COMPETITION LAW AND ELECTRONIC COMMERCE: COMPARATIVE ANALYSIS OF US, EUROPEAN UNION AND INDIAN LAWS

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Abstract: A thorough understanding of a particular industry is crucial for enforcement of competition laws. The objective of competition law is to draw a fine line between legitimate business practices and those inviting the regulator's attention, thereby promoting consumer welfare and allocative efficiency. Every industry poses different challenges with respect to competition law enforcement. Presently, electronic commerce is one such sector, whose innovative models of operation have thrown open, challenges for competition law regulators worldwide, resulting in blurring of differences between genuine industry practices and anti-competitive ones. The present paper is a modest attempt to examine some competition concerns like geo blocking as entry barriers, predatory pricing, and collusion over online platforms, among others. The first part explores the twin doctrines of rule of reason and per se, which are prerequisite to understanding competition law. The second part examines the industry practices and anti-competitive activities with few cases from developed jurisdictions like the European Union (EU) and the United States (US). The concluding part advocates the need for balance between conventional retailers and online retail players along with suggestions to address the aforesaid issues.

Keywords: allocative efficiency, anti-competitive activities, geo blocking, predatory pricing.

Introduction: A robust competition law regime is prerequisite for ensuring every consumer of a product or service gets his or her share. Owing to emergence of innovative business models and information and communication technology, many traditional industries have found new modes of distribution and operation for their products and services. For instance, the electronic commerce industry reaches customers quickly and offers the same commodities as are available through retail stores or supermarkets. The flip side is, the distinction between legitimate business practices and anti-competitive ones becomes blurred.

It is the consumers whose disposable incomes are impacted and who are spoilt for choices as a result of collusion among market players, or abuse of dominance. Studies show that collusive agreements raise prices of commodities by more than ten per cent. The aforesaid practices prevail because the modus operandi is to operate in secrecy considering the consumer's ignorance with regard to such practices. Hence, the competition law regulator is also a de facto consumer rights regulator irrespective of the jurisdiction. The present paper is an attempt to trace competition law challenges prevalent in electronic commerce. The research relies on research journals, case laws, books and websites as primary and secondary sources.

Per se and rule of reason: Anti-competitive practices can generally be classified into two analogies which form the prerequisite before understanding anti-competitive practices in any industry. These doctrines have significance because of their acceptance as parameters for determining anti-competitive conduct.

The per se rules reflect a long standing judgment that *every horizontal price fixing arrangement among competitors poses some threat to the free market even if the participants do not themselves have the power to control market prices* [1]. The simplest example is of a cartel whereby few market players combine forces to avoid uncertainties of price competition and thus prices of commodities are decided according to their actions and not because of healthy competition.

For instance, drug manufacturers can raise prices arbitrarily in a secretive manner resulting in coordinated movement of prices, termed as price parallelism. Hence such agreements do not require introspection as they are by their very nature against healthy competition. The *rule of reason approach requires investigation into the purpose and effects of an agreement or concerted action or practice before holding it as causing unreasonable restraint [2].*

In other words a market player may be excused if a particular conduct is a consequence of the nature of the industry or, even if deliberate, it is done to meet the requirements of competition. For instance, the Competition Commission of India recently in Ashish Ahuja v Snapdeal, held that the electronic commerce market not being concentrated shows that no single player is dominant, and offering of discounts does not in any way prevent other websites from offering such discounts [3].

Nature of industry: The reason why this sector has shown exponential growth is because *consumers save time by comparing prices quickly and obtaining the commodity at discounted rates.* Brick-and-mortar shops are subject to opening hours' limitations, and consumers are normally constrained by both the number of shops they can visit in their neighborhood

or city as well as the limited time they can dedicate to shopping [4]. Hence, brick and mortar stores apprehend erosion of their consumer base owing to mushrooming of such commerce sites. Most players in the electronic commerce segment initially receive rounds of funding from venture capitalists and private equity investors till they become established and raise funds through initial public offering like Alibaba, the Chinese electronic commerce giant.

