements can, inter alia, be in the form of contractual obligations to deal exclusively with the e-marketplace or commit high minimum volume to it. Along with the same, the e-marketplace could raise the cost of switching to another e-marketplace.

Competition authorities could find it difficult to assess net competitive effects of it. General rule across markets is that harm caused by exclusivity inducements is directly proportional to the market power of the firm. Further, exclusivity is more harmful during the mature phase of e-commerce as opposed to the start-up phase.

Another competition problem that has been noted by the OECD is that of enhanced ability to co-ordinate the competitive behavior. E-commerce makes prices more transparent and reduces the cost of changing price lists. Prices could rise in the markets where sellers are accurately aware of their interdependence, for ex: in an oligopoly, because price decreases would be quickly known to competitors and more rapidly matched. On the other hand, price increases could be more quickly and easily rescinded if rivals are unable to match.

Technology, along with presenting the consumers with benefits, also comes with its own set of peculiarities. It could facilitate collusion by providing new ways to exchange information, some of which might be nearly impossible to be traced and acted against. For ex: online chat rooms. One such example was the case of US Airline Tariff Publishing Case. Here, possible price changes were revealed to rivals but not to consumers and price notices were accompanied with tags hinting at the conditions under which the changes might be rescinded. This act of the parties was frowned upon and acted against by the authorities.[30]

It may also make it easier to cartelize as it makes it easier to detect cheating on anti-competitive agreements and to target retaliatory price changes.

The positive efficiencies of e-commerce are not overlooked but it can be associated with harm to competition when it is used to exclude or discriminate against rivals. The competition concerns rise with the degree of market power exercised by a site and the degree to which the control is concentrated in the hands of one or a small number of participants.

According to *Australian* authoritiesBenchmark competition analysis may become more relevant as, although, actual online sales may not be large, the greater amount of information available to consumers may increase ability to benchmark the prices.

Further, ability of firms to charge different prices to different customers and prices different from other online or retail stores may be enhanced in online environment. This could be for various

[30] The United States Department of Justice, *Order and Opinion, United States of America vs Airline Tariff Publishing Company*, *United States District Court for the District of Columbia* (June30, 2015), http://www.justice.gov/atr/case-document/order-and-opinion

factors like greater scope for product and service differentiation in online world and higher costs involved in surfing the internet.

However, such behavior is unlikely to justify a regulatory response unless the same arises due to misuse of market power. In absence thereof, ability of price discrimination may prove to be pro-competitive and, accordingly, may increase rather than restrict output.

Relative ease of communication over the internet makes it easier to detect anti-competitive transactions. However, volume of information available on the internet may increase such costs which may create new challenges in detecting anti-competitive price-discrimination.

According to ACCC, as e-commerce grows, inter alia, following competition issues may arise:

a) Exclusive dealing arrangements or Most Favoured Nation clauses between traditional distributors and suppliers to constrain entry of e-commerce competitors.

b) Exclusive territorial licenses may be used to restrict the ability of suppliers or new e-commerce participants to establish online distribution outlets in competition with existing distributors.

c) Primary boycott activity against suppliers who deal with e-commerce competitors.

Competition authorities in *Canada* lay more emphasis on computer codes having anti-competitive effects.

Canada foresees the following activities as the possible anti-competitive results of e-commerce:

a) Consumer scams

b) Malicious computer codes

c) Posting disinformation about a competitor on the internet

Canadian authorities suggest following methods to effectively enforce competition law in market places:

a) Substantive provision of any competition law must remain relevant in the e-world

b) Provisions of the law must remain technology neutral and must cover in its sweep any kind of anti-competitive conduct, be it in the physical or online marketplace.

c) With the ever-growing sophistication of technology, the enforcement agencies must be amply equipped with tools of gathering the evidence of highly perishable and fragile data of competition offences.

Germany also believes that e-commerce has a tendency to make it easier to cartelize as e-commerce makes it easier and faster to get access to information about price and product specifications and other purchasing conditions. Increased transparency may give rise to negative consequences. Transparency can benefit companies and this can create incentives for price co-operation between them. It makes it easier to identify whether a company which is a part of cartel is following its rules and it, further, creates opportunities for companies to rapidly communicate with each other without the public or its agencies being able to monitor the same.

In the *European Union*, qua the competition issues, no substantial competition issues involving pure e-commerce have come before the European Commission as yet. Network externalities are expected to be less common in B2C sector as opposed to B2B. services of auctions or file-sharing systems are ones where network externalities may be relevant. However, as yet, there has been no competition law concern raised in respect of these services.

As regards vertical restraints, the Commission examined the impact of the internet on the traditional distinction between active and passive sales under EU competition law. The block exemption on vertical restraint regards the restriction of the territory into which, or of the consumers to whom, a buyer may sell the goods or services as a hardcore restriction, subject only to four exemptions. The first of these provides that active sales can be restricted provided that they are designed to protect an exclusive territory or customer group allocated to a distributor.

Vertical restraints guidelines refer briefly to new questions posed by the use of the internet for goods distribution. The non-geographic nature of the internet makes for a difficult relationship between distribution arrangements based on geographic areas and the concepts of active and passive sales. Guidelines indicate that using a website to distribute products is, in general, considered a form of passive selling and that every distributor must be free to use the internet to advertise and sell products. Clauses preventing a distributor from selling online would only be permissible if a certain specific use of the internet amounted to active sales.

DELINEATION OF RELEVANT MARKET IN E-COMMERCE

One pertinent issue when analyzing the interplay between e-commerce and competition law is the determination of the question as to whether traditional brick and mortar stores and e-commerce market places form the part of the same relevant market. Although, this issue has not been conclusively decided as of yet in any jurisdiction, the trends and opinions from various jurisdictions may give an idea as to the way ahead. No discussion on possible competition concerns of e-commerce would bear any fruit unless the relevant market for the same is delineated.

As regards India, for the competition authorities, both the law and the sector are relatively new and, hence, we, naturally, witness that the horizon in the judgments of CCI is presently not as wide as is evident in other jurisdictions. In the SanDisk/Snapdeal case (supra), the CCI, while closing the Information, observed that offline and online markets are merely two different distribution channels of the same product and not two different relevant markets. But, as stated supra, the question still remains open to be decided by the CCI.

Keeping in view the fact that it is the transaction efficiency which marks the importance of internet as a trading platform, in some cases, e-commerce may represent an additional marketing channel for the same products while, in others, it may create new products, services and marketplace.[31]

Broadly, the question as to whether e-commerce creates a new product market would depend upon case to case basis. In some cases, e-commerce may act merely as an addition sales channel. For ex: grocery market. Online grocery retailing is an alternative sales channel for the same product. In other cases, e-commerce creates entirely new products and services and, thus, new economic markets. Many e-marketplaces offer a service which was hitherto unavailable mostly because the cost thereof was pretty high.

This issue, however, is not new. Competition authorities in other jurisdiction have had to determine whether mail order competes with other sales channels and also whether large supermarkets lie within a market of their own separate from small grocery stores.

Since the determination of issue is not as easy as ebony and ivory, we, at the same time, also need to consider customer perceptions as to difference between two sales channels which entail comparing the prices and providing ancillary services like providing the buyer with product information and helping the buyer assess his/her needs etc.

[31] http://cci.gov.in/images/media/ResearchReports/E-Commerce%20and%20Competition%20Law.pdf

The author of this research has had a personal experience that, many a times; the e-marketplaces (through their call centres) are not able to provide any information to the customer apart from what is already printed on their website as regards product specification or their customer policies. This is different from the traditional marketplaces where the customer is able to see and thoroughly enquire about the product before paying for the same.

Internet greatly reduced the cost of information exchange and, as such, lowered the search and transaction cost. Whether e-commerce forms part of the same relevant market would differ from market to market and would partly depend on whether and how firms in traditional channels become involved in the development of B2C and B2B and also on the online deliverability of the product.

Although e-commerce tends to widen geographic markets but, internet being a global medium, does not mean that the transactions take place in global markets. Language barriers, taxation issues etc are the problems which act against there being a truly global market.[32]

However, European Commission has recognized this issue and is moving in the direction of creating a digital single market which, in times to come, may act as precursor for a digital single global market. This focus of the EU is reflected in the press release of the speech of Miss MargretheVestager, Commissioner for Competition dated 26-03-2015. According to the release, as well functioning digital single market could add up about 340 billion Euros to the economy of the Union. In March, 2015, the European Parliament voted a Commission proposal to cap the costs of using debit and credit cards for EU citizens and merchants – the so called interchange fees. EU believes that an open and fair digital market can benefit both customers and merchants. The benefits of a better price to the customers are understood but the benefit of the sheer scale of the market for the companies is immense. Apart from the national rules and policies, often it is also the companies which hinder cross-border trade by erecting technical barriers such as geo-blocking. Geo-blocking prevents customers from accessing certain websites based on their residence or credit card details. Restrictions like these are, mostly, a result of the contractual arrangement between manufacturers/content owners and distributors. These arrangements are covered under the Block Exemption Regulations and Guidelines on Vertical Restraints. A review in 2010 made it clear that both distributors and consumers should be allowed to use the internet freely to, respectively, sell and purchase the product. Contractual bans of passive online sales are

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[32] Directorate For Financial, Fiscal And Enterprise Affairs Committee On Competition Law And Policy, *Policy Roundtables, Competition Issues in Electronic Commerce* (2000), http://www.oecd.org/regreform/sectors/1920373.pdf

considered a hardcore restriction on competition. To further the intentions, European Commission has already started investigations like the one about restrictions to pricing and cross-border trade of consumer-electronic products over the internet. In order to determine the functioning of the e-commerce sector and detect the obstacles to the stream of a fair competition, a thorough sectoral inquiry has been proposed within the EU. Miss. Vestager foresees that, inter alia, the inquiry would strengthen and make more uniform the action that the Commission and Europe's national competition authorities take against restriction of online sales. Findings would also act as guidance to the firms in order to adapt their conduct with the law.[33]

As regards B2C,there is some evidence that consumers are willing to switch to e-commerce in order to escape the sales tax. Further, it is also believed that, for some products, traditional markets and e-commerce might be a good substitute to each other. However, for other products or group of customers, delivery problems or lack of trust in e-payment can effectively divide markets.

The author of this research is of the opinion that, although traditional and e-commerce are dealing in same products, given the fact that e-commerce is a different environment where, for one, customers and seller do not have a physical interaction and customer is not able to see or test the product before buying and, secondly, because e-commerce, from a customer point of view, is a market where the prices of the product are mostly lesser than traditional marketplace, e-commerce is rendered a different environment altogether. Lastly, e-commerce renders the transaction easier as compared to traditional marketplaces. As a result, if a substitution takes place, it mostly takes place only between different e-commerce market players and, hence, it should be a different product market than a traditional brick and mortar marketplace.

However,experts believe thatwithin e-commerce, market definition may be difficult as price discrimination could become more widespread. E-commerce makes it easier to disguise price discrimination and reduces the chance that buyers could arbitrage amongst themselves. It, further, opens up new avenues of price discrimination like quoting different prices to different customers based on user supplied information or based on user's past behavior. Price discrimination, although, has a consumer benefit, it can be used to lower costs of predation strategy.

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[33] European Commission Press Release Database, *Competition Policy for the Digital Single Market: Focus on E-commerce* (March 26, 2015), http://europa.eu/rapid/press-release_SPEECH-15-4704_en.htm

AUSTRALIA'S PERSPECTIVE ON RELEVANT MARKET DEFINITION:Australian Competition and Consumer Commission, in order to conclude whether traditional stores and e-commerce fall within the same market, may apply SSNIP test from a point of view of hypothetical monopolist traditional market. While determining as to whether there would be a swing towards online channels, key considerations would include consumer confidence in relation to privacy and security issues, the comparative cost structures of online businesses against traditional outlets and access to infrastructure within Australia (which might end up being a generic consideration across jurisdictions).

There also can be industry specific issues while deciding the question like demand preferences to purchase particular type of goods from traditional outlets, access to suppliers and inventory and consideration of the impact of vertically integrated distribution chains on the potential for independent online competitors to enter the market.

Presence of e-commerce competitors may also impact upon the methodology used to determine markets. Supply-side substitution may become a more prominent characteristic of retail markets as online environments may add different types of products more efficiently than physical markets. Greater level of price and product differentiation will need to dealt with in applying the SSNIP test.

GERMANY'S PERSPECTIVE ON RELEVANT MARKET DEFINITION: German authorities, while determining the relevant market, are of the opinion that the question is to be answered from demand side perspective. There are many factors determining the substitutability including security of payment, schemes and reliability of shipping transactions etc. however, the answer might differ based upon types of goods. For ex: in case of goods like music, computer software and hardware etc., advantages of easy access, fast delivery and customized goods seem to outweigh the disadvantages compared to shopping in stores. However, for many other goods, online shopping might not be a substitute for physical stores.

German authorities are also of the view that internet does not seem to widen geographic markets, as normally perceived. Although internet is not hindered by boundaries, it does not mean that all trade over the internet is taking place in global markets. It is possible to target specific groups of customers based on language, region etc. Goods that are to be delivered physically might be sold only in certain areas but still marketed over the internet. Hence, a differentiated stance towards the tendency of internet to generate world markets is warranted.

UK's PERSPECTIVE ON RELEVANT MARKET DEFINITION: Competition authorities in the UK also believe that e-commerce and traditional stores may represent different relevant markets for different products like auctions and exchanges.

They also believe that issues like vertical restraints are likely to manifest themselves in e-commerce as a result of more integration by suppliers into retailing their own products, the development of new intermediaries, and increased buyer power for downstream firms etc.

EUROPEAN COMMISSION'S PERSPECTIVE ON COMPETITION AND MARKET DEFINITION: The European Commission (EC) believes that principles of defining markets are the same both for traditional stores and e-commerce marketplaces. However, existing tools like SSNIP may require data which are not readily available, given the rapid changes in the sector. EC is, hence, considering what additional evidence may be best used in cases where traditional data not available.

One important case in the EU where an effort was made to delineate the markets was in the case of **Telia/Telenor/Schibsted**[34]**.** In the aforesaid case, the Commission differentiated between the following types of internet content/services markets:

a) Internet advertising

b) Paid for content provision

c) Sales of specific products via the internet

This 3-fold distinction, while being broadly helpful, will require detailed elaboration in the context of particular cases. Each of the above covers many product markets and the last one is particularly important and is being hereinafter described in detail.

The types of goods available on the internet may be classified as follows:

a) Sales of traditional products using online medium. For ex: online exchanges of traditional goods, online sale of books.

b) Sales of electronic products that have potentially substitutable offline products. For ex: downloadable music, financial services etc.

[34] Commission decision of 27-05-1998 declaring a concentration to be compatible with common market (Case No. IV/JV.1_*TELIA/TELENOR/SCHIBSTED), according to Council Regulation (EEC) No. 4064/89

The difference in the nature of the aforesaid products, accordingly, raises slightly different market definition problems.

Qua online sale of traditional goods and services i.e. the goods which are being sold through internet but the same are also available through traditional outlets, the following questions would be faced by the Commission:

a) Does the online sale of products have characteristics from the offline sale? For ex: availability of offline goods, range of goods available, product delivery etc.

b) Is it possible to price discriminate between online and offline user of the product. Here, price discrimination is being used for market definition and not as an anti-competitive activity.

Similar issue arose in the case of setting up of an online book store, BOL, by Bertelsmann and other JV partners[35] and the Commission has been able to leave this question open. No problem arose even on the market definition which was most unfavourable to the parties.

The Commission considered that two following markets could be relevant for consideration of the issue:

a) The market for distant sales of consumer books like book clubs, mail order and sale by internet.

b) The market for the internet sales of books.

Commission chose not to consider to what extent the internet sales of books are competitors to sales through traditional outlets. However, it is to be seen that no competition problems arose even on the basis of two narrower market definitions cited by the Commission, thereby, rendering consideration of wider market definition unnecessary.

As regards electronically delivered goods or services i.e. sales of purely online products that are potentially substitutable for offline ones, the questions related to characteristics of online sales will still be relevant. In addition thereto, particular characteristics of the online product itself would also be relevant. For ex: the case of online music and music CDs. By their nature, the online and offline products are substitutable to each other. However, they may have different prices and

[35] BERTELSMANN/PLANETA/BOL SPAIN, JV.24, 03-12-1999

intended use. Digital music is more flexible and can be transferred and carried in more media as opposed to traditional music and it also requires different equipment to play the same. The absence of a permanent medium and lower delivery costs of digital music also leads to lower cost of production. Perception of customer towards these characteristics may lead to a conclusion that markets are separate.

As regards geographic markets, the Commission is also of the opinion that many factors like language barriers and regulatory barriers etc. render the geographic markets of e-commerce national rather than international.

CONCLUSION

A perusal of the above makes it clear that, although, advent of e-commerce has drastically transformed the way the transactions are undertaken now a days and its importance is only going to increase with every passing day with it offering better prices and services to customers and opening new avenues for new market players. But this new medium is not devoid of its own set of issues which run the risk of falling foul of competition laws. E-commerce and traditional brick and mortar stores may be, for the most part, presenting similar competition concerns but e-commerce, being a product of technology, does bring with it some issues which are unique to this medium and the respective governments need to be a step ahead in order to foresee them and effectively legislate. Further, competition authorities have to be abreast with the jurisprudential development in other developed countries so as to be well prepared when similar issues come for their consideration. Along with the same, as stated supra, they also need to be well equipped to gather the highly perishable and fragile evidence in cases of competition law violations.

Another issue that lies at the root of the competition law jurisprudence is the delineation of the relevant market. We have seen that this issue has not been conclusively laid to rest in any jurisdiction across the world. Competition Commission of India, in the case of SanDisk/Snapdeal, decided that both the mediums lie within the same relevant market. But it cannot be blamed as both the law and the sector is new for India as opposed to other developed jurisdictions. Since, growing trends in other jurisdictions give an idea that competition authorities seem to be inclined not to put both the media in same relevant market and, instead, decide the same based on the nature of product and service, inter alia, we can be assured that the same would find a favour with the Competition Commission of India. Along with the same, this issue would also be decided with finality in the near future.

Experts also believe that the competition authorities must also take into account the consumers' perspective and accord the primacy to the same. They need to view as to how a potentially anti-competitive restraint might affect competition environment rather than on particular form of restraint used. Balancing the potential competition issues with numerous advantages to consumer without being too interventionist should be the ideal approach to effectively deal with this new scenario.[36]

EMERGENCE OF DIGITALIZATION AND ITS IMPACT ON COMPETITION LAW

Ashna Chabbra and Anuja Chaduhury

1. INTRODUCTION

The advent of digitalization in the Indian Economy has created a need for development and advancement in all the spheres of law. It has become indispensable to adapt the dynamic needs of the industry and urgently render protection, especially across multi-sided platforms. Competition in the digital economy requires more attention as in contrary to that prevailing in the traditional "brick and mortar" markets. The dynamic character of the digital market makes it conclusively collapse into a limited set of competitors due to the market created impediments and difficulty in

[36] M.M. Sharma, *India: Do Online Markets Effect Competition* (Nov. 14, 2014), http://www.mondaq.com/404.asp?404;http://www.mondaq.com:80/india/x/353986/Trade+Regulation+Practices/Do+Online+Markets+Effect+Competition&login=true

independently existing in the presence of other major opponents. The sector consists of platform-based business models, multi-sided markets, network effects and economies of scale which render competition issues more complex.[1] Unlike in most economic sectors, the interconnectivity of digital economy requires unavoidable co-ordination and co-operation between the firms, which may indeed be pro-competitive.[2] Innovation which forms the foundation of technology-driven industries makes it more susceptible to "**violations of competition law**". There is a continuous discussion regarding the compatibility and the scope of the existing competition law regime to address the issues arising out of virtual markets and the majority opinion with respect to the Indian scenario has leaned against it. A number of establishments in the virtual world have resorted to a strategy which involves inculcation of losses in order to ultimately gain network effects. The extent of losses being incurred by e-commerce firms in India through heavy discounting practices is estimated to the value that these businesses expect to gain from ensuring early control over the market leading to new concerns of predatory pricing for the competition law regulators[3] It is reported that the combined losses of India's top ten e-commerce companies quadrupled in the financial year 2014-15 standing at a total of Rs.51.5 billion.[4]The firms have failed to realize that such strategies might provide brief monetary rewards will be brought under the scanner of the competition authorities' subsequently .Though there are new ch*allenges imposed by the new industry, it has several positive impacts across the globe. It transformed industries and economies by introducing new ideas and technologies in the economy and has become the driving force for liberalization and innovation. It has contributed immensely in creating transparency and accountability across the consumer-supplier platforms. We will go on to elaborately discuss both the pro-competitive and anti-competitive angles of the digital economy focusing majorly on the Indian and the European scenario and its corresponding laws.

2. DETERMINATION OF RELEVANT MARKET

2.1. The composition of market in a Digital Economy

[1]"Digital Economy, Innovation and Competition", Organisation for Economic Co-operation and Development(OECD), Available at: http://www.oecd.org/competition/digital-economy-innovation-and-competition.htm.
[2]Ibid.
[3]SmritiParsheera, Ajay Shah &Avirup Bose, *Competition Issues in India's Online Economy* (NIPFP Working Paper Series No. 194, 3rd April 2017), http://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf. at:http://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf.
[4]Id.

The emerging market revolutionised by the power of clicks and links has more intricacies than a regular brick and mortar market selling the same products. It is pertinent for any competition law authority or jurist to understand that the consumer behaviour observed in the digital e-commerce markets varies majorly with that in traditional markets. As compared to other markets, digital economy provides the players in that market huge opportunities to invest in greater degrees of innovation and technological developments. The choice of the consumers is overweighed by the quality and product features than the price. Due to its high concentration, it is relatively contestable and allows the entrants and the existing market players to reach a large segment of the market due to the strong network effects and economies of scale. The non-requirement of the heavy investments in the supply chain allows the companies to expand their operations quickly without any substantial resources. The distinctive feature of the digital economic market is the two-way benefit user group which connects the service provider and the consumer. This results in the wool gathering of a lot of data and its analysis to develop the pricing and consumer preference algorithms, sometimes making it susceptible to anti-competitive effects.[5]

2.2. Challenges with Relevant market definition according to the traditional methods.

The diversity in the character of the digital economy is pertinent to be recognized as the factor to be emphasised while determining the relevant market in case of competition law issues. Market definition is the first step in discussing the competition and regulation concerns as it helps to establish the dominance of a substantial market share of an enterprise in an existing market. The already established tools of market definition have proved to be unsuitable due to the very nature of the digital economy. Due to the presence of more than one relevant market in the multi-sided platforms, non-reliance on the price based indicators owing to the zero pricing policy and the fluidity between the markets boundaries are the main challenges for concluding the relevant market of digital economy.[6]

Many competition law authorities fail to distinguish the two-sided transaction and two-sided non transaction markets, both of which require different treatment in the determination of market. Two-sided transactions involve direct transaction between the users on both side of the platform

[5]Dr. Maria Maher, "Resetting competition policy frameworks for the digital ecosystem" (2016) Available at: https://www.gsma.com/publicpolicy/wp-content/uploads/2016/10/GSMA_Resetting-Competition_Report_Oct-2016_60pp_WEBv2.pdf, henceforth known as "GSMA".

[6]Nicolai Van Gorp, Dr. Olga Batura, Challenges for a Competition Policy in a Digitalised Economy, IP/A/ECON/2014-12 (2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf [hereinafter "EU Digital Economy"].

which demands definition of a single relevant market due to the presence of indirect network effects. While on the other side, in the case of non-transaction markets, the product might compete on one side, but not the other, for e.g. market for broadcasted media and should be defined with multiple relevant markets. The anomaly of defining relevant market was identified when the EU Commission while referring to the DoubleClick and Google acquisition case defined the relevant market as only that of "online intermediation" and ignored the two-sided markets of movie-streaming platforms and navigation markets. As a result, the acquisition of DoubleClick strengthened Google's position as it could obtain data of other users and improved its targeted advertising.[7]

The main attraction of the consumers towards e-commerce platforms is the availability of the services at zero-pricing. This takes a problematic turn as the basis of competition ceases to exist. The traditional SSNIP tests built on the pricing changes prove to be non-functional as it cannot account for the interdependencies among prices of products in multi-sided platforms. However, many competition law authorities claim that in situations where there is no price tagged on certain products, the consumers end up paying prices in other forms, flowing from the annoying advertisements, privacy or in the form of their data, making data as a currency. The basis for substitutability by the consumers becomes the differences in product features or functionality. As the content of services becomes less comparable in the eyes of the consumers despite its glaring differences on the face value, the basis of determination of the relevant market ceases to be demand-side substitutability and is replaced by the notion of whether one enterprise is able to steal the profits of the other company.[8] The market definition tools are inapt for adopting the fluidity of the market boundaries which results from the creation of new markets by developing new development models.

1.3 Suggestions on the definition of relevant market definition.

The determination of relevant market should be narrowed down by not analysing how much profit turnover a particular digital platform is making, but rather by its ability to steal away the profits of another company. The analysis of the relevant turnover, pertinent for determining the dominance of a particular enterprise is to be determined by scrutinizing the strength of the competitive constraints which include the buying and selling power depending on the horizontal market power vis-a-vis the competitors, the presence of potential entry barriers and the analysis of the vertical

[7] *Id.*
[8] *Id.*

power relations throughout the value web.[9] Some jurists suggest that in the case of digital economy, rather than the traditional SSNIP test, there should be the usage of the Small but Significant Non-Transitory Decrease in Quality Test (SSNTDQ) which asks the question whether the decrease in the quality of the service will still retain the customer base of that platform. The China Competition Law Authorities and the EU Competition Law Commission have admitted that in online markets[10], due to the zero pricing policies, emphasis is paid on quality as the significant parameter. Also, it is to be noted that in the case of digital economy, major contributor to market power is data. The ease in which data sets can be replicated and the scope of the data for competitive performance is to be considered to assess its contribution. Accessibility of data confers an unmatchable advantage to the enterprises over their fellow competitors in the market.

