ABSTRACT

Last decade has witnessed the upsurge in the e-commerce activities across the globe. India is no exception, and hence the result is mushrooming internet platforms, sporadic growth of start-ups and changing consumer preferences. Although the e-commerce industry in India is in its nascent stage, but is already under the Competition Commission’s scanner. It is evident that e-commerce will provoke different set of anti-competitive concerns which may be unknown or unexpected. A number of issues emerge like: Will the existing gamut of rules and regulations would be applicable under these new economic circumstances as well? The need is toanalyse the implications of e-commerce on the touchstone of the relevant market concept and probe further into an enquiry; Whether e-commerce forms a new kind of relevant market or takes a new form of a retail channel (e-tailing) as distinct from the traditional channel or it simply lies in the four corners of the existing market. The research seeks to examine the current stand taken by the Commission on above mentioned contentious issues pertaining to the Indian e-commerce industry. While strongly mooting for cautious delineation of relevant market concept and probe further into an enquiry; Whether e-commerce forms a new kind of relevant market or takes a new form of a retail channel (e-tailing) as distinct from the traditional channel or it simply lies in the four corners of the existing market. The research seeks to examine the current stand taken by the Commission on above mentioned contentious issues pertaining to the Indian e-commerce industry. While strongly mooting for cautious delineation of relevant market concept and probe further into an enquiry; Whether e-commerce forms a new kind of relevant market or takes a new form of a retail channel (e-tailing) as distinct from the traditional channel or it simply lies in the four corners of the existing market. The research seeks to examine the current stand taken by the Commission on above mentioned contentious issues pertaining to the Indian e-commerce industry.

Key words: E-commerce; Competition Law; Competition Commission of India

INTRODUCTION

The electronic commerce or e-commerce industry has indisputably witnessed an unprecedented growth in the last few years. The electronic commerce has caused a paradigm shift in the ways business was done and there remains no sector or industry which is untouched by the e-commerce revolution.

E-commerce brings together vast numbers of buyers and sellers through the medium of World Wide Web and thereby expands the options available to the buyers, provides the seller’s access to new customers, hence causes reduction in the transaction costs in the market for all the players.

The World Wide Web facilitates international e-commerce transactions which lacks territorial boundaries. This leads to global legal complexities, but due to the absence of consensus on international antitrust regimes, these problems thus have to be addressed through the national antitrust regimes (See for instance the Reports of OECD on E-commerce).

The underlying theory behind an antitrust law is the positive effect of competition in an economy’s market, acting as a safeguard against misuse of economic power of which consumer welfare is a facet. Today modern competition regime has become a sine qua non for economic democracy in a free market structure. India since the adoption of modern competition law in the form of Indian Competition Act, 2002 has aptly established itself as an emerging competition regime.
RESEARCH QUESTIONS AND OBJECTIVES

Although the e-commerce industry in India is in its nascent stage, but is already under the Competition Commission’s scanner. It is evident that e-commerce will provoke different set of anti-competitive concerns which may be unknown or unexpected. A number of issues emerge like; Will the existing gamut of rules and regulations would be applicable under these new economic circumstances as well? The need is to analyse the implications of e-commerce on the touchstone of the relevant market concept and probe further into an enquiry; Whether e-commerce forms a new kind of relevant market or takes a new form of a retail channel (e-tailing) as distinct from the traditional channel or it simply lies in the four corners of the existing market. The researchers seek to examine the current stand taken by the Commission on above mentioned contentious issues pertaining to the Indian e-commerce industry. While strongly mooting for cautious delineation of relevant market in case of e-commerce industry, the researcher foresees the need for Commissioners’ major role in scrutinizing the e-commerce sector (like the European Commission recently launched a probe into the EU e-commerce) and will finally discuss some directions for future research.

E-Commerce: Concept and Nature

Electronic commerce or simply e-commerce is defined as a broad concept including any kind of commercial transaction (whether between private individuals or commercial entities) taking place vide electronic network. There exists no widely accepted or standard definition of the term e-commerce, however it is generally used to signify a mode of conducting business through the electronic means as against the traditional means.

The electronic business requires the computer or any other device like a phone enabled with an internet connection to facilitate ‘click and buy’ method of business. While the tradition mode is the brick and mortar type which involves purchase/sale of goods through brick and mortar shops.

