DEFINING RELEVANT MARKET IN EVOLVING INDUSTRIES

Written by ***Abhilasha Tiwari***

4th Year BBA LLB Student, Institute of Law, Nirma University

INTRODUCTION:

Winston Churchill once said, *"To improve is to change, to be perfect is to change often."* The same theory applies to laws of the land which requires constant review as per the changing time and circumstances. Especially, when it comes to the globally evolving market economy where things become obsolete at the wink of the eyes, the laws and their criteria should be molded accordingly. As per the Internet and Mobile Association of India (IAMAI)[1] the country's internet users have grown from 1.6% in 2002 to 36.5% in 2016, thereby becoming the third largest online-market economy in the world, only after the US and China. Thus, such rapid growth rate calls for redefining the market economy for the purpose of legislations.

In the competition law, delineate relevant markets is often a critical stage. If the market is defined too narrowly, then market analysis is likely to overestimate the power possessed by the firms possess market power. Where no firms possess market power, remedies or regulations are unlikely to improve outcomes because market forces are already providing customers with the power and opportunities to choose among rivals that are competing to earn the customers' business. However, if the market is defined too broadly, then it may appear that no firms, even monopolists, have market power, even though at least some firms are able to receive supernormal profits by limiting output.[2]

Given the importance of market delineation, it is not surprising that various jurisdictions publish documents which provide a systematic conceptual framework that should be followed when delineating relevant markets. However, rapidly evolving technological developments, structural changes within every sector, product innovation and changing consumer preferences are all

[1] http://www.internetworldstats.com/asia/in.html.
[2] Market definition, *Policy Roundtables 2012*, OECD.

contributing to a changing market economy. The purpose of this study is to delineate the relevant market in the evolving markets, so as to look for the competition issues in such markets. The study will include the national and international case laws in such market along with the author's opinion.

RELEVANT MARKET AS PER INDIAN COMPETITION LAW:

In almost every competition case, defining relevant market is a critical threshold issue for assessing the legality of the business conduct in question. This is not because the market definition is an end in itself. It is generally accepted that market definition merely provides an analytical framework for assessing market power, which in turn is fundamental to the determination of whether the conduct in question can harm competition and consumers. Accordingly, as long as attempts to measure market power directly remain too imprecise or impractical for general application by courts, the determination of the relevant market will remain critical in most antitrust cases and will often dictate the outcome of a case. The Competition Act, 2002 in its nuanced sense, defines relevant market in section 2(r) as a market which is a combination of 'relevant product' and 'relevant geographic' market.[3]

Product market: On the face of it, the objective of product market definition is easy to state but often difficult to apply. In general, product market definition as per section 2(t) describes a market that comprises all those products or services which are regarded as substitutable or interchangeable by the consumer by reason of their characteristics, prices and intended use. However, the difficulty lies in determining how close a potential substitute must be in order to be included in the market. This task is particularly difficult when the products in question are significantly differentiated by physical differences, brand name, quality, sales and distribution methods, or some other combinations of these characteristics.[4]

On the one hand, in the absence of substantial switching costs for consumers, one could argue that all functional substitutes should be included in the same product market since consumers can readily switch away in the face of an attempt to exercise market power. While on the other hand,

[3] Supra Note 2.
[4] James A. Keyte*, Market definition and differentiated products*.

product differentiation itself indicates the existence of some degree of market power since it gives the producer the ability to price above the cost. Thus, every differentiated product, at least in theory, has the potential to be its own antitrust product market or part of a distinct market limited to that product and its closest substitutes. If significant product differentiation results in a convention "gap" that separates reasonable substitutes from unreasonable ones for any particular end-use, then defining market boundaries is less difficult. The problem however, is that in most cases no one can agree on whether a "gap" exists or whether it is significant enough to create a market boundary.

Geographic market: Looking at the second element of relevant market, relevant geographic market as per the act 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.

