

DEFINING THE RELEVANT MARKET IN AN ONLINE-OFFLINE PLATFORM

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INTRODUCTION

The advent of internet in India was in the year 1995 when it was formally launched by the Vidhesh Sanchar Nigam Limited (VSNL) for the Indian people. And since then, internet is ruling all of our lives by taking care of each and every requirement be it shopping, social media, banking, education, grocery etc. and we undisputedly have become the slaves of this modern technology. With the increase in technology and the usage of internet as a mandate for public work like Aadhar registration, the number of users will be likely to increase. Today, from searching for a city in US to a small search like the nearest shop for medicines we all use google, from using social media to connect with the thousands of people to studying online we all are dependent on it. Google has become the remedy to all our problems. Penetration of Internet in India grew from just 4 per cent in 2007 to 35.03 per cent in 2017ⁱ. Moreover, in India Google has approximately 97% of market share in search engines like Bing and Yahoo between September 2017 – September 2018.ⁱⁱ The people of different age-group they are also using this intelligent tool for their needs. Now, the aged ones prefer ordering fruits and vegetables from Big Basket rather than going to the local vendor, as it is available all at a single click, which earlier was not the case. People back some 10-15 years ago were more outside this virtual world, they used to go to the shops for shopping, used to negotiate with the drivers for the fares and destination which has been gradually shifted to the online applications like uber for travelling, amazon for shopping and so on. The reason of this ease is the increase in the usage of smart phones which caters to all such facilities. According to the *Cellular Operators Association of India (COAI)*, India's private telecom service providers for 2017 had a total of 981.65 million subscribers baseⁱⁱⁱ. Now from social media, to booking of cabs, to playing games, watching movies, shopping everything can be done through such a handy device, providing the growing prospects for the online markets. This paper is basically about the different challenges associated with the online market with respect to defining the relevant

market where it operates. Also, the paper would delve into defining what relevant markets would be in online market in terms of both relevant product market and relevant geographic market, along with defining the relevant market in the merger between an online and offline platform.

DIFFERENCE BETWEEN ONLINE OFFLINE MARKETS

We have been observing the gradual shift we are making from offline markets to online markets. This is being done by us mostly unconsciously wherein we ourselves would not be able to recollect the time when we started taking glides from offline market to online market. But are they both substitutable? Are they both in all circumstances provides us with the fulfilment of our demands? These are some of the questions which we will be discussing in this chapter.

Online market as the name itself suggests are the markets where buyers and sellers meet virtually i.e. without any actual interaction but only through screens. The buyers generally buy goods or avail services without any pre- inspection of goods which is available in the offline markets. Also, the chance of returning the goods is high in online markets when compared to offline markets as people they buy after inspecting the goods to their full satisfaction. Online markets do not provide the instant delivery of the products which is very well served by the offline markets. I want to buy a dress for tomorrow's function, even though I may get thousands of options to choose at a single place in an online platform but I would not be able to buy it and for that I would be required to go and select from the brick and mortars available. Also, the delivery charges which are charged by the online platforms such as Flipkart, Myntra on every order is also a wedge when it comes to shopping of a single product and people tend to go and get it from the nearby stores where they are not required to give any kind of extra charge. Similarly, on seller's part, in order to cut short, the charges to attract a greater number of buyers', lemon effect^{iv} is what generally prevails.

In the case of *Otto/Grattan* the European Communities differentiated between the catalogue market and the brick and mortar market through three basic characteristics: firstly, the ability to make the choice with already fed information without the presence of the seller; secondly, the consumers are entitled to have the goods delivered to their home and to return the goods at