3. ABUSE OF DOMINANCE IN THE DIGITAL ECONOMY:

3.1 Traces of Abuse of Dominance.

The growing "**base**" of digitalization and a corresponding change in the commercial behavior has alarmed the competition law authorities across the globe. As recognized by the Antitrust law, abuse of dominance of an enterprise in a market is anti-competitive per se and not mere dominance.The abuse of dominance becomes more prevalent in the virtual economy market than in the traditional markets. Among several other causes for the rising cases of abuse of dominance in the virtual market, is the lack of entry barriers. Entry barriers are the prominent factors of consideration in the assessment of market dominance. Traditionally, the existence of substantial entry barriers indicated a high market share translating to monopolized market power abuse of dominance[11]. However in the virtual markets, due to the concentration of market power in a few platforms in the e-commerce industry has enabled and encouraged these establishments to practice business by substantially controlling the market behaviour of the competitors as well as the new entrants.,

It is noted that as a result of market power, "some platforms can control access to online markets and can exercise significant influence over how various players in the market are remunerated"[12]The power to control the market behaviour of the new entrants highlights the "First-Mover" advantage that is enjoyed by the major e-commerce giants having a global presence along with an established brand loyalty. European Commission has pointed that nearly half of the

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[9]*Ibid*
[10]GSMA, *supra* note 5.
[11]OECD, Policy Roundtables, Barriers to Entry (2005), https://www.oecd.org/competition/abuse/36344429.pdf.
[12]Communication from the Commission, A Digital Single Market Strategy for Europe, COM(2015) 192, p11,

internet traffic goes to only 1% of the websites that are actively trading in all the member states.[13]Though, this does not constitute per se a violation of the competition law but when such control is clubbed with other behaviours of the virtual establishments, they can be anti-competitive in nature.

To combat the first traces of abuse of dominance across the digital platforms, the European Commission investigated the search engine giant Google, who was alleged to have abused its dominant position by lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as "price comparisons" (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services.[14]Google was criticised for restricting competition and innovation. It was considered that vertical integration by Google had a major impact on innovation because it reduced the incentive for start-ups to develop alternative services: "They will have no access to the market. They will not be visible and therefore consumers will not use them."[15]

3.2 Abuse by way of Network Effects.

Network effects can at any point of time turn anti-competitive and can lead to winner-takes- all outcomes. The interaction between the platform sites with interdependent demand leads to direct or indirect network effects.[16]The direct network effects arise where users of a particular platform give more importance to a product or a service directly increases the number of users on the platform as seen on Social Networking platforms. Such network effects can accelerate switching costs and create substantial entry barriers leading to a monopolistic tendency in the industry. However, the major players who are successful in tackling these effects can leave a major impact by drastically decreasing and limiting the choice for consumers, hence posing as a necessary evil for survival in the virtual market. In contrast, indirect network effects arise when the users of one side value a product more; the more users 'from the other side' are using the platform.[17]It is purely

[13]SELECT COMMITTEE ON EUROPEAN UNION, House of Lords, REPORT ON ONLINE PLATFORMS AND THE DIGITAL SINGLE MARKET, 2015-16,HL, 10 (UK), https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf, [hereinafter "House of Lords"]
[14]European Commission Press Release, IP/10/1624, Antitrust: Commission probes allegations of antitrust violations by Google, (Nov. 30, 2010), http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en.
[15]House of Lords, *supra* note 13.
[16]JOHN E. KWOKA& LAWRENCE J. WHITE, THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 606 (6th ed., 2013).
[17]MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 451 (2004).

an accelerating mechanism which is building an easy path for a rapid growth in this new networked economy.

3.3 Data-related Abuse

"Data" is the major assets of a virtual business and every major platform is interested in the increasing its reservoir of exclusive data by entering into agreements with other platforms and to prevent the access of such data to other players and new entrants. The virtual market is purely data-driven and is more likely taken undue advantage of by the rival players as well as the platforms to which it belongs. It is one of the potential means of abusive manipulation.. In addition to this, there is major degradation of the security provided to personal data of consumers across platforms, associated with violation of consumer rights. The customers neither approve of nor are unaware of the misuse of their personal data by the platforms and how their personal data has become a business commodity which is shared by the major players in the digital market for which they didn't sign up.

4. MERGERS AND ACQUISITIONS

When Google undertook 187 acquisitions, it was appropriately opined that "In this way, a powerful platform can foreclose future markets and throttle innovation; it would leverage its own market power instead of competing on merits and is likely to prevent others from competing on merits."[18]European Commission recently faced a huge challenge regarding in the Whatsapp-Facebook Merger, which was considered as one of the landmark deals as Facebook successfully bid over Whatsapp for $19 Billion. One of the major areas of concern in this particular deal was the restriction of competition in the relevant market. EU identified the relevant market as a combination of three markets i.e. The Communication Market, Social Networking and Online Advertising Market. However, this bid eventually received a green flag by the authorities in Europe and the US. As far as Indian Competition regulators are concerned in the Whatsapp Case[19] regarding the inquiry into the alleged abuse of dominance by Whatsapp Inc., the Competition Commission of India held a different stand with regard to the relevant market of Whatsapp than what was initially bought before by the Informant and it also observed that these instant messaging

[18]Nicolai Van Gorp&Dr Olga Batura, *Online Platforms and the EU Digital Single Market*, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/24920.html.
[19]Shri Vinod Kumar Gupta v. WhatsappInc.Case No. 99 of 2016, CCI.

applications cannot be treated or be compared to the traditional messaging services rendered primarily by the Telecom Service Providers.

2. VERTICAL RESTRAINTS IN THE DIGITAL ECONOMY

The nature of the Digital Economy strives on innovation and technological development which makes it extremely susceptible to imposition of non-price vertical restraints. The vertical restraints as in the traditional markets have the same aim of facilitating collusion and softening competition among the enterprises existing in the digital economy. Though instruments such as the Resale Price Maintenance (RPM) aim to eliminate competition among the sellers, the price transparency in the online markets makes it difficult for the platforms to enter into a cartel, proving to be a lesser concern than its practice in the traditional market.

Vertical restraints have always been weighed on the golden scale of rule by reason, appreciating the pro-competitive effects it brings in with its usage. They are believed to mitigate the free-rider service problem that may compel customers to use the services provided by the traditional markets, before jumping onto the online services. Vertical restraints compel the retailers in engage in demand-enhancing activities such as servicing and advertising. They have also been successful in incentivizing the retailers to promote the manufacturer's brand, by prioritizing it by showing in the top search lists rather than demoting it to remote particular searches.[20]

However, some particular emerging practices such as the price-parity agreements or best-price guarantee clauses incorporated in the agreements between the manufacturers and the retailers have raised the concerns among the anti-trust regulators to have the potential to showcase anti-competitive nature.

5.1 Price-Parity Clauses and Retail Price Most-Favoured Nation Clauses

Such clauses is an agreement between a seller and an electronic trade platform where the seller undertakes not to charge on that platform a price that is higher than the price that he charges on other platforms.[21] They are instruments to ensure that the manufacturers are not providing better incentives to the other competitors in the market, and if so, the same may be directed to them as well. They entered the sphere of digital economy, under the scrutiny of the Commission with the

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[20] OECD, POLICY ROUNDTABLES, VERTICAL RESTRAINTS FOR ONLINE SALES (2013), http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf, hereinafter EU Vertical Restraints.

[21] *Ibid.*

investigations on Amazon who had clauses with its various manufacturers to be informed of the most favoured or alternative terms offered to their competitors and in the Online Booking sector.

5.1.1. Potential Effects of the Parity Clauses:

The most relevant competitive effects are likely to occur in the markets where the platforms compete against each other and the prices of the goods/services sold on that platform in relation to other competing platforms. It is easier to foresee the anti-competitive effects of such clauses.

The most visible effect is the foreclosure of the entry of new competitors in the relevant market. For instance, if "A" and "B" are two competing enterprises which desire to enter the market for Soft-toys. The most obvious strategy would be to lower the transaction fee from the sellers, so as to allow them to charge lower prices and attract the buyers. However if A has signed price-parity agreements with the sellers, covering the new entrants as well, this will prevent the sellers to charge them lower prices on the new platform. This will restrict the new entrant to attract new buyers. This plays a major role when competition is based on non-price elements and strong network effects.[22]

Such clauses have also been evidenced to soften the competition between the competitors. Suppose A demands a higher transaction-based fee from the sellers that use it than platform B and the sellers have signed such a clause with platform A, they will have to charge on A a price that is not higher than the price charged on platform B. This would reduce the prices that they would charge the buyers on A and subsequently increase the same on B. Buyers of B, will to some extent, subsidise the buyers on A. This would reduce B's incentive to decrease its fee and increase A's incentive to increase its fee as the sellers would have to spread the increase across the prices on both the platforms. The end outcome remains that both platforms charge a high fee to sellers. This further worsens when both have entered into price parity agreements with the sellers and get the more incentive to raise seller's fee.

An across-platform parity clause may facilitate collusion between platforms and also between sellers. Such clauses improve the ability of one platform to monitor each other as the sellers will definitely complain about the higher prices they have to pay on other platforms. Less price variety

[22]Luca Aguzzoni&Ors., *Can 'Fair' Prices Be Unfair?*,OFFICE OF FAIR TRADING, (2012), http://www.learlab.com/wp-content/uploads/2016/04/Can-%E2%80%98Fair%E2%80%99-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf.

improves the sellers' ability to monitor each other pricing decisions and reduces the costs of enforcing a horizontal agreement.

However it can be denied that such clauses may help a high cost/high quality platform to defend its quality investments by preventing other platforms from free-riding on them.

5.2 Dual Pricing

Though it donning an innocent garb, dual pricing is a competitive threat aimed directly against the online sales. The system of dual pricing involves the imposition of different prices to the retailers based on whether he chooses to sell the product online or over-the-counter. The manufacture's selling prices have a direct impact on the determination of the retailer's selling prices and the and by increasing the margin between the two gives the manufacturer the power to determine the retailer's choice of sales channel for the sale of his products. An unattractive MSP for online sales can reduce the online market for that product to zero, thus dismantling the online distribution channel for that product.[23] When the German Commission prevented the usage of agreement that provided a special rebate to the products sold at brick-and-mortar shop and the prices in the online distribution market was relatively higher, the German Commission recognized the anti-competitive nature of such policies in hindering the possible structural change towards online distribution and prevented the use of the same.[24]

5.3 Selective Distribution as a ban on online sales

By limiting the scope of the online distribution offerings to selective distribution platforms, the manufacturers restrict the retailers in order to maintain their status of their brand, their credence and the luxury of their product. These restraints are employed to not create a negative impact for the luxury products in the minds of other retailers based on the poor quality standards of a single retailer. It means to limit the provision of the incentives to few authorised retailers only. It also aims to provide the customer base of the product to have the access to full and complete information from the retailers whom the manufacturers sanction for distribution. However, these selective distribution practices have the potential to restrict the intra-brand competition and lead

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[23]"Vertical Restraints in the Internet Economy" (2013) Available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2

[24]Cf. Activity Report of the Bundeskartellamt 2011/2012, document 17/13675, p. 74 Available at :http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202012.pdf?__blob=publicationFile&v=5.

to the foreclosure of certain kinds of distributors in an online platform and are considered to be a hard-core restriction.[25]

6. FEW CONSIDERATIONS:

The competition law authorities are slowly recognizing digital economy paving its way in indulging into anti-competitive agreements and activities. The nature of the digital economy while guaranteeing more transparency and efficiency for the regulators to monitor them, can also shove the anti-competitive effects under the veil behind the computer screen. All the anti-trust jurists have firmly formed their opinion against the utility of the present techniques in the legal provisions to deal effectively in the light of emerging issues of the digital economy. Efforts have been made to considerably understand the nature of the market as opposed to the traditional markets and the significant changes in the consumer behavior towards e-commerce, regardless of it selling the same products.

The legislative action requires primarily, the constitution of an efficient body consisting of members ranging from fields of competition law and consumer law protection, science and technology, economics, business fields, anthropologists studying the consumerist behavior, etc. to recognize the nature of the digital economy and its functioning. Efforts have to be made in order to fully understand; not only the anti-competitive risks but also the data protection risks involved in this technologically-run market. A full assessment of the market would be fundamental in the formulation of either a separate legal mechanism to deal exclusively with the issues arising out in the e-commerce industry and imposing penalties for the offenders, or in the understanding of the various amendments, additions and the removal of the severable parts in the existing legislation to incorporate the risks involved. Recommendations can be borrowed from the successful models and proposals that have been advocated by German Competition Law Authority and the EU Competition Law Commission. The legislation has the burden also to educate the inspectors, authorities and the administrative machinery involved in the investigation and proceedings of such cases.

In the recent cases which emerged in the recent facet of digital economy Whatsapp-Facebook merger case, Ola-Uber Taxi case, Reliance Jio case, etc. posed a unique question of authority allocation of the cases. While the Competition Commission of India is riddled with the powers to decide cases relating to the competition law related issues pertaining to every sector of the

[25]EU Vertical Restraints, *supra* note20.

economy; individualized authorities like Telecommunication Regulatory of India also has some distinct powers to decide, investigate and adjudicate cases relating to the anti-competitive activities relating to the technology sector. Hence, when an issue of anti-competitive violation surfaces, there has to be a judicial precedent prescribing the overriding power of one authority over the other. The legislation can also aim to either dedicate a separate quasi-judicial branch within the CCI who focuses especially on cases related to the digital economy or there can be a creation of separate quasi-judicial body under the new formulated legislation and TRAI and CCI can be relieved from commencing proceedings against the same.

7. CONCLUSION

Giving due consideration to all the dimensions of the digital market and their impact upon the competition regime it can be reasonably concluded that the ambit of the competition law currently in force is not wide enough to include under its purview the dynamic obstacles prevailing due to digitalization and there is a need for establishment of a separate enactment and regulating authorities to meet the rising challenges.

THE CONUNDRUM OF ONLINE RETAIL IN COMPETITION LAW

-Lavanya Chawla

INTRODUCTION

Online retail generally refers to the buying and selling of goods over the internet. Though online retail appears to be a new concept, the core elements of it have been in existence since the 19th century when mail order and distant selling had become common.

The advent of e-retail has led to many competitive and welfare effects, however its coexistence with the offline sector has also raised competition concerns. On the one hand, online retail has led to increased price transparency, reduced search cost, and staff cost, greater variety and intensification of inter-brand and intra-brand competition. On the other hand, its rapid growth along with the co-existence of brick and mortar stores has led to concerns like resale price maintenance and online sale bans. There is a debate on whether these concerns can be dealt within

the existing legal framework or new rules are needed due to the unique nature of the industry. For instance, will the SSNIP test be a correct parameter to delineate the relevant market or some other tools should be employed? Similarly, should the regulation be in the nature of self-regulation or close scrutiny by the authorities? All these are issues which have arisen due to the unique parameters involved in any industry run with the help of internet.

This paper attempts to study the various competition law issues that have arisen with the growth and rise of the online retail sector and provides guidance regarding the approach to be followed by the regulators towards this industry.

1. Delineation of Relevant Market

> *"[t]oconsumers, online and offline aren't really separate. Many shopping journeys do take place purely along one of those channels; but increasingly the line is blurring."*

-Philip Marsden (CMA Inquiry Chair)

One of the fundamental issues that need to be addressed before any discussion of the conduct of the online retail players is whether online retail constitutes a separate relevant market from the traditional brick and mortar stores or is just a different channel within the retail market? This basic issue has huge implications when debating whether any of their conduct is anti-competitive as a Section 3 analysis (anti-competitive agreements) under the Competition Act, 2002 requires looking at the effects in the relevant market while a section 4 (Abuse of Dominance) analysis involves establishing dominance in the relevant market.

I. RELEVANT MARKET: AN OVERVIEW

A relevant market defines the arena of competition which exists for a product by highlighting the competitive constraints for the particular product. The relevant market is defined in two areas: product and geographic. Generally, a relevant market is determined on the basis of substitutability. Three criteria are used- demand side substitutability, supply side substitutability and potential competition.[1]

[1]RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 31-35 (7th ed. 2012).

For demand side substitutability, you look at which products are interchangeable for the consumers on the basis of price, intended use and characteristics. The next criteria is supply side substitutability which looks at whether the suppliers will shift their production patterns in the short term in response to increase in price of the other product. SSNIP is used for both of these. Potential competition is more relevant for market power than definition. [2]

II. RELEVANT MARKET ANALYSIS FOR ONLINE RETAIL SECTOR

One of the first questions that crops up when carrying out a market definition analysis of the online retail sector is whether general rules of competition law should apply or different rules tailor-made for the sector should be adopted. The researcher is starting with the assertion that traditional rules of competition law can apply for deciding the relevant market for the online retail sector as well. This is supported by the Competition and Markets Authority's reasoning that online platforms like online retailers just act as a marketplace and their activities are not any more novel than what a shopping mall or traditional marketplaces do. Though they are multi-sided markets with suppliers and buyers on the two sides of the market, they don't create any new dynamics for the market analysis. Reliance is placed on analysis of the newspaper industry. While it is also a two-sided market, the traditional tools of market analysis are deemed sufficient. Similarly, online retailers are in fact just another form of retailers who are acting between wholesalers and customers.[3]

Further, applying the question of SSNIP i.e. *whether the customer switch from a physical store to an online store as response to small but significant increase in price*, all the variable needed are the same as in case of a physical product as the way of production and cost of production doesn't vary based on where it is traded. If there is any difference it is in the way the consumers interact with the sellers and the distribution networks.[4]

[2] *Id.*

[3] Competition & Markets Authority, Select Committee on the European Union: Internal Market Sub-Committee, CMA Response to the Call for Evidence: Online Platforms and the EU Digital Single Market (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502607/Response_to_House_of_Lords_inquiry_on_online_platforms.pdf.

[4] Aleksandra Belousova, Relevant Market: The Application to E-commerce Area in the EU (2010) (unpublished M.Sc. master thesis, Aarhus School of Business), http://pure.au.dk/portal/files/9751/Final_thesis_Relevant_Market_the_application_to_the_E-commerce_area_in_the_EU_.pdf.[Hereinafter Aleksandra, *Relevant Market*].

Hence, based on the above discussion, it can be said that the application of traditional relevant market analysis does not create any methodological problems when applied to the online retail sector.

However, there are certain shortcomings in terms of data which exits when applying this analysis to the online retail sector. Over the short term, it will be difficult to find reliable sales and price data considering the rapid pace with which online retail market is growing and changing. This growth and change affects the way they compete with traditional sellers. Further, where there is price discrimination between customers, it will be difficult to study prices. Due to these limitations, using past data for SSNIP won't be very accurate and will be an unreliable guide for the current or future market condition.[5] However, over the long term, this shortcoming would be dealt with and competition authorities can easily obtain data as the transactions are carried out electronically and records are easy to keep. Procedures can be put in place by a law requiring the e-commerce players to preserve data with the government agencies/ regulators.[6] In fact, data on customer location will even help in demarcating the geographical market.

III. TRENDS ACROSS JURISDICTIONS

The trend across the US and EU has been to look at substitutability in the offline sector to decide whether offline and online constitute the same market or different markets. If there are offline substitutes for the online service, the market ends up being defined broadly and there is less chance of any finding of anti-competitive conduct in a wide definition.

As compared to social networking sites and search engines, online retail presents a unique picture because the former has no real substitutes in the offline arena while the latter does, in most cases. Hence, in the US, social networking sites have been clearly established as constituting a separate relevant product market which is distinct from the market of other internet based service like online dating sites or email.[7]

In the case of online retail, *Gerlinger*v. *Amazon*[8] is one case where in the context of books, it was held that online books and hard copy books do not form a separate market but are instead part of

[5] Office of Fair Trading, *E-Commerce and its Implication for Competition Policy*, (August 2000).
[6] DOTECON, COMPETITION COMMISSION OF SINGAPORE, E-COMMERCE AND ITS IMPACT ON COMPETITION POLICY AND LAW IN SINGAPORE (2015), https://www.dotecon.com/assets/images/DotEcon-Ecommerce-Final-Report.pdf [Hereinafter DotEcon Report].

[7] LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. Appx. 554 (9th Cir. 2008).
[8] GERLINGER V. AMAZON 311 F. SUPP. 2D 838 (N.D. CAL. 2004) (QUOTING BROWNLEE V. APPLIED BIOSYSTEMS, INC., NO. 88 20672, 1989 WL 53864, AT *3 (N.D. CAL. JAN. 9, 1989))

the same market. A suggestion was also made in the *InRe EBay Seller Anti-trust Litigation*[9] that the market, should be the market for online auction. It will be similar to saying that Flipkart, Amazon India and other online retailers form a separate market of online marketplaces. However, this was not accepted readily as the approach failed to acknowledge that the same had substitutes in the offline market as well and hence, would be too narrow a definition to adopt.[10]

Even for the EU, this discussion of whether online channel constitutes a separate market is not completely new. As discussed above, mail order selling was similar to the online selling business and this issue has already been discussed by EU cases. The *OTTO/Grattan*[11] case was one such case where it was held that catalogue mail order is a separate relevant market. The reasoning for this was based on the difference in the shopping experience than other things. The Difference in experience included things like ordering without seller's presence, the possibility of return of product with full reimbursement, product's availability for larger geographical areas.

Besides this, some of the EU merger cases have discussed the relevant market for online products. *Bertelsmann /Mondadori* was one such case where the commission held that distant selling through the internet should constitute a separate market from selling books through stores. The reasons given for this were that the person can make a choice while sitting at home and the costs of delivery and sending back the books is with the seller. Further, it can reach to remote areas while normal book stores can't supply to remote areas.[12]*Bertelsmann/Havas/Bol*[13] is another case where separate product market was recognised for sale on the internet because of technology for selling books and the requirement of the internet.

In India, this was first discussed in the case of *Ashish Ahuja* v.*Snapdeal.*[14]The case involved a claim by one of the sellers of Snapdeal that Snapdeal had removed their products from the website on the ground that only authorised dealers of Snapdeal would be listed on the portal. The informant alleged that this was collusion between Sandisk and Snapdeal and leading to higher prices for the consumers. Here, the CCI discussed that online and offline are just different channels of distribution and not different markets.

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[9]In re eBay Antitrust Litig., 545 F. Supp. 2d 1027, 1032 (N.D. Cal. 2008) (quoting Brownlee v. Applied Biosystems, Inc., No. 88 20672, 1989 WL 53864, at *3 (N.D. Cal. Jan. 9, 1989)).

[10] Kagan Bricks, *Mortar and Google: Defining the Relevant Anti-Trust Market for Internet Based Companies*, 55 N.Y.L. Sch. L. Rev. *271 (2010/11).*

[11] European Commission, Otto/Grattan, Case No IV/M.070.

[12]European Commission, Bertelsmann /Mondadori, Case No IV/M.1407, ¶15

[13] Bertelsmann/Havas/Bol, Case No IV/M.1459, ¶16.

[14]Ashish Ahuja v. Snapdeal, Case no. 17 of 2014.

In the case of,[15]the court dealt with the topic of relevant market in the context of exclusive distribution agreement and whether the same leads to relevant market being defined only as that product for which there is the exclusivity agreement. For instance, if Flipkart and ChetanBhagat have an exclusive distribution agreement for sale of *Half girlfriend*, will the relevant market be only the market for *Half Girlfriend* or will it include other books which are substitutable. The CCI held that products which exercise competitive constraint on *Half Girlfriend's* sale should form part of the same market. Hence, similar books which consumers might buy instead (say DurjoyDatta) should be part of the same market. The CCI left the question of e-portals being a separate market as an open question because irrespective of that question being answered either way, none of the e-tailer could be said to be dominant.

IV. SHOULD ONLINE RETAIL CONSTITUTE A SEPARATE MARKET?

Considering it has been established that SSNIP test can be used even for determining relevant market for online retail, in this section the researcher tries to evaluate whether the test will lead to a separate market for online retail both from the demand side and supply side.

There have been marketing studies conducted in the US where it has been found that for products like books,[16] diapers[17] and computers, offline and online are substitutable. This has been attributed to the wider choice online than in a traditional store. Lower prices have also been cited as reasons for expensive products like computers and repeat purchases like diapers and books. However, this might not be the case where there are benefits to offline sale service like personal consultancy in case of make up or ability to examine the product quality physically.

Further, the shift towards omni-channels also hints at the fact that these two channels are interchangeable. This is so because most customers end up using both channels together to buy a certain product. For instance, a customer compares prices online and then visits a store to buy the product or visits a store to physically view the product and finally buys it online due to pricing. [18]

Hence, it can be said that many products turn out to be the same offline and online and hence, can be seen as substitutes for each other. However, for certain customers and kinds of products,

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[15]MohitManglani v. Flipkart&ors., Case No. 80 of 2014.
[16]Chris Forman et al., *Competition Between Local and Electronic Markets: How the Benefit of Buying Online Depends on Where You Live*, 55(1) Mgmt. Science 47-57 (2009).
[17]Jeonghye Choi & David R. Bell, *Preference Minorities and the Internet,* 48 J. MARKETING RES. (2011).
[18]*DotECon Report, supra note 6..*

due to the difference in delivery mechanism and complexities of electronic payment, the market could be divided[19].

From the supply-side, the business structure of a brick and mortar store is very different from an online retailer. But the question is whether shifting from one to other is easily possible without huge investments? Shifting from an offline store model to online store is easy. The entry barriers aren't very high and the costs are minimal in terms of logistics, and setting up of a website. However, shifting from online to an offline store has its limitations and costs in terms of territorial exclusive agreements and setting up costs. For a player shifting from offline to online, there are possibilities of a decrease in his costs as traditional costs like building and staff will be lowered.

Hence, though there are differences between the online and offline retailers, the difference is getting smaller. The primary conclusion coming from the above discussion is that a traditional retailer can switch the traditional retail model to an online retail model without huge investments. The present trend towards the hybrid model of bricks and clicks stores further shows that it is not that difficult to shift from offline to online selling.[20] However, the same cannot be said about shifting from an online marketplace model to an offline model.

It should also be noted that the underlying policy objectives of a regulatory authority also play a role when they define the relevant market, especially in case of emerging sectors. This is evident from the EU and US approach. The EU policy has been commented upon as being a biased policy towards avoiding type II error while the lenient US policy is bias towards avoiding a type I error. Considering the online retail sector is an innovation-driven sector which is in a growing phase in India and is contributing positively to the economy, both in terms of money and welfare effects, the Indian regulator's approach seems to be light handed. India is following a similar approach as the FTC by defining the market broadly in a bid to avoid Type I errors which can curb innovation.

2. Conduct of Online Retailers: Competition Implications

I. PREDATORY PRICING IN THE ONLINE RETAIL SPACE

"The Big Billion Sale" and "End of Reason Sale" are some of the most successful marketing strategies used by the online retailers to lure customers and generate revenues. Some informal sources had projected that Flipkart earned revenue of 100 million within 10 hours of the Big Billion

[19]VidhiMadaanChadda, *Competition Law and E-Commerce Industry: Predicting the Future for India Inc.*, 5 (5) Abhinav Int'l Monthly Ref. J. of Res. in Mgmt. and Tech. (May, 2016).
[20] Aleksandra, *Relevant Market*, *supra* note 4, at 38.