Emerging E-Commerce Markets In India

Last decade has witnessed the upsurge in the e-commerce activities across the globe. India is no exception, and hence the result is mushrooming internet platforms, sporadic growth of start-ups and changing consumer preferences. E-commerce has caused a sea change in the marketing and distribution industry. Many e-commerce companies, such as Flipkart, Snapdeal and Jabong are fully based on Internet-backed marketing concepts. Traditional brick and mortar companies have now started to offer both lines of distribution: the classical channels with intermediaries and e-commerce.

A report recently revealed that India’s e-commerce market is expected to grow by 37% to reach USD 20 Billion by 2015.11 Another fact reported by Forrester Research that the consumers in the urban India are the key drivers of e-commerce and they are primarily availing e-commerce services in areas of travel16, consumer durables and e-books.35

In many cases, the traditional production and distribution networks coexist with the e-tailing (e-retailing) networks. This creates a supposed tension between these two competing networks, which is also mirrored by the fact that dealers and distributors may also start selling on the Internet. Although the e-commerce companies in India so far have taken a stand that they are merely facilitators for marketing and distribution and in no way are replacing the brick and mortar set up but just have added a new alternative for the consumers. The e-tailing has primarily become a lifestyle and shopping medium for the urban Indian. Moreover this new form of business capitalises on its convenience factor which it offers to all the players in the market whether it is a manufacturer, supplier or a consumer.

Competition law in India: A Brief Overview

Undoubtedly competition promotes efficiency and accountability of the players in the market ensuring ample choices for the consumer and ultimately leading to consumer welfare. Competition in a market economy can be equated to franchise system in a democratic set up, wherein the market players have knowledge of the fact that their rivals are present to displace them in case they do not perform well.
Across the globe, the 20th century marked the beginning of the era of globalised, liberalised and privatised economies. India too was not an exception and the year 1991 caused a paradigm shift in the Indian economic milieu. Ever since the economic reforms in early 1990’s, the trend in India has been to replace the command and control laws with the free market principles and laws. The present Indian competition law finds its genesis in the post reform era as against the Indian economy of the past that was characterised by substantial government intervention marked by dominance of huge state-owned public sector enterprises.

The Government appointed the Monopolies Inquiry Commission (MIC) in April 1964, in order to investigate the extent and effect of concentration of power in the private sector, i.e. its factors and social consequences and to suggest necessary legislative, or other measures in light of the findings. The MIC suggested for implementing an effective legislative regime to deal with the problem of concentration of economic power. Further the Industrial Licensing and Policy Inquiry Commission (ILPIC) set up by the government in 1967 felt that licensing was unable to check concentration and hence also suggested the enactment of Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) as proposed by the MIC. The MRTP Act was enacted in December 1969 to tackle concentration in various sectors in the economy. It came into force in June 1970 and the MRTP Commission was set up in August of the same year as the enforcement agency.  

In the changed economic milieu, post the new economic reforms it was felt that the MRTP Act had become obsolete in the light of international economic developments particularly in the competition laws. Further the need was to shift the focus from curbing monopolies to promoting competition. Government thus felt it incumbent to replace MRTP Act with a modern competition law suitable to the changed economic landscape.

For the said purpose the central government constituted a high level committee on competition policy and law under the chairmanship of Sh. SVS Raghvan in the year 1999, which submitted its report on 22nd May 2000. The government consulted all the concerned groups including the trade and industrial associations, professional bodies, MRTP Bar Association, various experts and general public. After considering the suggestions of all the groups on the committee recommendations, the central government enacted India’s modern competition in January 2003 namely the Competition Act, 2002. The Preamble provides that Competition Act sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition within the markets in India. In order to promote and sustain competition in the market, protecting interest of the consumers in the market and ensuring freedom of trade, the Act provided for the establishment of a Quasi-Judicial body to be called as Competition Commission of India (CCI). CCI was also required under the act to undertake competition advocacy for creating awareness and imparting training on competition issues.

The Competition Act repealed and replaced the MRTP Act, 1969 and lead to the dissolution of the Monopolies and Restrictive Trade Practices Commission. All the cases pending before the MRTP Commission were transferred to CCI except those cases which related to unfair trade practices, which were taken up by the Consumer for a set up under the Consumer Protection Act, 1986.