the expense of the company and to be reimbursed in full and thirdly, the ability of the consumer to access the online platform and place their order anytime^v. Similarly, in the *Meru Travel Solution Private Limited v. Uber India System Private Limited &Ors.* the CCI differentiated between the yellow taxis and the radio taxis looking at the ease of booking, pre-booking, search cost, round the clock availability etc. The targeted customers in online markets generally outnumber those of offline markets who can target a limited customer at a time unlike online markets who target at international level. Another factor which differentiates the market is the interoperability factor^{vi}. According to this, the incurring of expenses is often looked at in deciding whether one market player can set up the other market. If the interoperability comes to be less, it shows that the platform will incur huge expenses thereby making it difficult to shift. Let's take the example of the online booking of hotel rooms through OYO so the OYO if wish to start its own hotels this would bring to him huge costs as to provide hotels in each city and in every main parts of that city it being not possible for OYO similarly for an independent hotel having a small market online making its own online application and regulating it all now and then is not possible, looking at the already established network effects of the sellers offering same services for e.g. Make My Trip making it highly difficult for this small hotel to compete with such established online platforms^{vii}, thereby suggesting us the less interoperability of the two markets making the two markets different from each other.

DETERMINING THE RELEVANT MARKET IN AN ONLINE PLATFORM

The relevant market as defined under section 2(r) of the Competition Act, 2002 means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets^{viii}; that means relevant market is either the sum of RPM and RGM or individually RPM and RGM. So, it is important to know what does relevant product market and relevant geographic market means. Relevant Product Market is defined under section 2(t) which 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^{ix}; Relevant Geographic Market defines under section 2(s) 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 neighbouring areas^x. Relevant market at the first instance is important to know because it is through this market only the Competition Commission and the various other commissions worldwide decides whether an enterprise^{xi} has the power to control prices or exclude competition^{xii}.

The relevant market in the online markets would be determinable looking at the interaction between different players involved in that platform i.e. the seller, the retailer, the advertising agents, the consumers and also through the degree of substitutability which the online platform would have with the offline platform. When we talk about online market, they at least serve two customer groups by providing a platform to interact. Thus, while determining the relevant market it is important to note first whether the customer groups also form part of the same relevant market or different relevant markets^{xiii}. There has so far, no particular rule/ direction which the different commissions worldwide have reached to with respect to the relevant market in an online platform. Now, we know that market runs because of demand and when there is the demand which is substitutable then all such substitutes also constitute a same single relevant market but in online platforms there could be a possibility of having multiple relevant groups because of more than two consumer groups. Therefore, every online platform's relevant market needs to be judged accordingly. For example, Zomato facilitates the interaction between the restaurants, the delivery persons which can be self-employed as well and the consumers. Here the Zomato only acts as a facilitator and neither the owner of the two. This being the apt example of three-sided interaction. Further, the success of the Zomato depends on the demand of the interaction facilitation service of the consumers and the delivery. It is to be noted, that this interaction facility service between these three groups will constitute the focal product of the market definition process for which the demand side substitutability should be tested for all three customer groups^{xiv}. The relevant market has to be decided looking at all the players involved in the transactions in the online platform, limiting the focus on two main players:

Suppliers and Merchants:

The supplier is the one who offers its products or services through the online platform to the large base of consumers. The supplier for providing its services use platforms like Amazon,

Flipkart and through such platforms sell its products or provides services. Now the online merchants like Amazon they do not provide these suppliers with any kind of discounting prices or zero pricing which they possibly sometimes provide to the end users^{xv}. The question of relevant market arises because of the charging of high prices by such merchants and secondly because of the presence of other such merchants i.e. the competitors in the market. For e.g. Flipkart, E-bay etc. To the supplier if the products or services in which he deals can be sell through other such platform (be it online or offline) then such platform would be considered as a substitute and would fall under the same relevant market.

The suppliers/ sellers they through merchant's online platform interact with the customers directly therefore it is the merchant which is the connecting link between two consumer groups on its platform, making this online platform different from the offline platform where this interaction between the producer and the end -user is not there. Also, when we look it from supplier's perspective they are free to change or set the price, decide the quantity even when they sell their product either to the wholesale, retailer or consumers directly but when we talk about the offline market the producers loose this power of setting or changing the prices once they let go of their products to the next stage of delivery i.e. to the retailer or wholesaler who thereby decides the further prices. Therefore, we can say that the online- offline markets from the perspective of the suppliers and the merchants presents a different view when compare with the offline market suppliers and producers. The difference with respect to the mutual matching and transaction facilities available with the online market players are different from the offline market and thus creates a difference in looking at these two types of markets^{xvi}. The substitution here is also looked from both the merchants and consumers perspective when we talk about supply chain in the online market. In the case of google shopping case, the relevant market where google was found to be indulge in the anti- competitive practices of giving more preference to its own products over other players brands, the European commission held the relevant market both from the suppliers and consumers perspective and held the general advertising to be different relevant market against the specialised relevant market. To explain this, in the *Times Pequenna Case*^{xvii}, it was held that that the relevant market for the morning and the evening newspapers were two separate relevant market as the intended use, the targeted readers were different in both the newspapers and were held to be not substitutable and this was looked both from the Consumers and the supplier's perspective. Similarly, when we talk about the online reading news application like inshorts and the offline newspapers, they both