Limits of geographic markets are often determined by transportation costs, tariffs, trade barriers etc. As an illustration, if foreign producers of a product must pay a tariff (domestic producers do not) then the resulting increase in the price of the foreign product may be so large that the consumers would not switch from the domestic product for the foreign product.[5]

However, if there is no such difference in the price and people still can opt for the foreign product or service, then it can be termed to be in the same geographic market. The relevant geographic market could be determined by the Competition Authority having regard to all or any of the following factors such as regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences, need for secure or regular supplies or rapid after-sales services.[6]

A relevant market has therefore two fundamental dimensions, product and geographic. The product market describes the good or service. The geographic market describes the locations of the producers or sellers of the product or service. Relevant market is defined by consumer or

[5] Chakravarthy S., *Relevant market in competition case analyses.*
[6] Mark Jamison, *Defining Relevant Markets in Evolving Industries*.

purchaser preferences and actions. Thus such a definition of relevant market through relevant product market and relevant geographic market enables the determination of suppliers and buyers active in that market. From this point, based on the suppliers' sales of the relevant product in the relevant region, total market size and the market share of each supplier may be calculated. Therefore, such a delineation of the relevant market is crucial in analyzing dominance or offences of abuse of dominance or any other anticompetitive issue.

RELEVANT MARKET IN THE EVOLVING INDUSTRIES:

1. E-COMMERCE:

The Internet is apparently the most powerful force in the global economy. Like printing press, electricity and the steam engine, the Internet has become, in the words of the OECD, a "general purpose technology enabler," a once-in-an-era innovation that reorganizes world economic activity and spurs productivity. Although the positive effects of this reorganization are apparent, but the rapid pace of innovation and the subsequent restructuring of economic activity have placed pressure on regulators to understand this vital but rapidly changing new economic sector.

Online platforms cover a wide range of activities including online advertising platforms, marketplaces, search engines, social media and creative content outlets, communications services, payment systems, application distribution platforms, and platforms for the collaborative economy. They are strong drivers of innovation and play an important role in the World's digital society and economy. Therefore, the increased consumer choice and improved efficiency and competitiveness of industry call for defining relevant market in this regard. The report discusses a few online platform markets and the delineation of relevant market.

E-commerce is not considered just a potential sector; it is one of the highly booming sectors India is witnessing right now. India has an internet user base of about 462.1 million as of June 2016 and that constitute almost 35% of total population. We have already witnessed a digital revolution in the past decade, the contributing factors being extensive mobile connectivity, declining broadband subscription prices, aided by the launch of 3G and 4G services subsequently. This has led to an ever-increasing number of internet users in the country which is not just limited to urban areas now.[7]

If we consider only online retail revenues (e-tailing), a report provided by Forrester Research, e-commerce revenues (retail) in India will increase by more than five times by 2016, jumping from USD 1.6 billion in 2012 to USD 8.8 billion in 2016. **Further, India is the fastest-growing E-Commerce market in the Asia-Pacific region and** India's online sales will grow more than fivefold by 2020 as the number of online buyers and per capita online spending increase rapidly. This goes on to suggest that the growth in e-commerce sector may be way more than the industry estimations and hence a more efficient set of competition laws will be required to facilitate fair-play ground to the increasing number of players in this field.

Relevant market: The first and foremost question that clicks the mind is whether e-commerce platforms/online markets are separate markets altogether or just a different channel of distribution of the existing market. Determining this issue becomes important because to prove any kind of anti-competitive practice under the Competition Act, 2002, relevant market needs to be identified.

One of the special issues with regard to the market definition is the question of whether bricks-and-mortar substitutes in the offline world are available. If both traditional bricks and-mortar businesses and internet businesses are included, then markets are delineated much more broadly than in areas in which only internet businesses exist. However, it varies from the case to case, as when offline and online market are to be regarded as two different channels of the same market or two separate markets.[8]

Snapdeal-SanDisk Case: In this case a physical market player tried to get the sale of its products promoted through online portal of Snapdeal at a price much below than the other sellers of the same product. It was alleged that SnapDeal and SanDisk India had some agreement to market the latter's products online for Indian consumers, which may have been subsequent in time to the agreement which Snapdeal had with the complainant firm.

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[7]http://economictimes.indiatimes.com/tech/internet/indias-internet-users-to-double-to-730-million-by-2020-leaving-us-far-behind/articleshow/53736924.cms

[8] David Evans & Elisa Mariscal, *Market Definition Analysis in Latin America with Applications to Internet-Based Industries*.