Market players of this industry look to generate traffic and garner market share, as sales are a necessary consequence of such efforts. *This industry operates on different models like marketplace and click-and-mortar model to name a few. Under marketplace model, sellers use online platforms to enhance their distribution networks. However, sellers have limited say on pricing and customer experience [5]. Hence, platforms like Flipkart, Myntra, among others provide products on discounted rates. Under click-and-mortar model, a particular player operates through retail stores and online.*

Internet or online markets, like mobile networks exhibit "network effect" i.e the value of the product or service increases with each added user [6]. Also, business-to-business commerce transactions exist between manufacturer and wholesaler, or wholesaler and retailer which provide a platform for these businesses to meet and culminate their transactions [7].

Competition law issues: Determining the relevant market:

The relevant market forms the bedrock for the enforcement of competition law. Generally speaking, relevant market is the area within which firms compete to offer better products and choices to consumers. Across India, United States (US) and the European Union (EU), relevant market is decided in accordance with relevant product market and the relevant geographic market. The former means *a market consisting of products interchangeable with each other depending on prices, purpose of use and customer preferences.* The products need not necessarily be identical. For instance, the Competition Commission of India in [3] included pen drives and memory cards in one product market. Relevant geographic market could be local, national, international or occasionally even global depending upon the particular product under examination, the nature of the alternatives in the supply of the product, and the presence or absence of specific factors (e.g., transport costs, tariffs, or other regulating barriers or measures) [8].

In the European Union (EU), for the definition of the relevant market, the competition authorities take into account a number of factors, such as the *reactions of economic operators to relative price movements, the socio-cultural characteristics of demand and the presence or absence of barriers to entry, such as transport costs [9].* But, complications arise in the context of electronic commerce. While some jurisdictions such as India are undecided on treating online retail products as part of the same market, developed jurisdictions have gone a step further. For instance, in the Google Double click case, where Google was alleged to have abused its dominance in online search, the Federal Trade Commission (FTC) of the United States and the European Commission (EC) treated the online search advertising market as a separate market because of differences in the scope of potential target audiences, advertising effectiveness and pricing mechanisms [10]. In case of India, the Competition Commission of India (CCI) recently refused to clarify whether online retail portals are under the same relevant market and stated 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 OPs (Opposite Parties) seems to be individually dominant" [11.] This is in contradiction with [3] where online retailers were put under the same relevant market.

Predatory Pricing: Predatory pricing occurs *when a dominant market player prices its products below the cost of production with a view to eliminate its competitors. Once competitors are eliminated, the dominant player recoups its profits by charging consumers exorbitant rates.* Any other player may engage in such acts, but they would not be termed predatory pricing, if the goal is to stay in competition due to conduct of the dominant player or, the pricing is a business practice in an industry.

The Competition Commission of India advocated this recently in Ashish Ahuja v Snapdeal. The informant was engaged in selling of pen drives and other memory devices of SanDisk, through the online portal of Snapdeal. But, it emerged that the informant was not the authorized seller of SanDisk, and Snapdeal later terminated its agreement with the informant. The informant alleged that SanDisk being dominant in the relevant market colluded with Snapdeal to offer prices below competitive rates to compel the informant to be authorized partner of SanDisk. The Commission held the informant had not adduced sufficient evidence and FlipKart, Amazon, eBay, Shopclues, Yebhi, jungle.com, rediff.com, indiatimes.com, etc are also operating and the e-commerce market thrives on special discounts and deals [12].

Vertical Restraints: Vertical restraints imply restrictions imposed by manufacturers on retailers with respect to commodity prices, modes and territories of distribution, or other non-price restraints. For instance, a particular manufacturer may enter into an exclusive distribution agreement in

a certain area, with certain distributors for particular commodities. Depending on the jurisdiction and factors like market power, pro competitive effects, such conduct may or may not be anti competitive. *Vertical restraint refers to a contractual term that a dealer must accept in order to qualify for a franchise* [13].

