THE CONUNDRUM OF ONLINE RETAIL IN COMPETITION LAW

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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. <u>Delineation of Relevant Market</u>

> *"[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]

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]

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

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]

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.

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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*].

[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].

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 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

[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))
[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.

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.

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

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

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, 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

[18]*DotECon Report, supra note 6*..
[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.

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 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

[21] Alison Jones and Brenda Sufrin, EU Competition Law: Texts Cases and Materials 392 (4th ed. 2008).

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 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

[22] *Id.*
[23] SM Dugar, Guide to Competition Law 493 (2016).
[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).

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.

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.

[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

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.

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*

[28] Flipkart Case, *supra* note 15.

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 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

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

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 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.

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[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*]
[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

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.

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.

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[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
[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).

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 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.

[44] Julia Wahl, *The Internet*, *supra* note 32.

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.

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

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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.

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.