However, instead of taking the next step, i.e. investigating this complaint, CCI vide its order dated 19 May, 2014 had closed the case holding 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." [9]

The author is of the view that the Commission was right in terming online market as just a different channel of distribution and not a different market altogether, the reason being - products offered and the consumer are the same as the physical market. To the end consumers, online and offline markets are not really separate. The shopping experience mainly in metropolitan cities, do not take place purely along one of those channels and the line is blurring increasingly. As we all readily experience, some shoppers start searching in the real world, then go online to compare prices and other features, and then make the purchase; while some go the other way and start online, dip into a shop and pop back online again. Therefore to the consumer online and offline options are merging; and same is being experienced by the firms which henceforth are moving towards providing service in both channels to meet growing customer expectation.

Since internet intensifies price competition, this may not be enjoyed by a large portion of the physical retailers and they may simply be attempting to ensure their edges by attempting to limit value rivalry online so they can keep on competing on non-value components, for example, administration and presentation in-store. Along these lines, in evaluating business rehearses, the opposition power must consider the over customers' excursion and think more from the buyers' viewpoint. There is a need a view on how a possibly hostile to aggressive limitation may influence this market environment, as opposed to on the specific type of "restriction" that is utilized.[10]

Flipkart Case: The commission brilliantly explained opined that the relevant market could not be product specific as it includes all substitutes of a product. Therefore, it could not be said that a party has 100% dominance in the market for the products which are exclusively marketed by him.

[9] *Ashish Ahuja v. SnapDeal and Another*, Case No. 17 of 2014, para 16.
[10] http://dazeinfo.com/2016/06/13/number-internet-users-worldwide-2016-2020/

Further, irrespective of whether the online retail market is considered to be a separate relevant product market or a subset of the retail market, none of the party could be said to be individually dominant, given the multitude of e-portals in the market offering similar facilities.[11] Therefore it is the proper product differentiation which is crucial delineating the relevant market and not the product specifically. Even if we look at the case of smart phone OnePlus One which is solely available for purchase on Amazon.in in India, and is not available on any other ORP or through any brick and mortar retail outlet. In such an event if any of the ORPs or an owner of any of the brick and mortar retail stores that sell smart phones alleges that Amazon.in has entered into an anti-competitive agreement with OnePlus, it has to be established that there has been AAEC in the relevant market. And as per the concept of product differentiation such a relevant market would not be product specific rather will include all the substitutes.[12]

Alibaba-Jasper Case: However in this case, the commission is apparently discussing the relevant market confining to the electronic platform only and thereby considering the acquired share of the opposite party. The online marketplace of the two parties was looked as a separate market from that of the traditional retailers and thereby the market share was calculated. Thus, in a way, the commission tried to delineate the market as per the circumstances and not going by any defined statement.[13]

Thus, it can be very well inferred from the above cases that there is no straight jacket formula of defining relevant market or bifurcating it into online or offline for that matter; rather it varies from case to case and its circumstances. There are a plethora of elements that have to be taken into consideration for such delineation.

2. NEWS AGGREGATORS:

The newspaper industry has experienced a noteworthy change since its development. What's more, to extra, the appearance of web has altogether decreased the expenses of getting to data and of

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[11] *In Re: Mohit Manglani v. M/s Flipkart India Private Limited and Others,* Case No. 80 of 2014.

[12] Divya Sharma, *India: Competition Law And E-Commerce: A Concern For The Future.*

[13] C-2015/08/301

dispersing the substance all around and this has favored the production of numerous news benefits that contend with online newspapers.

Search engines like Google News, Bing News or Summify, give connections to the news stories of online newspapers and show them at a solitary webpage joined by a title and a brief portion. Their business target is basically to re-guide visitors to different destinations on a similar stage, for example, regular searchers that offer promoting space or social stages. News aggregators vary marginally, because of the fact that they distribute bits of news made with data got from newspapers and press organizations, and typically they don't give connections to their unique sources. Thus, they go into permitting concurrences with data providers to keep away from copyright encroachments. A portion of the best known aggregators are Yahoo! News, Drudge Report, and The Huffington Post.

Along these lines with the advancing mechanical advancements, the time has come to legitimate outline the product offering of a media distributer that confronts rivalry from a web indexes and news aggregators. Although some publishers consider search engines to be free-riders reselling the information they have gathered at vast expense whereas the other belief is that search engines can expand a publisher's market share because their visitors usually click through to the original contents of newspapers. Moreover, search engines help in increasing the number of consumers participating in the content ecosystem, as they reduce consumers search costs by presenting the news items of several newspapers on the same news site. This is the reason why most of the publishers have adopted search engines and accepted their links.[14]

However, such an integration of publishers and aggregators raises novel economic questions regarding the impact on competition. Publishers want to integrate aggregators to obtain more indirect traffic and referrals, but they can use their position to exclude competitors or to give an advantage to their own contents.