Vertical restraints in United States: The US law on vertical restraints is regulated by The Sherman Act, 1890, the precedents set by the US Supreme Court, and the state laws which are compliant with the federal laws. Unlike the European Union (EU), US competition law on vertical restraint is more liberal. As a matter of federal antitrust law, essentially all vertical distribution restraints are analysed under the rule of reason [14]. *US courts have long realized that, the manufacturer acting unilaterally, has the unfettered right to: (i) announce the conditions on which it will do business with its distributors, (ii) unilaterally select the distributors and customers with which it will do business, and (iii) ultimately cease to do business with any dealer who does not adhere to its terms and conditions* [15].

However, this does not mean that every vertical restraint will be tolerated, when there are no accrued pro competitive benefits. For instance, in BabyAge.com v. Toys "R" Us, the online retailer sued Toys "R" Us, the biggest brick-and-mortar retailer at the time, and different manufacturers as the former coerced manufacturers to not supply their products to those online retailers who retailed products below prices at brick-and-mortar stores [16].

US competition law permits situations where manufacturers grant *privileges like increased advertising and selling on their websites to some online retailers and not to others. But, the privilege given must be consistent with the manufacturer's legitimate business needs* or to meet competition requirements. For instance, in MD Products, Inc v. Callaway Golf Sales Co., the manufacturer, Callaway, had observed that few online retailers offered substandard products at discounted rates to customers. This led the manufacturer to formulate a unilateral policy which allowed few online retailers to advertise and sell on its site, who did not commit the above practice. The court held that the manufacturer's conduct was not anti competitive as it was done to protect its business interests [17]. Therefore judiciary will not involve itself in making legitimate business decisions and leave it to the market players as long as their actions generate pro competitive benefits. In more recent times, the Apple e-book case has been in the limelight. Through parallel investigations by the US Federal Trade Commission (FTC) and the European Commission (EC), it was revealed that the parties involved were iBookstore, Apple's online book retailer and five international publishers. The publishers and Apple entered into illegal agreements for e-book pricing that would have the object or the effect of restricting competition in the EU [18].

Vertical restraints in India: In India, because electronic commerce has only recently gained ground, not much case law exists for analyzing vertical restraints. Very recently, in Mohit Manglani v Flipkart India Pvt Ltd, the Competition Commission of India held that in accordance with Competition Act, 2002, exclusive distribution agreements entered between online portals and the products' distributors could not be anti competitive as they did not foreclose competition and the practice was prevalent among other market players [19].

Vertical restraints in European Union: *The European Union (EU) law on vertical restraints is governed by Article 101 of the Treaty on The Functioning of the European Union (TFEU) which prohibits agreements which affect trade between member states and distort competition in the internal market.* Also, soft legislation like the revised Vertical Block Exemption Guidelines (VBER), or the vertical guidelines, determine the market share threshold beyond which certain agreements can be anti competitive. Besides the above, country specific laws, electronic commerce and consumer rights directives of the European Union (EU) and court judgments are important sources. There is no rule of reason under EU competition law [20].

The stricter regime of EU competition law can be deduced from the fact that the aforesaid guidelines prescribe sector specific market threshold limits, whereas such guidelines are non-existent under the US regime. Unification of the single market is an obsession of the EU authorities; this has meant that decisions have sometimes been taken prohibiting behaviour which a competition authority elsewhere, unconcerned with single market considerations, would not have reached [21].

EU competition law gives recognition to concepts like active and passive sales over the internet. Passive sales are responses from online retailers in response to requests from customers. In other words, they refer to electronic commerce between such retailers and customers irrespective of the jurisdiction. Under the vertical guidelines, active sales mean actively approaching individual customers or a specific customer group or customers in a specific territory [22].

Selective distribution agreements are another kind of vertical restraint that sellers and retailers often engage in. As the name suggests, these agreements seek to affect competition in more than one territory. In other words, the supplier wishes to limit his authorized distributors to a select few.

