

Cornucopia: A Miscellany of Scholarly Papers

ISBN: 978-81-954010-0-0

# E-Commerce and Relevant Market: Unease for Future

**Ketan Desai**

Assistant Professor  
Dept of Law,  
The M.S. University of Baroda,  
Vadodara, Gujarat, India

**Hemang Shah**

Assistant Professor  
Dept of Law,  
The M.S. University of Baroda,  
Vadodara, Gujarat, India

---

## **Abstract**

To inquire into any alleged abuse of dominant position, the first step and indeed a question of paramount importance is to ascertain the relevant market.[1] The Raghavan Committee Report points out that dominance and its subsequent abuse can be established only in the context of relevant market.[2] Thus, the relevant market forms the bedrock for the enforcement of competition law.[3] However, it is to be noted that determining the relevant market is not an end in itself but a key step in identifying the existing competitive constraints.

### **1.1. Market:**

The expression 'market' owes its origin in the concept of

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

economics. As a result, it is bound to be dynamic in nature and varies with peculiar facts of each case.[4] The Webster's International Dictionary defines the term 'market' as a place where provisions are sold. It is a place where exchange or purchase and sale take place.[5] Similarly, Oxford English Dictionary states that a market is a place or seat of trade.[6] In layman's language, market is a place where buyers and sellers meet. In a larger sense, market would mean the availability of commodities at a particular price specifying the needs and requirements of the sellers and the buyers. It is an operation between the parties in trading with each other, depending upon the utility of the product from the purchaser's point of view and the price from the vendor's point of view. A true market connotes freedom of bargain.[7] Therefore, a market means a place where parties to the purchase or sale have access to each other. It is an established medium or platform for supplier-consumer communication. Based on certain unique set of circumstances, a market can be of the following kinds[8]:

***Table II – Kinds of Market***

<b>Character istics</b>	<b>Perfect Compet ition</b>	<b>Monopoli stic Competiti on</b>	<b>Oligopoly</b>	<b>Monopoly</b>
<b>Number of competito rs</b>	Many	Few to many	Very few	No direct competition

## Cornucopia: A Miscellany of Scholarly Papers

ISBN: 978-81-954010-0-0

<b>Ease of entry or exit from industry</b>	Easy	Somewhat difficult	Difficult	Mostly regulated by Government
<b>Similarity of goods/services offered by competing firms</b>	Same	Seemingly different but maybe quite similar	Similar or different	No directly competing products/services
<b>Individual firm's control over price</b>	None (Set by the market)	Some	Some	Considerable (In true monopoly); little (in regulated monopoly)
<b>Examples</b>	Agricultural products	Fast-food restaurants	Automobile manufacturers	Indian railways

### 1.2. Relevant Market:

**Section 2(r) of the Competition Act, 2002.** *Relevant market means the market which may be determined by the*

1. Abir Roy and Jayant Kumar, *Competition Law in India* (Eastern Law House Pvt. Ltd 2008) 100-101
2. The Report of High Level Committee on Competition Policy Law (SVS Raghavan Committee Report), Para. No. 4.4.5
3. Amrit Subhadarsi, 'Competition Law & Electronic Commerce: Comparative Analysis of US, European

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

Union and Indian Laws' [2016] Business Sciences  
International Research Journal 56

4. Smeksha Bhola, 'India: Determination of Relevant Market – Easier Said Than Done' (*Mondaq*, 26<sup>th</sup> February 2014) <<http://www.mondaq.com/india/x/295618/Trade+Regulation+Practices/Determination+Of+Relevant+Market+Easier+Said+Than+Done>> accessed 1 April 2018
5. *Webster's International Dictionary* (2<sup>nd</sup> edn, 1934) vol. 1, page no. 1163
6. *Shorter Oxford English Dictionary* (3<sup>rd</sup> edn, 1973) vol. 1, page no. 1280
7. D.P. Mittal, *Competition Law & Practice* (3<sup>rd</sup> edn, Taxmann Allied Services Pvt. Ltd. 2011)
8. Sugata Bag, 'Economics of Regulations: Market Types' (Delhi School of Economics, 2013)

*Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.*

The Competition Act, 2002 exhaustively defines the expression 'relevant market'. The Indian competition law has borrowed the concept of relevant market from the EU competition law. In accordance with Section 19(5) read with Section 2(r) of the Competition Act, 2002, the Commission shall take into consideration the relevant geographic market and relevant product market for the purpose of determining

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

whether a market constitutes a relevant market.