though look to be substitutable superficially but when we look them deeply from both the suppliers and consumers, they come out to be the products falling in two different relevant market. The people who lives in metro cities who have a fast life and more into technology they generally are into the online reading market whereas the age group above 50 years they generally prefer reading it in papers only as it helps them to connect more, and easy to apprehend without any technological barriers.

Consumers:

When we look at the market from the consumers point of view, again we see it through the economics concept of demand side substitutability and supply side substitutability. Therefore, the consumer also forms an important part in deciding the relevant market and then later to establish the dominance of the dominant enterprises. To a consumer the platform does not bother unless the products or the transactions done varies sharply. For me, ordering a dress from Myntra costs Rs. 1100 and the same dress at Levis's brick and mortar is available for Rs.1000, I would go to buy from Myntra as this additional Rs. 100 would be considerable to the extent that this will include my travelling expense if I go and buy by myself and would save my time as well. The product i.e. the dress remains the same only the shopping experience and platform changes. So, in this case, both offline and online market from the consumer's perspective would be substitutable and interchangeable therefore would fall under the same relevant market. The sale of the products would thus be depended upon the demand and supply side substitutability. In cases the implications of difference between the online-offline market is indifferent to consumer in terms of the products, the relevant market changes from one to multiple platforms. For e.g. buying fruits online or from the local vendor would not in any case be going to provide one with extraordinary products both platforms in the end would provide only the fruits. Therefore, to the consumers it does not matter from where they are transacting unless the transacting platform diverts to a quite extent away from the consumer's preferences both in terms of quality and price. While determining the characteristics of a product to look at the substitutability factor both the internal and external features of the products are taken into consideration and the variation it underwent. Adding to this, what might not be substitutable from the merchants/ supplier's point of view could be positively substitutable from a consumer's point of view. But the case differs in a merger case where the availability of other platforms providing the variety of products diminishes the consumers options to choose from decreases, narrowing down the relevant market. the recent *flipkart -walmart*^{xviii} deal wherein

the acquisition of the online entity has been acquired by an online entity. This acquisition is certainly going to decrease the market for consumers by providing all the grocery at a single place leaving less options to the consumers and removing the offline stores out of the race as they would not be able to match the revised expectations of the consumers.

RELEVANT MARKET IN THE ONLINE MARKET THROUGH THE EYES OF CCI

In India the position with respect to the platform being substitutable or not was first discussed in the case of *Ashish Ahuja v. Snapdeal*^{xxix} wherein the online and offline markets were held to be mere different distribution channel and part of same relevant market, which in the case of flipkart was judiciously decided to be not in a position as of now to figure this out^{xx}. The similar view was also taken in the case of *In Re: Mohit Manglani v. M/s Flipkart India Private Limited and Others*^{xxi}, wherein the CCI agreed to the OPs view and held "these two markets are different channels of distribution of the same product and are not two different relevant markets." However, CCI listed down the differences between both these markets like the shopping experience, discounts which were different to the consumers. When we see markets from consumers point of view, we provide more substitutability to the markets. Then in the case of *Deepak Verma v. Clues Network Pvt. Ltd*^{xxii}. Again, the similar view was taken into consideration by the CCI. All the three above mentioned cases highlight the stand of CCI which considers substitutability from the consumers' perspective to be the yardstick for concluding the two separate markets to be falling under one single market. Then in the two cases so far, the CCI has been seen deflecting from its' usual thought process. In the case of *Justickets v. Big Tree Entertainment*^{xxiii} the CCI held that online vending platforms are distinct from the ticket counters in terms of the ease of booking, degree of comfort, which is a prime factor in mitigating the substitutability between the two. This case indicates the determination of relevant markets on several factors other than the nature of markets as a distribution channel for common goods.