Case laws are in favour of such agreements, provided such agreements have their object as general

improvement in competition and not to reduce competition among distributors of a particular product. For instance, in *Makro v. Beaute Prestige International AO, the Belgian Supreme Court upheld the Liege Court of Appeal order, according to which restriction on internet sales concerning luxury perfumes and cosmetics was objectively justified as the nature of the products required professional advice and methods of sale which could not be guaranteed on the internet* [23]. However, not all selective distribution agreements have been allowed to prevail. In the Pierre Fabre case, it was held that an absolute ban on online selling imposed by a supplier on its authorized distributors constitutes a hardcore restriction on competition by object and that *the aim of maintaining a prestigious image is not a legitimate aim for restricting competition* [24]. It should be noted that the US competition law regime focuses on inter-brand competition, or competition between two or more manufacturers or suppliers, rather than intra-brand competition, or competition between two or more distributors or retailers, thus making the European Union competition law more restrictive [25].

All of the aforesaid examples result in constituting barriers to entry for online retailers. Hence, the phenomenon of a barrier to entry is both an anti-competitive conduct and a resultant consequence of agreements such as the above. Very recently, the European Commission (EC), has identified certain practices as geo blocking, whereby, *sellers and providers of services are engaged in blocking access to websites across borders resulting in denial of information about product ranges and prices. Also, according to the Commission, in some cases, cross border access to websites is allowed but, the customer is denied the delivery of the product because of restrictions on shipping of the said products.* The Commission wishes to curb such practices through the Digital Single Market Strategy unveiled on May 2015 [26].

Collusion over business-to-business platforms: Globally, electronic commerce can be segregated into business to consumer (B2C) and business to business (B2B). While the aforesaid discussion highlights issues under business to consumer, a significant portion of electronic commerce also takes place between manufacturer and wholesaler, wholesaler and retailer, or between manufacturer and retailer. Interactions can also take place between two or more manufacturers or retailers who operate at the same level of production or distribution. *This easy collusion is facilitated by easy access to information and availability of internet as a platform to communicate and exchange information* and signal changes to other market competitors in an easy manner [27].

The further challenge with such collusion is that unlike other trade platforms such as trade associations and unions, whereby passed resolutions, minutes of meetings can be examined by a competition regulator, *in case of collusion over internet platforms no such physical record of tacit collusion would exist to derive a conclusion of anti-competitive conduct and real time customer data is used to affect competition*. This was observed in the *United States Airline Tariff Publishing case*, whereby there was collusion among airline companies to effect changes in prices without the knowledge of consumers. The price notices issued to consumers bore tags which specified conditions under which the changes would not come to force. The case reveals that highly sophisticated forms of communication may be adopted by the enterprises to enter into agreements to form a cartel [28].

Conclusion: It can be safely concluded from the aforesaid discussion that depending on the jurisdiction, competition law enforcement for electronic commerce will gain ground. However, one thing which can be concluded with absolute certainty is the fact that electronic commerce is here to stay. The growing interaction of online retailing is both a boon and bane for competition law regulators worldwide. Countries like India, where electronic commerce is relatively new, can use authorities from other jurisdictions as being of persuasive value, whereas developed markets can face hurdles in curtailing innovative models of distribution adopted by market players. The need of the hour is therefore to integrate electronic commerce and conventional retailing. For instance, in India, Tata markets its Croma brand of watches through both online and offline channels, through the click-and-mortar channel. Also, at the same time, it should be kept in mind that while some market players may operate genuinely in the online segment, others may engage in anti-competitive practices to defend their market positions. The duty of the regulators is to differentiate between the two.

In light of the above, the following suggestions may be useful. For instance, the International Competition Network (ICN), a forum for competition regulators, can formulate guidelines for integrating competition law as part of corporate governance of online market players. Secondly, there should be implementation of the aforesaid guidelines by the online players, and their performance in this regard can qualify them for relaxation in their modes of operation, or additional funding depending on the jurisdiction. Thirdly, there should be wider collaboration between competition regulators and the International Competition Network (ICN) with respect to new investigative techniques for the electronic commerce sector. Lastly, conventional brick-and-mortar stores can

explore the click-and-mortar mode of retailing for some goods as highlighted above, so that both online and offline modes of business for the same product can thrive and ensure cohesion.