Relevant market means the periphery of the market in which the enterprise participates or conducts its business.[1] According to Black's Law Dictionary, relevant market is defined as a market that is capable of being monopolized, i.e., a market in which a firm can raise prices above the competitive level without losing so many sales that the price increase would be unprofitable.[2] In the words of Supreme Court of United States[3], relevant market is the area of effective competition, within which the defendant operates.[4] The Commentary of UNCTAD - Model Law on Competition states that the relevant market is the place where supply and demand interacts.[5]

In short, for the purposes of Competition Act, 2002, relevant market is merely a portion of the Indian market which can be viewed as an independent business area in which competitive relationships are affected or destroyed.[6] Determination of relevant market means identifying the particular products or services produced or rendered, as the case maybe, by an enterprise in a given geographical area.[7] It is to be borne in mind that there is not strait-jacket formulae to decide the contours of the relevant market.[8] According to World Bank/OECD Glossary, if markets are defined too narrowly in either product or geographic terms, meaningful competition may be excluded from the analysis. On the other hand, if the product or geographic market are too broadly defined the degree of competition may be overstated. Too

broad or too narrow market definitions leads to understanding or overstating market.[9]

**1.2.1. Relevant Geographic Market:**

**Section 2(s) of the Competition Act, 2002.** *Relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.*

The Indian competition law has borrowed the concept of relevant geographic market from the EU competition law with a few minor changes. Instead of the words 'distinctly homogenous', the EU law uses the expression 'sufficiently homogenous'. Relevant geographic market is the area in which the sellers of a particular product or service operate and sell the product or service in question which the buyers purchases[10]. It involves the identification of the geographical area within which competition takes place.[11] Homogeneity of the market conditions for the supply of goods or provision of services in a specified area is the requirement. The expression 'homogenous' has not been defined in the Competition Act, 2002. As per Law Lexicon, homogenous means "of same description".[12] Homogeneity means uniformity of composition.[13] Thus, the conditions of competition should be the same in the relevant geographic market.

It is to be noted that a geographic market is not the

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

physical territory in which the competing enterprises operate but only that part of the territory in which the conditions of competition for supply or demand of goods or services are distinctly homogenous and distinguishable from the conditions prevailing in the neighboring area. Only that part of the geographic territory where uniformity of composition is present should be considered as geographic market. Conversely, when conditions prevailing in the neighboring areas are different, the markets are different.

The Court in *United Brands v. Commission*[14] opined that the geographic market helps to evaluate the market power of an undertaking. Relevant geographic market could be local, national, international or occasionally even global, depending upon the particular product under examination, the nature of alternatives in the supply of the product, and the presence or absence of specific factors.[15]

If purchasers of a product sold in one location would, in response to a small but significant and non-transitory increase in its price (popularly known as SSNIP Test), switch to buying the product sold at another location, then those two locations are regarded to be in the same geographic market, with respect to that product. If not, the two locations are regarded to be in different geographical markets.[16] Geographic market definition involves the identification of those firms to which the consumers in the area will turn in the event of a significant price increase, and may also include firms that would enter the geographic area in response to

such an increase.[17]

Section 19(6) of the Competition Act, 2002 explicitly lays down certain factors which the Commission shall take into account while ascertaining the relevant geographic market. The factors are reproduced below:

- (a) Regulatory trade barriers;
- (b) Local specification requirements;
- (c) National procurement policies;
- (d) Adequate distribution facilities;
- (e) Transport costs;
- (f) Language;
- (g) Consumer preferences;
- (h) Need for secure or regular supplies or rapid after-sales services

### **1.2.2. Relevant Product Market:**

**Section 2(t) of the Competition Act, 2002.** *Relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.*

The Indian competition law has borrowed the concept of relevant product market from the EU competition law. Relevant product market, as per Section 2(t) of the 2002 Act, comprises of interchangeable or substitutable products or services. The products or services may be switchable/exchangeable due to its characteristics, price or use. On the demand side, the relevant product market



## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

includes all such substitutes that the consumer would switch to, if the price of the product were to increase. On the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods.[18] It was observed in *Brown Shoe v. United States*[19] that in determining whether products are interchangeable or substitutes are available for that product, an element for consideration is to be made for responsiveness of the sales of one product to price changes of the other.[20]

As stated above, the test to determine the relevant product market is interchangeability or substitutability of the product or service in question. Thus, the factor to be taken into consideration is whether the end use of the product and its substitutes are essentially the same or whether the physical characteristics or technical qualities are similar enough to allow customers to switch easily from one to another.

Also, as stated above, one of the central factors is price. It involves enquiry into the proportionate amount of increase in the demand of one commodity due to the proportionate increase in the price of another commodity. In a highly elastic market, a slight increase in the price of one product will prompt customers to switch to the other, thus indicating that the products in question compete in the same market while a low cross-elasticity would indicate the contrary, i.e., that the products have separate markets.[21] In some

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

cases, even one brand of a product can constitute one market.[22] A product market has no geographical limits.[23] Section 19(7) of the Competition Act, 2002 explicitly lays down certain factors which the Commission shall take into account while ascertaining the relevant product market. The factors provided under Section 19(7) are reproduced below:

- (a) Physical characteristics or end-use of goods;
- (b) Price of goods or service;
- (c) Consumer preferences;
- (d) Exclusion of in-house production;
- (e) Existence of specialized producers;
- (f) Classification of industrial products.

### **1.2.3. Examples of Relevant Market:**

In *Belaire Owner's Association v. DLF Ltd.*[24], DLF announced the launch of a housing complex comprising of five multi-storied residential buildings to be constructed in DLF City, Gurgaon, Haryana. The owners' association alleged that unfair, arbitrary and unreasonable conditions were imposed on the owners by DLF Ltd. amounting to abuse of dominant position under the Competition Act, 2002. The Commission delineated the relevant product market as high end residential accommodation/buildings. The relevant geographic market was decided to be the city of Gurgaon.

In *Shri Shamsher Kataria v. Honda Siel Cars India Ltd. and Ors.*[25], three car manufacturers were alleged to be indulged into anti-competitive practices wherein genuine spare parts of automobiles manufactured by them were not

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

made freely available in the open market. Later, other automobile players were also investigated. The Commission delineated two separate relevant product market, namely, market for manufacture & sale of cars (primary market) and market for sale of spare parts (secondary market). The secondary market was further divided into market for supply of spare parts and market for after-sale services. The relevant geographic market was common in both the cases. It was the whole of India.

In *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & DotEx International Ltd.*[26], the fee waiver and other concessions in the currency derivatives market granted by NSE was in contravention of the provisions of the Competition Act, 2002. The zero pricing policy adopted by NSE was opposed by the Informant. Stock exchange services in respect of currency derivative segment were considered to be the relevant product market. The relevant geographic market was delineated as India.

### **1.3. Relevant Market in E-Commerce Industry:**

*Prima facie*, ascertaining the relevant market sounds like a cakewalk but it can be aptly remarked as 'it is easier said than done'. Determining relevant market in e-commerce sector remains debatable and questionable. With reference to Indian competition jurisprudence, the question of paramount importance arises as to whether e-commerce and traditional market are two separate relevant markets or are merely different channels of distribution of the same product or

service.

In most cases, products or services offered through various e-portal platforms can be purchased and delivered in any part of the country. Rapid technological advancements have, undoubtedly, withered the geographical limits. Thus, in context of e-commerce, the relevant geographic market will be India. With reference to relevant product market, products or services offered on various e-commerce platforms are identical in nature, characteristics, intended use etc. Thus, products or services offered online are perfectly substitutable and interchangeable with products or services offered offline. Consumers find it easy to switch from offline to online market place and *vice versa*. This is evident from the fact that the online retail sales in India has jumped from a meager US \$ 3.8 billion in 2009 to an impressive US \$ 38 billion in 2016.[27] For the time being, it can be concluded that both - offline and online markets- are a part of singular market.