<u>Relevant market:</u> If we try to delineate the relevant market for the online platform of news aggregators, geographic market definition should not be seen as an end in itself, rather as providing a useful framework for the competitive analysis. It should be used to identify a geographically

[14] Justus Haucap & Torben Stühmeier, *Competition and Antitrust in Internet Market.*

coherent group of customers whose purchases are competed for by suppliers located in the same geographic area (and possibly also by suppliers located at a greater distance).

However, in cases of online platform market, especially news aggregators, as far as the readers of same geography are receiving news from both the traditional and online news publishers; they can be put into the definition of relevant geographic market.[15]

Whereas, looking at the relevant product/ service market, the news provided by both the traditional news retailers as well as online news aggregators is same. There is no product differentiation so as to delineate the market into two or more sub segments.

Therefore looking at the scenario of news market, there has been a little difference between traditional news publishers and the online news aggregators. In the internet access world where computers are interconnected worldwide and where every individual has a smart phone, there remains no difference in accessing news online or offline. Further, if a person was reading three newspapers earlier, he will shift to one newspaper and rest to any news aggregator where all the news can be read for free. Also, if we consider the clause of price, most of the news aggregators are free and even the subscribed news cost is as minimal as traditional newspaper. Thus, it could be inferred that the technological advances has not left any difference in the traditional and online news publishers as most of the population has access to both of them.

3. Computer Software Industry

India is among the largest sourcing destination for the information technology (IT) industry in the world, accounting for approximately 67 per cent of the US$ 124-130 billion market. The industry employs about 10 million workforces. India's cost competitiveness in providing IT services, which is approximately 3-4 times cheaper than the US, continues to be the mainstay of its Unique Selling Proposition (USP) in the global sourcing market. However, India is also gaining prominence in terms of intellectual capital with several global IT firms setting up their innovation centers in India.[16]

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[15] Joan Calzaday & Guillem Ordonez, *Competition in the news industry: Fighting aggregators with versions and links*, February 13, 2014.

[16] http://www.ibef.org/industry/indian-it-and-ites-industry-analysis-presentation

The data suggests that a huge amount of information and knowledge is exchanged and shared in real time in digital network society, which is created upon the Internet. Since it has become an indispensible platform for the various internet based industries, their current economic value is enormous and will continue to grow. Thus to preoccupy these promising worlds, a large number of companies are striving for innovation under fierce competition. And there comes the role of competition authorities to look for any anti competitive practices prevailing in the market and relevant market as per the changing circumstances.

Competition issues relating to computer software industry could be well read with the Microsoft-Windows Media Player case. Although the commission has not seen any such big issues coming up but Korea and the United States well describes the case and probable definition of relevant market.

Microsoft- Windows Media Player (WMP) case:

With the technological developments and innovations, the global market has seen many cases where such delineation was very essential to find out whether such advances are affecting the fair competition in the booming economy. To start with, the Microsoft- Windows Media Player case has been widely discussed in this regard.

Korea- The Korea Microsoft case was filed with the KFTC which covered issues relating to multiple tying in the areas of digital media systems and instant messaging systems. KFTC found these activities to be anticompetitive and unfair both in relation to PC OS and related market (media player market, media server program market, instant messenger market etc.). However, the manner in which the commission evaluated the case is commendable. The Microsoft was permitted to tie WMP and MS Messenger to Windows PC OS only under the condition that the company installs on its OS both **'Media Player Center'** and **'Messenger Center'** that allows users to more easily link the web pages of the competing products. Such a type of corrective measure was the first to be designed in the world.[17]

[17] Sejin Kim, *Korea Fair Trade Commission's decision on Microsoft tying practice: The secondbest remedy for harmed competitors.*

The commission brilliantly took into consideration the relevant market for both the tying product (PC server OS market) and tied product (streaming media server program market). The commission found that there was no substitutability of demand and supply between a 'PC Server OS' and 'medium-to-large-size server OS' in terms of functions, price and technologies. Also, there was no substitutability of demand and supply between 'streaming method with streaming media server program' and 'downloading method with web server program'. [18]

Thus, instead of simply defining a computer system as a whole, the commission went on defining PC server OS system, windows media player and windows messenger separately.