The Competition Act, is premised primarily upon the four pillars as follows:

1. Prohibition of Anti-Competitive Agreements which causes or is likely to cause appreciable adverse effect on competition in India, (section 3 of the Competition Act, 2002)
2. Prohibition of Abuse of Dominant position by an enterprise within in India, (section 4 of the Competition Act, 2002)
3. Regulation of Combination above a prescribed threshold limit; (section 5 and 6 of the Competition Act, 2002) and
4. Undertaking competition advocacy initiatives (section 49 of the Competition Act).
Competition Issues in the E-Commerce Sector

E-commerce or commercial transactions powered by internet is rapidly gaining momentum and is all set to become a part of the mainstream business. The growing acceptability of this way of doing transacting business, it becomes pertinent to note the competition complexities that might emerge in the e-commerce sector.

At the outset, it can be safely stated that the e-commerce has a potential to improve market efficiency and the magnitude of the gains will depend specifically on the degree of competition prevailing both in process and transaction e-commerce, hence the competition policy has an integral role to play in the e-commerce "revolution".12

One of the competition concerns relating e-commerce is whether or not e-commerce constitutes a separate market from the traditional retail activity. While on one hand, there are certain products sold through the e-commerce portals and traditional channels usually turn out to be substitutes for each other. However in some products or certain target consumers due to reasons like delivery issues, complexities of electronic payment or lack of trust while paying in making advance payments, the market could be easily divided.

Even within e-commerce itself, it is difficult to delineate markets because price discrimination becomes rampant. The e-commerce allows the consumers to possess more information about the consumer’s preferences. E-commerce can easily disguise the existence of price discrimination and also open up possibilities of price discrimination like: charging different prices from different consumers based on the information and details already shared by the consumer with the web portal. Consumer behaviour can be easily established through e-commerce websites as these usually indulge in tracking previous behaviour through placing cookies.3

Then there can be issues emerging out of infrastructural factors as well, for instance as we know that internet facilitates e-commerce and internet stipulates no boundaries, then e-commerce will considerably extend the scope of the geographical markets, ultimately benefitting the competition. Here the concern is to assess whether this geographical extent is restricted by imposition of any regulatory barriers and how the national competition agencies would deal with this. Another complexity emerging from ‘internet’ as a pre-requisite for e-commerce requires that to be able to enter into any commercial transaction online the consumer must have an access to an internet connection which is possible through a connection with an Internet Service Provider. It will in turn be dependent upon the Service providers’ ability to provide access to the consumer. Such access will expand the market on one hand and also responsible for adding more competitors to the market. Thus the access to internet can be considered as an ‘essential facility’ giving rise a number of antitrust issues.4

The e-commerce industry is susceptible to network effects (which are a common feature of a high tech market, here a product displays positive network effects when more usage of the product by any user increases the product's value for other users). Network effects may also make the e-commerce networks ‘tippy’ by greatly improving the market share of any small start-up. However, the other network owners will cut their costs by offering loyalty programs and other initiatives.

Due to wide spread availability of information, rapid communication and lower costs permits the e-commerce consumers to be better placed in terms of availability of options and comparative analysis. This makes the e-commerce markets more transparent, which not only facilitates price discrimination (as discussed above) but also promotes co-ordinated effects amongst the participants thereby hampering effective competition.

CCI on Online Retail Portals in the E-Commerce Sector

Recently few complaints against the online retail portals were made before the competition regulator, alleging that these e-commerce portals contravene the provisions of the Competition Act, 2002. The competition concerns highlighted through these cases in the e-commerce sector range from delineation of relevant market (as the e-commerce companies have no fixed geographical locations and no
particular area of operation in terms of geographical space), alleged price predation by the online retailers and entering into exclusive dealing agreements. This section of the paper will delve upon the few CCI orders underlining the competition issues in the e-commerce industry. It is pertinent to point out here that the CCI has so far not made out any prima facie case of anti-competitive conduct against any of the e-commerce company/portal in any of its orders so far.

In the case of, Ashish Ahuja v. Snapdeal.com (Case No. 17 of 2014), CCI rejected the allegations of abuse of dominant position by the online portal Snapdeal.com and SanDisk Corporation in the portable small sized consumer storage device market. Here the complainant, who sold SanDisk products amongst others alleged that Snapdeal.com had barred him from selling products through its online platform stating that only authorised dealers could sell SanDisk products on the portal. It was averred by the complainant that the e-commerce website and the Indian Sales office of SanDisk Corporation (which is a leading supplier of the data storage card products in India) were colluding with each other, thus compelling him to become the authorized dealer for SanDisk and trying to stop him from offering competitive prices which were much below than what was offered in the market. The Commission held the relevant market in the present case as the market for portable small sized consumer storage devices such as USB pen drives, SD Memory Cards and Micro SD Cards in India.