Sale. However, apart from bringing cheer for the company, these revenue projections also attracted regulatory attention to these tactics adopted by the online retailers. One of the main issues which were raised was whether such deep discounts offered on particular days like the Big Billion Day Sale constitute anti-competitive conduct by virtue of falling under the concept of predatory pricing. Brick and mortar stores have constantly opposed these deep discounts being funded by foreign capital infused in these e-commerce companies. In fact, there was so much hue and cry regarding these tactics that the Department of Industrial Policy and Promotion ("DIPP") vide its Press Note 3 of 2016 ("Press Note") dated March 29, 2016 specifically clarified that the marketplaces cannot influence the price of the goods being sold on their platform. The CCI, however has not passed any adverse order on this issue till now.

This section attempts to analyse this issue by looking at the concept of predatory pricing by studying the various tests employed and applying those tests to the conduct of the online retailers.

THE CONCEPT OF PREDATORY PRICING

Predatory pricing has been defined as a "*practice whereby an undertaking prices its products so low that competitors cannot live with the price and are driven from the market*".[21] Once the competitors are driven out, the undertakings involved raise their prices to monopoly levels to recoup their losses. The reason why it is considered to be anti-competitive conduct despite the benefit of low prices is because the low prices are only in the short term and the final effect of this conduct is to strengthen the dominant position of the undertaking to the prejudice of the consumers. It is harmful to competition because it can end up excluding equally efficient competitors from the market.[22]

There are certain conditions which make an industry more feasible for successful conduct of predatory pricing. Dominance in the market along with deep pockets to finance and sustain despite the short term losses is one such pre-condition.[23] Another condition considered necessary for predatory pricing to bear fruits is that there should be barriers to entry so that when the predator raises its prices, others cannot enter and compete on prices. Another condition which is usually present in case of predatory pricing is that the firm in question is operating multi-market because in one market scenarios, it is cheaper for the dominant firm to absorb the other firms by merger or take-over rather than suffering losses in the short term by price undercutting with no certainty of future profits. This problem is sorted in case of multi market operators as they can set off losses

[21] Alison Jones and Brenda Sufrin, EU Competition Law: Texts Cases and Materials 392 (4th ed. 2008).
[22] *Id.*
[23] SM Dugar, Guide to Competition Law 493 (2016).

of one market from the profits of another. Excess capacity is also required so that the new customers attracted by the low price can be absorbed.[24]

Predatory pricing is generally undertaken by a dominant firm when it prices below costs. However, distinguishing predatory behavior from legitimate competition has always been difficult. In the EU, the AKZO test is followed where prices below AVC are presumed to be predatory. However, prices below Average Total Cost could also be predatory if they are determined as a part of a plan for eliminating competitors. This is different from the US where the Areeda Turner test only raises a presumption that prices below Average Variable Cost are abusive. The US also has a requirement of producing proof of recoupment to prove predatory pricing.[25] The EU courts, unlike the US courts do not have a requirement to prove recoupment of losses.

ARE INDIAN ONLINE RETAILERS INDULGING IN PREDATORY PRICING?

Predatory pricing falls under Section 4(2)(a) of the Competition Act i.e. abuse of dominance. India follows the test of below Average Variable Cost as well as proving the intent to eliminate competition. India, in the case of *MCX Stock Exchange v. National Stock Exchange*[26] indicated that recoupment in its own won't be a factor but the focus would rather be on the unfairness of the move on the competitors.

Based on the above tests, it can be argued that the online retailers are not engaging in predatory pricing as per the Indian legal regime. *First*, the players which have been accused of predatory pricing like Snapdeal, Flipkart etc. are not engaged in purchase and sale of goods. They are just marketplaces which act as intermediaries.

Second, as predatory pricing falls under abuse of dominance, there is a precondition to prove dominance. Assuming there to be two possible scenarios: online and offline forming part of the same market v. online constituting a separate market of its own. In either case, no online retailer can be said to be dominant as online retail constitutes less than 2% of the retail market and there are numerous players within the online market with no one dominant player. Section 9(4) lists down the various factors which are to be considered for establishing dominance which includes market share, size and resources, size and importance of competitors, entry barriers, countervailing buyer power and so on.

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[24] *Id.*
[25] Brooke Group v. Brown Williamson Tobacco 509 U.S. 309 (1993).
[26] MCX Stock Exchange v. National Stock Exchange, 2011 Comp LR 0129 (CCI).

Relying on the market share and importance of competitor's components, no online retailer can be said to be dominant. Informal estimates suggest that Flipkart has 37% of the market while Amazon and Snapdeal have 21% and 14% respectively as of 2016.[27] Based on these market shares, none of the firm can be said to be dominant. Even the other factors like countervailing buyer power point against dominance in the online retail sector.

Third, the precondition of barriers to entry also does not exist in case online retail as internet is an open space anyone can enter the online retails sector with minimum investment. Hence, a successful predatory strategy would be difficult in this case as a new player can enter when the predator raises its prices.

Fourth, assuming a player to be dominant (say Flipkart), the discounts offered by these players are not anti-competitive as they don't have a detrimental effect on competition. Most online retailers offer similar discounts simultaneously. Also, these discounts are offered for a very limited period i.e. 2 to 3 days which is not enough to drive out competitors. Such discounts are comparable to the clearance sales in brick and mortar stores.

Fifth, it is difficult to establish that there is a link between these discounts and charging of excessive prices in the future. Even though recoupment is not an essential factor in India, proving the same does add value to the claim of predatory pricing. Considering that online retail industry is at a nascent stage, it is tough to attribute these losses to predatory pricing. The nascent stage of the industry makes it more obvious to assume that the losses are due to heavy marketing expenditure to build customer loyalty and further, their lower prices can also be result of the economies of scale they enjoy over a traditional store.

II. EXCLUSIVE DISTRIBUTION AGREEMENTS

Choosing of exclusive dealers thereby foreclosing the market for other dealers has always been a problem. However, it has become common place in case of online retailers. Moto G is only available on Flipkart, Xiaomi was only available on Amazon and ChetanBhagat's Half Girlfriend was only available on Flipkart. This topic is dealt under Section 3(4) of the Competition Act which covers vertical agreements and where an appreciable adverse effect on competition is required to be proved.

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[27]MadhavChanchani, *Amazon Pips Snapdeal to become India's Second Largest Marketplace*, The Econ. Times (April 28, 2016), https://economictimes.indiatimes.com/industry/services/retail/amazon-pips-snapdeal-to-become-indias-2nd-largest-online-marketplace-after-flipkart/articleshow/52017176.cms

This issue was raised in the case of *MohitManglani*[28] where Flipkart had an exclusive arrangement with Rupa publishers for ChetanBhagat's novel. The informant had contended that Flipkart is dominant as relevant market would be the product, Half Girlfriend. However, the CCI held that the relevant market can't be the product itself. It has to include its substitutes. Further, the CCI held that the exclusive agreement is not an abuse because none of the e-tailers are dominant.

It is submitted that this opinion of the CCI is consistent with the existing competition law rules. Exclusive agreements can't lead to relevant market being the product itself. Thinking that the product like a Half Girlfriend or Harry Potter is a market in itself is equivalent to toothless fallacy. This is so because a normal rational consumer would shift to substitutes of the book. It is only if we only look at a brand loyal customer will we assume that significant increase in price won't lead to shift from one book to the other and doing this is exactly the toothless fallacy.

III. GEO-BLOCKING:

One other conduct of the ecommerce players which has come under the scanner of the competition authorities is that of geo-blocking. Geo-blocking has been defined as "*business practices, whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper's location or country of residence*".[29] This is mainly relevant in the European context as websites which don't let European users shop for goods from across the EU are against the EUs' objective of creating a single market.[30] For instance, in case a German user is unable to buy from a French website because of his IP address or is rerouted without his consent to the German website or his payment is refused because of his address. This falls within Article 101 of the Treaty on the Functioning of the European Union (TFEU). Guidelines on vertical restraints also provide for the same.

3. Response of the Brick and Mortar Stores

I. VERTICAL RESTRAINTS:

With the popularity of the internet as a channel for distribution of goods, the traditional stores have started acting in a defensive manner. Various methods have been devised between the

[28] Flipkart Case, *supra* note 15.
[29] European Commission, *Sector Inquiry on E-Commerce*, *available at* http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html (Last visited on February 2, 2016).
[30] EU, *Geo-blocking practices in e-commerce:Issues paper presenting initial findings of the e-commerce sector inquiry conducted bythe Directorate-General for Competition* (2016).

manufacturers and the traditional store operators which can be potentially anti-competitive. Putting vertical constraints on selling online is one way. This can be in the nature of general bans or across platform parity agreements or exclusive distribution systems or dual pricing systems with higher prices for online sales. They are also generally divided into price restraints and non-price restraints. These are covered under Article 101 of the European Union's TFEU. The US on the other hand hasn't paid much attention to vertical restraints in the online space and more focus is on issues like net neutrality.

Earlier, many of the vertical restraints were subject to per se analysis in the EU but with the adoption of Vertical Agreements Block Exemption, there has been a change and the cases are analysed on fact to fact basis. The burden of proof is now on both the parties i.e. the authorities and the parties to the agreement to put forth their pro-competitive and anti-competitive effects. However, there are certain restrictions which are considered hard-core restrictions and they do not have the benefit of safe harbours under the guidelines.

In the US, a rule of reason approach is adopted when it comes to vertical restraints, both price restraints and non-price restraints.[31] Rule of reason ends up prohibiting only those agreements which are very unreasonable. The analysis has to be made of the specific business characteristics in existence, the nature of the restraint and the effect of the restraint along with the conditions existing before and after the restraint. The burden is higher for the plaintiff in such an approach and hence is considered to be a lenient approach towards vertical restraints due to their potential to have pro-competitive effects in certain circumstances.[32]

a. NON-PRICE RESTRAINTS:

As the e-commerce sector grew, the EU authorities tried to fit in online sales within their system of active and passive sale. Accordingly, sale on the internet is considered as a form of passive sale and any restriction on it is equivalent to a hard core restriction not eligible for the Block Exemption. Hence, any provision banning online sales completely or limiting the amount of products that can be sold online or resale price maintenance will fall under this category. However, there are certain exemptions granted under the Vertical Guidelines like mandatory percentage

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[31]Leegin v. Kat's Korner, 551 U.S. 877 (2007).

[32]Julia Wahl, SiskaTroost& Caroline Buts, *The Internet: Just Another Distribution Channel? EU and U.S. Competition Policy Approaches to E-Commerce* (2011), https://econrsa.org/system/files/workshops/papers/2015/buts.pdf . [Hereinafter Julia Wahl, *The Internet*]

selling from a physical store can be set but the same cannot be done relative to online sales, certain quality standards equivalent to the standards for offline sales can be set for online sales etc.[33]

In the US, there is no equivalent to the active sales and passive sales system. Further, the US in case of online restrictions, focuses on whether the inter-brand competition is strong. Hence, even if the intra-brand competition is restricted by a restriction on online sales but the inter-brand competition is strong, they would find crude bans unproblematic. [34]

In the *Yves Saint Laurent Perfume Case*[35], it was considered appropriate that online sale was only available to those sellers who also had a physical store as the product could only be preserved and its proper use ensured if it was handled by specialised distributors. In *Bijourama*[36], the French regulator allowed restriction on internet sale by a manufacturer whose market share was below 30% as it met the Block exemption regulations on vertical constraints. One of the most popular ruling on this issue was in the *Pierre Fabre Case*[37] where it was held that an absolute ban on online sales on the ground that the goods require a pharmacist assist is as infringement by "object" i.e. per se violation as per Art 101(1) TFEU.[38] Hence, in Europe, the approach has rather been strict with regards to protecting intra brand competition without considering if there is sufficient inter-brand competition.

In the US, in two of the cases dealing with non-price restraints in case of online sector i.e. *Gerlinger v. Amazon*[39] and *Jacobs v. Tempur-Pedic*[40], the complaints were dismissed as the rule of reason standard was not met by the informant. In the third case of *Emporium Drug Mart, Inc. of Shreveport v. Drug Emporium, inc*[41]*. (2000)*, a virtual drug store was prohibited from selling in a territory which was the exclusive territory of a physical store retailer. This exclusive agreement was upheld in arbitration and the virtual store could not sell the products in that territory and had to guide the people to the brick and mortar store instead. Under EU law, this would have qualified as a hard core restriction as it is a restriction on passive sales.

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[33]*Commission Guidelines on Vertical Restraints*, SEC (2010) 411.
[34] Julia Wahl, *The Internet*, *supra* note 32.
[35]Yves Saint Laurent Perfume, Commission Decision 92/33/EEC, IV/33.242.
[36]Decision n°06-D-24, *Festina France*. Upheld by Paris Court of Appeal in *Bijourama v. Festina*, 16 October 2007.
[37]Case C- 439/09, Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi.[2011] O.J. C 355/04
[38] Justus Haucap and TorbenStuhmeier, *Competition and Anti-Trust in Internal Markets*, DUSSELDORF INSTITUTE FOR COMPETITION ECONOMICS: DISCUSSION PAPER NO.155 (October 2015).
[39]Amazon Case, *supra* note 8
[40]Jacobs v. Tempur-Pedic, 626 F.3d 1327.
[41]Emporium Drug Mart, Inc. of Shreveport v. Drug Emporium, inc No. 71-114-0012600

b. PRICE RESTRAINTS:

In *Babyage*v. *Toys R Us*[42], the e-tailer had complained against the manufacturer as it had forced its supplier to not sell online that were selling below the prices of physical retailers. The FTC held that this was violation of Section 1 of the Sherman Act and an imposition of a vertical restraint against competition. *McDonough* v. *Toys R Us*[43] is another case dealing with manufacturers forcing internet retailers to not offer discounts to keep the brick and mortar stores happy. This was a class action claim and was finally settled. In the EU, there have been various cases dealing with this issue. Bundeskartellamt, the German Cartel office fined Phonak. Phonak was a hearing aid manufacturer and one of its retailers had put the prices of various hearing aids it was selling on the internet. The price which the retailer had quoted for Phonak was less than the market price prevailing then. This had upset the other physical store retailers and they complained to Phonak about the same. Phonak in a bid to force the first retailer to sell at a higher price, refused to sell to him. The authority held that this was particularly a severe restriction to competition as the competition was already weak in this industry and an online retailer was being stopped whose entry would have had an effect of increasing price transparency and lowering of prices. Similarly, CIBA vision, a market leader was accused of influencing prices of its internet sellers and pressurising them to follow the same.

The erstwhile OFT also dealt with this issue in the case of Roma Scooters. Here, the manufacturer entered into an agreement with some of the big online retailers which prevented them from selling Roma Scooters online. The OFT found this violation to severely restrict consumer's choice and ability to compare prices online. They specifically mentioned that consumers should have an opportunity to get a good price by using the advantages of internet.

The approach in the EU hence, focuses more on the advantages of an online platform due to its benefits in terms of consumer choice, lower prices and achievement of a common single market. On the other hand, United States treats RPM in online retail like any other case of RPM. The specific nature of internet services doesn't make much difference to the analysis and conclusion.[44]

The US approach of the rule of reason and analysis of pro-competitive and anti-competitive effects seems to be a better approach than the hardcore restriction approach of the EU. From an economic and brand value perspective, exclusion of online sales shouldn't always be considered as

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[42]Babyage v. Toys R Us, 558 F. Supp. 2d 575.
[43]McDonough v. Toys R Us, 834 F. Supp. 2d 329 (E.D. Pa. 2011).
[44] Julia Wahl, *The Internet*, *supra* note 32.

a per se violation. In case of various expensive and luxury products like perfumes, watches etc., and customers purchase it because of its brand image of being expensive. Online sales can tarnish this image of status goods. It isn't possible to prove this scenario under the hard-core restriction regime. This strictness is misplaced as the focus should also be on whether there is active inter-brand competition. If that exists, then such an exclusion of intra-brand competition by banning online sales shouldn't be a problem.

INDIAN SCENARIO

In India, the emergence of the online retail sector has led to a lot of hue and cry from the brick and mortar stores. Various methods of protests and lobbying have been tried as a way of getting their voices heard. Various manufacturers had also started putting Caution Notices claiming that online retail platforms are not a part of their authorised distribution channels and they would not honour the guarantee on such products. Cases of Resale Price Maintenance have also surfaced. It must be noted that under the Indian framework, RPM cases are neither considered per se anti-competitive nor competitive. A rule of reason approach like the US is adopted where pro-competitive and anti-competitive effects are considered.

In the *Ashish Ahuja* case,[45] a dealer instituted a complaint against Snapdeal and Sandisk as he was forced to obtain a No Objection Certificate (NOC) from Sandisk before being able to sell on Snapdeal. He alleged that this was an unfair restriction and Sandisk is using this to determine the price at which his products would be sold online. Violation of Sections 3 and 4 was alleged. The CCI refused to buy the argument of the informant and held that NOC was a quality check requirement which was essential to maintain the brand's goodwill. [46]

This issue recently came up in the case of *Kaff Appliances*[47] where Snapdeal filed a case against Kaff appliances for displaying a notice on their website saying that Kaff products sold on Snapdeal are counterfeit and they will not honour the warranties on products bought online. Further, Kaff informed Snapdeal that they would not allow Snapdeal to sell their products either by authorised or unauthorised dealers unless they agree to the minimum price set by KAFF. Hence, they were trying to negotiate a resale price maintenance agreement. This was held to be in violation of Section 3(4)e.

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[45]Snapdeal Case, *supra* note 14.
[46]Geetanjali Sharma, *Competition Law and E-Commerce: Emerging Trends*, ICLR, *www.iclr.in/assets/pdf/ICLR%20Volume%201%20Table%20of%20Contents.pdf.*
[47] Jasper Infotech v. Kaff Appliances, Case No. 61 of 2014.

The difference in the outcome of the two cases might be a cause of confusion for some. However, the difference between the two cases is due to the fact that in Ashish Ahuja, only one distributor was not allowed to sell online and that was due to not meeting the quality considerations. In *Kaff*, on the other hand, it was held that irrespective of the dealer, the customers who buy the products from online retailers won't get warranties. Hence, it was an attempt to ban online sales altogether which is similar to the hard-core restriction on passive sales in the EU context.

It remains to be seen as to what will be the Indian regulator's approach when more such cases turn up. Since India has adopted a rule of reason approach for section 3(4), it is likely that RPM would be seen in the context of both, its pro-competitive and anti-competitive impact.

4. Conclusion

In this paper, the research looked at the interplay between competition law and online retail. Three main aspects of the same were covered. First, the researcher undertook a detailed analysis of the relevant market for online retail sector. It was observed that the existing tools in competition law like the SSNIP test are equipped to deal with this sector as well. Further, it was seen that in the present context, online retail doesn't form a separate relevant market and falls within the domain of retail market in India on the basis of demand side substitutability and supply side substitutability. This stand was also supported by the policy reasons similar to that of US, of avoiding type I errors as the sector is in a growing phase and over-regulation can hamper growth.

The second aspect that was considered was the potential anti-competitive conduct that the online retailers indulge in. Here, three main instances were studied: Predatory pricing, exclusive distribution agreements and geo-blocking. Applying the concept of predatory pricing, it was found that as per Indian law, the online retailers can't be said to be engaging in predatory pricing as no player is dominant in the field irrespective of how the relevant market is defined. Further, the preconditions that need to exist for predatory pricing to be successful do not exist in the online retail sector at present. It was also found that the duration of these sales was not enough to have anti-competitive effects and the sales were, in fact, similar to clearance sales conducted by offline stores. One issue which can be evaluated in the future is whether the AVC standard should be followed for online retail sector or considering the low AVC in the sector (similar to telecom sector in the EU), a different standard is needed. Exclusive distribution agreements were discussed in the context of the Indian market. It was seen that the CCI won't be taking any stand against these agreements unless there is a dominant player. Geo-blocking was another practice which was

considered. This is more relevant in the context of EU as it poses a threat to single market. It has occupied centre stage in EU as the EC is in the process of coming up with specific regulations for the same.

The third aspect dealt with in this paper was the response of the brick and mortar stores to the coming in of e-tailers. It was found that ban on online selling and resale price maintenance between the manufacturer and the online seller has become a rising concern. On comparison of EU and US, it was found that EU is stricter when it comes to ban on online sales and it is considered a hardcore restriction. On the other hand, US follows a rule of reason and evaluates its impact before holding anything. India also has a rule of reason approach for vertical agreements and hence, the cases have adopted a similar flexible approach to this issue.

FAILING FIRM DEFENCE IN MERGER CONTROL: ASSESSING POSITION, PROSPECTS AND CHALLENGES IN INDIA[1]

- Anam Rais Khan[2]

1. CONCEPTUAL FRAMEWORK

"For it ought to obey him by whom it is preserved; because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him."

(Thomas Hobbes[3])

Competition Law, in whatever form it exists globally, has certain common ends it seeks to achieve, which include enhancing economic development of the concerned jurisdiction, preserving healthy and vibrant competition in the market, protecting the interests of customers and end consumers, promoting efficiencies, and ensuring freedom of trade by balancing the situations to create a fair and level playing field for all the players in the market.

Merger Regulation or Merger Control mechanism is specifically aimed at regulating those transactions which are likely to create anti-competitive effects due to increased concentration in the market which, as a result, considerably impairs the competition. If this causal connection is established, the regulators have a reasonable pretext to block such a merger. On the other hand, the absence of such a causal connection between the proposed merger and the anticipated harm, gives rise to the defences which may be available to parties in a merger proceeding. Some jurisdictions have expressly recognised the same and have raised them to the pedestal of formal defences in their legislations, while there are jurisdictions which have preferred to take such an absence of causal link as one of the many factors which may be considered by the regulators in assessing mergers. India falls in the category of jurisdictions which have not raised formal defences in their statutes but have recognised them as factors that should be considered in a merger analysis. Defences or factors related to efficiencies, innovation, and involving a failing firm etc, have found place in most of the merger control regimes including United States, European Union and India too.

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[1] This Article is substantially derived from the LL.M Dissertation of the Researcher.

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[3] THOMAS HOBBES, LEVIATHAN 140 (Cambridge Univ. Press 1996) (1651).

1.1 The Rationale.

When one speaks about the inclusion of a failing firm defence particularly in the assessment of mergers, it entails not only an anti-trust rationale, but also certain economic and social factors which play an important role. Failing firm defence can also be understood as a way of protecting the weak[4] and failing firms by allowing them to merge with the established strong players in the market. Generally, a merger that creates a dominant position or strengthens an already dominant player in the market is under the strict scrutiny of the regulators and on account of its prospective adverse effects on competition, it may not be allowed to proceed. In this backdrop, on the face of it, making an argument for strengthening an already strong firm in the market may sound a bit absurd, but it is not just the concentration in the market that matters as there are various other undercurrents that provide legality to such an approval of a merger. A merger that would otherwise be blocked due to its harmful impact on competition is allowed when the firm to be acquired is a failing firm and no other competitive solution to the problem is readily available. Even considering the situation socially and economically, the defence finds a sound basis to be good in law. If such a merger involving a failing firm is not permitted, it is expected to cause unemployment in the concerned sector. Further, the useful assets of the failing firm which could have been put to a better use in the event of the proposed merger, shall also eventually exit the market leading to a crunch in the possible economic and social benefits to the society. Therefore when Thomas Hobbes calls *'preservation of life as the end, for which one man becomes subject to another'*, we need to understand that for the greater good and greater goal of promoting effective competition leading to consumer welfare, recognising the failing firm defence is imperative for the regulatory bodies to serve the ends of justice.

The failing firm defence has been interpreted and applied by competition agencies throughout the world from the time it was first perceived in the United States vide the decision in **International Shoe Case** in 1930.[5] The burden of proof was placed on the failing firm, to prove that *"its resources were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure."*[6]In the European Union, the first case in which this defence was raised, although unsuccessfully, was **Aerospatiale-Alenia/De Havilland** in 1991, just one year post the

4 AgnieszkaZwirska, Failing firm defence 6 (2003) (unpublished Master thesis, Lund University) (on file with Lund University).

5 International Shoe Co. v. FTC, 280 U.S. 291(1930).

6 *Id.* at 302.

enforcement of EC merger control.[7] Since then, the defence has infiltrated, to various jurisdictions, in varying degrees and forms, although it is sparingly applied till date.[8]

1.2 Factors constituting Failing Firm Defence.

The general consensus on the issue has led to policy convergence and has brought out certain common factors that constitute a failing firm defence as accepted by majority of jurisdictions. These factors include that (a) there should be high evidentiary standards for the failing firm defence to be accepted, (b) in the absence of merger the failing firm would exit the market leading to lesser and weaker competition and (c) the proposed merger is neutral towards any distortion of competition which means that merger has no causal link with the deterioration of competition and even if it is disallowed the anti-competitive effect would be the same. Precisely speaking, a failing firm defence is accepted usually when the assets of the allegedly failing firm are expected to leave the market in the near future if not acquired, and there's no other less anti-competitive prospective buyer of those assets other than the present acquirer.

1.3 Failing Division Defence.

There is another debate that revolves around the failing firm defence. It is with respect to peculiar kind of defence based on a failing division of an enterprise and hence is called as the "Failing Division Defence". Regulatory bodies have been reluctant in allowing this kind of a failing firm defence. In such cases they strictly scrutinize all the conditions, especially the evidence on record which is more likely to be molded and manipulated to favor the parties. It is *"generally difficult to establish that a firm is failing"*[9] in the strict sense of the term and there is always a likelihood of maneuvering the balance sheet of the allegedly failing division by its parent company to serve its own purposes. Hence, it is important to unveil the real motive behind the possible failure of the division- a management decision or an actual economic breakdown. Despite the risks associated with allowing the failing division defence, it is generally accepted that such a defence cannot and in fact should not be expressly wiped off. **At times there may be genuinely failing divisions which could have utilised the defence to save their assets, would lose such an opportunity**

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7 Case IV/M.053, Aerospatiale-Alenia/de Havilland, OJ 1991, L334/42, ¶ 31.

8 In India there has been no case till date where failing firm defence was successfully raised. Handful of such cases have been decided in European Union and position is not much better in the United States.

