

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

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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

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

more and, 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-proprietary 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
- In the year 2004 – USD 428.1 billion (projected)

⁴https://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%2Fcommerce17.ppt&usg=AFQjCNE07wYLAzHKnrID-lrrcmwKMsJIVA&sig2=5JvH1JFM3t7o7SxZ2CvjAA&bvm=bv.102537793,d.c2E

⁵Directorate 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>

⁷https://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%2Fcommerce17.ppt&usg=AFQjCNE07wYLAzHKnrID-lrrcmwKMsJIVA&sig2=5JvH1JFM3t7o7SxZ2CvjAA&bvm=bv.102537793,d.c2E

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

⁸ <http://www.nextbigwhat.com/india-e-commerce-marketplace-seller-issues-297/>

⁹ <http://cci.gov.in/images/media/ResearchReports/E-Commerce%20and%20Competition%20Law.pdf>

transaction 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

¹⁰https://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~jfp%2Ffe-

¹¹Tutorials 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>

¹⁵ChaitaliChakravarty&RasulBalay, *Marketplace Model adopted by e-commerce companies just smart accounting: Kishore Biyani, Future Group*, (May 27, 2015), http://articles.economicstimes.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 amounts 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 ceiling etc – 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/Snapdeal¹⁷ 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.

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>

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 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 conjectures¹⁸, 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

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>

incumbent firms to establish a strong consumer base for their products and services and they cannot be blamed for that.

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 MohitManglani²⁴ 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

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+C>
oncern+For+The+Future

²⁴ <http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf>

be said to be dominant in the relevant product market and, as such, their conduct cannot be said to affect the competition therein.

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 be 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

²⁵ <http://www.cci.gov.in/May2011/OrderOfCommission/261/612014.pdf>

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.

E-COMMERCE AND EUROPEAN COMPETITION LAW²⁶

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.

²⁶Dennis 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&clpg=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

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 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.

²⁷Divye 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+C oncern+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 OECD²⁹

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* authorities Benchmark 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

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* (June 30, 2015), <http://www.justice.gov/atr/case-document/order-and-opinion>

various 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 cooperation 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 Margrethe Vestager, 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

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 that within 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

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

discrimination, although, has a consumer benefit, it can be used to lower costs of predation strategy.

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 be 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.

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

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

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 partners³⁵ 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

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

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 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

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>