### **1.3.1. An Opportunity to Settle the Law:**

In the case of *Mr. Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors.*[28] as discussed in Chapter-II under the heading 'Exclusive Arrangements in E-Commerce Sector', the Informant alleged that e-commerce websites and product sellers have entered into exclusive supply agreements to sell selected products exclusively on selected portals. Accordingly, other e-portals and physical channels are excluded. The Informant named Chetan Bhagat's book titled 'Half Girlfriend' and a few other products which were exclusively sold by one

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

or the other opposite party.

During the course of proceedings, the Informant submitted that each of the OPs has 100% market share for the product in which it is exclusively dealing. Thus, according to the Informant, the relevant market has to be defined in context of a particular product in question. To the contrary, the OPs argued that relevant market cannot be construed in context of each product separately. It was strongly argued by the OPs that online and offline retail market do not constitute separate relevant market. Both are merely different channels of distribution of the same product. The product purchased or service availed either through online or offline portal is fundamentally the same in its nature and characteristics.

The Commission rightly observed that online portals provide benefits to consumers such as comparing the prices, weighing the pros and cons, rapid delivery right at the door step, purchase of product at convenience of the consumer, quicker purchase than brick and mortar retail outlet. It further went on to observe that every single product cannot be delineated as relevant market. Subsequently, it found that none of the OPs are individually in a dominant position

The disturbing part of the order is that the Commission did not go any further to investigate the question of relevant market. For the purpose of the case, the analysis of relevant market was not useful as the OPs were not in a dominant position. But, for the purpose of settling the law and establishing a precedent for further reference, the

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

Commission should have resolved the question. Despite having an opportunity, it left open the question of whether e-portal markets may be treated as a separate relevant market or as a sub-segment of the market for distribution.

### **1.3.2. Online and Offline Markets Constitute a Single Market:**

In the celebrated case of *Re: Mr. Ashish Ahuja v. Snapdeal.com and San Disk Corporation*[29], decided on 19<sup>th</sup> May 2014, the Commission examined the question of relevant market in context of e-commerce. The Informant, in the present case, is engaged in selling various products, particularly electronic products, such as pen drives, hard disks, laptops etc. OP 1 is an online portal or marketplace for sellers and buyers to meet. The portal charges a commission from the seller. It has tie-up with cargo companies for successful delivery of the ordered consignment from the seller's place to buyer's place. OP 2 is Indian sales office of San Disk Corporation, USA. San Disk Corporation is engaged in the business of manufacture, distribution and sale of pen drives, SD cards, Micro SD cards and other storage devices. The Informant entered into an online agreement with OP 1 for sale of various products such as pen drives, laptops, hard disks etc. The sale took place electronically, i.e., through online portal of OP 1. Subsequently, OP 1 abruptly denied the Informant from selling its products through the online portal. It

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

informed the Informant that he is not an authorized partner to sell San Disk items as per the revised and confidential list of M/s San Disk India authorized online channel partners. In order to use the online portal, OP 1 demanded that the Informant shall acquire a NOC from San Disk. On further enquiry, the Informant discovered a letter being circulated by San Disk Corporation in the market. The letter explicitly stated that San Disk Corporation, USA has authorized only four *bona fide* national distributors via whom all products of San Disk Corporation are imported into and sold in India. No other person is lawfully authorized to deal in products of San Disk Corporation.

Based on the above facts, the Informant alleged that the collusion between OPs resulted into the Informant being tried to stop from offering products at competitive price which was below the price offered by other sellers of the same product. Further, the Informant submitted that OP 2 is monopolizing the market. Lastly, by entering into an agreement, the OPs are unfairly deciding the price of the product being sold online.

With regard to relevant market, the Commission under Para. 15 held that the relevant product market, keeping in view the characteristics, price and intended use of the products, is the market for portable small-sized consumer storage devices that includes USB pen drives, SD memory cards and micro SD cards. The above stated storage devices were considered to be interchangeable and substitutable.

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

Taking into account the nature of e-commerce, the Commission under Para. 17 stated that the relevant geographic market would be India. Therefore, the relevant market in the present case is the market for portable small-sized consumer storage devices such as USB pen drives, SD memory cards and micro SD cards in India.