9 Organisation for Economic Co-operation and Development (OECD), *Roundtable on Failing Firm Defence* 6 ¶ 15, DAF/COMP (2009) 38 (Aug. 10, 2010).

altogether. But, evidentiary standards for such a defence have to be stringent. This has been established across the leading competition law jurisdictions of world.[10]

1.4 Failing Firm Defence and Economic Crisis.

Another issue that usually crops up in the discussion about failing firms is whether relaxation in standards of accepting the defence should be made in the times of financial distress in a country. But this statement, again, is very contentious. The document produced in OECD Competition Committee's Roundtable Discussion on the Failing Firm Defence, 2009[11] highlights that during the times of financial distress and economic crisis, it is quite likely that there are increased numbers of claims for the application of failing firm defence as has been seen in major developed nations when they faced economic crisis. Total bankruptcy filings in the United States alone, increased from 603,633 in 2006 to 847,141 in 2007 and increased to 1,117,771 in 2008.[12] This pattern was also traced in Europe. Standard & Poor's (S&P) estimated that the overall default rate increased to as high as 11% in 2009, while the average rate was around 3% for the past 15 years.[13] Even in Japan, in December 2008, company bankruptcies were approximately 25% higher than the previous year.[14] But, even during the economic crisis, none of the major developed jurisdictions agreed to relax their criteria to allow the failing firm defence to proceed unless all the required conditions were fulfilled. If there were any mergers that were allowed during the financial distress period on account of failing firm defence, despite many speculations, the authorities refused to declare economic crisis as a relevant factor to allow the defence to succeed. Recently, in the times of economic crisis, two cases were decided by the European Commission in 2013 one after another, allowing the failing firm defence. However, the European Commission refused to accept the fact that they were allowed by relaxing the standards due to economic crisis. Probably, there is no need to relax the standards in the times of economic crisis because the doctrine of *"res ipsa loquitur"* (Latin for "the thing speaks for itself") may be applied to assess such situations. If the

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[10] Case COMP/M.2876 NewsCorp/Telepiu

[11] OECD*, supra* note 9

[12] See bankruptcy statistics of American Bankruptcy Institute: http://www.abiworld.org/AM/Template.cfm?Section=Annual_U_S_Filings1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=62&ContentID=36294.

[13] *European bankruptcy laws - Out of pocket*, THE ECONOMIST (Dec. 30, 2008), www.economist.com/displaystory.cfm?story_id=12855376.

[14] *More firms go bankrupt in Japan*, BBC NEWS, http://news.bbc.co.uk/2/hi/business/7826009.stm (last updated Jan. 13, 2009).

condition of the failing firm is so bad such that it qualifies for the defence, it would speak for its own cause, be it in times of crisis or otherwise.[15]

The assessment shall vary from case to case as there may be few failed companies whose assets would be of a greater value if continued as a going concern than if sold vide liquidation. Firms that are desperately failing anyways would prefer to be acquired by the prospective purchaser instead of liquidating if their claims are not being negotiated well by the creditors, as happens in a credit crunch situation. But, it is quite expected that during a credit crunch situation, due to economic crisis, there may be many merger filings involving failing firms. At times, it makes perfect sense for merging parties to get along in this manner in times of financial crisis. But yes, the question remains, whether the harm which is likely to be caused to consumers has been taken into account without fail or not. Another important question that can be raised here is that can a defence that has emerged and developed in the times of perfect financial order stand the rough tides of economic crisis at present? Can the factors laid down during financially sound state apply well during financial distress? Or is it the appropriate time to revisit and refine the concept of failing firm defence in the wake of recessionary economic conditions being witnessed now?

2. FAILING FIRM DEFENCE IN INDIA

India has, over the years, seen a gradual evolution of its competition law regime. From considering *"big is bad"* to *"big is bad only if it is abusive"*, from restricting monopolies to promoting competition, it has taken a great leap towards the modernisation of the Indian competition law regime. India adopted the Nehruvian[16] Socialism Model of a mixed economy post-independence which impacted its competition enforcement indirectly. Industries (Development and Regulation) Act, 1951 (IDRA)[17] was the first Act which was enacted by the Indian Government to regulate the private sector and the issues related to pricing, production, distribution, labour etc. But this Act could not produce the desired uniform growth rate as expected and there began to emerge great disparities in economic standards of Indian masses at large. Therefore, the Government appointed a Committee to inquire into the inequality in the distribution of income and standards of living

15 KalpanaTyagi, *Merger Control in times of Financial Crisis: An Expedient Instrument to Heal the Fledgling Economy or an Object of Abuse*, RILE- BACT Working Paper Series No. 2015/5, Rotterdam Institute of Law and Economics &Behavioural Approaches to Contract and Tort, Erasmus University Rotterdam, http://ssrn.com/abstract=2614861.

16 Named after the First Prime Minister of India PanditJawaharLal Nehru.

17 Act No. 65 of 1951.

(Mahalanobis[18] Committee, October, 1960.)[19]The committee found that due to the planned economy that India was, several giant business houses were emerging and hence there was an emergent need to chain/restrict these monopolies to prevent the destruction of industrial structure and restore the lost economic balance. On account of recommendations made by the Mahalanobis Committee, the Government instituted the Monopolies Inquiry Commission (MIC) in 1964 to look into the power matrix in the private sector and strengthened monopolies. In furtherance of the recommendations of the MIC, Monopolies and Restrictive Trade Practices (MRTP) Act[20]was passed in 1969 to control this concentration in the Indian market.[21] With the increasing policy convergence in the wake of globalisation and with the passage of time, MRTP Act became obsolete and it could no more live up to the international standards. WhenIndia liberalised its policies in 90s to fall in conformity with the commitments made at the WTO and opened up its economy, the discourse around the concept of competition law began to take a new turn which after the report of a High Level Committee (**S.V.S Raghavan Committee, 1999**[22]) on Competition Policy and Competition Law. This culminated into passage of the present Competition Act, 2002.The Act was brought into force in two phases. Provisions relating to anti-competitive agreements and abuse of dominance were notified in May, 2009.[23] Thereafter provisions relating to combinations were notified in June, 2011[24].

Combinations are explicitly dealt under the Indian Competition Act, 2002 and the relevant text enumerates the thresholds, factors and defences to be considered by the Commission in regulating combinations. As far as Combinations are concerned, India is a **"Suspensive Jurisdiction"** [25]*(if threshold met)* because there is mandatory notice filing requirement, i.e. no notifiable transaction can

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18Prof. Mahalanobis was the real architect of the second plan. And was responsible for introducing a clear strategy of development based on Russian experience

19 See PRADEEP S. MEHTA, COMPETITION AND REGULATION IN INDIA – LEVERAGING ECONOMIC GROWTH THROUGH BETTER REGULATION(2009).

20 Act No. 54 of 1969.

21 It may be relevant to note that the Government had also formed the Hazari Committee which looked into aspects relating to industrial licensing procedure under the IRDA which indicated that the licensing system had resulted in disproportionate growth in respect of industrial houses. Subsequently, the Dutt Committee (Monopolies Inquiry Commission) was also constituted in 1964 to study monopolistic practices and the Dutt Committee also observed the economic concentration of power and suggested the introduction of the MRTP Bill.

22http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

23 Central Government notification S.O 1241 (E) and S.O 1242 (E) (May 15, 2009).

24 Central Government notification S.O. 479(E) (Mar. 4, 2011).

25 G.R. Bhatia, *Mergers under new Competition Law Regime* (Nov. 7, 2009), https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwjk37zE7ODMAhXHHZQKHQs2ANYQFghKMAg&url=http%3A%2F%2Fwww.icsi.edu%2Fdocs%2F37nc%2FPresentations%2FG%2520R%2520Bhatia.ppt&usg=AFQjCNHyuAP8zHJZtfDGJ0r3J6fmgY8xRQ&bvm=bv.122129774,d.dGo

be proceeded with, without being approved by the Competition Commission of India[26]. The regulation of Combinations under the Competition Act has made the existing legislative framework on combinations in India even more comprehensive.[27] All the provisions of the Act including those on combinations have to be read in the light of and to give effect to the objective enshrined in its preamble which states-

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."[28]

A combination analysis is always an *ex ante* analysis of the factors which may reduce the competition in the market if such a combination is allowed by the regulatory authorities.[29] Concentration which may be caused or a dominant position which may be created post a combination is worth considering. The greatest procedural difference between merger control and the control of dominance post-merger is that any analysis of merger will usually be undertaken *ex ante*, and any assessment of abuse of dominant position will always be made *ex post.* This is what makes the entire combination analysis quite contentious, as the results are based on anticipation and not exact calculations or past experiences.[30]

The after effects which a merger may cause are at the heart of analysing such mergers at the touchstone of various merger provisions in the Act. It is pertinent to note that the after effects may be negative or positive depending upon the facts and circumstances of each case. If negative, they cause appreciable adverse effect on competition and if positive they form a part of the efficiencies argument/defence in mergers.

2.1 Possibility of a Failing Business

From 2011 till date, Indian Merger Control Regime is not even 7 years old. Being a nascent competition jurisdiction, the jurisprudence in India is still not as developed as is in the United States, European Union or for that matter any other mature jurisdiction. We have something to

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26 The Competition Act, § 6 (2A) (2002).

27 For e.g.§§ 108A-108H (§ 56 Provisions of Companies Act, 2013 as notified) and§§ 391-394 of the Companies Act 1956 (Under Companies Act, 2013- §§ 230-240, yet to be notified) ; the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 1997.

28 The Competition Act, Preamble (2002).

29 RICHARD WHISH, COMPETITION LAW 806 (Oxford Univ. Press, 6th ed. 2008).

30 MARK FURSE, COMPETITION LAW OF THE EC AND UK 374 (Oxford Univ. Press, 6th ed. 2008).

learn from each jurisdiction, its experiences and challenges and apply the same in the Indian context in the Indian way. Exact legal transplants have never been fruitful, and modifications to suit the Indian needs and requirements of the time are always required.

Learning from various jurisdictions, India has also moved towards recognising the "failing firm defence" in its own manner and form. Discussions on the issue initially cropped up during the passage of the Competition Act and also find mention in the S.V.S. Raghavan Committee Report. While commenting on Horizontal mergers, the report speaks of several issues that need to be considered, while assessing the permissibility of a horizontal merger. Two of them it says may be the efficiencies argument and the failing firm defence-

"The case can be made that even mergers that lead to an uncompetitive outcome could result in certain "efficiencies" that more than make up for the welfare loss resulting from this. The Russian law has such a provision. The US law has generally been balanced in favour of competition. However, the "failing firm" defence has, at times, been accepted by courts. If a firm is, indeed failing and likely to go out of business, it is not clear what social welfare loss would occur, if this firm's assets were taken over by another firm."[31]

The concept was later incorporated in the Competition Act 2002 as well. In order to determine whether a combination would have the effect of or is likely to have an *appreciable adverse effect on competition* (AAEC) in the relevant market, the Competition Commission of India (CCI) shall consider various factors which are enumerated in Section 20(4) of the Act. The factors interestingly also include the defences which the parties may raise in combination proceedings which the CCI shall also pay due regard to. And one such defence that it states unequivocally is the failing firm defence, worded under **Section 20(4) (k)** as – *"possibility of a failing business"*

2.1.1 When shall a business be considered as *'failing'*?

While discussing the applicability of a failing firm defence in Indian Context, it becomes quintessential to understand what meaning can the term *'failing'* used under Section 20(4) (k) basically import. Since the Act does not define or explain what shall be meant by the term 'failing', interpretation in the light of other provisions and the preamble of the Act are the available resorts.

Reference may be made here to the latest version of Companies Act, 2013 wherein Chapter 19, deals with the Revival And Rehabilitation of Sick Companies. This chapter on Sick Companies shall, once notified, replace the provisions of Sick Industrial Companies (Special Provisions)

31 *Supra* note 22, ¶ 4.6.4.

[SICA] Act, 1985[32], and would result in a wider application of this concept. The application of SICA is confined only to industrial companies, while the 2013 Act encompasses within its sphere the revival and rehabilitation of all companies, irrespective of their sector. Section 253 (1)[33] of Companies Act, 2013 (Determination of Sickness) states that a company which is unable to pay or secure a debt amounting to fifty percent or more of its total outstanding debt, within thirty days of demand notice, it may be declared as a sick company by the National Company Law Tribunal.[34] The entire definition of a "Sick Company" has been changed altogether. Instead of previous "net worth erosion"[35] , now the inability to pay dues to creditors within 30 days of the demand would be sufficient enough prove that the company has become a sick company under the Act. Hence, the CCI, when faced with a failing firm claim while assessing a merger, may refer to this provision on sickness to determine corresponding failure under Section 20 (4) (k).

While understanding the concept of failure, it is also important to examine the true financial picture of the allegedly failing business to find out whether the business is actually financially distressed so as to avail the advantage of the failing firm defence or not. Usually, firms assert that they are failing but those which actually meet the criteria under the section are rare in number. Many firms may at times face certain financial difficulties but not every financial difficulty can be termed as a failure to qualify for the said defence. There may be several reasons due to which firms may encounter certain periods of distress, like – fierce competition in the market, expansion at a fast pace, and also certain unanticipated events such as natural calamities, currency rate fluctuations, economic crisis, war situations etc. Hence, the failing business must be genuinely 'failing' and not merely 'ailing', meaning thereby that a business should be facing an emergent situation of

32 SICA was to be repealed through Sick Industrial Companies (Special Provisions) Repeal Act 2003- Not made effective.

33 Section 253 (1) Where on a demand by the secured creditors of a company representing fifty per cent or more of its outstanding amount of debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors, any secured creditor may file an application to the Tribunal in the prescribed manner along with the relevant evidence for such default, non-repayment or failure to offer security or compound it, for a determination that the company be declared as a sick company.

34 Constituted under § 408 of the Companies Act, 2013.

35 It's a scenario in which liabilities are higher than the assets. Deficit net worth can occur for a variety of reasons, but typically it arises when current or future asset values erode unexpectedly. For example, when home values fall, often one is left owing more on their mortgage than the home is presently worth. Likewise, in frontier days, land and property often gained or lost value suddenly depending on where the nearest railroad was located. It is also known as negative net worth, https://www.investopedia.com/terms/d/deficit-net-worth.asp.

bankruptcy or approaching insolvency so as to be deemed to be failing. This interpretation is the position of the USA and European countries.[36]

American Regulators take into account several factors to deduce a firm's failure. These factors are whether a company's costs are greater than its revenue[37], whether total liabilities exceed total assets over a period of time[38], if a company's short term losses are likely to be repeated[39], if company's "productivity is declining"[40], company's poor current management[41], company's financial problems are part of "an irreversible downward trend"[42], firm is attributable to the "general, and temporary, depressed state of the economy"[43], "company's pre-merger, ordinary course of business documents reveal an imminent financial failure, or if the claims of failure appear to be invented to help defend the merger"[44] etc. United States anti-trust authorities also take into account the possible failure to reorganise under the Bankruptcy Act to determine the validity of the defence.

In India, the RajyaSabha on May 12, 2016 gave its assent to the new bankruptcy code, almost a week after it was passed by the LokSabha, clearing path for the law that provides for speedy resolution of bankrupt businesses.[45]Prior to this law, there was not a single umbrella law dealing with insolvency and bankruptcy in India. Liquidation of companies was being handled by the high courts, while individual cases were being dealt with under the **Presidency Towns Insolvency Act, 1909** and **Provincial Insolvency Act, 1920**.[46] The recently passed **Insolvency and Bankruptcy Code, 2016** is being seen as a consolidated mechanism to swiftly resolve issues of bankrupt companies, and side by side the interests of all stakeholders. Hence, if a company is unable to reorganise itself or is declared as insolvent or bankrupt or an order to effect liquidation

36 Ravisekhar Nair, *The Failing Firm Defence*, 1 Comp LR 105 (2009), http://www.luthra.com/admin/article_images/manupatra-clr-failing-firms-rn.pdf.
37 *Id* at 111.
38 California v. Sutter Health System, 84 F. Supp. 2d 1057 (2000).
39 Ken Heyer& Sheldon Kimmel, *Merger Review Of Firms In Financial Distress*, EAG 09 – 1 (2009), *https://www.justice.gov/sites/default/files/atr/legacy/2009/03/31/244098.pd*f.
40 *Id.*
41 *Id.*
42 OECD, s*upra* note 9, ¶ 177.
43 OECD, *supra* note 9.
44 OECD, *supra* note 9 at 177-178.
45 Joel Rebello, *Bankruptcy Code gets RajyaSabha nod, to ease business conditions*, THE ECONOMIC TIMES (May 12,2016, 02:43 AM), http://articles.economictimes.indiatimes.com/2016-05-12/news/73039464_1_bankruptcy-bill-bankruptcy-law-new-code.
46 Other laws which deal with the issue include SICA (Sick Industrial Companies Act), 1985; Recovery of Debt Due to Banks and Financial Institutions Act, 1993, SARFAESI (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest) Act, 2002 and Companies Act, 2013, http://indianexpress.com/article/india/india-news-india/insolvency-and-bankruptcy-code-a-legislation-to-promote-investments-develop-credit-markets/#sthash.uZ6I9U3e.dpuf.

is passed under the new Insolvency and Bankruptcy Code of India, it may be a relevant factor to be considered by the Competition Commission of India in deciding whether a business is failing.

Bankruptcy is a state of inability to repay debts to the creditors. Under the new code, a bankrupt entity is a debtor who has been adjudged as bankrupt by an adjudicating authority that has passed a bankruptcy order. The adjudicating authority for companies and limited liability partnerships is the National Company Law Tribunal (NCLT), and for individuals and partnership firms the competent forum is the Debt Recovery Tribunal (DRT).[47] Hence a possibility may also arise wherein the Competition Commission of India may require an allegedly failing firm to first present its case of failing business to the above mentioned competent authorities and only after order to that effect has been passed by any of these Tribunals, shall the Commission take into consideration the failure. Since the new Code has made the insolvency and bankruptcy procedure clearer and easier, it shall herald a new era of development of jurisprudence on failing firm defence as well.

Another important factor worth considering post the passage of the new Insolvency and Bankruptcy Code, 2016 is the increased role of creditors. The code has made remarkable changes to the prioritisation of creditors in the liquidation process which is a radical shift from previous position, under which some of the dues owed to the government and statutory dues took precedence over the dues owed to secured creditors. The re-prioritisation of creditors in relation to the distribution of the insolvent body's assets is likely to act as a major incentive for investors and creditors alike, since it substantially increases the likelihood of successful debt recovery.[48]Hence when creditors have now become even greater and important stakeholders in the event a firm is failing, their interests shall also be considered by the Commission when a claim of possible failing business is raised in mergers.

In Europe, in order to determine the failure of a firm, reference is made to the balance sheet of a company, to examine its profitability, ability to reorganise, liquidity, and solvency, which will in turn depend upon the industry and market characteristics. There are different parameters and evidence that are used in this assessment in different sectors by the European Commission. In the banking sector, if there are solvability problems being faced by a bank which are also confirmed

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[47] Khushboo Narayan, *Simply put: Why the proposed Bankruptcy Code is needed, how it'll tackle bad debts*, THE INDIAN EXPRESS, http://indianexpress.com/article/explained/bankruptcy-code-passed-why-the-proposed-bankruptcy-code-is-needed-how-itll-tackle-bad-debts-2792444/ (last updated May 10, 2016, 7:02 AM).

[48] Jyoti Singh & Vishnu Shriram, *India: Insolvency and Bankruptcy Code 2016: Well worth the Wait*, http://www.mondaq.com/india/x/462788/Insolvency+Bankruptcy/Insolvency+And+Bankruptcy+Code+2015+Well+Worth+The+Wait (last updated Feb. 2, 2016).

by the central bank, then it can be deemed to be sufficient enough to constitute a financial difficulty under the first limb of this test in EU.

Similarly India can opt for a cumulative approach to determine the required standard of failure to be eligible enough for extending the advantage of failing firm defence to the parties. Banking sector can always be treated as an exception to the general rule. In exercise of the powers conferred by **clause (a) of Section 54** of the Act, the Central Government, in public interest, has already made two kinds of exemptions to regulation of combinations under the Act, which were revised recently in March 2016 itself:

1. **Small Target Exemption**- "an enterprise, whose control, shares, voting rights or assets are being acquired, has either assets of the value of not more than INR 350 crore in India or turnover of not more than INR 1000 crore in India from the provisions of Section 5 of the said Act for a period of five years."[49]

2. **Banking Sector**- "Banking Company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Act for a period of five years."[50]

2.1.2 Interpreting the *'Possibility'*.

The term *"possibility"* as used in Section 20 (4) (k), hints towards a future probable failure of a business which may take place and in anticipation of such a probable failure, Commission shall consider the defence of merging parties under this section. This means that the business need not be a failure at the time of notifying the CCI, but a mere possibility that it is likely to fail in future is enough to entitle the parties to claim the failing firm defence in India. This is similar to the position in United States and the European Union.

The first and also the third limb of the test of failing firm defence in EU laid down under the horizontal merger guidelines states- *"(i) the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking"*[51]

"(iii) In the absence of a merger, the assets of the failing firm would inevitably exit the market."[52]

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[49] Ministry of Corporate Affairs Notification S.O. 674 (E) (Mar. 4, 2016).

[50] Ministry of Corporate Affairs notification S.0.93 (E) (Jan. 8, 2013).

[51] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OFFICIAL JOURNAL OF THE EUROPEAN UNION ¶ 90 (Feb. 2, 2004).

[52] *Id.*

Both the limbs indicate towards a possibility of failure in near future which may drive the failing firm out of the relevant market hence leading to its assets exiting the market too and consequently leading to a greater market concentration too. Hence making such an *ex ante* analysis of probable negative after effects of the firm failing, it is better allowed to merge to save the assets and maintain effective competition in the market.

The 2010 Horizontal Merger Guidelines in the United States provide-

"The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger."[53]

The first two requirements of the test clearly and unequivocally represent the "possibility" character which Indian law also incorporates. The U.S. antitrust law also rests its failing firm defence on an *ex ante* analysis of the approaching failure of a firm and not necessarily a failed firm already.

Since Indian Competition Act 2002, does not have express guidelines on the failing firm defence, the term 'possibility' has to be cautiously interpreted. Learning from the E.U. and U.S. experience, one thing which we need to understand while interpreting this possibility of failure is that it should denote the possibility of failure in the 'near future'. The possibility should not go on to mean a probable failure in few years or a longer period of time, because it is impossible to reasonably stretch the *ex-ante* evaluation of a merger that far. Hence the time frame must be reasonable to consider validly this possibility.

What is important to understand in Indian parlance is that this 'possibility' should not be *a remote possibility* of failure. The chances of the allegedly failing firm *failing* should be as high as to legally entitle the parties to claim the failing firm defence under this section. American law on the point speaks of bankruptcy proceedings and European practice takes into account the approaching

[53] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Horizontal Merger Guidelines*,http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf(Aug. 19, 2010) [hereinafter 2010 HORIZONTAL MERGER GUIDELINES].

insolvency proceedings. Hence India can set its own parameters to decide the gravity of this probable failure so as to constitute a valid possibility worth giving consideration to under the Act.

2.1.3 What Shall Constitute a *'Business'*?

Section 20(4) (k) seeks to address the possible failure of a "business". However it is quite uncertain as to what shall constitute a business precisely. The Legislature has left the question open ended without restricting it to a particular- enterprise, firm, company etc. It could have expressly used the term *'enterprise'* which has been used throughout the Act and refer the same as a 'failing enterprise', but that has not been the case. This makes it quite clear that the intent of the legislature was not to restrict this defence only to enterprises as defined under Section 2(h) of the Competition Act[54] but something beyond that.

One possibility of wording the sub clause in this manner could be to give room to the ***"Failing Division Defence".*** This defence is recognised by many other jurisdictions including EU too, although the evidentiary requirements and nature of the test to qualify for this defence is much more stringent. Despite many apprehensions accompanying such kind of failing firm defence, it is never out-rightly rejected and rather should not be rejected in my opinion. The possibility of failure of a particular kind of business which a parent company or enterprise undertakes cannot be ruled out. The test to claim the defence can be validly designed to be stricter owing to the influence which the parent company has to manipulate the balance sheets and economic records of the subsidiary/unit/division or business.[55]Recently Failing Division Defence was accepted by the European Commission, in two back to back decisions of NYNAS/Shell/Harburg Refinery Case[56] and Aegean/Olympic II Case[57].

India has something to incorporate from various jurisdictions which are open to such kind of defence. Our legislature has left it open ended for the Commission to decide and ponder upon the same when faced with such a situation. In my opinion, the Commission may take advantage of

[54] "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

[55] *Supra* note 9 ¶15.

[56] Case No COMP/M.6360, NYNAS/Shell/Harburg Refinery.

[57] Case COMP/M.5830 Olympic/Aegean Airlines, Decision of Jan. 26, 2011 ¶ 1988.

such wordings of the section to interpret it as the situation demands. There may be cases where a failing unit of an enterprise is a merging party and may raise the argument under Section 20(4) (k). Therefore Commission may impose higher standards of evidence upon the merging parties but it should not completely foreclose its stand to exclude such possibilities and rather keep the situation as status quo in the manner legislature has intended it to be. Interpreting it case by case would add beauty to the defence and help in evolving a comprehensive jurisprudence on the point.

Till date there has been no case in Indian Competition law regime wherein failing division defence was raised. When faced with such a situation, it would be interesting to see how the Commission responds and sets a precedent.

2.2 Failing Firm Defence as Merely one of the Factors in Merger Assessment and not an Absolute Defence

The failing firm doctrine as established by the US Supreme Court in 1930 and modified in 1969 has also infiltrated in different forms in various jurisdictions including India (Section 20(4) (k))[58] and major other Asian and African nations (For e.g. South African merger regulatory framework)[59]. Essentially an American doctrine, it now finds acceptance even in the developing jurisdictions and major developed nations as well. One such jurisdiction is South Africa. It is worthwhile to mention as we can learn something from the South African Merger Control as well, since we share a common colonial past and face certain common challenges of a developing economy that we both are. Section 12 A (2) of the South African Competition Act[60] enjoins the authorities to, assess *"whether the business or part of the business of a party to the merger or proposed merger has failed or is about to fail"*[61] in determining a merger's likely competitive effects. Similar to the Indian position, the South African provision relating to the failing firm defence renders the doctrine as one of the many factors enlisted in section 12A(2) of the South African Competition Act that must be considered in assessing the compatibility of a merger. In the Indian Competition Act the relevant section is Section 20 (4) (k). This indicates that, both in Indian and South African parlance, even if the criterion for establishing a failing firm is met, the merger must still pass the other factors of the

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58 The Competition Act (2002).