Here CCI pointed out that both offline and online markets have different features like discounts offered, shopping experience and buyers have the option of weighing such terms offered in both markets and decide accordingly. In case there is a significant increase in the prices in the online market, then the consumer may choose to shift towards the offline market and vice versa. Thus Commission took the view that these two markets namely offline and online are different channels of distribution of the same product and are in no way different relevant markets.1

The Commission on one hand held SanDisk as a market leader in the relevant market (CCI in its order dated 19 May 2014 noted that in terms of unit shipments in fourth quarter of 2014, SanDisk was a dominant player with 35% market share followed by Transcend and Kingston (other companies in the same segment) with 11% and 6% respectively). However, the condition imposed by SanDisk that its products sold through the online portals must be bought from its authorised dealers only, cannot be categorised as an abusive conduct as it is within the scope of a company to protect the sanctity of its distributive channel. As far as Snapdeal.com was concerned, it is merely a web portal which enables the sellers and buyers to interact by providing a platform for the sellers to sell their products for a commission. Here it was also pointed out that the e-commerce market in India has a number of web portals like flipkart.com, Amazon, eBay, yebhi etc. which thrive on special discounts and deals. Hence no prima facie case was made out against Snapdeal.com or SanDisk for abuse of dominant position under section 4 of the Competition Act, 2002.

In another case, Mohit Manglani v. Flipkart India Private Limited & Ors, (Case No. 80/2014) the five major e-commerce portals in India namely; Flipkart, Snapdeal, Amazon, Jabong and Myntra were alleged to have contravened the provisions of the Competition Act, 2002. Here the informant alleged that the e-commerce portals entered into exclusive agreements in order to sell selected products exclusively through their portal and excluded other e-commerce portals and physical channels. He further averred that these e-portals decide upon the terms of resale, sale price, quality or service conditions, terms of payment and delivery. Moreover, all these stipulations were non-negotiable in nature for the prospective consumers. Further the informant claimed that each of these e-commerce portals were dominant as they had 100 percent market for the product they chose to exclusively deal in. It was contended here that the relevant market constitutes the market in context of that particular product and dominance is also perceived accordingly. These allegations were submitted to have an appreciable adverse effect on competition and thereby violated the sections 3(1), 3(4) (b) & (c) and sections 4(a) (i), 4(b) (i) and 4(b) (ii) of the Competition Act, 2002.8

The Commission while assessing the facts submitted before it, also considered the complaint of All Delhi Computer Trader Association (ADCTA) contending anti-competitive conduct on the part of e-
commerce portals. It is clear that for assessing the contravention under section 3(4) read with section 3(1) of the Act, foremost it is required to establish the existence of an agreement and then as to its adverse appreciable effect on competition under section 19(3) of the Act which enumerates the factors to assess appreciable adverse effect on competition.

The Commission was of the opinion that upon a bare perusal of the arrangement with reference to the above stated provisions and factors did not create any entry barriers for the new entrants in the market, thus were not having any appreciable adverse effect on competition. These online portals provide a distribution channel wherein the consumers can compare the prices and also the quality and features of the products. Further this alternative to the brick and mortar retail outlets is beneficial to the consumers as it provides the option of delivery right at the doorstep. The Commission out rightly denied the allegations of dominance by not accepting the relevant market definition as every product being sold on the e-portal. The Commission felt that there were several players in the e-commerce market to make an individual online retailer as dominant whether it e-commerce market considered as a relevant market or when it is treated as a distribution segment of the entire market (both brick and mortar and e-commerce markets). Thus the question of dominance and abuse as per section 4 of the Act does not arise in the present case and hence the Commission did not make out a prima facie case against the e-commerce portals.

In the recent case involving e-commerce sector of Jasper InfoTech Private Limited (Snapdeal) v. Kaff Appliances (India) Private Limited (Case No. 61 of 2014), the CCI has made out a prima facie case against a company engaged in manufacturing and selling of kitchen appliances and order for an investigation by the Director General in the matter.

In the said case the information was brought before the Competition regulator by Jasper Infotech Private Limited which runs the e-commerce portal Snapdeal against Kaff appliances. The informant alleged that Kaff appliances displayed a ‘Caution Notice’ on its website declaring that its products sold by Snapdeal were fake and thus not authorised by it. It was also stated in the ‘Caution Notice’ that the alleged e-commerce portal was also deceiving the public with intent to sabotage the image of its company and infringement of its trademarks. Hence the company clarified its stand through the said notice of not honouring the warranties of the kitchen appliances sold through the online portal and also served a legal notice in this regard to the e-commerce portal. On this the e-commerce portal maintained that it was merely an online market place and does not directly or indirectly sells any products. Hence the portal is a facilitator wherein the manufacturer or its agents (sellers) directly raise invoices to the customer and bear the commercial risks.