The Commission made a crucial observation relating to traditional market and e-commerce market. In fact, this observation was the turning point of the case and a reference for future cases. The Commission observed that online and offline market is a singular market and cannot be considered as two separate markets. The online and offline players are competing on the same level playing field. Para. 16 of the judgment is reproduced below:

“The Commission also notes that both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decides accordingly. If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa. Therefore, the Commission is of the view that these two markets are different channels of distribution of the same product and are not two different relevant markets”

The Commission noted that requiring a NOC for online sale cannot itself be abusive as it is within the right of the OP to protect the sanctity of its distribution channel. The circular mandating such NOC was considered to be a part of



## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

normal course of business practice. It also observed that OP 1 is not in a dominant position. Accordingly, the Commission held that no *prima facie* case of contravention of the provisions of the Competition Act, 2002 is made out against the OPs. Thus, the matter was closed under Section 26(2) of the Competition Act, 2002.

### **1.3.3. Affirmation of the Ratio:**

In *Re: Mr. Deepak Verma v. Clues Network Pvt. Ltd. & Ors.*,<sup>[30]</sup> the Informant filed information against 23 online e-commerce companies. They were alleged to increase their business illegally and fool consumers by using anti-competitive practices. The Informant was aggrieved by the defective and deficient products and services supplied by the online market players. The matter was closed section 26(2) of the Competition Act, 2002 since OPs were not held in a dominant position.

However, it is to be noted that the Commission affirmed the ratio held in *Snapdeal.com*<sup>[31]</sup> case regarding relevant market. It stated that “in the recent past, it has been observed that buyers are shifting from offline to online retail market because of heavy discounts, better choices and convenience. Similarly, if the prices in the online market increase significantly, the consumers are likely to shift back towards the offline market and vice versa. Therefore, the Commission is of the view that these two markets are only two different channels of distribution and are not two different relevant markets. Earlier, similar observation was also made

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

by the Commission in Case No. 17 of 2014, namely, Mr. Ashish Ahuja vs. Snapdeal.com and Another.” In addition, the Commission also observed that there is growing competition between the e-commerce market players *inter se*. The consumers can easily move from one e-commerce market player to another without much difficulty.

Similarly, another recent case on the subject is *In Re:Confederation of Real Estate Brokers' Association of India v. Magicbricks.com, 99acres.com, Housing.com, Commonfloor.com & Nobroker.in*[32]. The OPs run and manage their respective web-portals and property services division by acting as commission agents in real estate transactions. The Informant, being a confederation of 35 real estate brokers' association consisting of approximately 20,000 real estate brokers, alleged the OPs of contravening the provisions of section 4 of the Competition Act, 2002. As a result, businesses of traditional real estate agents are adversely affected. Similar to the previous case, the OPs were not held to be in a dominant position. Thus, the matter was closed under section 26(2) of the 2002 Act.

Speaking of relevant market, it was delineated as market for the services of real estate brokers/agents in India. With regard to relevant geographic market, the Commission compared the geographical boundaries and traditional and online real estate brokers in terms of supply and demand. From the supply side, traditional brokers offer services within their respective locality, whereas online brokers are in a

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

position to provide services anywhere in India. From the demand side, the consumers can purchase or rent any real estate property in any locality in India. Thus, the relevant geographic market was considered to be the whole of India. The Commission made an important observation under Para. 11 of the judgment for the purpose of delineating the relevant product market. The said Para. is reproduced as below:

“The Commission observes that India is one of the fastest growing e-commerce markets. With the growth of e-commerce, the number of online portals engaged in the activities of real estate listing, property finder solution, etc. have been increasing. It is observed that, besides OPs, there are also many other real estate listing sites which are offering similar services, providing various options to the consumers. Besides the online platforms, real estate brokerage business in India is also undertaken by the traditional brokers in a large scale. Both the online platforms and the off-line traditional brokers are offering similar services to the customers. Accordingly, the Commission is of the view that on-line and off-line services of brokers cannot be distinguished while defining the relevant product market in the instant case. Both are alternative channels of delivering the same service. So, the market for ‘the services of real estate brokers/ agents’ is considered as the relevant product market in the present case.”