US- Given the similarity of US and EU antitrust law, it is debatable why the Microsoft antitrust litigation developed differently in each jurisdiction. Many legal commentators assert that antitrust law in the US focuses on protecting consumers through competition, while the EU emphasizes protecting the competitive process.

The District Court never engaged in such an analysis nor entered detailed findings defining what a browser is or what products might constitute substitutes. In the Findings of Fact, the District Court (in a section on whether IE and Windows are separate products) stated only that "a Web browser provides the ability for the end user to select, retrieve, and perceive resources on the Web. Furthermore, in discussing attempted monopolization in its Conclusions of Law, the District Court failed to demonstrate analytical delineation of the product or geographic market."[19]

4. COMPUTER HARDWARE INDUSTRY:

To start with computer hardware industry, it is very essential to look at the basics of a computer system. A computer in the nuanced terms is composed of the following major things:

- A PC – the hardware system.
- An operating system- the software.
- And some applications.

[18] Supra note 15.
[19] *United States of America v. Microsoft Corporation*, case No. 00-5212 and 00-5213.

A computer is made out of the accompanying real hardware i.e. a CPU, a memory storage device, for example, hard drive and RAM (Random get to memory), and fringe devices, for example, keyboards, monitors and so forth. The fundamental programming that runs the PC or the server is known as the operating system, which controls all the essential elements of the computer system.

IT markets represent an assortment of expository difficulties. They are described by both supply- and demand-side economies of scale and scope, typically implying high market share and/or high levels of concentration (e.g., Herfindahl-Hirschman Index ("HHI"). Albeit such flow could bring about market energy to the degree that the advantages are "fundamental" to contend, customary focus measures are good for nothing to determine such possibilities given their restricted and static nature. Undoubtedly, fast development and the potential for troublesome passage infer such market power might be transient, even deceptive. Rivalry in such markets happens both inside stages (e.g., amongst HTC and Samsung for authority on the Android stage) and among them (e.g., amongst Android and iOS). Disagreements about interconnection terms – in which firms look to make and practice bartering force and accordingly boost their shares of the financial benefits made by an effective stage – are ordinary. Hence it requires a clever depiction of the market in the digitalized world in the wake of comprehension the mechanical use of the item or administrations, their relationship remembering the real item/administrations separation and their homogenous and heterogeneous qualities and so forth.[20]

Denali- EMC Case- 2016/01/370

The case involved a combination where the nature of the products and services was such that it required a comprehensive assessment to be undertaken, in terms of substitutability for exact delineation of the relevant market. The deal diversifies Dell's product mix, merging its 4th place ranking and expertise with servers (14% market share) with EMC's number one position in data storage (and 24% market share). The combined company will have leading positions in servers, storage, virtualization and PCs and be well positioned in other fast growing IT segments: Digital Transformation, Software Defined Data Centers, Hybrid Cloud, Converged Infrastructure, Mobile, and Security.[21]

[20] Cento G Veljanovski, *Competition law issues in the computer industry: An economic perspective.*

[21] Bruder Capital, *EMCs stock going away*.

While delineating the market, it was found that the business activities of the parties to the combination overlapped in the following segments in India but the commission went on further segregating the market as and when required. These are:

- EEDSS (sub-segmented into entry-level, mid-range and high-end)- Enterprise disk storage is a broad category of IT storage that includes products and services designed to assist organizations with saving and retrieving digital information. It can handle large volumes of data and large numbers of users. The commission intelligently segmented the EEDSS and regarded that the parties had market share in different sub segments which gave no undue advantage of such combination.
- Backup software (*i.e.,* software designed to make additional copies of data onto separate storage devices) are used to ensure data protection and integrity (and then restore such data to primary storage as necessary.) Although it was regarded as one market, but the small market share did not call for any anticompetitive issues.
- IAM solutions refer to software that governs various processes to manage identity and access information across different applications / systems. Although it was regarded as one market, but the small market share did not call for any anticompetitive issues

Further the potential vertical relationship between Dell and EMC in terms of server was in question. To this the commission elaborately explained the server model of both Dell and EMC as well in the following terms:

- ➢ Dell's business model for servers depends on an open ecosystem, which assures the compatibility of its servers with third party infrastructure, such as storage solutions. Thus, a "mix-and-match" between servers and storage systems from different brands is possible.
- ➢ Further, there is inter-operability of servers of Dell with Server Virtualization software provided by Microsoft, Red Hat Inc., etc.
- ➢ Moreover, VMware's (subsidiary of EMC) business strategy is hardware and software-neutral and it has been working with different server vendors such as IBM, HP etc. that will continue to operate either in partnership with VMware or with third party Server Virtualization software providers, thereby, providing competitive constraint to Dell post-combination.