59 S 12A(2)(g) of the Competition Act and See Iscor Limited/Saldanha Steel (Pty) Ltd 67/LM/Dec 01 para 101; Schuman Sasol (SA) (Pty) Ltd/Price's Daelite (Pty) Ltd 23/LM/May 01 para 57; Santam Ltd/Emerald Insurance Co Ltd and Emerald Risk Transfer (Pty) Ltd 57/LM/Aug 09 para 52 and generally Phodoclinics/Protector Group Medical Services 122/LM/Dec 05.

60 Act No. 89 of 1998.

61 The Competition Act, § 12(A)(2)(g) (2002).

substantive assessment test.[62] This therefore enjoins that India has not established the failing firm doctrine as an absolute defence to an otherwise anti-competitive merger like is the position in U.S. and E.U. India rather considers it merely as one of the factors that is considered in assessing mergers which probably also explains why it is not coming up with any guidelines or regulations on the failing firm defence. Since in India, Legislature has not created failing firm defence as an absolute defence but rather has kept it as one of the many factors which CCI shall look into while assessing mergers, therefore probably the Commission is reluctant in carving out a defence out of one single factor of Section 20 (4).

It is clear that the Indian approach to the failing firm doctrine is different from the European and American approach, as the latter treat it as an absolute defence to an anti-competitive merger while the former has the same in its Competition Act as one of the many factors to be considered while assessing mergers. The distinction may on the face of it appear to be very minute but this drift towards a serious interpretation can produce strikingly varied results on application of the doctrine in these jurisdictions. These drifting and contrasting approaches actually compel us to analyse whether it is necessary to adopt the traditionally narrow and stringent criteria, the US and EU have been adopting, or is the Indian approach of the doctrine which considers it as only a factor in merger assessment is better to proceed with.

Although United States and European Union exhibit a high degree of flexibility, the doctrine is narrowly interpreted there. This makes it more like a paper tiger than a defence of an actual use. On the other hand India has prospects of turning out to be a far more flexible jurisdiction by treating the defence as one of the factors in assessment, and providing wider options to restructure transactions which may be done by learning something from South African jurisdiction which "subjects mergers involving failing firm claims to further scrutiny thereby giving the failed claims a second chance at navigating the traditionally strict and narrow criteria synonymous with treating the doctrine as an absolute defence."[63] Similarly our substantive assessment test under Section 20 (4) can be effective in preserving a competitive market structure by treating the doctrine as a factor and questioning the rationale of adopting a narrow and strict approach thereto in terms whereof it is considered in isolation in order to decide whether an anti-competitive merger should be approved.[64]South African Competition Law is much influenced by the *Public Interest Doctrine* which

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[62] The Competition Act, § 12(A)(a)(ii) (2002).

[63] IgnatiousNzero, *Interpretation and Application of the Failing Firm Doctrine in MergerRregulation in South Africa and the US: A Comparative Analysis*, 77 JOURNAL OF CONTEMPORARY ROMAN-DUTCH LAW 443 (2014).

[64] *Id.*

gives enormous powers to the Competition Authorities there to either block or allow a merger solely on the grounds of public interest and this is why they have also not raised this factor to the pedestal of a formal failing firm defence. India has also not yet come out of the socialist flavour of economy probably, and hence it has also adopted the South African way.

In this manner CCI has a wider power of interpreting the factor of failing firms to restrict an anti-competitive merger, even if it qualifies for the failing firm defence in the strict sense of the term as in U.S. and E.U. Had it been the case that it enjoyed a position of an absolute defence under the Act, it would act as a blanket exemption if the criterion of fulfilment was satisfied. It would have categorically operated as the General Defences operate under the Indian Penal Code, which once proved, absolves one of any liability under the Code. Similar is the case of the Failing Firm Defence as is understood in the European and American parlance, which if proved, even entitles an anti-competitive merger to be allowed. But Indian legislators, either intelligently or as a matter of mere chance, left the avenue open by giving space to failing firm defence as a factor but not closing the possibility of blocking an anti-competitive merger even if it involves failing firms.

3. CONCLUSION

India has a fine merger regulation mechanism in place, but there are a few gaps which need to be filled. Some modifications and clarifications were made through the (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (the Combination Regulations) which came into effect from 1 June 2011. Thereafter amendments were made to these regulations frequently in February 2012 and April 2013 and recently in 2016 as well. Even the Insolvency and Bankruptcy Code, 2016 is a consolidated mechanism to swiftly resolve issues of bankrupt companies, protecting interest of all stakeholders. Hence, if a company is unable to reorganise itself or is declared as insolvent or bankrupt or an order to effect liquidation is passed under the new Insolvency and Bankruptcy Code of India, it may be a relevant factor to be considered by the Competition Commission of India in deciding whether a business is failing. Reference may be made to the latest version of Companies Act 2013 wherein Chapter 19, deals with the Revival And Rehabilitation of Sick Companies. This chapter on Sick Companies shall, once notified, replace the provisions of Sick Industrial Companies (Special Provisions) [SICA] Act, 1985[65]and would be a wider application of this concept. Hence the CCI may, while assessing

[65] *Supra* note 32.

mergers, when faced with a claim of failing business may refer to this relevant provision on sickness to determine corresponding failure under Section 20 (4) (k).

Having mentioned the existing provisions from other legislations that may be sought help of, it is pertinent to highlight that till date no provision has been incorporated into the Combination Regulations regarding Failing Firm Defence or as to what factors, shall the Commission consider when parties raise this defence under Section 20(4) (k) and what shall a "*possibility of a failing business*" actually mean in Indian competition law parlance. The probable reason for this lack of attention towards such an important internationally recogniseddefence may be that the Competition Commission of India has not yet encountered any case involving such a defence being claimed by the merging parties. But in my opinion the Commission may not wait for long for such a defence to be raised by the parties and it may, in near future, be ready beforehand with a clear set of guidelines as to what factors it shall consider as qualifying a merging party for the failing firm defence.

An alternative way out may be that CCI instead of amending the present Combination Regulations, may also come up with standalone regulations on failing firm defence setting out the rules and procedure of how it will perceive the defence and the criteria it will adopt in assessing combinations involving failing firms quite like competition authorities in the U.K.[66], E.C.[67], Canada[68] and the U.S[69] and many others jurisdictions around the world. I have tried to frame a proposal which the Competition Commission of India may consider if it thinks fit. The Proposed Draft Regulations on Failing Firm Defence in India form Annexure A of this Article.

It would be quite interesting to note how the Competition Commission of India interprets the "possibility of a failing business' to allow or disallow such a claim in future.

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66 Restatement of OFT's Position Regarding Acquisition of Failing Firms (Dec. 2008), http://www.jonesday.com/files/upload/OFT%20Guidance.pdf .

67 *Supra* note 51.

68 Canadian Competition Bureau, Merger Enforcement Guidelines, Part 9. http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html

69 *Supra* note 53.

ANNEXURE A

DRAFT PROPOSAL

The Competition Commission of India (Guidance with regard to possibility of a failing business) Regulations, 2018

(No. X of 2018)

Regulations to establish the position of Competition Commission of India regarding its approach to cases where parties to the merger seek to convince the Commission that an otherwise anti-competitive merger should be allowed on 'possibility of failing business' grounds, by virtue of Section 20 (4) (k).

No. 1-1/Failing Business-Regulations/2017-18/CD/CCI.--- In exercise of the powers conferred by sub-section (1) and clauses (b), (c) and (f) of sub-section (2) of section 64 read with sub-sections (2) and (5) of section 6 of the Competition Act, 2002 (12 of 2003), the Competition Commission of India hereby makes the following regulations, namely:-

1. Short title and commencement

(1) These regulations may be called the Competition Commission of India (Guidance with regard to possibility of a failing business) Regulations, 2018.

(2) They shall come into force on X day of XYZ, 2018.

2. Definitions

(1) In these regulations, unless the context otherwise requires:-

(a) "Act" means the Competition Act, 2002 (12 of 2003) as amended from time to time;

(b) "Combination" means and includes combination as described in section 5 of the Act and any reference to combination in these regulations shall mean a proposed combination or the combined entity, if the combination has come into effect, as the case may be;

(c) "Commission" means the Competition Commission of India established under subsection (1) of section 7 of the Act;

(d) "Enterprise" shall mean "enterprise" as defined in clause (h) of section 2 of the Act;

(e) "Parties to the combination" means persons or enterprises entering into the combination and shall include the combined entity if the combination has come into effect;

(2) Words and expressions used but not defined in these regulations shall have the same meanings respectively as assigned to them in the Act or the rules or regulations framed there under or in the Companies Act, 1956 (1 of 1956).

3. Power to determine procedure in certain circumstances

In a situation not provided for in these regulations or the Competition Commission of India (General) Regulations, 2009, the Commission may determine the procedure, in specific matters, if so required.

4. Approach of the Commission regarding 'Possibility of a failing business' under section 20 (4) (k)

A. Failing Business claims are, in essence, ones that the target business will exit the market in the absence of proposed merger; any harm to competition should therefore not be causally linked to the merger. As Appreciable Adverse Effect on Competition, or 'AAEC', test requires that the merger be the cause of competitive harm, the Commission shall allow meritorious 'failing business' cases.

B. The Commission may decide that an otherwise problematic merger should nevertheless be allowed if one of the merging parties is a possibly failing business.

C. The proposed merger if not positive, is at least neutral towards the deterioration of competition in the relevant market.

D. The allegedly failing firm is in such a condition of financial distress that its assets would be inevitably forced to exit the relevant market in the absence of the proposed combination.

E. No other prospective buyer is available as a less anti-competitive option other than the present acquirer.

F. The Commission's assessment of financial information includes a review of historic, current and projected income statements and balance sheets. The reasonableness of the assumptions underlying financial projections is also reviewed in light of historic results, current business conditions and the performance of other businesses in the industry.

5. A firm is considered to be failing if it satisfies the following criteria

A. It is insolvent or is likely that insolvency proceedings may be initiated against it in the near futureunder the Insolvency and Bankruptcy Code 2016;

B. It has initiated or is likely to initiate on its own motion the bankruptcy proceedings under the Insolvency and Bankruptcy Code 2016;

C. It is a Sick Company under Chapter 19 of the Companies Act 2013;

D. It otherwise seems to be financially distressed to such an extent that the Commission considers it to be a fit case of a failing business under Section 20 (4) (k) of the Act.

6. Burden of proof

The notifying parties are required to provide all the relevant information, including documentary evidence, necessary to show that that appreciable adverse effect on competition, if any, shall not be the result of the proposed merger.

7. Information required in the assessment of a failing business

In assessing the extent to which a business is likely to fail, the Commission may typically require the parties to furnish the following information:

A. The most recent, audited, financial statements, including notes and qualifications in the auditor's report;

B. Projected cash flows;

C. Whether any of the firm's loans have been called, or further loans/line of credit advances at viable rates have been denied and are unobtainable elsewhere;

D. Whether suppliers have curtailed or eliminated trade credit;

E. Whether there have been persistent operating losses or a serious decline in net worth or in the firm's asset;

F. Whether such losses have been accompanied by a deterioration of the firm's relative position in the market;

G. Whether the value of publicly-traded debt of the firm has significantly dropped;

8. Failing Division

All the factors taken into consideration by the commission to determine a possibility of a failing business apply equally to failure-related claims concerning a division or a wholly-owned subsidiary of a larger enterprise. However, in assessing such submissions relating to a failing division, particular attention is to be paid to transfer pricing within the larger enterprise, intra-corporate cost allocations, management fees, royalty fees, and other matters that may be relevant in this context.

9. Order for restructuring or reorganising

Where the Commission is of the view that the retrenchment or restructuring of a failing business may prevent its projected failure and enable it to survive as viable business and an effective competitor, by narrowing the scope of its operations, for instance, by downsizing or withdrawing from the sale of certain products or from certain geographic areas, it may pass an order to that effect.

10. Application of the 'failing firm' criteria in existing economic and market conditions.

A. The Commission shall take account of existing economic and market conditions while assessing mergers involving failing businesses. A contextual evaluation of evidence shall be carried out.

B. However, as a legal and policy matter, the Commission shall not, regardless of existing economic and market conditions, relax the standard required to establish a successful possibility of a failing business under Section 20 (4) (k).

DIGITAL ECONOMY & COMPETITION LAW: A CONUNDRUM

Aryan Mohindroo and Rajat Mohindroo

1. Introduction

Digital economy has a very broad impact and affects human activities to a very large extent. It has been very effective in influencing our social and economic activities. The term 'Digital Economy' was coined by Don Tapscott in his best-seller "The Digital Economy: Promise and Peril in the Age of Networked Intelligence" (1995)[1]. The digital economy is an umbrella term used to describe markets that focus on digital technologies. It typically involves the trade of data, services or goods through electronic commerce as a medium.[2] With the expansion of this sector there has been substantial economic growth in the last couple of years and technological shift has had effects on the markets that go far beyond the digitalisation context alone. Furthermore, the accessibility of internet has increased over the years owing to mobile devices. Consequently, the increasing audience to the digital economy has resulted in the outburst growth of this sector.

The digitalisation of various sectors in the traditional economy has had a dramatic effect on how regular and traditional businesses work, and consequently, the related markets. There are many differences between the traditional and digital markets. *Firstly,* a major part of the digital economy is based on users' personal data, and flow of this data from one platform to another. The standard units of transactions in a market, price and money paid, consequently, are rarely seen.[3]For example, a firm's turnover is a significant indicator of its market size, however, a digital platform may deal with multiple sides in an economy, where one side is subsidised by the other, implying a zero-priced market.

Secondly, the elements that influence the market vary to a great extent. Unlike the traditional market, sole pricing structures are not the determinant of demand in the market. The interplay of various network effects,[4] consequently, determine and promote the market concentration. A digital economy is much more dynamic than traditional economy. Owing to availability of innumerable routes to reach an end-user and deliver digital services, the market power of any firm can easily be

[1]KoshaGada, *The Digital Economy In 5 Minutes*, Forbes (Jun. 16, 2016), https://www.forbes.com/sites/koshagada/2016/06/16/what-is-the-digital-economy/#1d2103f17628(Last visited 28 March 2018).

[2]Organisation of Economic Co-operation and Development (OECD), *The Digital Economy* (Feb. 7, 2013), http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf (Last visited 28 March 2018) [hereinafter "OECD"] .

[3] Cassandra Liem&Georgios Petropoulos, *The economic value of personal data for online platforms, firms and consumers*, Bruegel (Jan. 14, 2016), http://bruegel.org/2016/01/the-economic-value-of-personal-data-for-online-platforms-firms-and-consumers/ (Last visited 28 March 2018)[hereinafter "Liem"].

[4] CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (Harvard Business School Press,1998).

challenged, and a smallest and freshest of entrant in the market can become a challenge to incumbent's business.

This paper opens with an analysis of the major stake-holder sectors of the digital economy**(2)** relying on which, an identification of issues and challenges posed to the competition law authorities is made with reference to formerly recognised sectors and digital economy as a whole.**(3)** Based on the assessments previously done, in the light of assertions made by competition law authorities worldwide and eminent legal scholars, the authors have made an effort to provide recommendations and inputs to the aforementioned challenges in the latter part of this paper.**(4)**

2. Searching the web, socializing or making a purchase- It's all digital

Digitalisation can be seen in all economic avenues today. However, this advent came with popularisation of certain sectors in this economy. Internet search, social networking and E-Commerce are some of those sectors. This section deals with the authors' insight into the three major stakeholder sectors in this economy, the mechanism on which these sectors function and their approach to earn profits. Through analysis of these sectors, authors make an attempt to devise the challenges they pose, or are likely to pose to the competition authorities during analysis of these sectors.

SEARCH ENGINES

The growth in the search engine market has not been very old in the digital economy. Back in the 1990s search engines were hardly used on a large scale, while today search engines like Google and Bing are among the multi-billion dollar business models.[5] According to the net market share (as of April 2017) the global search engine market share statistics favor Google with a dominant share of 77% followed by Baidu, Bing and Yahoo at 8.13%, 7.31% and 5.6% respectively which indicates the dominant position of Google in the search engine market.[6] The search engine market also earns a major share of their revenue from the advertising they offer.[7] Most widely used search engines are a lucrative choice for the advertisers as they get more views along with accumulated data by the search engines. Users generally are aware of the use of their search-query logs by the search engine companies and agree to it as it is a part of transaction for which they are provided a

[5] Justus Haucap& Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet driving competition or market monopolization*, 11 INT. ECON. ECON. POLICY 49 (2014)[hereinafter "Haucap&Heimeshoff"].
[6] Robert Allen, *Search Engine Statistics 2017*, Smart Insights (Apr. 13, 2017), http://www.smartinsights.com/search-engine-marketing/search-engine-statistics(Last visited 28 March 2018).
[7] Shiv Mehta, *How Google's Search Engine Makes Money*, Investopedia (Aug. 13, 2015), http://www.investopedia.com/articles/investing/081315/how-googles-search-engine-makes-money.asp (Last visited 28 March 2018).

service for free. However, use of this information by third parties is more problematic and may be objectionable on the part of unsuspecting users.[8] Further Google argues that the retention of these query logs is critical to its ability to operate and improve its services. It faces a daunting task to guess what a user intends, based on two or three words they enter as a search query.[9] This entire algorithm provides user with a personalized experience, which makes Google the most widely used search engine.

Yet Google also analyses search-query logs for revenue-generating purposes, particularly for targeting and maximizing the effectiveness of advertisements, Google, after all, is an advertising company.[10] Behavioral advertising forms a predominant model for search engines in which users are displayed advertisements based on their usage of the search engine. By installing cookies in users' browsers, search engines like Google record the type of pages users visit and associate them with certain interests.[11]These advertisements earn revenue on a pay-per-click basis. Google CEO Eric Schmidt stated: "If we target the right ad to the right person at the right time and they click it, we win".[12] Such targeting can only be achieved by analyzing a user's search history.

SOCIAL NETWORKS

Another very significant sector in the digital economy is Social Networking. It is immensely popular among billions of people around the world, simply for a reason that the virtual network has made it feasible to stay in touch with friends and acquaintances. Social networking portals like Facebook or Google Plus have made the world a smaller place as they have provided users a virtual platform that brings them closer. With their limited exposure of social media, in the year 2007,*Danah M. Boyd* and *Nicole B. Ellison* defined social media as:

> "*Web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.*"[13]

Interestingly, with technology becoming handy and innovation, the ambit of social networks now undertake from "people you may know" to "what's on your mind", contrary to the classic Boyd and Nicole definition. Social networking portals also come with varied purposes. Where Facebook

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[8] Omer Tene, *What Google Knows: Privacy and Internet Search Engines*,4UTAH. L. REV. 1434 (2008)[hereinafter "Tene"].
[9] *Id.*
[10] Saul Hansell, *Google Wants to Dominate Madison Avenue, Too,* The New York Times (Oct. 30, 2005), http://www.nytimes.com/2005/10/30 /business/yourmoney/30google.html(Last visited 28 March 2018).
[11]Liem, *supra* note 3.
[12]Tene, *supra* note 8.
[13]Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History and Scholarship,* 13 JCMC 1 210 (2007) (Last visited 24 March 2018).

is for social contacts and LinkedIn for the business contacts, there is also Tinder that indulges in the digital economy as one of the leading online dating portals. Surprisingly, these three different networks target similar audience but serve different purposes. Social networking portals with their immense growth have been under the competition law radar for quite a few years now. Since the monetary network switching costs are zero and the procedures allow multi homing with convenience as it takes only a couple of minutes to set up a user profile, the only way out for a rival to conquer the market is product innovation. Until a few years ago MySpace was the leader of the industry which was outrun by Facebook. We may see the emergence of a new social-networking company that would manage to find a powerful concept or technology to revert the tendency of Facebook's increasing position.[14]

The lock-in effects that bind an existing user to a platform might prove to be an obstacle while switching platforms. Due to heterogeneous preferences not every user might be willing to use the same platform. From worldwide perspective, Facebook is by far the market leader[15]. There are 1.2 billion users on Facebook, but the product cost being zero doesn't explain where the revenue comes from. The social media industry works on a simple principle, "if you are not paying for the product, the product is you".[16] The real transaction isn't between the user and the interface that the product has created, but with the advertisers that indulge in behavioural advertising based on the user's search pattern and online activities.[17]

E-RETAIL AND E-COMMERCE

The presence of Digital/Digitalised markets, do not only affect a narrow section of the economy, but new technologies, also work to change how all other markets work in important ways. E-Commerce, more popularly known as E-retail, has gone through a significant revolution after the popularisation of the Digital markets. Led by faster reliable telecom network speeds, convenience, as well as better adoption of internet services, online retail in India is expected to be at par with the Indian physical stores in the next half a decade.[18] As per a European survey, around 53% of

[14] Florence Thépot, *Market Power in Online Search and Social Networking: a Matter of Two-Sided Markets* (UCL Centre for Law, Economics and Society, Working Paper No. 4/2012), https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-4-2012 (Last visited 22 March 2018) [hereinafter "Thépot"].
[15]Haucap&Heimeshoff, *supra* note 5.
[16] Scott Goodson, *If You're Not Paying for it, You Become the Product,* Forbes (Mar. 5, 2012), https://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/#43de71e45d6e (Last visited 20 March 2018)
[17] Greg McFarlane, *How Facebook, Twitter, Social Media make money from you*, Investopedia, http://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx (Last visited 28 March 2018).
[18] *Retail Industry in India,* India Brand Equity Foundation (Sep. 2017), https://www.ibef.org/industry/retail-india.aspx (Last visited 28 March 2018).

the total retail sales in Europe will be web impacted, majorly influenced by *cross-channel* retail sales.[19] Online markets and E-Commerce in India and abroad can be seen in four categories.[20] The first category includes goods which are provided to an end-user in the digital form. Netflix, Amazon *Prime Video*, YouTube Red are some platforms which provide these services. Second category includes firms like Amazon, Flipkart, and EBay, which merely facilitate the search and purchasing of the goods. Hotel search and booking websites like MakemyTrip and Expedia are also included in the second category. Another species of E-commerce is that of digital markets at the wholesale level. This is the kind where transactions take place on a Business-to-Business level. Aiming to facilitate trade between businesses, some of these markets don't even function by employing internet, instead, other internal electronic systems may be used. Reliance *e-biz* is one such platform in India. The fourth category can be called a substitute of e-retail, that is, Auction platforms. EBay since decades has been the market leader in the area of online auctions.

The online retail enterprises in India aren't subject to much scrutiny, as there is regular entry of new competitors in this area of trade. Flipkart led the market by becoming the first $1 bn. firm in this sector, but was followed by the entry of firms like Amazon and prospects of Alibaba of China entering the market.[21] The prospects of anti-competitive practices in this sector are unlikely till date.Although, firms like Amazon may be at an advantage with their internationally accumulated assets. However, any misuse of its market position is yet to come under the scanner. Competition Law is meant to benefit the ultimate consumer by promoting innovation.[22] As long as there is innovation in the market, ability of the consumers to multi-home and freedom of entry of new firms, any anti-competitive practices are unlikely.[23]

The situation is different when it comes to e-auction platforms, where EBay has been seen as the market leader worldwide since years. This is due to less multi-homing abilities of consumers on one side of the platform owing to the individual reputation which takes time to build, switching costs and indirect network effects. Therefore, the lock-in effect on EBay is significant.[24] This

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[19] *Web to influence more than half-or-€947 billion-of European Retail sales by 2020*, Forrester (Jul. 28, 2015), https://www.forrester.com/Web+To+Influence+More+Than+Half+Or+947+Billion+Of+European+Retail+Sales+By2020/-/E-PRE8284 (Last visited 28 March 2018).

[20] NIKOLAOSVETTAS,COMPETITION AND REGULATION IN MARKETS FOR GOODS AND SERVICES: A SURVEY WITH EMPHASIS ON DIGITAL MARKETS (Athens University of Economics and Business and CEPR, 2015).

[21] SohiniMitter, *How Alibaba is slowly yet surely expanding its footprint in India,* BGR (Jun. 12, 2017), http://www.bgr.in/news/how-alibaba-is-slowly-yet-surely-expanding-its-footprint-in-india/(Last visited 28 March 2018).

[22] The Competition Act, Premable (2002).

[23] Haucap&Heimeshoff, *supra* note 5.

[24] *Id.*

situation may apply to certain other firms in the online marketplace and consideration of the same is of major importance when an analysis is done by the competition authorities.

3. Challenges to Competition & Antitrust Laws

A close look at the above mentioned stake-holder sectors reveals a lot about how their markets function and about their approach towards making profits. Authors in this section, have provided their insight towards the speed-bumps that authorities may go through during digital market analysis, as compared to traditional market analysis.

DEFINITION OF MARKET

The Competition Authorities face a variety of challenges when defining a market in the digitalised economy. The digital market comprises of two kinds of platforms/vendors. One, where a vendor operates among one class of consumers. WhatsApp, for example, is one sided market vendor.[25] Two sided markets, on the other hand serve two types of consumers at the same time.[26] For instance, a market for newspaper advertising serves both, the advertisers, as well as the newspaper readers simultaneously. A third kind emerged with advent of the digitalised economy, called the Multi-sided platforms (MSPs).[27] A multi-sided platform gets varied customer groups together on a common platform and gets them to interact. Operating systems like Microsoft Windows, Mac OS and Linux, e-commerce platforms like eBay and Amazon, social networking platforms like Facebook and advertising platforms like Google and Yahoo, among others, are some examples of multi-sided platforms. Interaction of these Multi-sided platforms among themselves as well as with the consumers raise a number of issues for competition regulations and analyses. Being associated with a comparatively concentrated market where a single platform serves a major consumer base, these platforms are often scrutinisedby the competition regulators. The techniques and tests currently used by competition authorities are devised keeping in mind the traditional economy. Owing to the complicated strategies used in digitalised economy, which lack scope in explaining competitive significance and inapplicability of previously devised tools and techniques, such platforms pose significant challenges to market analysis starting from market definition itself.

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[25] *INFORMATION SYSTEMS: A MANAGER'S GUIDE TO HARNESSING TECHNOLOGY,(*Open Textbooks- University of Minnesota Libraries), http://open.lib.umn.edu/informationsystems/chapter/6-3-one-sided-or-two-sided-markets-2/ (Last visited March 26, 201).

[26] *Id.*

[27] David S. Evans, *Competition and Regulatory Policy for Multi-Sided Platforms with Applications to the Web Economy*, 2 CONCURRENCES 57-62 (2008), http://ssrn.com/abstract=1090368 (Last visited 28 March 2018) [hereinafter "Evans"].