DEFINING RELEVANT MARKET IN ADVERTISING AND SOCIAL MEDIA PLATFORMS

Advertising platform:

The first advertisement appeared on the internet in the year 1993 on the Global Network Navigator. The advertisement at first used to be sold on a cost per impression (CPM) model of pricing, which was changed with the advent of pay per click model through the launch of GoTo.com. with this the advertisements started to be shown on the Google's launched AdWords service in October 2000. AdWords basically used to put advertisements on the search result pages which used to be on the basis of the keywords typed by the operator. Then came the AdWords Select which worked on the cost per-click pricing in the year 2002. Then gradually google came up with different kinds of advertising model like AdSense, Site Targeting which allowed the advertisers to show their ads on a particular website(s), then again in the year 2009 , it came with the advertising for the non-searches, that is AdSense ads for the 'interest based advertising' to display the ads chosen by google on the basis of the match between advertiser's keywords and the web sites content.

Drawing the challenges in defining the relevant market when it comes to online Advertisement are many. In online advertisement, the cost of the ads is decided on the basis of the exposure the ads get unlike the offline market where the dispensability of the ads both in the newspaper and to the mass chunks of population decides the costs. In online market, the advertisers are willing to pay high for better targeted ads which holds the potential to increase the value to the advertisers of the product. The process of showing advertisements differs even within different medium of advertisement like television, newspaper, radios etc. television cannot be preferred for long commercial ads being too costly, radios would not be used for some graphical ads and similarly newspaper would be used for both matter related ads with/out any pictorial representation. Thus, the advertisements in different platforms creates difference in the relevant market. The different platforms target different customers, the customers differ with the content of advertisement as well. For e.g. it would be difficult for Hindustan Times to advertise about the movie trailer which the advertisers would try to showcase on the televisions or online channels like Youtube as the intent of the advertisers there is to target the maximum possible consumers whereas the ads for a simple notice/ tender would not be shown through the

television as a medium but would be published in a newspaper as the targeted customers set differs. The whole purpose of advertisement is to know about the returns on the advertising, if being an advertiser I advertised for let's say a plastic bottle to expose it to the people, I would expect a certain amount of return on the advertising. The value of the profit which the advertiser expects to receive is calculated by multiplying the no. of exposures the advertiser expects to receive per dollar of incremental advertising expenditure, the number of incremental sales the advertisers expects to receive per exposure along with the profit made per sale inclusive of net variable costs.^{xxiv}

Defining the relevant market in the case of advertising platform is looked by taking the offline advertisers as well into the relevant market's ambit. The Small but Significant Non-transitory Increase in Prices^{xxv} (SSNIP) test (also known as FTC Horizontal Merger Guidelines in US) is also taken into consideration while marking the relevant market by the US. The concerned authorities determine the relevant market by analysing the change in another market with the fluctuation in price or demand in one market of the advertisement. For e.g. if the price of the newspaper gets to Rs. 5 per newspaper per day, totalling the amount at the end of the month to Rs. 150 which before the change was only Rs. 90 per month. So, if because of this small but significant change the readers shift them to the online newspaper applications then the offline advertisements would fall under the same relevant market as that of online advertisement.

When we compare the online advertising with offline advertising, this is quite often seen nowadays that the consumers prefer online advertising more than offline advertising. The reason for this shift is that the people have started spending more time online, the availability of the current updates prior to getting the knowledge through offline medium without incurring any cost. This shows that the online markets compete with the offline market in order to retain and attract more consumers to their platform as more consumers would lead to more exposure of their ads leading to making of profit. The dip in the sales of newspapers have been witnessed already. In a study conducted among 3183 online newspaper readers, 18% of 15-20 age group, 12% of 20-30 age group and 8% of 30-40 age group have been found with reduced interest to read printed newspaper and prefer reading online.^{xxvi} in the case of *Shri Vishal Gupta v. Google LLC and Ors.*^{xxvii} the online and offline advertisings were held to be different relevant markets as the demand in the case was of AdWords online advertising services was not substitutable by the offline advertising.