Therefore, from the above discussion, it can be inferred that a proper understanding and delineation of the key characteristic for each product markets, its usage, players operating in the said businesses in India, new entrants in the said product markets, nature and extent of technical innovation in the said industry, extent of barriers to entry, etc. is required to be undertaken for a defining relevant market for any of the IT or IT enabled services.

5. INFORMATION TECHNOLOGY ENABLED SERVICES:

IT Enabled Services (ITES) has been the key driver of development for the Indian IT industry. The ITES-BPO segment in India developed at more than 46 for every penny - from US$ 2.5 billion in 2002-03 to touch US$ 3.6 billion in 2003-04. This division is evaluated to enroll a development of around 40 for each penny in fiscal year 2004-05 to achieve incomes of US$ 5.1 billion.

IT software and services in India represented 2.4 for each penny of the nation's GDP and 20.4 for each penny of fares in 2002-2003. It is anticipated to represent 7 for each penny of India's GDP and 35 for each penny of aggregate fares by 2008. India offers a particular arrangement of favorable circumstances, which make it a favored goal for ITES. As per a review by Forrester, India's edge over other contending countries in the IT outsourcing business originates from the nation's decade old involvement around there, familiarity in the English dialect, steady government arrangement framework, and excellent offerings. [22]

Information technology enabled services are also known as web enabled services or remote services that covers a plethora of services which involve information technology for improving efficiency of any organization. It is a sort of outsourcing of services which exploits Information technology in various fields like banking, insurance, finance, telecommunication, etc. This generally includes BPO, KPO, etc.

Since ITES being the evolving economy, there have been a few anti- competitive issues in this area. To start with, the combination registration no. C-2016/04/396 of the Competition Commission of India, whereby three IT and IT Enabled Services company (HCL Technologies Limited, Geometric Limited and 3DPLM Software Solutions Ltd) comes into picture with regard to certain overlapping of relevant market and anti-competitive practices.

[22] http://www.ibef.org/download/ITES_sectoral.pdf

HCL Technologies Limited, Geometric Limited and 3DPLM Software Solutions Ltd Case:

In this case HCL was acquiring Geometric Ltd. and Geometric Ltd. was merging with 3DPLM. In this merging, there seemed to be some overlapping of IT and IT Enabled Services. However, the Commission brilliantly, further delineated IT and ITES as they are involved in many sectors such as finance, banking, insurance, telecom etc.

The Commission was of the view that,

> "IT services and engineering, research & development ("ER&D") are the overlapping segments between HCL and Geometric in the IT and ITES market in India. HCL and Geometric are stated to have small market shares in the business of IT and ITES as well as in the Overlapping Segments, and there are several large entities, like Tata Consultancy Services, Infosys and Wipro, operating in the business of IT and ITES, as also in the Overlapping Segments. These competing companies will continue to pose competitive constraint to HCL and Geometric. In view of this, no appreciable adverse effect on competition ("AAEC") seems to arise with regard to horizontal overlaps."[23]

Therefore, such delineation shows that it requires a deep understanding of the area so as to properly delineate and defining the relevant market neither too broadly nor too narrowly.

CONCLUSION: BEST PRACTICE TO DELINEATE MARKET

'Traditional market definition analysis' which studies constraints on firms' price/output decisions, can present a seriously misleading picture of competitive relations in the new economy. Successful incumbents in Schumpeterian industries are constrained primarily by dynamic competition: by the threat that another firm will come up with a drastic innovation that causes demand for the

[23] *Combination registration no. C-2016/04/396*

incumbent's product to collapse. The new product may be just a vastly better version of the old product (the Palm Pilot vs. the Apple Newton), or it may be an entirely different product that eliminates the demand for the old product (the hand-held calculator vs. the slide rule).[24]

The recent history of high-technology industries demonstrates that dynamic competition takes place among firms that are not necessarily competitors in the static markets that economists ordinarily define for antitrust cases. Dynamic competition has been particularly evident in the software industry. Sometimes dynamic competition takes the form of innovation to displace a category leader.