Every act contrary to the spirit of competition and consumer benefit in the market shall be subjected to scrutiny by the relevant competition authorities.[28] This criticism is effected through certain steps, first of them being the Market definition.[29] The relevant market has been defined as the market determined by the competition authorities with regard to the relevant product market and relevant geographic market where relevant product markets include all interchangeable products in the market.[30] Identification of products which exert competitive pressure on the product that a particular firm or firms deal with is the main purpose of identifying relevant market.[31] This goes for all the cases, be the firms which are likely to merge, firms subjects of regulatory intervention and firms which are suspects of anti-competitive activities.[32]

With advent of the multi-sided platforms like Google and Facebook, determination of whether one, two or multiple relevant markets should be defined poses the first challenge to the competition policy. Each side of the MSP's business influences and constrains their strategies on the other side.[33]The competition authorities often fail to distinguish between transactional and non-transactional markets.[34]Further, when defining the relevant market in case of multi-sided digital platforms, there is a risk where the authorities may analyze two sides of a platform, but fail to recognize the subsequent relationships of those sides with other platform markets. This can be observed in the case relating to acquisition of WhatsApp by Facebook.[35]The CCI, in this merger analysis failed to recognise certain narrower markets when dealing with WhatsApp. It is well known, that WhatsApp is a platform for voice calling through internet, video-calling through internet and instant messaging. Contrarily, in this case, markets pertaining to video calling, voice calling through internet, as well as online messaging were all dealt with under the same relevant market of "*the market for instant messaging services using consumer communication apps through smart phones*". Although, it must have been considered that applications like Skype, which deal solely in the market of video calling might be adversely affected when their market is not considered in the

[28] Philip Lowe, *The design of competition policy institutions for the 21st century — the experience of the European Commission and DG Competition*, Competition Policy Newsletter, European Commission (No.3, 2008), http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf (Last visited 28 March 2018).

[30] The Competition Act, §2(r), §2(t) (2002).

[31] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (7th ed. OUP 2012).

[32] Competition Commission of India v. Co-ordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors., (2017) 5 S.C.C. 17.

[33] David S. Evans & Michael D. Noel, *The Analysis of Mergers That Involve Multisided Platform Businesses*, 4 J. COMP. L. & ECON. 663, 696 (2008) [hereinafter "Evans & Noel"].

[34]LapoFilistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, (Tilburg Law School Legal Studies Research Paper Series, Paper no. 09/2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850 (Last visited 28 March 2018) [hereinafter "Filistrucchi'].

[35]Shri Vinod Kumar Gupta v. WhatApp Inc., Case No. 99 of 2016 (March,1 2017) (CCI), http://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2099%20of%202016.pdf. [hereinafter "Whatsapp CCI case"

analysis separately. Further, although this definition was similar to the narrow definition adopted by the European Commission in its decision approving the acquisition in question,[36] it must be noted that EC's ultimate analysis was undertaken in three narrower markets namely market for consumer communication services, social networking services, as well as online advertising services keeping in mind the narrow markets, which may be effected in light of this merger. These three different markets, nonetheless, were not identified by the Competition Commission of India.[37] However, an omission of taking other narrow markets into consideration may have an effect in the longer runowing to markets which may be affected due to the anti-competitive activities, but *not being subject to market analysis uponfailure of* defin*ition*.

A similar position can also be observed in the European Commission decision pertaining to the Google-DoubleClick merger.[38]. Google acquired the advertising platform DoubleClick.Following which the European Commission analyzed the concern that the combination of Google's and DoubleClick's assets could put the merged parties into a position of strength, unmatchable by their competitors. The EurpoeanCommission, as well as the United States' FTC found that none of the alleged scenarios were likely to be implemented, let alone distort competition. This decision has been critiqued as it failed to take into consideration markets apart from those pertaining to online intermediation and missed out on considering other two sided platforms like movie streaming and navigation services that may be drastically effected post the merger in question.[39]

Another challenge posed to the competition authorities is owing to the dynamic nature of market. The companies in a digital economy keep creating new markets, resulting in giving an ever-changing nature to the digital markets. For instance, PayTM, has evolved and entered markets like E-retail from solely being a money transfer application in a span of 2-3 years. Such a nature of the digitalised economy, hinders competition authorities from incorporatinga market in defined boundaries.

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[36] Facebook/ WhatsApp, Case No. Comp/M.7217 (Oct. 3, 2014) (European Commission), http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf [hereinafter "Facebook/Whatsapp EU case"].

[37] Modhulika Bose, *Who Will Bell The Apps?*, MONDAQ (JUL. 13, 2017), http://www.mondaq.com/india/x/610112/Antitrust+Competition/Who+Will+Bell+The+Apps (Last visited 28 March 2018) .

[38] Google/DoubleClick, Case No. Comp/M.4731 (Mar. 11, 2008) (European Commission), http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf [hereinafter "Google/DoubleClick case"].

[39] Thépot, *supra* note 14.

The competition authorities face yet another issue with regard to market definition, one pertaining to the policy tests used for evaluating the same.[40] The most meticulous test used for market definition is the Small but Significant and Non-transitory Increase in Price (SSNIP) test.[41] The SSNIP test is the standard approach to defining relevant market, in both, Indian and European Competition Law regimes.[42] It defines the market, which includes collectively the narrowest product and geographical market, for which a firm could exercise dominance and raise prices.[43] Numerous scholars in the past have warned against use of the SSNIP test in two-sided or multi-sided markets like those which persist in the digitalised economy.[44] The traditional SSNIP test deals with increases and decreases in single prices, in one-sided markets.[45] This test, consequently fails to take into consideration the interdependencies and network effects that are a result of an interaction between two sides of a two-sided or a multi-sided platform.[46]

It has been recommended that it is enough to define a single market as long as all transactions at the different sides of the platform take place simultaneously.[47] A modified version of the single SSNIP test is suggested, which relies on measuring the overall profitability, by including the simultaneous fixed and variable costs incurred, and the losses incurred by all sides of the platform.[48]The question still remains whether it is more viable for the Competition Authorities to attempt to measure the net effects of profits/losses of the multiple sides of platforms in such a situation, or treat the two sides separately to define relevant markets?

ASSESSMENT OF DOMINANCE AND ABUSE

By now we have established how digital economy and 'brick and mortar' economy or traditional economy function on very diverge lines of action. However applying the same competition regime on both might prove to be a tedious task. The market trends, types of investments, growth, innovation and market tactics applied in both the economies are tremendously dissimilar. It requires a different interpretation of the same law in situations where facts *prima facie* appear to be

[40] OECD, *supra* note 2.
[41]Filistrucchi, *supra* note 34.
[42] Mr. RamakantKini v. Dr. L.H. Hiranandani Hospital, Case No. 39 of 2012 (Feb. 5, 2014) (CCI),http://www.cci.gov.in/sites/default/files/392012GG_0.pdf.
[43]Filistrucchi, *supra* note 34.
[44] Evans & Noel, *supra* note 33..
[45] *Study of the Policy Department A: Economic and Scientific Policy on Challenges for Competition Policy in a Digitalised Economy* (Jul. 2015),http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf (Last visited 28 March 2018) [hereinafter "EU – Challenges of a Digital Economy"].
[46] *Id.*
[47] OECD, *supra* note 2
[48]Filistrucchi, *supra* note 34.

similar. Competition law in India functions to keep the market competition alive, create space for entries of new market players and keep the innovation going.

The European Court of Justice has defined a dominant market position as:

> *"A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers."*[49]

Market power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumersis a prerequisite for determining a dominant position. While analysing the dominant position the authorities often make use of quantitative indicators such as market shares, price levels, concentration ratios or profit margins without realising some of these indicators can be defined only when the market remains static.[50] However the digital market, as a result of constant innovations has evolved itself to be a dynamic one[51]. The rate of technological change is high. An example of how fast a market position can be challenged is the social media service Myspace[52]. Once it is identified that a digital company holds a dominant position in market another challenge that the authorities come across is to determine if its conduct can be considered anti-competitive. In the dynamic context of digital markets, it is challenging to distinguish anticompetitive behaviour from normal business strategies.[53] The law doesn't criticise being in a dominant position but prohibits 'abuse of dominance'[54]. Digital monopolies, barriers to entry in market for new market players, pre-emptive mergers are a few ways in which dominance is abused.

ANALYSIS OF MERGERS

Any merger, or combination, as mentioned in the Competition Act, 2002, which causes or is likely to cause Appreciable Adverse Effects on Competition is void under the Indian Competition

[49] Case C-27/76, United Brands Company and United Brands Continental BV v Commission of the European Communities-, 1978 ECR 207 [hereinafter "United Brands case"]; Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, 1979 ECR 461.
[50] OECD, *supra* note 2.
[51] EU – Challenges of a Digital Economy, *supra* note 45.
[52] "Myspace founded in 2003 grew and became a very popular social media service. However, in 2008 Facebook overtook Myspace by large numbers and the number of Myspace users has declined ever since", http://en.wikipedia.org/wiki/Myspace ; Bloomberg Businessweek http://www.bloomberg.com/bw/magazine/content/11_27/b4235053917570.htm.
[53] EU – Challenges of a Digital Economy, *supra* note 45.
[54] Consolidated version of the Treaty on the Functioning of the European Union, Art. 102, 2008 O.J. (C115) 89; The Competition Act, §4 (2002).

Act.[55]Further, parties to any merger, meeting the threshold set by the Competition Commission have to mandatorily notify the commission regarding the same.[56]

Mergers and Combinations are a quotidian activity of technology related companies as well. Facebook taking over WhatsApp[57], Google's takeover of DoubleClick[58] and Microsoft's acquisition of Skype[59], among numerous others, are examples of some widely known mergers in the technological sector. The emergence of such technological firms in the digitalised economy pose another challenge to the competition authorities like Competition Commission of India. One of those related challenges being a concealed intention to enforce a pre-emptive merger.

Pre-emptive mergers are aimed by established companies to acquire potential competitors, so as to prevent disruption of one's own business model.[60] Mergers of this nature are contrary to the principles of a competitive market, as they are likely to reduce innovation and potential competition, leaving less options for a consumer to choose from. The challenge exists in the identification of such mergers, as it is difficult to distinguish competitive business strategies from anti-competitive motives in such markets.[61] There might be instances of pre-emptive mergers in acquisition of smaller units, but extreme cautiousness should be taken so not to consider every acquisition as anti-competitive. A failure to do so can adversely affect innovations, as it is prospects of a takeover which motivate smaller firms to innovate. The analysis of mergers involves a series of steps, starting from market definition, which is a challenge in itself, as discussed above, followed by an analysis of market power of the firms and of whether the behavior in question is anti-competitive.[62] The problem arises in the definition and determination of market boundaries itself, as has been discussed earlier in this paper which is a result of the dynamic nature of this market and the constantly changing market boundaries. Further, due to dynamic markets and similarly dynamic feedback of users towards the platforms in the market, the standard tools of evaluating

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[55] The Competition Act, §6 (2002).
[56] The Competition Act, §6(2) (2002); *see also* The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations (2011), http://www.cci.gov.in/sites/default/files/regulation_pdf/Combination%20Regulations%202016%20-%20FINAL.pdf.
[57]Whatsapp CCI case, *supra* note 35; Facebook/Whatsapp EU case, *supra* note 36.
[58] Google/DoubleClick case, *supra* note 38.
[59] Matt Rosoff, *Microsoft Insider: Here's Why We Bought Skype,* BUSINESS INSIDER (May 12, 2011) http://www.businessinsider.com/why-microsoft-bought-skype-an-insider-explains-2011-5?IR=T (Last visited 28 March 2018).
[60]JózsefMolnár, *Pre-emptive Horizontal Mergers: Theory and Evidence* (Institute of Economics, Hungarian Academy of Sciences, Discussion Papers, Paper no. MT–DP. 2002/13),http://econ.core.hu/doc/dp/dp/mtdp0213.pdf(Last visited 28 March 2018).
[61] EU – Challenges of a Digital Economy, *supra* note 45.
[62] MAHER M. DABBAH, EC AND UK COMPETITION LAW: COMMENTARY, CASES AND MATERIALS (1st ed., Cambridge University Press 2004).

market shares or profit margins turn out to be less useful as market power determinants.[63] Owing to the fact that first-mover advantages can make a significant difference in a market position like that of firms in digital markets, it turns out to be of equal importance to prevent others from entering the market in future. Firms anticipate future entry into a market through innovation, which becomes a lucrative option for existing larger firms to takeover or merge with. This activity is extremely beneficial to the end-users, as such mergers are likely to increase innovation in the market. However, when such acquisitions are for the sole purpose of eliminating the potential competitors or alternative routes to consumers, they are threatening to market prosperity. The competition authorities frown upon such mergers and the CCI subjects prospectively anticompetitive mergers, to scrutiny, but that is limited to mergers of bigger firms with mavericks. There is a need for reconciliation of mavericks in context of digital and dynamic markets, as mavericks, or market stealers, in these markets aren't the competitive bigger firms, but innovative new firms which are likely to attract the end-users.[64]

Competition authorities across the world have till date, failed to reconcile with the requirements of a dynamic market. This inability is evident from numerous competition authorities' decisions in the past likethe Google-DoubleClick acquisition[65]. DoubleClick used a state of the art DART (Dynamic Advertising Reporting & Targeting) ASP/SaaS ad-serving technology which allowed clear targeting and reporting of ad-serving per media property for websites within its network and technology sectors.[66] Acquisition of DoubleClick by Google allowed to gather information and technology to serve the most personalised advertisements. This acquisition was approved by both the European Commission and the FTC, with one dissent based on network effects of the firms not being taken into consideration.[67] Consequently, this acquisition has produced certain barriers to entry owing to the fact that no competitor can manage to offer a service of the same quality, because of the tremendous amount of user-data, that Google owns.[68] Acquisition of WhatsApp

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[63] *See* The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, Schedule 1 (2011), http://www.cci.gov.in/sites/default/files/regulation_pdf/Combination%20Regulations%202016%20-%20FINAL.pdf.

[64] EU – Challenges of a Digital Economy, *supra* note 45.

[65] Google/DoubliClick case, *supra* note 38.

[66] *DoubleClick: Early Developments*, WIKIPEDIA (Sep. 15, 2017), https://en.wikipedia.org/wiki/DoubleClick#Early_developments (Last visited 28 March 2018).

[67] Google/DoubliClick case *supra* note 38; "Commissioner Pamela Jones Harbour;s dissent in Google/DoubleClick",https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf

[68] *The Data-Driven Economy. Challenges for Competition* (AutoritatCatalana de la Competència),http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/Eco-Dades-i-Competencia-ACCO-angles.pdf (Last visited 28 March, 2018) [hereinafter "The Data-Driven Economy"].

by Facebook[69] is also illustrative of such shortcomings. WhatsApp was a paid online messaging service, which was acquired by Facebook recently. It is evident that Facebook was interested in obtaining information generated by WhatsApp so as to be able to target ads more efficiently. A changed business model of WhatsApp can be observed today. Firstly, it doesn't charge for its services anymore, experimenting with the same. Secondly, WhatsApp's privacy policy has been amended to share data specifically with Facebook.[70]This merger has drastically affected the market.End-users had two routes, one of a paid service with privacy of data (WhatsApp messenger), another, with less privacy protection, but free services (Facebook messenger).[71] Today, consumers are at a loss of alternate routes and multi-homing is equally difficult in this sector[72], owing to the mass usage of WhatsApp messenger. Consequently, the users who valued their privacy over charges for a service, have seen a decrease in their welfare.

It can therefore be concluded, that the present thresholds and tests provided for subjecting a merger to scrutiny are comparatively static, and fail to take into regard the changing position like that of the economy in question. Therefore, a newer approach, along with the already provided tests, to conduct merger analyses is required. There is a need to explore whether mergers in the digitalised economy should be looked with the valuable data involved, irrespective of the turnovers and numerical statistics of a firm's performance.[73]

IDENTIFICATION OF PREDATION

Predatory pricing like other anti-competitive practices is a result of abusing the dominant position[74]. Pricing one's product below the incurred costs with an aim of eliminating other market players who aren't dominant in the market and recouping initial losses in future by increasing prices is the overall idea of predatory pricing.[75] Both predatory pricing and abuse of dominance share a genus-species relationship.

Due to the dynamic nature of the digital markets, establishing dominance of a single company in the market can be a difficult task. It would be no surprise to see multiple digital companies emerging as dominant market players. Moreover one should admit that the market power of a

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[69]Whatsapp CCI case, *supra* note 35; Facebook/Whatsapp EU case, *supra* note 36.
[70] Natasha Lomas, *WhatsApp's privacy U-turn on sharing data with Facebook draws more heat in Europe*, TECHCRUNCH (Sep. 30, 2016), https://techcrunch.com/2016/09/30/whatsapps-privacy-u-turn-on-sharing-data-with-facebook-draws-more-heat-in-europe/ (Last visited 28 March 2018).
[71] The Data-Driven Economy, *supra* note 68.
[72]Haucap&Heimeshoff, *supra* note 5.
[73] Duncan Robinson, *European Commission may consider customer data concerns in mergers*, FINANCIAL TIMES (Sep. 29, 2016), https://www.ft.com/content/415351b8-3ec6-3d1e-9677-ff0e54cc9101?mhq5j=e5 (Last visited 28 March 2018).
[74] The Competition Act, §4(2) (a) (2) (2002).
[75] The Competition Act, Explanation (b), §4(2) (2002).

company during the predation phase doesn't tell us much about the market power during the post-predation phase and this is what the predatory pricing law should seek to prevent. The law must take into account the firms which are not yet 'dominant' but have a fair share of their financial resources engaged in predation and ultimately obtain control of the market. If the laws require satisfaction of the dominant position parameter at the time of predatory pricing it would be unable to restrict firms which attain the dominant position as a result of predatory pricing. It may be true that the competition policy is designed to protect competition and not to protect competitors, but that contrast rather loses meaning where the only competition is the only competitor.[76]

Another challenge confronted by the competition authorities is the predation in two-sided or multi-sided platforms of digital companies. Multi-sided platforms have the privilege to operate at zero costs at one side and recoup losses by highly pricing the users on the other side. For instance, Google being a multi sided platform provides various services at no costs but can recoup those losses by charging the advertisers for advertising their content, thereby compensating the initial losses and attaining a dominant position in the digital market. However while determining predatory pricing in two-sided or multi-sided markets treating separate sides of a digital platform as separate markets shall make it possible to catch price abuse.[77]

The line of distinction between predatory and legitimate price in a competition is hard to establish because of various key factors that determine the market price. Therefore the test of predatory pricing must be based on a substantially high standard of proof simply to prevent the possibility of penalizing companies engaged in legitimate price competition. The *equally-efficient-competitor benchmark test* is a commonly used benchmark test while determining anti-competitive pricing.[78] The test examines whether a competition can be maintained between a competitor and the dominant firm when it applies the same end-user price.[79] However, multi sided platforms charge multiple prices, one to each different sides of the platform leaving the authorities with an ambiguity as to which prices should be compared and when are they anti-competitive. Two-sided digital markets are often witness to zero-pricing strategies.[80] Under some legal procedures test of recoupment of losses by the praying platforms is also examined.[81] One major shortcoming with this test remains, the two-sided platforms that can recoup losses from either side of the platform

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[76] Cyril Ritter, *Does the Law of Predatory Pricing and Cross-Subsidisation Need a Radical Rethink?*, 27 W. Comp. L. Rev. 613-649 (2004) [hereinafter "Ritter"].
[77] Evans, *supra* note 27.
[78] Ritter, *supra* note 76.
[79] *Id.*
[80] EU – Challenges of a Digital Economy, *supra* note 45.
[81] Ritter, *supra* note 76.

and be in the competition. With that, one cannot disagree that forecasting future developments on the basis of certain thresholds such as market entry, capacity, reputation and policies of a company offer very little reliability and accuracy.

MONITOR EXCLUSIVITY AGREEMENTS?

The plight of an innovative competitor, failing to enter the market due to anti-competitive practices that the dominant players conduct is unimaginable. One of the most debatable practices in the digital market is the restrictive trade agreements, which may involve exclusivity agreements. Google in relation to manipulating search results and imposing exclusivity obligations on advertising partners at the expense of competing services may fall under this category[82]. Additionally, Google has become exclusive search provider to high volume websites like Amazon. This, consequently, reduces the likelihood of newer search providers finding area of service[83].

On the same lines Apple and Amazon were also involved in exclusivity arrangements. Audible is the audiobook subsidiary that belongs to the e-commerce giant Amazon.[84] The terms of the agreement didn't allow Apple to purchase digital audiobooks from other suppliers making the entire arrangement anti-competitive as other suppliers would end up missing on a huge customer base and Amazon would be in a position that is unreasonably dominant. The agreement had been in place for over a decade, since 2003, but came to an end as a result of the companies' own decision to end this exclusivity agreement.[85] However there were investigations held, but were suspended due to the voluntary decisions made by the companies. *"This will enable a wider range of offer and lower prices for consumers"*, Andreas Mundt, President of Germany's Anti-trust Agency, claimed in a statement.[86]

Not only advertising agreements, Google has also been alleged of its involvement in distribution agreements under which Google search related products and services, such as toolbars and web-browsers came as default setting in various products of software vendors, hardware manufacturers

[82] *Id.*
[83] Damien Geradin& Monika Kuschewsky, *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, http://ssrn.com/abstract=2216088 (Last visited 28 March 2018) [hereinafter "Geradin&Kuschewsky"].
[84] *Audible: Audio books and Original Audio*, https://about.audible.com/ (Last Visited 28 March 2018).
[85] Jacob Kastrenakes, *Apple and Amazon end decade-long audiobook exclusivity deal*, THE VERGE, https://www.theverge.com/2017/1/19/14323438/apple-audible-exclusivity-agreement-ended-antitrust-investigation (Last visited 28 March 2018).
[86] *Id.*

and service providers. For instance, Google signed exclusive deals with Mozilla Firefox, Opera and Apple Safari, whereby each of these browsers is delivered with Google as the search default.[87]

One important example in this category of cases is the one directed against online hotel agencies HRS and Booking.com. These agencies had a clause in their contracts with hotels, that obliged the hotels to always offer the best price on the platform with no possibility of deviating from the contract and not letting any other competitor to offer a price lesser than what they are offering. There is something very interesting particularly about these kinds of clauses in a contract as they have the ability to direct network effects in the parties'favour. Best price clauses offer a two-fold arrangement for both, the platform and the hotels. Platforms get higher attraction from the users and consequently it benefits the hotels as well. This could ultimately result in the foreclosure of the market. For innovative newcomers like Justbook mobile, it was not possible to enter the market by providing the customers any incentives, such as offering hotel rooms at good conditions or extended check-in or check-out timings because HRS would always be able to offer less or at least the same price. The Bundeskartellamt, the German competition authority saw this as a clause that restricted competition and prohibited the use of such most-favoured-treatment clauses.[88]

A major segment of digital platforms function on the user data which is recorded by the usage trends of the consumers. Exclusivity agreements let online service providers gather large amount of user data. This user data is further used for behavioural advertising that means selective advertising for users as per their usage trends. Personal data allows online service providers to offer relevant services based on user interest through means of advertising. For instance, when a user searches for a franchise food joint he will be especially interested in a joint that is located near him. Search engines are expected to cater the user to the relevant interests that they possess. Knowing the interests and preferences of a given user contributes to the ability of search engines like Google or Bing to deliver results relevant to that particular user. Quality in terms of the relevance of the results is the only thing that matters to the user which entirely depends on the ability of the online service provider to tailor users' services to their specific needs. [89]

Dominant companies have accumulated years of user data that makes it easier for them to indulge service providers into exclusivity arrangements. As a result of which they tend to furnish a monopoly in the markets leaving no competition.

[87]Geradin&Kuschewsky, *supra* note 83.
[88]RupprechtPodszun& Stephan Kreifels, *Digital Platforms and Competition Law*, 5 EUVR1 33–39 (2016).
[89]Geradin&Kuschewsky, *supra* note 83.

4. Towards a coherent regime

The abovementioned challenges to the competition authorities in dealing with the firms involved in the digitalised economy are very limited. The challenges and problems persist at every level of the market analysis. All the challenges described above illustrate well, that the ultimate aim of the market analysis in this sector should be to focus on business models. It is a viable idea to change the primary focus from what constitutes as a substitute for the end-user, to all the external elements and interdependencies of the platforms in this economy. Analysing the mode of generation of profit and turnover of the firm should be the primary aim of the competition authorities. Competition authorities should also look up to the potential competitors and parties who hold the potential to steal profits from the incumbents.[90]

SHIFT OF FOCUS

Regarding the challenge pertaining to market definition, the approach dealing with *reasonable substitutability*[91] needs to be overturned in cases pertaining to the digital economy. It is suggested that the competition authorities, while defining the relevant market, should adopt a much more behavioural approach in doing the same. Further, there is a need to consider all the effected markets pertaining to a multi-sided platform to assess the influence of any decisions of the same in all the related markets. For example, Google, the search engine also acts as an advertising body, among other areas of operation.[92] Any decision which increases the search users' base of Google Inc. is likely to increase its Advertisers' user base as well, owing to the related indirect effects. Competition authorities, in cases involving parties like Google Inc., should take all related aspects into consideration. A failure to do so is likely to result in flawed approvals or rejections, which may have degrading effects on the competition and innovation in the market.

TESTING BENCHMARKS

The benchmark tests and the tools used for market analysis need to be altered to cater with the needs of changing economic environment. The SSNIP test is one of the widely used tests for this purpose.[93]"The objective of SSNIP test is to determine, in as much scientific and systematic way as possible, identify and define the boundaries of competition between firms."[94] The inapplicability

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[90] EU – Challenges of a Digital Economy, *supra* note 45.
[91] Roger D. Blair & Jill Boylston Herndon, *Market Definition: An Introduction*, 28 J. REPRINTS ANTITTRUST L. & ECON. 3, 12 (1998).
[92] Evans & Noel, *supra* note 33.
[93]Kaushal Sharma, *SSNIP Test: A Useful Tool, Not A Panacea,* COMPETITION LAW REPORTS 188-192 (May-Jun, 2011), http://www.cci.gov.in/sites/default/files/presentation_document/SSNIPTestKKSharma260711.pdf?download=1.
[94] Commission Notice on the definition of relevant market for the purposes of Community competition law, notice No. 97/C 372/03, 1997 O.J. (C 372/40) 5.

of these tests in zero-priced markets of digitalised economy is a major concern for authorities.[95]The *"First Streamcast Fallacy"* made it evident that a nominal price increase is meaningless when the benchmark price for a market is zero.[96]A lot of products in the digitalised economy are sold for zero prices, with collection of consumer data for commercial purposes, a consideration. This is the case with platforms like YouTube, Facebook, Google, etc. The present tests like SSNIP or the *Hypothetical Monopolist Tests*[97], rely mainly on price mechanisms instead of the market behaviour. It has been suggested that quality of services/products offered should be made an indicator with use of a Small but Significant non-transitory decrease in Quality (SSNIQ).[98] However, this approach needs to be applied with extreme caution as the firms enjoying market power in some zero-priced markets are unlikely to choose to exercise that power by lowering quality.[99]Until consumers, content providers, advertisers or any agents of the platform do not transact among each other, a different market should be defined for all sides of the platform.[100] Further, all the externalities imposed on the remaining sides should be considered by the authorities, with implementation of a slightly different SSNIP test which evaluates the impact of a change in price on the comprehensive profitability of the firm.[101] However, there still aren't easy answers to many questions, for instance, where one side of a platform subsidises the other, what happens when one side benefits, while other incurs losses? There might be a case where efficiency results in benefit of advertisers in multi-sided markets, by targeting behavioral advertisements in a more targeted manner. This might be made possible through the consumer data collected by provision of free services to the user. This results in a reduction of the quality of privacy protection which is given to them as a consequence of behavioral advertising.[102] In that case it becomes a challenge for the competition authorities to balance the gain to advertisers compared to the losses incurred by consumers, all based on a non-monetary unit of quality, likely in cases where SSNIQ or a modified SSNIP test is used.