### **1.3.4 An Attempt to Dissent:**

A controversial view was taken by CCI in *Justickets*

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

*Pvt. Ltd. v. Big Tree Entertainment Pvt. Ltd & Vista Entertainment Solutions Ltd.*[33]as the Commission divorced from its view held in the *Snapdeal.com* case[34] relating to relevant market. The Informant and OP 1, in the present case, are engaged in the business of online movie ticketing through their respective official website. In addition, both also have their own box office software. The software is provided to theatres for selling tickets at the counter. OP 2 is a global leader in the supply of box office ticketing software called 'Vista'. OP 1 is the sole distributor of 'Vista' in India. The Informant alleged that the OPs are abusing their dominant position by creating barriers for online movie ticketing portals from getting access to 'Vista'. The outcome of the case was that no *prima facie* case was made out against the OPs. There was plausible explanation for the act of the OPs. Accordingly, the matter was closed under section 26(2) of the Competition Act, 2002.

As far as the relevant market is concerned, OP 1 strongly but unsuccessfully argued that there is no difference between the online and offline market which are merely two different channels of distribution. Thus, the relevant market in the present case should be the market for sale of movie tickets in India. Similarly, OP 2 argued that at best relevant market would be the market for box office software provided to cinemas in India. However, the Commission delineated two separate relevant markets for each of the OP, namely, market for online movie ticketing portals in India for OP 1 and market

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

for box office ticketing solutions in India for OP 2.

Another similar case on the subject is *In Re: Mr. Vilakshan Kumar Yadav, Mr. Rizwan & Mr. Shiv Shankar v. M/s ANI Technologies Pvt. Ltd.*[35] The Informants, being auto rickshaw and taxi drivers in NCR, alleged the OP (operating under the brand name 'Ola' and 'Taxi For Sure') of abusing its dominant position in auto rickshaw and city taxi services – collectively known as paratransit services. However, similar to the previous cases, OP was not found to be in a dominant position. Thus, no case under section 4 of the Competition Act, 2002 was made out and accordingly, the matter was closed under section 26(2) of the 2002 Act.

The Informants submitted that the relevant product market is paratransit services comprising of auto rickshaws, black-yellow taxis and city taxis. Similarly, the relevant geographic market is NCR comprising of Delhi, and certain districts of three other States – Haryana, Uttar Pradesh and Rajasthan. Thus, it was submitted that the online and offline market players to be considered part of the same relevant market i.e., paratransit services in NCR. To the contrary, the OP strongly argued that auto rickshaws, black-yellow taxis and city taxis cannot be considered to be competing in the same market.

The Commission delineated the relevant geographic market as Delhi. Further, the Commission rightly observed that auto-rickshaws and taxis, despite offering similar services, differ in their characteristics, prices, consumer

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

preference, comfort, consumption of time etc. Thus, auto-rickshaws and taxis cannot be called as part of the same relevant market. This observation seems reasonable. However, the Commission also distinguished between traditional taxis and radio taxi services despite the fact that both types provide almost identical services. Accordingly, two relevant market was determined namely, 'provision of Radio Taxi Services in Delhi' and 'provision of rickshaw services in Delhi'.

The deviation from the ratio held in *Snapdeal.com* case[36] was unnecessary. In addition, it is also to be noted that in an earlier case of *Re: Meru Travels Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd., Uber BV and Uber Technologies International Inc.*[37], the Commission considered radio taxis and yellow taxis as part of the same relevant market.

In another landmark case of *Matrimony.com Ltd. v. Google LLC, Google India Pvt. Ltd. & Google Ireland Ltd.*[38], the Informant alleged Google for running its core business of search and advertising in a discriminatory manner, thereby causing harm to the competition. The OPs were accused of contravening the provisions of section 4 of the Competition Act, 2002. Unlike previous cases, the Commission did find Google to be in a dominant position within the relevant market. It held Google to have abused its dominant position. With respect to the relevant market, the DG observed that online advertising is distinct from offline advertising. Similarly,

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

online search advertising is also distinct from other forms of advertising like display advertising. Thus, the DG delineated two separate relevant markets, namely, relevant market for online general web search service in India and relevant market for online search advertising in India.