For example, Micropro's WordStar was the early leader in word processing software for PCs, which significantly displaced dedicated word processing systems such as those offered by Wang. But WordStar was eventually displaced by WordPerfect. WordPerfect retained category leadership for approximately six years before being displaced by Microsoft Word, which was helped in part by the transition to graphical user interfaces and, in particular, Windows. This pattern is not unique to computer software. It can also be observed in other industries such as pharmaceuticals and handheld devices.[25]

Therefore, the boundaries of relevant market may not be precise. Some products may be 'in the market' while others may be 'out of the market'; however products that lie outside the market can still provide a competitive constraint and should not be excluded from competition analysis simply because of market definition. However, there are certain common elements which should be taken into consideration while delineating the relevant market especially in the evolving industries. These are:

1.) First, market share tests, such as SSNIP or be it HMT, do not provide a useful screen in new-economy industries, since most leading firms have market power in the static sense. Thus a consistent application of this approach would imply that their business practices would always be subject to full-blown rule-of-reason inquiries. Indeed, in many high-technology industries a single

[24] Market definition, *Policy Roundtables 2012*, OECD.
[25] Justus Haucap & Torben Stühmeier, *Competition and Antitrust in Internet Markets*.

firm has a high share of whatever category it serves; but this does not apply that the industry has an.

2.) Second, the theory of product differentiation should be taken into consideration. An attempt should be made to fill the gap by adapting a system of demand functions for differentiated goods (differentiated markets). The basic idea here is that the determination of the relevant market is synonymous to determining how low the degree of market differentiation should be in order to be able to decide which markets or brands should be included in a firm's relevant market. However, there are no formal theories to analyze which markets should be considered to be relevant to a specific firm operating in an industry producing or selling differentiated products or services and thus varies from case to case. Such a differentiation could be vertical, horizontal, mixed, circular etc.[26]

For instance, in the Microsoft- Windows case (Korea), the commission went on differentiating the streaming media server program to that of downloading server program, thereby brilliantly delineating the market as per the product specification.

3.) Thirdly, the reliance on market share in new-economy industries which has static market power does not provide a useful measure of the constraints that market forces place on efforts by a firm to take anticompetitive actions those that will tend to reduce consumer welfare. In most traditional businesses, firms are primarily constrained by their direct competitors in the market. In some cases, potential competitors are also an important constraint because it is easy to enter the business, produce comparable products, and compete effectively.

4.) Fourth, homogenous products. When a producer asks for a standardized productive input satisfying an exhaustive list of technical requirements and is indifferent to who will be the provider, the input is to be called "homogenous". If the quantity required is large enough, by that producer and possibly by many further producers expressing the same set of requirements and all indifferent to the supplier, a market of the homogenous product will emerge. If no other variants were to be demanded, this market would represent the actual collapse in one specific variant of a much larger

[26] http://www.economicswebinstitute.org/glossary/product.html

potentially differentiated products. If other variants continue to be demanded, it will represent a niche of a broader differentiated market.

For example, this is what happens with steel, which is an input in many productive processes which are highly standardized and require exactly the same type of steel. However, in parallel, there are many different steels (e.g. carbon steels with varying degrees of carbon content), alloys (e.g. high strength low alloy steels) and special steels as market niches of a broader and very articulated metal industry, which includes products differing both for their technical features and for the shapes in which they are supplied.

Other instance would be the Dell- EMC case, as referred above, where the sub segmentation of storage devices into their level of capacity thereby delineating the market as per the homogenous product.

5.) Fifth, also inference can be drawn from other jurisdictional laws such as EU, US, New Zealand etc. Interestingly, the competition commission in New Zealand provides for five categories of delineating relevant market such as product, geographic, functional, and temporal and customer based. Therefore, such new parameters can be taken into consideration into Indians laws too and can change according to the changing scenario.[27]

Therefore, there is no straight jacket formula. Although, these are some of the crucial aspects which should be considered while defining a relevant market for the product or enterprise, still there is no straight jacket formula as to which could be followed every time a situation arises.

[27] http://www.ictregulationtoolkit.org/2.2