[95] David S. Evans, *The Antitrust Economics of Free*, 7 COMP. POL'Y INT'L 71, 72 (2011).
[96] John Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49 (2016) [hereinafter "Newman"].
[97] Hypothetical monopolist test (HM test) (European Economic & Marketing Consultants - EE&MC), http://www.ee-mc.com/tools/agreements/hypothetical-monopolist-test-hm-test.html (Last visited 28 March 2018).
[98] OECD, *supra* note 2; *see also* Beijing Qihoo 360 Technology Co. v. Tencent Technology (Shenzhen) Co., (Sup. People's Ct. 2013) (China), https://www.competitionpolicyinternational.com/assets/*DecisionTranslation.pdf* .
[99] Newman, *supra* note 96.
[100]Filistrucchi, *supra* note 34.
[101] EU- Challenges of a Digital Economy, *supra*note 45.
[102] OECD, *supra* note 2.

RE-ASSESSING DOMINANCE

Even after the market is defined properly, the assessment of market dominance in the digitalised economy is a challenge to the authorities. As per Organisation of Economic Co-operation and development,

> *A dominant firm is one which accounts for a significant share of a given market and has a significantly larger market share than its next largest rival. Dominant firms are typically considered to have market shares of 40 per cent or more.*[103]

The European Court of Justice has defined a dominant market position as a position which comprises of economic strength manifested in an economic undertaking which gives it the ability to prevent effective competition in the relevant market, owing to its power of behaving independently of its competitors and consumers to an appreciable extent.[104]In their market analyses, authorities use quantitative indicators like market shares and price levels, which fail in application when the market is a zero priced one. Further, the market dynamics and innovation happening in the sector make it difficult to analyse a market, as notions like market dominance are subject to fast change over a comparatively shorter time period.[105]An example of this position is that of search engines like Yahoo! and AltaVista, which were the widely used search engines some nineteen years ago, unlike today.[106] Therefore, instead of traditional indicators of dominance, the authorities should pay reliance on the indicators which give a view of the contestability of the firm in terms of the entry-barriers that it raises, the ways to reach end-users, etc. Reliance should also be paid to whether the conduct of a firm leads to certain blockades on the routes to reach end-users. The activities of incumbents with respect to mergers reveal a lot about their targeted practices. In numerous mergers between incumbent firms and innovative, newer firms, which may hold a lot of relevant data, but not have a reflection of their value in terms of cash-income. Merger activities pertaining to incumbent firms with smaller innovators should be well scrutinised as the intention of incumbent behind acquiring such firms may be to remove the disruptive innovator out of the market. The question whether incumbent firm is working on similar innovations as well as the amount incumbents are willing to spend in such acquisitions tend to reveal a lot of the incumbents' intention behind the acquisitions. Such transaction thresholds exist in US and

[103]*Dominant Firm,Glossory of statistical terms*, (The Organisation of Economic Co-operation and Development), *https:*//stats.oecd.org/glossary/detail.asp?ID=3199. (Last visited 28 March 2018).
[104] United Brands case, *supra* note 49.
[105] EU- Challenges of a Digital Economy, *supra* note 45
[106] Adam Thierer, *The Rule Of Three: The Nature of Competition In The Digital Economy,* Forbes (Jun. 29, 2012), https://www.forbes.com/sites/adamthierer/2012/06/29/the-rule-of-three-the-nature-of-competition-in-the-digital-economy/#6775ebd27a04 (Last visited 28 March 2018).

Mexican competition law Jurisdictions and are being considered by others.[107] Another option suggested for such mergers and acquisitions is requirement of notifiers to brief the use they will put the collected information from the merger to. However, this may limit firms' operations and involves strategic information of the notifiers.

Now, it must be seen that the most important question for competition policymakers is about the temporariness and non-temporariness of the position of any dominant player in the market. Clearly firms like Google, Facebook, Skype and EBay dominate their relevant markets and leave very little scope for any competitive edge. The question needed to be asked is whether these firms are protected from competition through entry barriers created by them or they enjoy profits only owing to their superior technology and faster innovation?[108]

TAKING A STEP BACK

We are of the view that the modern day economy is a *Schumpeterian* Economy. Schumpeter's view of *perennial gales of creative destruction*[109]aptly defined the digital economy decades ago. The examples of MySpace, Yahoo!, Orkut, Nokia, clearly prove that even though a firm may reach a dominant position in the digitalised economy, but this position of such firms tends to be brief and the one driving most competition and innovation tends to win the race. Although, an approach may be defined beyond basic competition law principles to deal with digitalised economy, less intervention by the competition authorities is perceived best to let this economy flow in the way Schumpeter devised.

It is clear that in an argument being raised towards dominance of a firm in the market, there would be valid counter-arguments based on the innovation incentives. Therefore, with adoption of a more behavioral approach by the competition authorities, as long as a dominant firms' strategies do not impose barriers on market entry of firms, not lead to a reduction in competition, are countered by low switching costs and multi-homing, there is less requirement of competition authorities' intervention in similar *contestable markets.*

A starting point for the same can be taking inspiration from the foreign competition law regimes and acting in line with what other competition authorities may be adopting, although, changes

[107] A draft amendment to the *Act against Restraints of Competition* by the German Federal Ministry of Economic Affairs and Energy was published. It proposed creation of a new threshold for the value of transaction set at EUR 350 million, alongside the existing thresholds pertaining to turnover.
[108]Haucap&Heimeshoff, *supra* note 5.
[109] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81 (3rd ed., 1950), http://www.compilerpress.ca/Competitiveness/Anno/Anno%20Schumpeter%20CSD%20Ch.%20VII%20Creative%20Destruction.htm. (Last visited October 27, 2017).

need to be in accordance with the nature of Indian Economy and policies. These changes need to come with trials and errors as time passes and the Indian regime becomes accustomed to the changes brought. Inspiration can be taken by Indian policy makers, from the German Parliament, *Bundestag*, which realized possibilities of a company dealing with zero-priced goods with insignificant turnovers and amended the Act against Restraints of Competition.[110] This amendment realized the need of taking into consideration the intention of incumbents when acquiring a smaller firm. Therefore, introduced new threshold for merger notification where notification was made mandatory for mergers with purchase price and assumed liabilities amounting to more than 400 million euros.[111]Co-operation with other authorities worldwide to release solutions and discussions shall prove to be of major assistance in devising strategies in the dynamic economic environment.

5. Conclusion

Search engines, E-commerce and social networks are the major faces of any data driven economy. In the modern day, it is apparent that only a handful of firms dominate all these spheres of the digitalised economy. In this context, there is much skepticism among the competition authorities worldwide towards the modes and methods adopted by the leading firms in retaining the leader position that they hold in this economy. However, certain issues and challenges are faced when an attempt is made to conduct an analysis of these firms which seem beyond the scope of present modes and methods available for market analysis.

The competition laws have only been there in India for a very short time. This makes it obvious to say, that there is potential for numerous tests and tries in this area of law. The rise of digitalised economy is even fresher, an area of markets worldwide, with India contributing significantly to this economy. This area of Indian Economy, being one of the fastest growing areas, requires constant checks and balances. Further, the possibilities of firms in the digitalised economy engaging in anti-competitive practices are just as likely as in the brick and mortar or the traditional economy. Contrary to the traditional economy, the benchmark tests and techniques defined fail implication in the modern digital economy. This is a result of numerous factors, like the dynamic nature of the market, indirect network effects, multi-sided economy and zero-priced products. These factors, among others, result in making a numerical assessment of the market harder, as well

[110] Rahul Goel, *Emerging Trends in Market Power: An Update*, Competition Law: A Cyril AmarchandMangaldas Blog (July 25, 2017), https://competition.cyrilamarchandblogs.com/2017/07/emerging-trends-market-power-update/ (Last visited 28 March 2018).

[111] Bryan Cave LLP, *Significant Changes in German Competition Law*, Lexology (Aug. 16, 2017), https://www.lexology.com/library/detail.aspx?g=0661587d-c4c7-4363-8276-f32bc4c43cfc (Last visited 28 March 2018).

as increase the area of market assessment to a significant extent. This results in plenty of challenges and a need for change in approach and techniques used by the competition authorities worldwide.

Although, significant changes aren't required in the laws as such, and the present-day laws do not require to be repealed. There is, however, a need for the competition authorities to change the way cases pertaining to digitalised economy are dealt with. A more behavioural approach towards such cases is recommended. Focus should be shifted towards business models to determine the mode of profits of the firms under scanner. Changes may also be brought to the present thresholds for notifications etc. Further, many key aspects of actions and steps taken by foreign competition authorities can be adopted with certain changes to apply them in the Indian markets. More challenges and changes are clear to be witnessed when the suggested changes are put into practice. The transition of approach towards a dynamic, digitalised economy is a gradual process and shall keep requiring change with changes in economy of a dynamic nature.

SINGLE ECONOMIC ENTITY DOCTRINE IN INDIA

CHIRAYU JAIN[1]

Does the Competition Act 2002 contemplate exclusion of Single Economic Entity Doctrine?

INTRODUCTION

On 09.12.2016, the Competition Appellate Tribunal ["**CAT**"] gave the ruling in *Public Insurers* case.[2] The four insurance companies (National Insurance, New India Assurance, Oriental Insurance and United India Insurance) were alleged to have cartelized by rigging the bids that were submitted in response to the tenders floated by the Government of Kerala for selecting the insurance service provider for the RashtriyaSwasthyaBimaYojana ["**RSBY**"]. Before the Competition Commission of India ["**CCI**"], the insurance companies tried to plead that since they were constituted under General Insurance Companies Act, 2002, placing them under the control and direction of Department of Financial Services ["**DFS**"], all the four companies' along with the DFS formed a Single Economic Entity, and therefore could not have cartelised. The submission did not sail through. CCI found the four insurance companies as having cartelised and rigged the bidding process, therefore imposed a penalty of Rs. 671 crores. The insurance companies preferred an appeal before the CAT. Before the CAT, they changed their submissions. By arguing that since unlike the foreign jurisdictions, Competition Act 2002 provides for definition of 'enterprise', and if it could be proven that the four companies along with DFS constitute one enterprise as per the requirements of definition, the doctrine of Single Economic Entity ["**SEE**"] ought not to apply since an enterprise cannot cartelise with itself. The advocates for appellants, Krishnan Venugopal and Ramji Srinivasan, submitted that the Indian law by providing for definition of 'enterprise' conceptualises a broader understanding than the SEE doctrine as applied in American and European jurisdictions. Thus, if the requirements of definition of 'enterprise' are fulfilled, the control and direction test ought not to be applied to ascertain whether the entities form one SEE. Even though this was the core submission of the insurance companies which the counsels argued for over three days, the CAT in its final order dealt only summarily with the issue, dismissing the submissions made. Thus, this paper aims to analyse the veracity of the submission that the

[1]The author expresses gratitude to Krishnan Venugopal, Senior Advocate for giving an opportunity to intern at his chambers.

[2]National Insurance Companies Ltd. and Ors. v. Competition Commission of India (2017) Comp LR 1 [hereinafter "**Public Insurers Case**"].

insertion of the definition of enterprise does away with the requirements needed to prove the existence of a single economic entity.

The paper is divided into four parts. The first part examines the definition of 'enterprise'. The counsels for appellants had extensively relied upon the drafting history of both the Competition Act and its predecessor- the Monopolies and Restrictive Trade Practices Act, 1969 ["**MRTP Act**"]. In this part I shall also be looking at the judicial treatment of 'enterprise' and 'undertaking' under the MRTP Act. In the second part I shall be focusing upon the secondary issue which arose in this particular *public insurers case*-whether a government department could have subsidiaries? This question becomes important to examine since it hinges upon how the definition of enterprise is supposed to be interpreted. The very idea of a single economic entity prizes the substantive unity of the enterprise over its legal corporate form. It remains to be examined, how much should the substantive unity be valued under competition law when it is in direct confrontation with basic tenets of company law. Here it is important to examine how the competition policy intended the government enterprises to be treated and therefore, whether the separate legal personality doctrine could be ignored by competition authorities? In the third part, the focus is upon the development and adoption of single economic entity doctrine in the European Union and the United States. By examining the decided case laws, different understandings and application of the doctrine is sought. In the United States, the *copperweld case* is perceived as the watershed moment which marked the death of intra-enterprise conspiracy doctrine. In this part, the arguments put forward by scholars like Phillip Areeda for applying SEE doctrine is presented. In the final part, building on the works of Phillip Areeda and other scholars, their perception and idea of single economic entity is discussed. In light of these differing ideas of SEE doctrine, the veracity of the submission made in the *public insurers case* is, thus, appraised.

I. DEFINITION OF 'ENTERPRISE'

S. 2(h) provides for the definition of 'enterprise'. It reads as follows:

> 'S.2(h) "enterprise" **means a person or a department of the Government**, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, **either directly or through one or more of its units or divisions or subsidiaries**, whether such unit or division or subsidiary is located at the same place where the enterprise is

located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.-For the purposes of this clause, — (a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c)"unit" or "division", in relation to an enterprise, includes

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;' [Emphasis supplied][3]

The Indian law is unique as it provides for a definition of what an enterprise is. The highlighted part of the definition clause entails that the enterprise is one which acts either directly or indirectly through its constituent-units, divisions or subsidiaries. It goes beyond the company law concept of a company having 'separate legal personality' and recognises that different juristic persons may, in certain cases, be acting and behaving as one. This circumscribes the concept of SEE doctrine, which excludes the application of anti-collusion laws upon firms which form a single undertaking. The antitrust measures like anticompetitive agreements ought to be scrutinised only in the cases where they have been entered between independent undertakings. SEE doctrine however requires that the 'decisive control' of the parent company be proved over the subsidiaries. Whereas certain courts equate "decisive control" with "control of share capital", others require actual exercise of influence in either key decisions or day-to-day operations to be proved.

In the *public insurers* case, the issue raised was whether the inclusion of definition of enterprise in the Act excludes the application of SEE doctrine? That is, if the requirements of the definition are proven in a particular case, the test for direction and control need not be applied. SEE doctrine has been for long been applied by Indian authorities. The contention that section 2(h) (definition of an enterprise) ought to exclude the doctrine's application was raised for the first time in this case. The contention that section 2(h) (definition of an enterprise) ought to exclude the doctrine's application was raised for the first time in this case.

[3] Competition Act, §. 2(h) (2002).

The original enacted text of the MRTP Act provided for the definition of 'undertaking' as: **S. 2(v) 'Undertaking' means an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind**.[4] Soon after the enactment of the MRTP Act, in 1973 a suit reached Supreme Court, where a public limited company (appellant) had been barred from holding 100% share capital of a privately-owned company.[5] The privately-owned company was actually being floated by the appellant itself, as its own subsidiary, so that it could transfer one of its plants to the proposed private company and raise capital. The MRTP Act at the relevant time provided that the permission of central government was needed for merger or amalgamation of one undertaking with another. The issue that arose in this case was whether the company which was yet to be incorporated, could be said to be an 'undertaking' as for the purposes of MRTP Act? The Supreme Court citing an earlier reported judgment, held that as per S. 2(v), an undertaking could only be one which is actually engaged in production, supply, distribution or control of goods, at the material date and not a firm which intends to be engaged in such activity in future.[6] Importantly, the Supreme Court also noted, that through the 100% transfer of shares, the appellant was only acquiring the control and right of management of the proposed company and that it would not amount to purchase of an undertaking. Referring to the established company law principles that the company has a separate legal personality and it is the company not its shareholders, who could actually own the company; the court held that transfer of 100% shares to the appellant company only made the appellant a shareholder, not the owner of the undertaking.

The judgment in *Carew and Co.* v. *Union of India,* necessitated a review of the definition of undertaking.[7] In 1984, the definition was amended and adopted as follows:

In 1984, the definition of undertaking was amended as follows: S.2(v) "undertaking"	**Competition Act 2002:** S.2(h) "enterprise" means a person or a department of the

[4]Monopolies and Restrictive Trade Practices Act, 1969 was enacted at a time when the idea of state-control of the economy was celebrated in India. It served as a precursor legislation to Competition Act, 2002. While it was in force, MRTP Act underwent several major amendments to keep the law abreast of politico-economic developments. The aims and objectives of this Act were:

1. To ensure that the operation of the economic system does not result in the concentration of economic power in hands of few rich.
2. To provide for the control of monopolies, and
3. To prohibit monopolistic and restrictive trade practices.

[5]Carew and Co. v. Union of India AIR 1975 SC 2260.

[6] Union of India v. Tata Engineering and Locomotive Co. Ltd. AIR 1972 Bom 301.

[7]Report of High-Powered Expert Committee on Companies and MRTP Acts at ¶19.21 (Ministry of Law, Justice & Company affairs, 1978), http://reports.mca.gov.in/Reports/30-Rajindar%20Sacher%20committee%20report%20of%20the%20High-powered%20expert%20committee%20on%20Companies%20&%20MRTP%20Acts,%201978.pdf (hereinafter "**Sachar Committee Report**").

means an enterprise which is, or has been, **or is proposed to be,**[8] engaged in the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, **either directly or through one or more of its units or divisions**, whether such unit or division is located at the same place where the undertaking is located or at a different place or at different places. Explanation I : In this clause, – (a) "article" includes a new article and "service" includes a new service; (b) "unit" of "division", in relation to an undertaking includes, – (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the provision of any service. Explanation II : For the purposes of this clause, a body corporate, which is, or has been, engaged only in the business of acquiring holding, underwriting or dealing with shares, debentures or other securities of any other body corporate shall be deemed to be an undertaking	Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, **either directly or through one or more of its units or divisions or subsidiaries**, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. Explanation.-For the purposes of this clause,— (a) "activity" includes profession or occupation; (b) "article" includes a new article and "service" includes a new service; (c)"unit" or "division", in relation to an enterprise, includes (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the provision of any service;

[8] The inclusion of this phrase was a direct consequence of judgment in *Carew and Co.* v. *Union of India* AIR 1975 SC 2260 and recommendations made by RajinderSachar Committee.

Explanation III : For the removal of doubts, it is hereby declared that an investment company shall be deemed, for the purposes of this Act, to be an undertaking;	

The absence of the phrase "**or is proposed to be engaged in any activity**" in the latter is worthy to take note of. While this phrase was part of Competition Bill 2001, it eventually got deleted because its presence was found to be confusing.[9] It could not be assumed that the drafters were unaware about the reason for inclusion of this term. Nor could it be assumed that the legislative intent is now to be understood as to exclude the firms which would go into production in future. The ratio in *Carew and Co.* v. *Union of India*, could not be understood to have been discarded. Plausibly, what could be inferred is, that the drafters and the Parliament by not focusing upon the text of the definition, intended to prize the substance over the form, ie, what the definition of enterprise implies is to be valued over what it literally says.[10]

II. GOVERNMENT ENTERPRISES UNDER COMPETITION LAW

A secondary issue which arose in this case was whether a government department could have a subsidiary? The Competition Act refers to the Companies Act, 1956 to define the term 'subsidiary'.[11] This question was posed by the bench to the counsels of insurance companies, as it is understood that only a body corporate could have a subsidiary in form of a company. The counsels were trying to submit how the government department 'Department for Financial Services' together with the four insurance companies (as its subsidiaries) formed one enterprise. A

[9] "9.1.1 A suggestion has been received that the words "is proposed to be, engaged in any activity" in the definition of 'enterprise' in sub clause (g) of the clause appears to be confusing and thus may be deleted. The Department has agreed to delete those words appearing in second line of the sub-clause."
Department-Related Parliamentary Standing Committee on Home Affairs, Ninety Third Report on the Competition Bill, 2001 (2002) at ¶23, http://www.prsindia.org/ uploads/media/1167471748/bill73_2007050873_Standing_Committee_Report_on_ Competition_Bill__2001.pdf.
[10]It seems however, that the Indian competition law authorities in recent years have not paid attention to this deletion "*or is proposed to be engaged in any activity"* from the definition of enterprise nor kept the ratio of *Carew India case* in mind. This phrase entails that not just the present impact upon the competition ought to be under the supervision of competition law authorities, but also potential harm/impact upon the competition ought to be supervised. For instance in the *Third Party Administrators case,* whereas the CCI was concerned with and dealt with impact upon potential entrants to the TPA market, it also observed "*selection of partner for a yet to be formed JV TPA cannot be termed as anti-competitive at this nascent stage, which does not in any manner indicate that the mere formation of the same would automatically trigger the contravention of the provisions of the Act.*"; which indicates the oversight by CCI to look into the potential impact which the said yet-to-be-operationalised TPA could have upon the market. It is my submission therefore, that this oversight is in contravention of *Carew India case's* ratio which requires the competition law authorities to look into the potential impact of a firm which is yet to go into production upon the competition in the market.
See Association of Third Party Administrators v. General Insurers' (Public Sector) Association of India and Ors. Case No. 107/2013 (CCI) [Para 64].
[11] Competition Act, §. 2(z) (2002).

foray into the jurisprudence of company law thus needs to be made, to understand the concept of 'subsidiary'. At the same time, drafting notes of the Competition Act need to be referred to understand how a government department was envisaged to be treated vis-à-vis other juristic persons, particularly for purposes of S. 2(h).

The nature of reference made by Competition Act to the Companies Act is also unclear. S. 2(z) provides as follows: **S. 2(z) words and expressions used but not defined in this Act and defined in the Companies Act, 1956 (1 of 1956) shall have the same meanings respectively assigned to them in that Act.** Overtime, Companies Act, 1956 has been replaced by the Companies Act, 2013; however the Competition Act has not been updated accordingly.

The question that was posed by the bench to the counsels of public insurance companies was whether the government department could have a subsidiary of its own? This was left unanswered. The Competition Act makes a reference to Companies Act 1956 for the terms which are undefined. However, first, it needs to be clarified whether the Competition Act intends to treat public-sector enterprises differently from private-sector?

A. COMPETITION LAW POLICY BEHIND TREATMENT OF PUBLIC SECTOR

The SVS Raghavan Committee Report (2000) spelled the intended purpose behind the Competition Bill. The Committee recorded that in recent years a lot of sectors earlier reserved for public-sector have now been opened to private competition. In light of such developments, it did not deem fit to provide preferential treatment to public sector enterprises. It records that "*the regulator should not make any distinction between public and private companies.*"[12]This distinctive treatment was however done away with back in 1991 itself, through a government notification. In a case pertaining to violation of provisions of MRTP Act, the Madras High Court noted "*Be that as it may, by a Notification G.S.R. No. 605(E) dated 27.09.1991, (published in the Gazette of India Extraordinary, Part II Section 3, Sub-section (1)), the public sector undertakings whether owned by the Government or by Government Companies (except those excluded), statutory corporations, undertakings under the management of authorised controller appointed under any law, Co-operative Societies and financial institutions, all have been brought within the purview of the MRTP Act. As such, there is now no distinction in the treatment between public sector undertakings (except the excluded ones and the private sector companies and the public sector undertakings are subject to the same discipline as the private sector companies, in the matter of monopolistic, restrictive and unfair*

[12]Report of High Level Committee on Competition Policy & Law – Raghavan Committee (Government of India, 2000) at ¶2.8.6, https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf [hereinafter "**Raghavan Committee"**].

trade practices."[13] The Indian government, in its communication to WTO during early years of formulation of competition law policy did express its intent of bringing public-sector under the purview of competition law and to treat public-sector enterprises no differently from private-sector. In the same letter of communication, the Indian government stated that all trade practices of undertakings owned by government (other than those in strategic sectors like defence) were under the purview of MRTP Act.[14] It did not particularly clarify whether the government departments were also being regulated at par with other forms of entities under the Act.

Thus, should a government department be treated any differently from Government Company? The absurdity of such reliance upon juristic form of the entity in question was brought out by MRTP Commission's illustration-"*We may take up an illustration to adjudicate on this issue. In the territory of Delhi, Mahanagar Telephone Nigam Limited, a Government company is rendering the service of providing telephone facilities to citizens within. The Department of Telecommunications renders similar service for the citizens outside Delhi territory. Both the Mahanagar Telephone Nigam Limited and the Department of Telecommunications render the same service. Mahanagar Telephone Nigam Limited is indictable for deficiencies of service or for any negligence in carrying out its responsibilities, but the Department of Telecommunications is not indictable. This is the invidious discrimination that Dr. Aggarwal, counsel for the complainant, emphasised and argued that there is no justification in keeping one entity within the ambit of the Act and excluding another, when both are rendering the same service.*"[15]

However, this decision does not establishes a definite position of law. In this case, it was alleged that the Uttar Pradesh government's Department of Irrigation had indulged in restrictive trade practice and the same should be brought under the investigation of MRTP Commission. The MRTP Commission upon clearing its jurisdiction over the Department of Irrigation by treating it on par with government companies, had found the department guilty of restrictive trade practices. The case went on appeal before Supreme Court, and the judgment of MRTP Commission was set aside because no restrictive trade practice was found to have been committed.[16] While setting aside the judgment, the language adopted by the apex court was-"*Even if one were to assume that the State was an undertaking as defined in Section 2(V) and that the activity of arranging for the supply of water is a "service" as contemplated under the Act in the absence of this vital element of competition, the Commission could not have held that there was any restrictive trade practice within the meaning of Section 10 of the Act…*".[17] It did

[13] Tamil Nadu Co-op Mil Producers' Federation v. Triad Trading Services (2010) 4 LW 289.
[14] World Trade Organisation, "*Working Group Interaction between Trade and Competition Policy*" – Communication from India, (WT/WGTCP/W/110, Nov. 16, 1998).
[15] Gir Prasad v. Government of Uttar Pradesh [1996] 87 CompCas 623 [Para 59].
[16] State of Uttar Pradesh v. Gir Prasad AIR 2004 SC 1756.
[17] State of Uttar Pradesh v. Gir Prasad AIR 2004 SC 1756 [¶8].

not deal substantively with the issue of jurisdiction. Thus, by setting aside the MRTP Commission's judgment in the case, the apex court discarded its binding value, however, it does not seem to have discarded the rationale behind treating the government departments as 'undertaking' on par with government and private-sector companies.