References:

1. Siddharth Shastri, Leveraging foreign Direct investment for Economic; Business Sciences International Research Journal ISSN 2321 – 3191 Vol 2 Issue 1 (2014), Pg 261-268
2. D.P. Mittal, "Anti-competitive agreements", Taxmann Publication P. Ltd, 3rd ed, 2011, pp. 208
3. Supra, note 1
4. Ashish Ahuja v. Snapdeal, Case 17/2014, pp. 7
5. Gabriele Accardo, "Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution under EU and U.S Competition Laws", TTLF Working Papers, No. 12. 2012, pp. 6, available at http://dx.doi.org/10.2139/ssrn.2038239
6. PricewaterhouseCoopers eCommerce in India: Accelerating growth 2015, pp. 7, available at http://www.pwc.in/en_IN/in/assets/pdfs/publications/2015/ecommerce-in-india-accelerating-growth.pdf
7. Bhawna Sharma, Nilanjana Bagchi, A Probe into Impulsive Buying Behaviour and Related; Business Sciences International Research Journal ISSN 2321 – 3191 Vol 2 Issue 1 (2014), Pg 284-291
8. M M Sharma, "Do online markets effect Competition?", Competition Law Reports, vol. 3, Nov. 2014, pp. 109
9. G.R. Bhatia, "Competition Concerns in Electronic Commerce in India", Competition Law Reports, vol. 1, Apr. 2014, pp. 81
10. D.P. Mittal, "Relevant Geographic Market", Taxmann Publication P. Ltd, 3rd ed, 2011, pp. 141
11. Supra, note 8
12. Competition Commission of Singapore, E-commerce and its impact on competition policy in Singapore, Oct 2015, pp.87, available at http://www.dotecon.com/assets/images/DotEcon-Ecommerce-Final-Report.pdf
13. Mohit Manglani v Flipkart India Pvt. Ltd Case 80/2014, pp. 9
14. Lalida Poonsawad,Dr.Sirion Chaipoopirutana, Factors Affecting Consumers' Attitude towards; Business Sciences International Research Journal ISSN 2321 – 3191 Vol 2 Issue 1 (2014), Pg 305-309
15. Supra, note 3, pp. 7
16. Supra, note 4, pp. 101
17. Supra, note 13
18. United States v. Colgate & Co. (Colgate), 250 US 300 (1919)
19. BabyAge.com v. Toys "R" Us, No. 05-6792 (E.D. Pa. May 19, 2008)
20. MD Products, Inc v. Callaway Golf Sales Co., 459 F. Supp. 2d 434 (W.D.N.C 2006)
21. Lunita Hijam, "Whether the diwali sales offered by e-tailers have raised competition concerns?", Competition Law Reports, vol. 3, Oct. 2014, pp. 140
22. Venkateswaran.R, Dr. A.J. Augustine, Inventory Control Management tool of Performance; Business Sciences International Research Journal ISSN 2321 – 3191 Vol 2 Issue 1 (2014), Pg 297-304
23. Supra, note 11
24. Supra, note 13
25. Allison Jones, Brenda Sufrin. "The single market imperative". Oxford University Press 4th ed. 2011: pp. 24
26. European Commission Guidelines on Vertical Restraints, 51, 2010 O.J (Official Journal)
27. Makro v. Beaute Prestige International AO, ARR. CAS (Oct. 10, 2002)
28. Pierre-Fabre Dermo-Cosmetique SAS v. Président de l'Autorité de la Concurrence, Case C-439/09, [2011] ECR I-0000, 44, 46
29. Supra, note 13
30. Devika Swamy, Rajeshwari Chettiar, Communication and Teamwork: the Root of Supply; Business Sciences International Research Journal ISSN 2321 – 3191 Vol 2 Issue 1 (2014), Pg 239-242
31. European Commission, 'Barriers to the Single Market from Geo-blocking and other geographically-based restrictions' 2015, available at www.file:///C:/Users/kiit/Downloads/Geoblocking%20introduction%20text.pdf
32. Supra, note 7, pp. 82
33. Supra, note 7, pp. 83
34. Deepa Sharma, Dr.Sirion Chaipoopirutana, A Study of the Relationship Between Endorser; Business Sciences International Research Journal ISSN 2321 – 3191 Vol 2 Issue 1 (2014), Pg 292-296

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