The main issue of contention amongst the parties was the discounted price at which the e-commerce portal was selling the Company’s kitchen appliances. The said discounted price was below the Market Operating Price which the company selling the appliances wanted its retailers to maintain (Here, the e-commerce portal was asked to maintain the Market Operating Price vide an e-mail which was placed on record before the CCI). The Informant web portal thus alleged that the company is imposing a price restriction and forcing its dealers to sale at a prescribed minimum price amounting to resale price maintenance arrangement contravening section 3(4)(e) of the Act.

The Commission was of the opinion that any arrangement entered into between the company and its dealers in kitchen appliances will be covered under the provisions of section 3(4) of the Act. Further the prescription of Market Operating Price by the company to its dealers and insistence to follow the said pricing regime prima facie seemed to be in contravention of section 3(4) (e) read with section 3(1) of the Act.

Hence in the present case, the Commission was of the view that Kaff appliances held 28 percent share in the market of ‘supply and distribution of kitchen appliances in India’ and the agreement entered into with its dealers prima facie may have both adverse effect on competition in India and harm consumers ultimately.
WAY FORWARD

The accelerated growth of the e-commerce industry in India has enforced the market regulators to keep a closed eye on the operations of the e-commerce entities. Most of the flak comes from the brick and mortar companies against their online rivals, when they entreat the competition regulators to assess the anti-competitive nature of the business activities of their online counterparts. In such a situation CCI has earnestly attempted to put rest to some of the queries emerging out of the practices of the e-commerce companies.

In one of its earlier orders, CCI stated that online and brick and mortar are distinct channels in the same relevant market. However in another order CCI gave a statement that “irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the Opposite Parties seems to be individually dominant”. This statement evidences the ambiguity that still exists as regards the stand taken by CCI pertaining to nature of e-commerce market. Moreover, it is felt that e-commerce retail market can be treated as a separate relevant market as it caters to a specific class of people who have or can have access to internet services in India (there exists a large population in India who do not have access to the internet and hence will purchase goods from brick and mortar store only). Thus it becomes imperative for the e-commerce companies to assess the arrangements they enter into on the touchstone whether they cause or likely to cause appreciable adverse effect on competition.

The issues raised so far against the e-commerce platforms in India, are of predatory pricing and anti-competitive arrangements through the exclusive agreements with the dealers. However CCI has been of the view that these arrangements prima facie are not anti-competitive in nature. Such view can be attributed to the fact that the e-commerce industry is yet to grow and does not possess significant share in the retail sector in India.

On one hand, it is clear that the e-commerce sector has a potential of growth in the Indian scenario especially in the light of benefits it reaps to the consumers. While on the other hand, a bare look at the CCI’s orders so far affirms that competition law seeks to protect the ‘competition’ and not the ‘competitors’.

REFERENCES


3. Cookies technology allows a web site server to place information about a consumer’s visits to the site on the consumer’s computer in a text file readable only to that web site server. The cookie assigns each consumer’s computer a unique identifier so that the consumer can be recognized in later visits to the site. See Valentine, Debra (2000) "Privacy on the Internet: The Evolving Legal Landscape", prepared remarks before Santa Clara University, February 11-12, available at: http://www.ftc.gov/speeches/other/dvsantaclaraspeech.htm


5. ‘Essential facility doctrine’ finds its origins in the US antitrust cases. It simply means that the owner of an "essential" facility is mandated to provide access to that facility at a "reasonable" price. This doctrine stipulates two markets i.e. upstream and downstream, wherein one firm is active in both markets and other firms are active or wish to become active in the downstream market. A downstream competitor wishes to buy an input from the firm, but is refused. As per the essential facilities doctrine the competitor would be mandated to supply. OECD Policy Roundtable


10. Mohit Manglani v. Flipkart India Private Limited & Ors., Case No. 80/2014, para 18


14. See Ashish Ahuja v. Snapdeal.com, Case No. 17/2014, here it was stated that these two markets are different channels of distribution of the same product and not two different relevant markets. Further CCI also acknowledged that these two markets differ on many accounts like loyalty discounts and shopping experience they offer to their customers.