B. COULD A GOVERNMENT DEPARTMENT HAVE ITS OWN SUBSIDIARIES?

While evident, the position is not clearly established, that both the judiciary and executive went beyond the form (definition of undertaking/enterprise), and intended to treat public-sector enterprises, including government departments on par with private-sector, for the purposes of regulation under competition law. The question peculiar to the facts of the *public insurers case* that remains to be answered, is whether a government department could have its own subsidiaries? It could also be phrased as-why is it necessary that the parent body of a subsidiary be a body incorporate or a company? G.S. Singhvi in his judgment had recorded:

> "Subsidiary status is available only to companies or a body corporate. A department of the Government is neither a company nor a body corporate, and by its very nature cannot have subsidiaries. Any extended or altered meaning of the term subsidiary will mean a departure from the clear language of law under Section 2(h) read with Section 2(z) of the Act. Purposive rule and Mischief rule of interpretation cited by the counsel are not applicable in this case."[18]

A government department does not enjoy a separate legal personality. It is a non-corporate instrumentality of the government. The simplest argument against the appellants was if the idea of subsidiaries is to be expanded such that any person holding its shares could be deemed as the parent body, that would rupture the very tenets of separate legal personality as it would mean all the shareholders of all companies to be recognised as the parent body/holding company and be made liable for the acts of the company that is recognised as a subsidiary. The company law regarding subsidiaries is premised on the doctrine that the parent company is deemed not to be doing business through its subsidiaries, in the eyes of law.[19] Yet there are sufficient number of cases across jurisdictions challenging the immunity provided to the holding company for the debts, contracts or torts committed by the subsidiary etc.[20] In all such cases where the court has preferred to not be blinded by mere corporate form, are the cases where it has been demonstrated that the

[18] Public Insurers case, *supra* note 1, ¶13.9
[19] H.W. Ballantine, *Parent and Subsidiary Corporations,* 14(1) CALIFORNIA L. R. 12, 14 (1925). *Also see Gramophone and Typewriter Ltd.* v. *Stanley* (1908) 1 All ER 833.
[20] *Id* at 15.

subsidiary is one that is a mere adjunct, agency or instrumentality of the owning company. However, in ordinary cases, the shareholder (or the holding company) cannot be made liable. Where it is not shown that the subsidiary was acting as an agent, the relationship remains that of a shareholder to corporation rather than constituting the subsidiary as an agent.[21]

The idea of piercing the corporate veil exists in all the jurisdictions. The directing minds of the company are made liable for any fraud or any other illegal acts undertaken by the company upon their directions. But exploring the idea of piercing the corporate veil, it only provides an indication regarding when the directing minds of the company or the holding company of a subsidiary are to be made liable.[22] While a parity is drawn between the two situations, never has any court conflated the two by calling the company a subsidiary of its shareholder(s).

Yet, this deemed independence of business operations between holding and subsidiary companies and between a shareholder and a company, is often illusory, atleast as noted from competition law point of view.[23] It is arguable that a subsidiary has no real freedom of choice. One, a parent company would instruct the subsidiary to act independently only when it is believed that such directive would promote efficiency. But this grant of independence of operation implies that the subsidiary must coordinate with the parent or other sister subsidiaries when it is beneficial. Second, this grant of freedom could be qualified or repealed by either practice or tacit understanding. Finally, it would be both economically inefficient and illogical to presume that a parent body would ever want to grant independence to such a degree such as to make the enterprise liable for anti-competitive practices.[24] In the following sections the idea of economic unity of an enterprise is explored in light of developments in the EU and US jurisdictions.

III. SINGLE ECONOMIC ENTITY DOCTRINE

C. SEE DOCTRINE IN EUROPE

The EU courts have maintained the position that the concept of 'undertaking' must be understood as an 'economic entity'.[25] This doctrine evolved in 1970-71, as a consequence of corporations being arranged into separate subsidiaries for each member-state of European Economic Community

[21] *Id* at 19.
[22] United Statesv. Bestfoods 524 U.S. 51 (1998); RimaliBatra, *The Case of Economic Oneness of Group Companies,* JSA LAW (Sep. 2015) http://www.jsalaw.com/wp-content/uploads/2015/09/The-Case-of-Economic-Oneness-of-Group-Companies.pdf (Last visited 13 June 2017).
[23] Owen T. Prell, *Copperweld Corp.* v. *Independence Tube Corp.: An End to the Intraenterprise Conspiracy Doctrine*, 71(6) CORNELL L. R. 1151, 1171 (Sep.1986).
[24] *Id* at pg. 1172.
[25] Case C-41/90, Höfner and Elsner v. Macrotron, 1991 E.C.R. I-1979.

(presently, EU). In the earliest case where SEE doctrine was argued,[26] the applicant, tried to made out that how collusion as per Art. 85(1) (presently, Art. 101(1)) could not be made out since despite being separate legal personalities, all the subsidiaries along with parent company, hitherto fined, actually form one economic entity. Because the matter involved a parent company based in UK, ie, beyond EEC's jurisdiction at the relevant time, it involved exercising jurisdiction extra-territorially as well. The Court referred to the opinion of Prof. Jennings (International Law professor at Cambridge, *then*) as provided by the applicant. Prof. Jennings is quoted as having stated his opinion, that unless it can be shown that the subsidiary is an automation operated by the parent, the distinct legal personality of the subsidiary ought to be respected.[27]

In *Beguelin Import Co.* v. *S.A.G.L. Import Export*[28], the parent company was based in one country (Belgium) and the subsidiary in another (France). The issue came up, whether the exclusive sales agreement between the two infringed upon Art. 85(1). The European Court, upon reference from the commission, noted that to constitute offence under Art. 85(1) there has to be an agreement amongst the undertakings. Here it was actually one entity as per their conduct in the market, disregarding their separate legal personalities. Thus as far as the agreement between the two companies was concerned, the Court held that Art. 85(1) could not have been violated, as they constituted single undertaking. The relationship between parent and subsidiary, it ruled, need not be accounted for in determining validity of exclusive dealing agreement entered between a subsidiary and a third party.

The concept of SEE doctrine stems from fundamental proposition of competition-competition requires two or more entities acting independently in the market.[29]There are number of circumstances where separate legal entities are unable to autonomously exert an economic impact-their ownership relationship often explains this inability to compete. Competition is impossible where one entity could influence/determine the policy that the other intends to adopt in the market.[30]*P Viho BV* v. *Commission* is one most-cited case in this regard. ECJ in that case had based its decision on the rationale that there could be no competition between the parent company and its subsidiaries. Since there is no real autonomy in determining their own course of action,

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[26]Imperial Chemical Industries Ltd. v. Commission, Case 48/69, ECLI:EU:C:1972:70.
[27] *Id* at 626.
[28]Beguelin Import Co. v. S.A.G.L. Import-Export 1971 C.J. Comm. E. Rec. 949.
[29] The European Court of Justice asserted this as follows in T-Mobile v. Commission Case C-8/08 [2009] ECR I-4529, para 32: "each economic operator must determine independently the policy which it intends to adopt on the common market including the choice of persons and undertakings to which he makes offers or sells".
[30]OkeogheneOdudu and David Bailey, *The Single Economic Entity Doctrine in EU Competition Law,* 51 C. M. L. Rev.1721, 1727 (2014) [*hereinafter referred as* "**Odudu and Bailey**"]; GesellschaftAEG-TelefunkenAGv.CommissionCase 107/82 [1983] E.C.R. 3151, ¶49.

Article 101 could not be applicable as there is no competition conceivable amongst the group companies that needs to be protected.[31]

Unreported in the final judgment of COMPAT, in *public insurers case*, one of the questions put up to the counsels by the bench was whether SEE doctrine also protects anticompetitive agreements entered into by two subsidiaries of same company, but not by the parent company itself? *Hydrotherm* v. *Compact* is one such case in this regard.[32] In this case the legality of distribution agreement entered into between Hydrotherm and three different persons was under question. The 'three persons' were one Mr. Andreoli and two corporate legal entities over whom he had full control. The Court held that there was no competition possible between Mr. Andreoli and the two corporate legal entities held and controlled by him. *Hydrotherm* case could have therefore come to aid of the counsels for *public insurers,* however it was not argued. This case illustrates that for SEE doctrine to apply, legal relationship or the need to have a holding company for subsidiaries is not needed- what is needed is to prove that the entities exist and act as one economic entity, and thereby competition within its constituents is not possible.[33]

D. INTRA-ENTERPRISE CONSPIRACY DOCTRINE AND *COPPERWELD*CASE IN US

S. 1 of US's Sherman Act prohibits 'every contract, combination…or conspiracy in restraint of trade.'[34] This has been understood by American courts as requiring a concerted action between two or more independent firms in the market. It exempted unilateral action, S. 1 was noted as not restricting the right of trader/manufacturer engaged in entirely private business, to exercise his/her own independent discretion as to with which parties he/she shall deal with.[35] The *Copperweld*case, highlighted the difficulty in applying S. 1 of the Sherman Act upon a corporate defendant. In this case it was held that the separate divisions of a single corporation ought to be treated as a single entity in antitrust law, making them incapable of conspiring amongst themselves.[36] This case had

[31] P Viho Europe BV v. Commission Case, C-73/95 [1996] ECR 1-5457.
[32]HydrothermGerätebauv. Compact, Case 170/83 [1984] ECR 2999.
[33] Even though *Hydrotherm*case is widely cited as a case concerning anticompetitive agreement entered between two subsidiaries of same company, this case however, involved the agreement in question having been entered into between the owner and the two corporate entities wholly held by him. There has not been a case thusfar where the parent entity was not party to the anticompetitive agreement. *P Viho Europe BV* case comes close, however, in that case too the agreement was entered in between the subsidiaries and the parent company.
See Odudu and Bailey, *supra* note 29, pp. 1734.
[34] 15 U.S.C., § 1 (2012) [Sherman Act].
[35]United States v. Colgate & Co. 250 U.S. 300, 307 (1919).
[36]Copperweld Corp. v. Independent Tube Corp. 467 U.S. 752, 768–69 (1984) [hereinafter "**Copperweld case**"].

changed the hitherto position that was "*[where defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from [antitrust liability].*"[37]

*Copperweld*case understood the central concern of S. 1 arose from the risk of anticompetitive agreements that deprived the market of independent centres of decision-making which a competitive market assumes and demands. In a holding-subsidiary relationship, the interests of the two companies are so closely aligned that assuming them to be separate decision-making centres is absurd.[38] This decision of US Supreme Court led to discarding of hitherto upheld Intra-Enterprise Conspiracy doctrine. In the previous cases, the American courts had followed the rationale in *Perma Life Mufflers* case, as quoted above. Months prior to the decision being delivered in *Copperweld,* Prof. Phillip Areeda had written an article arguing against the intraenterprise conspiracy doctrine. Areeda had rejected the policy justifications for intraenterprise conspiracy doctrine as vacuous, suggesting that there is no meaningful distinction between separately incorporated but wholly-owned subsidiaries and separate divisions of a single corporation.[39]

In *Copperweld*case, the US Supreme Court had restricted the scope of application to the holding to a parent company with separately incorporated but wholly-owned subsidiary. It left the question open, regarding the degree of ownership or of alignment of interest, to suffice the defence of unilateral action for a case involving a parent company and less than wholly-owned subsidiary.[40] Thus it left open a divide amongst the American lower courts, while some courts applied *Copperweld*case only to situations involving parent and wholly-owned subsidiaries, others applied factual tests to determine the degree of alignment of interests in cases involving less than wholly-owned subsidiaries.[41]

IV. APPLYING THE SEE DOCTRINE IN INDIA

As evidenced in *Public Insurers case,* the competition law authorities interpret the direction and control test required to establish that different corporate entities/persons constitute a Single Economic Entity, entails finding answer to one question-whether the parent body exercises such

[37]Perma Life Mufflers, Inc. v. International Parts Corp. 392 U.S. 134, 141–42 (1968)[hereinafter "**Perma Life case**"]. ; *see also* Natasha G. Menell, *The Copperweld Question: Drawing the Line between Corporate Family and Cartel,* 101 CORNELL L. REV. 467, 472 (2016) [hereinafter "**Menell**"].

[38]Copperweld case, supra note 35.

[39] Phillip Areeda, *Intraenterprise Conspiracy in Decline,* 97(2) HARV. L. REV. 451, 452-453 (1983) [hereinafter "**Areeda**"].

[40] *Id.*

[41]Menell, *supra* note 36 at 480-483.

control over the subsidiary/unit/division that it directs the latter on how to conduct itself in day to day operations in the market? Justice G.S. Singhvi in *Public Insurers case* discarded the application of SEE doctrine, because of one of the finding being-"*In the present case, the Appellants are Board managed companies, with autonomy in operational matters and cannot be aggregated with DFS, which is not engaged in any activities relating to good or services.*"[42] However, the direction and control test has not always been applied with such consistency. In another case where the complainant wanted the exclusive distribution agreement entered into between two wholly-owned subsidiary companies of Volkswagen AG as anti-competitive, COMPAT found it convenient to find the two companies belonging to the same Single Economic Entity simply by relying on their share-capital structure. It did not found necessary nor important to delve into the amount of control exercised by the parent company.[43] These two cases, decided within two years of each other-expose how confused the approach of Indian competition law authorities is regarding understanding of and applying the SEE doctrine.[44]

Given this inconsistency and confusion regarding the SEE doctrine, it remains to be established in which cases is the SEE doctrine to be applied, what is to be understood by direction and control test and the degree to which the parent body should be noted to be influencing the decisions of the subsidiary-so they could safely be covered under the SEE doctrine. Thus, in this concluding part, I intend to examine various approaches proposed for applying the SEE doctrine and to examine whether the interpretation suggested by Sr. Advs. Krishnan Venugopal and Ramji Srinivasan, has credibility in the competition law jurisprudence. I shall begin by discussing the approach proposed by Phillip Areeda and other scholars when prior to pronouncement of *Copperweld* judgment, Areeda had argued against the application of the Intra-enterprise Conspiracy Doctrine. Based upon their submissions, relying mainly on Areeda's, the question whether the enterprise definition replaces the requirements of SEE doctrine is examined. What should be the best possible application of single economic unity in Indian law is also answered.

E. AREEDA'S APPROACH TO SEE DOCTRINE

Areeda in his 1983 paper began by critiquing the holding in *Perma Life Holders case*,[45] arguing that it was merely a conclusion based on mistaken belief that separate legal personality in corporate law entails conspiratorial capacity in antitrust law. The corporate structure is designed primarily for tax

[42]Public Insurers case, *supra* note 1, ¶13.12.
[43] Exclusive Motors Pvt. Ltd.v. Automobili Lamborghini SPA(2014) 121 CLA 230 (CAT), ¶ 8-11, 14 [hereinafter "**Lamborghini case**"].
[44] The presiding judge too, in both the cases was same-Justice G.S. Singhvi.
[45] "where defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from antitrust liability", Perma Life case, *supra* note 36.

management or greater compliance with the regulatory laws, or for other factors such as allowing investments into particular aspects of the conglomerate's business. Since different parts of business may require different accounting practices, labour standards or profit-sharing plans-Areeda stated that it in advantageous/beneficial for competition of competition to allow for such corporate structures to be deemed as one competition unit since it facilitates entry and reduces costs.[46]

At the time when Areeda had authored his paper, not all the US Circuit courts were applying the intra-enterprise conspiracy doctrine with uniformity. 7th, 8th and 9th Circuit courts amongst all were tilting most favourably to give the defence of single economic unit to the allegedly colluding enterprises.[47] This defence was provided for the firms owned or directly managed by a single individual, *natural or legal.* As noted before, post-*Copperweld* the lower courts in US were divided regarding how far to extend the application of *Copperweld's* dictum beyond 100% ownership. The US Solicitor-General in its brief in *Copperweld*had suggested that levels of 50-100% stock ownership by the parent body should create a rebuttable presumption that the two corporations are insufficiently independent to conspire with each other.[48]However, other factors like commonality of managers and employees or where the common body exercises some quantum of day-to-day control over operations of nominally independent corporations-were all seen as evidence of existence of a single economic unit that could not conspire with itself. Areeda however argued, that all these indicative factors are flawed. Here, I shall focus only those factors and their criticism which are presently relied upon by the competition law authorities.

One such factor is when a single decision maker directs day-to-day operations of commonly owned corporations. Absence thereof in the *public insurers case*, was the reason for not identifying the appellants as a single economic entity. Areeda however argued that its not an essential element since joint decision making by managements of commonly-owned corporations could also provide the same unified direction to the enterprise.[49] Thus an overlapping management is not always needed to be present. On similar lines, Areeda discarded the reliance upon commonality of office space, employees and managers. Since a single corporation may have one office or several; the employees may perform multiple functions or may have more specialised duties. Such allocation of functions between branches and employees is insignificant for the firm's antitrust policy, and it does not seem to become when the structure happens to involve several related corporations. While a complete commonality of managers certainly provides probative

[46]Areeda, *supra* note 38 at 452.
[47] *Id* at 454.
[48] Stephen Calkins, *Copperweld in Courts: The Road to Caribe,* 63(1) ANTITRUST L. REV. 345, 351 (1995).
[49]Areeda, *supra* note 38 at 465.

value-it is not an essential attribute since two divisions/companies having entirely different set of managers could be directed in subject to common direction, as long as one person or group directs them both.[50]

Areeda criticised the search for exercising day-to-day control over market operations as an unnecessary bias towards centralised decision-making. A firm could be integrally operated even based on general and infrequent policy directives from the parent organisation.[51] He cites the analogy of a grocery store owner, who may not need to be directly involved other than in the recruitment and training process of his/her employees. It would be therefore a grievous mistake to judge the store owner's extent of control merely by his/her exercise of control over day-to-day operations. This criteria is however largely relied upon because the occasional exercise of control indicates that the enterprise is actually integrated enough to constitute a single economic entity, because the complete walling-off of commonly owned corporations is rare. Yet, Areeda discusses an illustration comparable to the *public insurers case*, where the parent body directs the subsidiaries to make their own decisions independently and also to compete with each other. Wouldn't such a direction itself by the parent body and its compliance by the subsidiaries be indicative of presence of direction and control?

In the *Public Insurers case*, both the appellants' and the CCI's counsels referred to General Insurance Business Nationalisation Act, 1972 [**"GIBNA"**] to impress the court regarding their interpretation of degree of control vested with the parent body, ie, Department of Financial Services. The appellants pointed towards S. 18(1) of GIBNA which provided the government through DFS could aid, advise and assist the public insurance companies and issue directions in relation to conduct of general insurance business. Rajshekhar Rao, counsel for CCI, instead pointed to the Preamble of GIBNA which stated the intent that the appellant companies were being created *"to promote competition between them so that effective services in the field of general insurance may be rendered by them in all parts of India"*. This intent behind GIBNA is reiterated in several sections of the legislations which were brought to the notice of the bench, and thus the bench decided accordingly that GIBNA did not foster creation of a single economic entity but of multiple independent enterprises.[52]

Thus Areeda would have instead argued that very fact that the appellant companies were formed by virtue of one legislation, it indicates that they share a common object to provide *"effective*

[50] *Id* at 465-466.
[51] *Id.*
[52] Public Insurers case, supra note 1, ¶13-13.6.

services in the field of general insurance". He would have argued that encouraging competition between the four subsidiaries was akin to promoting competition between different divisions of same corporation, and for the purposes of antitrust law-both scenarios ought to be treated on par with each other. The legal form of corporations/divisions has no impact upon the competition.[53] For Areeda, the presence of common direction within a fully-owned corporate family is adequate to demonstrate the existence of a single economic entity. The very evidence to show conspiratorial coordination amongst the corporations or the presence of simple power to coordinate were enough according to Areeda to conclude that there exists a single economic unit which ought not to be charged of intra-enterprise conspiracy.[54]

F. APPRISING THE *PUBLIC INSURERS* SUBMISSION

> **S.3(1)** No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.[55]

The appellants in the *public insurers case* were rather seeking a literal statutory interpretation; mischief interpretation only to the extent to recognise that the companies held by a government department ought to be regarded as subsidiaries of the latter. They tried to demonstrate both- that the DFS and the four public insurance companies form a single economic entity, but, if that is not the case, they still form one enterprise as per the definition in S. 2(h) and therefore could not have colluded with itself. For argument sake, if it is the literal rule of interpretation that ought to be applied to S. 3(1), the section also provides that no person ought to enter into any such anticompetitive agreement. By 'person', the Competition Act refers to both natural and juristic persons-thereby implying that no company could enter into any such agreement with another.[56] That would amount to the section sanctioning the application of intra-enterprise conspiracy

[53]Areeda also negates the countervailing argument that if the parent body wishes the subsidiaries to operate independently, then the objective is best achieved through scrutiny of antitrust authorities. One, such scrutiny by antitrust authorities would raise the cost for the enterprise for using the 'multicorporate profit-center management' structure which it would have otherwise found efficient, and it would be unfair for the enterprise when other corporations operating through unincorporated divisions could allocate internal management without fearing the antitrust authorities. Second, this would force centralised decision making. The antitrust consequences to walling-off a subsidiary from another subsidiary or the parent body, would threaten the enterprise to not take such actions which it would have otherwise taken, since in the enterprise's assessment that would have led to more efficient operation. *See* Areeda, *supra* note 38 at 468-469.

[54] *Id.* at 473.

[55]THE COMPETITION ACT, §3(1) (2002).

[56]*Id.* §2(1).

doctrine in Indian law. As tumultuous it may have been, such interpretation has never been sought in any of the cases before CCI or before COMPAT thus far.

Had Phillip Areeda been engaged as the counsel by the appellants, he would have argued that the very fact the Government directed the four public insurers to compete with each other, suffices the direction and control test. That the GIBNA Act was legislated by the Parliament, it clearly shows that the four public insurers-not only share a common parent but also a common object. This would have sufficed as reasons enough for Areeda to demonstrate that there exists a single economic unit and it ought to be treated as one. However, the question of interest is would Areeda have agreed that the definition of enterprise should replace the single economic entity requirements?

The intra-enterprise conspiracy doctrine was noted to have no effect on the enterprises' choice of corporate structures in US. Therefore, it was liable to unjustly treat similar businesses to divergent competition law treatment. If this doctrine was so widely applied that it would have driven the enterprises to protect themselves by integrating their personhood into one corporation, their operations, cost savings and other benefits accruing from separate incorporations would have been sacrificed- with no evident benefit to the competition in the market.[57] Is there any specific benefit accruing to competition by applying the direction and control test to an enterprise to ascertain if it's a single economic entity?

The requirements of the enterprise definition are fulfilled the moment it is shown that the parent body owns the units, divisions or subsidiaries and is directly or indirectly operating in the market. This would not entail that a business conglomerate engaged in several businesses through divisions or subsidiaries would be treated as entirely one enterprise for an antitrust liability. Antitrust liability could only arise in a particular market, therefore pertain to specific activities being engaged in. Thus the enterprise definition itself would delineate the enterprise from within the corporation by including only the divisions or subsidiaries that are directly or indirectly engaged in that market. Areeda who disagreed with the commonly applied tests for single economic entity and sought to look at only the commonality of object shared by the related corporations, would have presumably, found it agreeable that the definition of enterprise suffices the criteria needed to prove economic oneness. Others, including the Indian competition authorities, who seek a more direct evidence of direction and control would find it disconcerting to do away with the test.

[57] Areeda, *supra* note 38 at 473.

The appellants submission prizes form over substance, though, for very different ends than the intra-enterprise conspiracy doctrine. In doing so, it makes a crucial oversight-that only the entities in hierarchical form could then be deemed as an enterprise. Two sister companies held by same parent, could not therefore be deemed to form an enterprise, by themselves. SEE doctrine provides that flexibility by prizing substance over form-as evidenced in the *Automobili Lamborghini case*.[58] Thus, whereas Areeda provides a convincing case to focus upon the commonality of object rather than factual claims regarding degree of control, commonality of managers/employees etc.; the case to replace the SEE doctrine's requirements, altogether, with those of enterprise defintion's, is not as convincing and would be very evidently be problematic and tumultuous.

6. CONCLUSION

As examined, the appellants in *public insurers case* made a very compelling submission by relying upon the literal rule of interpretation, however, Justice G.S. Singhvi did not do justice to the averments made in his judgment. Perhaps, considering both the primary issue with the less compelling submission for the secondary issue (whether government department could have subsidiaries?) together, led him to not devote as much consideration to the submission to replace the requirements of SEE doctrine.

It is true, that the importance given to factual considerations to prove SEE doctrine is not required. Focus upon the commonality of object would rather suffice and be in tune with the very idea of recognising that there could be substantive economic unity despite multiple incorporations. Thus, had the COMPAT considered Areeda's submissions, it would have deemed the four public insurers together with the government as constituting a single economic entity, incapable of conspiring among themselves.

The secondary question-whether the Act needs to be amended suitably to recognise that government department could have subsidiaries?, need not arise in light of *public insurers case*. SEE doctrine's requirements could not be replaced altogether by the requirements of definition of enterprise, as it would tantamount to prizing the form over substance. The factual matrix of *public insurers case* provides quite a convincing submission that there was a single economic entity, both due to commonality of object as well as the factual evidence presented by the appellants. Yet, the Hon'ble tribunal found the case of CCI to be more compelling. While the secondary question need

[58]Lamborghini case, *supra* note 42.

not be revisited in light of this case, however, the other case- *Gir Prasad* v. *State of Uttar Pradesh*,[59] whose position remains unsettled needs to be considered; therefore in light of that case, that the non-inclusion of such amendment might lead to differential treatment of private and public enterprises, the need for the amendment ought to be considered by the Parliament.

[59]Gir Prasad v. Government of Uttar Pradesh [1996] 87 Comp Cas 623; State of Uttar Pradesh v. Gir Prasad AIR 2004 SC 1756.