Social media platform:

We often talk about the dominance of Facebook or Whatapp in the social media market. Have you ever wondered on what basis we claim Facebook to be dominant or the most prevailing social media platform? The network effect is what gives the Facebook the position in the market to have an impact in the social media platform. Network effect is basically the impact when a player increases its consumers' base to such an extent that it becomes dominant because of such wide business arena to operate with. For Facebook, to operate successfully consumers are needed who could facilitate their further operations/transactions/communication using Facebook as the intermediary. Now, there is not only Facebook but Twitter, LinkedIn and Whatsapp for that matter which is considered by the people for their day to day activities be it chatting, socializing or building contacts for professional purposes. Therefore, these players strive for innovation to attract the consumers. We saw that Whatsapp in order to enter this market came up with providing free video calls services along with free voice calls, so such innovation is what is needed to keep the network effects scaling up. Basically "growth on the demand side both reduces cost on the supply side and makes the product more attractive to other users - accelerating the growth in demand even more."^{xxviii} Other thing which is considered here is the data network effects i.e. the only reason why Facebook and Google enjoy the dominant position in the online market of social media and advertising respectively. Facebook has such an immense data base of its consumers which no other competitor has, which gives Facebook the advantage. Now, we can say that Facebook has reached to such a point that none of its competitors could reach to Facebook's position having a large base of users – this is what tipping point mechanism.^{xxix} The interoperability factor also holds importance while determining the relevant market which we have already discussed this in Chapter – II of this paper. For e.g. Facebook, Whatsapp, Instagram these platforms could be said to be falling under the same market, as the consumers they can easily shift to the alternatives in case, one doesn't suit their demands or if finds the services unattractive. This factor plays an even important role because of the fact that having interoperability signifies the presence of other players in the market making the targeted entity not dominant. The Microsoft Case^{xxx}, is the best suitable example to understand this. The Microsoft used its dominant position in the market of PC Operating System by refusing to supply the interoperability information to its competitors. The essential facility doctrine is another factor

which is taken into consideration in the social media market, the current issue which is in news, about the abuse of the dominant position by the Facebook which is holding the immense consumers' data base over all other competitors is there. To determine the abuse by Facebook we need to look at the essential facility which is being kept away by the Facebook i.e. the data. In the case of *MCI Communications & Corp. v. ATIT*^{xxxii}, the Seventh Circuit Court, listed down certain factors to determine the issue to be essential or not. They are: the monopolists control the access to the essential facility; the essential facility cannot be practically or reasonably duplicated; denial of the use of the facility by the monopolist and; feasibility of providing the facility. Similar stand could be taken in India as well to determine the feasibility and appropriateness of any such dominant player having the control of any such essential thing.

CONCLUSION

Relevant market is such a vast area to deal with specially for the Competition Commission of India as Competition Act, 2002 is still in its' growing stage and thus the concepts are required to be analysed by looking at the available literature of the various countries, the most preferable ones being the European Commissions' Act and the Sherman Act, 1890.

The current holding of the CCI with respect to the determination of the relevant market is that the online offline markets are two modes of distribution and falls in the same relevant market which is contrary to the jurisprudence developed in EU or US, where they have decided the online- offline markets to be two separate markets. But the question now is how the CCI will be going to determine the emerging possible questions dealing with the issues of relevant market in the online-offline market and its impact on the market. We need to start questioning the different relevant markets related issues. For e.g. how to determine the relevant market if there are websites, offline substitute of that product, ad other competitors dealing in another way, whether they all will be considered to be falling under the same market or would not be depending upon the individual specificity of such platforms which prima facie don't seem to be substitutable. For e.g. if two markets are not substitutable generally but because of certain bonus factors if becomes substitutable then what will be the relevant market in such cases and what would be the value of this bonus factor. The example of cash backs which almost every

online entity offers would any two markets would be considered as substitutes or not in such a scenario.

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