The OPs questioned DG's delineation of relevant market on the ground that an advertiser will not restrict himself/herself merely to online medium. He/she will take advantage of other advertising opportunities to run the campaign. This includes both online and offline mediums such as TV, radio, newspapers etc. All these forms are substitutable and interchangeable. Thus, they form part of the same relevant market.

However, the Commission denied the averments made by the OPs and observed that the above said modes of advertisement are not substitutable or interchangeable. It observed that online and offline advertising services are not comparable. Accordingly the Commission upheld the findings of the DG in respect of relevant market.

### **Conclusion**

The researcher observation is that online and offline markets are different channels of distribution of the same product and do not constitute different markets appears to be just, fair and reasonable. As stated above, there is absolute interchangeability and substitutability between the products and services offered by online and offline retailers. The two markets also overlap geographically since the relevant

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

geographical market for an online retailer will be the whole of India. It is no doubt true that most of the prudent shoppers start searching for the product or service in the physical market, later compare the characteristics (like price) of the product or service offered by the e-market players and then finalize the purchase. Consumers may also prefer the other way round. Speaking out of personal experience, consumers at times inform the brick and mortar retailers about the prices offered by the e-tailers with a view that the former will match the latter. Thus, to the consumer, the online and offline markets are merging and demarcating line between the two is blurring.

It is true that business of offline retailers has been tremendously affected by the increasing number of e-commerce players. The reason, as noted by CCI, is that the traditional brick and mortar market and e-commerce market differs in terms of discounts, convenience etc. The Commission observed that online distribution channels provide consumers with an opportunity to compare prices as well as the pros and cons of a product much more easily than their brick and mortar counterparts. This implies that price competition as well as inter brand competition is intensified, both within the online sub-segment of retail as well as between online and offline retail markets. Also, it is to be borne in mind that the Preamble to the Competition Act, 2002 seeks to promote, sustain and protect the competition and not competitors. The advent of online retail has, undoubtedly,



## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

enhanced and improved competition in the market.

Had it been the case that the online market was about to absolutely replace the offline market, and then the grievances of the offline retailer may had been answered. The offline market constitutes merely a fraction of the total retail market share. As of now, none of the online market players seems to be in a dominant position. This is evident from the fact that e-commerce share of total retail sales in India was a negligible 3.6 % in 2017.[39] The Commission once observed that brick and mortar retail market holds more than 99% of the total retail market whereas e-commerce sector represents a miniscule proportion of less than 1%.[40]

However, the above said settled position seems just, fair and reasonable as of today where there are only handfuls of cases relating to e-commerce and the e-commerce market players are not in a dominant position. In near future, the Commission is likely to face such cases in large numbers. The above said settled law will not serve the purpose and spirit of Indian competition law.

The issue as to whether e-commerce forms a new relevant market, or whether e-commerce shapes a new retail channel, which competes with traditional retail channel, and lies within the same market has also been dealt by developed jurisdictions such as US and EU. In US and EU, each case is to be decided according to its peculiar fact and circumstances. Unlike India, there is no comprehensive answer to the above question. It is important to evaluate each

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

case separately and carefully. Factors such as nature of products, conditions of market, specificity of industry etc. shall be taken into consideration. It is time for the Indian competition jurisprudence to evolve in this regard. In case of e-commerce vis-à-vis relevant market, there is a need to consider each case on its peculiar facts and circumstances. In fact, the various cases discussed above in Chapter-III under the head 'An Attempt to Dissent' depicts that CCI is taking into consideration the practice followed in other prominent jurisdictions. Whenever need be, the Commission has considered the online and offline markets as separate markets. Whether the decision taken in those cases is bad in law is a subjective question of debate. However, the objectionable part is that the Commission has not yet expressly declared to treat each case on its peculiar facts and circumstances. The ratio that online and offline markets constitutes a single market holds good in law till date.

Hypothetically speaking, if CCI is encountered with a case relating to e-commerce market player engaged in the sale of fruits and vegetables. Here, online and offline market cannot be considered as a single relevant market. Usually, a person who purchases fruits and vegetables from a local vendor/market place will not purchase it via the internet. Similarly, a consumer belonging to a high standard society will not prefer to purchase fruits and vegetables from a local vendor/market place. Further, an illiterate consumer cannot switch to online market if there is a price increase in the offline

## **Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

market. Same principle applies in case of a consumer who does not have adequate infrastructure like internet connection. To the contrary, an extremely busy consumer will prefer online market shops for speedy trading of goods or services. The two markets can be easily divided on the basis of reasons like delivery issues, complexities of e-payment, lack of trust, infrastructural factors etc.

In light of the above discussion, it is viable for a sound competitive economy to consider the online and offline market as a sub-section of a single market and not two separate markets. But, with rapid growth of e-commerce sector, there will be a need to change the settled law in near future. It is true that e-commerce promotes competition in the market, but CCI also need to take steps in order to prevent the distortion of market before it is too late.

### **References**

1. *Vinod Dhall, 'Overview: Key Concepts in Competition Law' in Vinod Dhall (ed), Competition Law Today: Concepts, Issues and the Law in Practice (Oxford University Press 2008) 514*
2. *Black Law Dictionary (7<sup>th</sup> edn, 1999) page no. 983-984*
3. *Standard Oil Co. of California and Standard Solutions Inc. v. United States 337 US 293*
4. *T. Ramappa, Competition Law in India: Policy, Issues, and Developments (Oxford University Press 2006) 71*
5. *UNCTAD, World Investment: Transnational*

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

*Corporations, Extractive Industries and Development  
(Report 2007) 17*

6. *Supra at Note 7, Page No. 128*
7. *Ibid, Page No. 425*
8. *United States v. E.I du Pont de Nemours & Co. 351 US 377 (1956); cited in Supra at Note 1, Page No. 102*
9. *Supra at Note 1, Page No. 101; Supra at Note 9, Page No. 514*
10. *Supra at Note 14, Page No. 140*
11. *Supra Note 2, Para. No. 4.4.7*
12. *Cited in S.M. Dugar, Commentary on MRTP Law, Competition Law & Consumer Protection Law (4<sup>th</sup> edn, Wadhwa and Company 2006) 644*
13. *Supra at Note 12, Page No. 72*
14. *(1978) ECR 207/(1978) 1 CMLR 429*
15. *Supra at Note 14, Page No. 141; Supra at Note 2, Para. No. 4.4.7*
16. *S.M. Dugar, Commentary on MRTP Law, Competition Law & Consumer Protection Law (6<sup>th</sup> edn, Wadhwa and Company 2016) 135*
17. *HT Media Limited v. Super Cassettes Industries Limited, 2014 CompLR 126 (CCI)*
18. *Supra at Note 14, Page No. 132; Supra at Note 2, Para. No. 4.4.7*
19. *370 US 294 (1962); Similar view was held in United States v. Grienll Corporation 384 US 563 (1966)*
20. *Supra at Note 1, Page No. 104*
21. *Supra at Note 14, Page No. 132*
22. *Ibid, Page No. 133*

**Cornucopia: A Miscellany of Scholarly Papers**

**ISBN: 978-81-954010-0-0**

23. *Adi P. Talati and Nahar S. Mahala, Competition Act, 2002 (Commercial Law Publishers India Pvt. Ltd. 2006) 152*
24. *Case No. 19 of 2010*
25. *Case No. 3 of 2011*
26. *Case No. 13 of 2009*
27. *Statista, 'Online Retail Sales in India from 2009 to 2016' (Statista, January 2016)*  
<<https://www.statista.com/statistics/255359/online-retail-sales-in-india/>>  
*accessed 3 April 2018*
28. *Case No. 80 of 2014*
29. *Case No. 17 of 2014*
30. *Case No. 34 of 2016*
31. *Supra at Note 40*
32. *Case No. 23 of 2016*
33. *Case No. 8 of 2016*
34. *Supra at Note 40*
35. *Case No. 21 of 2016*
36. *Supra at Note 40*
37. *Case No. 81 of 2015*
38. *Case Nos. 7 and 30 of 2012*
39. *Statista, 'E-Commerce Share of Total Retail Sales in India from 2014 to 2019' (Statista, December 2015)*  
<<https://www.statista.com/statistics/379167/e-commerce-share-of-retail-sales-in-india/>> *accessed 10 April 2018*
40. *In Mr. Deepak Verma v. Clues Network Pvt. Ltd.; Case No. 34 of 2016*